

# UNIVERSITY TITLE IX COMPLIANCE: A WORK IN PROGRESS IN THE WAKE OF REFORM

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## INTRODUCTION

Concurrent with the recent outpour of allegations and admissions of sexual misconduct flooding the media today come the recently proposed changes to the law that regulates standards of handling sexual misconduct in college and university settings.<sup>1</sup> Unfortunately, college and university campuses throughout the country experience cases of sexual harassment and assault all too frequently.<sup>2</sup> And as if instances of sexual assault are not upsetting enough, schools continue to struggle to ensure both that victims are able to take action against their attackers, and that the accused are afforded their Due Process rights mandated by the Constitution and by Title IX itself.<sup>3</sup>

Title IX of the Education Amendments of 1972 is a federal law that “prohibits discrimination on the basis of sex in any federally funded education program or activity.”<sup>4</sup> Over time, the law progressed to include sexual harassment, sexual assault, and sexual violence as prohibited forms of sex discrimination for which schools could be held liable under Title IX.<sup>5</sup> Although the President

<sup>1</sup> See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT 2 (2017) [hereinafter Q&A ON CAMPUS SEXUAL MISCONDUCT (2017)].

<sup>2</sup> See, e.g., NAT’L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE (2015); see Keri Smith, Note, *Title IX and Sexual Violence on College Campuses: The Need for Uniform On-Campus Reporting, Investigation, and Disciplinary Procedures*, 35 ST. LOUIS U. PUB. L. REV. 157, 158 (2015).

<sup>3</sup> See generally, e.g., *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396–97 (6th Cir. 2017); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1068 (S.D. Ohio 2017); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016); Jeremy Bauer-Wolf, *Court Finds Due Process Denied in Sex Assault Case*, INSIDE HIGHER ED (Sept. 26, 2017), <https://www.insidehighered.com/news/2017/09/26/us-appeals-court-finds-student-accused-sexual-assault-was-denied-due-process> [<https://perma.cc/YF7B-2Y5U>]; George Leef, *Another University Will Have to Pay for Its Title IX Zealotry*, FORBES (Feb. 25, 2018), <https://www.forbes.com/sites/georgeleef/2018/02/25/another-university-will-have-to-pay-for-its-title-ix-zealotry/#6f47dfb9b033> [<https://perma.cc/M8H6-ANAQ>].

<sup>4</sup> *Overview of Title IX of the Education Amendments of 1972*, 20 U.S.C.A. § 1681 et. seq., U.S. DEP’T JUST., C.R. DIV., <https://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq> [<https://perma.cc/A8LS-QRKM>] (last updated Aug. 7, 2015) [hereinafter *Overview of Title IX*].

<sup>5</sup> See Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE 2–3, 5 (2001)

signed Title IX into law more than forty-five years ago, universities throughout the country still grapple with ambiguities and discrepancies in interpreting the guiding documents, and face both media and legal backlash for failing to comply with Title IX criteria.<sup>6</sup>

Accordingly, many continue to critique the law and advocate for additional safeguards to improve the system. Until the most recent 2017 changes, critics of Title IX have argued that it is interpreted too ambiguously and has left universities with too much breathing room in determining how to handle claims of sexual violence.<sup>7</sup> Others have argued that the resolution process completely ignores the complex web of relationships involved in many allegations of Title IX violations.<sup>8</sup> Some have even argued that removing claims of sexual violence from college campuses to civil and criminal judicial systems is the only viable way to ensure sexual assault adjudication is equitable and impartial for all affected parties.<sup>9</sup>

However, despite increasing concerns over the past few decades about the sexual victimization of university students, the little information that has been published about how higher education institutions handle claims of sexual misconduct reveals little consistency.<sup>10</sup> These inconsistencies are likely attributable to the way the Department of Education's Office of Civil Rights ("OCR") has interpreted Title IX, and the vague guidelines the OCR uses to determine whether a university's grievance procedures are acceptable.<sup>11</sup> Because of such ambiguities, universities maintain a large amount of discretion to establish their own procedures for resolving allegations, and policies on sexual violence end up varying from school to school.<sup>12</sup>

Ambiguities within Title IX standards have included how to file a complaint, how long universities may take to investigate the complaint, what punishment is appropriate and at what stage of the investigation/proceedings, and several other important issues that the OCR has not fully addressed.<sup>13</sup> In particular, consistency is a recurrent issue when interpreting Title IX compliance obligations. The lack of consistency in different schools' hearing requirements,

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[hereinafter REVISED SEXUAL HARASSMENT GUIDANCE (2001)]. Dear Colleague Letter: Sexual Violence, Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011) [hereinafter Dear Colleague Letter (2011)], <https://www2.ed.gov/about/offices/list/ocr/letters/coll-eague-201104.pdf> [<https://perma.cc/L8YB-KH8S>].

<sup>6</sup> Smith, *supra* note 2, at 158; *Overview of Title IX*, *supra* note 4; *see, e.g., Univ. of Cincinnati*, 872 F.3d at 396–97; *Ohio State Univ.*, 239 F. Supp. 3d at 1066, 1068; Bauer-Wolf, *supra* note 3; Leef, *supra* note 3.

<sup>7</sup> Smith, *supra* note 2, at 160.

<sup>8</sup> Joan W. Howarth, *Shame Agent*, 66 J. LEGAL EDUC. 717, 720 (2017).

<sup>9</sup> Stephen Henrick, Note, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013).

<sup>10</sup> *See* Smith, *supra* note 2, at 158.

<sup>11</sup> *Id.* at 158–59.

<sup>12</sup> *Id.* at 159.

<sup>13</sup> *Id.*

opportunities for appeals, and—now after the most recent changes—use of a uniform evidentiary standard continue to muddle any understanding of what the proper guidelines are.<sup>14</sup>

The large number of assaults that occur on college campuses each year, coupled with the large number of Title IX violation claims filed, indicate that the problem surrounding how higher education institutions handle claims of sexual misconduct remains, and the need for further reform to add clarity and consistency to the regulations is urgent.<sup>15</sup> The lack of consistent procedures amongst universities may cause students not only to lose faith in the system but to be less inclined to even report incidents of sexual misconduct they encounter.<sup>16</sup> Thus, continued advocacy for uniform on-campus reporting, investigation, and disciplinary procedures is essential for the future of Title IX compliance.<sup>17</sup>

The issues with lack of uniformity do not end there, however. Important regulations that would better protect parties' due process rights are still blatantly absent from current Title IX regulations.<sup>18</sup> Even after the most recent changes, the regulations still do not require schools to conduct formal hearings, they do not require that schools provide opportunity for appeal, and they do not require a uniform evidentiary standard as schools now have the option to use a preponderance of the evidence standard, or a clear and convincing standard.<sup>19</sup> Accordingly, only some schools conduct formal hearings, only some schools allow appeals, and some schools will use a preponderance of the evidence standard while others will use a clear and convincing standard.<sup>20</sup> The wide variety of interpreted standards demonstrates that a lack of uniformity, consistency, and clarity in Title IX procedures is ever-present even after decades of ambiguities, and numerous attempts at reform and/or clarification.

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<sup>14</sup> See REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 5 (“OCR considers a variety of related factors to determine if a hostile environment has been created . . .”); see also *infra* Part II.

<sup>15</sup> Smith, *supra* note 2, at 159; Office for Civil Rights, *Investigations Information*, U.S. DEP’T EDUC. (Jan. 3, 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/year-end-data/2016.html> [<https://perma.cc/YR3Y-ENN6>]; Teresa Watanabe, *More College Men Are Fighting Back Against Sexual Misconduct Cases*, L.A. TIMES (June 7, 2014), <http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html> [<https://perma.cc/LB3L-DKU2>] (“[M]ore cases are shifting from campuses to courtrooms.”).

<sup>16</sup> Smith, *supra* note 2, at 160–61; see Bauer-Wolf, *supra* note 3.

<sup>17</sup> See Smith, *supra* note 2, at 157.

<sup>18</sup> See *infra* Part IV.

<sup>19</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5 (the 2017 Q&A requires an investigator to make findings of fact and conclusions “with or without a hearing.”); *id.* at 5 n.21 (“A school has discretion to reserve a right of appeal for the responding party based on its evaluation of due process concerns . . .”); *id.* at 5 (“The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.”).

<sup>20</sup> See *id.*

Because the current system continues to lack clarity and consistency, this topic remains ripe for discussion, and it is clear our society needs to re-evaluate what proper Title IX requirements should include to improve our system for handling and preventing sexual misconduct, harassment, and assault. This note aims to further the argument that the interpretation of Title IX remains too ambiguous and inconsistent, exposes schools to the risk of mishandling sexual assault claims and facing consequent lawsuits, and continues to risk injustice for all parties involved while fostering a lack of faith in schools' ability and competence to handle such claims.<sup>21</sup>

Colleges and Universities are not tribunals in the traditional sense, yet under Title IX, these institutions still have the power and compulsion under letter of law to adjudicate proceedings<sup>22</sup>—though they often lack the proper processes and safeguards. Lawmakers, lawyers, university administrators, professors, and students alike cannot seem to find a proper middle ground. An effective standard to provide the greatest protections and justice for alleged victims, while simultaneously ensuring due process for the accused, remains elusive. Though the topic makes many uncomfortable, and it will likely be difficult to get opposing views to see eye to eye, the discussion needs to be continued—different ideas need to be considered, and options need to be weighed. Society as a whole needs to take the issue of sexual misconduct more seriously, and we can start by narrowing our scope to colleges and universities required to adhere to Title IX.

Unfortunately, many college and graduate students do not know exactly what Title IX is, what it says, and what its implications are.<sup>23</sup> In order to move forward in efforts to find solutions to the remaining issues and reform these important guidelines, it is important to understand where the law came from and how it has evolved over the years (to ensure we are not backtracking). We must look at the history—things that have worked, and things that have failed—in order to think of new ways to address the ongoing issues and get closer to finding solutions that better protect students as the law is intended to do.

This Note suggests that additional reform and safeguarded consistencies will eliminate many of the problems and skepticism surrounding Title IX's implementation in American universities, because even with the most recent changes, the current system remains greatly flawed. In order to fully examine the different approaches Title IX has seen over the past few decades, Part I will explore the history and evolution of Title IX standards for handling sexual misconduct in college and university settings. Next, Part II will discuss the grow-

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<sup>21</sup> See *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 397 (6th Cir. 2017); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1066–68 (S.D. Ohio 2017); Smith, *supra* note 2, at 161; Bauer-Wolf, *supra* note 3; Leef, *supra* note 3.

<sup>22</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5.

<sup>23</sup> See Smith, *supra* note 2, at 158 (“Most people mistakenly assume that Title IX only applies to athletics.”).

ing problems with the previous system that incited calls for reform. Part III will then discuss the most recent changes to the law and the present time of transition awaiting the close of the current rulemaking period.

Finally, Part IV will suggest that Title IX would benefit greatly from consistent regulations under which all colleges and universities would employ mandatory hearings with the ability to cross-examine witnesses, allow opportunity to appeal, and implement a uniform evidentiary standard—ideally the clear and convincing standard. These consistent measures will simultaneously promote the equity and impartiality that many critics fear the law currently lacks. After all, the rights of both the complainant and the accused are crucial to consider as “allegations of sexual assault now result in quasi-criminal proceedings instituted against an accused individual without any of the usual standards or protections found in criminal proceedings.”<sup>24</sup>

To promote a better understanding of the most recent changes to Title IX compliance requirements and what the OCR has already tried or already changed, a comparison of the main guiding documents and how the guidelines have evolved is necessary. As our society progresses through these changing times in the fight against campus sexual misconduct, we must consider where we—as a society—should be heading and what exactly needs to be reformed. Thus, in Part I of this note, I aim to simplify parts of the ambiguous documents while providing a detailed overview of the law and its currently changing requirements.

## I. TITLE IX: A HISTORY

Title IX of the Education Amendments of 1972 provides: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>25</sup> Although the law is most commonly associated with athletics, federally funded educational institutions maintain a duty to ensure gender equity in numerous areas, one of which includes claims of sexual harassment.<sup>26</sup> Before Title IX was enacted, the Civil Rights Act of 1964 had already banned discrimination based on sex in employment.<sup>27</sup> The Civil Rights Act did not, however, apply to educational institutions, where women continued to face widespread discrimination in various aspects of the educational experience.<sup>28</sup> Thus, Title IX was enacted in an effort

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<sup>24</sup> Gaines West et al., *Title IX: The Difficulties in Protecting an Accused's Rights*, 80 TEX. B.J. 510, 510 (2017).

<sup>25</sup> 20 U.S.C. § 1681(a) (2012).

<sup>26</sup> Smith, *supra* note 2, at 158.

<sup>27</sup> *Id.* at 161.

<sup>28</sup> *Id.*

to provide individual citizens effective protection against sexually discriminatory practices.<sup>29</sup>

As a condition of federal funding, the law requires colleges and universities to adopt and publish guidelines consistent with Title IX for handling allegations of sex discrimination and misconduct.<sup>30</sup> Over time, courts have extended Title IX's protections to schools' handling of sexual harassment, sexual assault, and sexual violence claims as well.<sup>31</sup> The law faced a slow implementation after its 1972 enactment, in part, because it took three years for the Department of Health, Education, and Welfare to finish drafting the regulations discussing which areas of law Title IX covered.<sup>32</sup> Thus, it appears that from the start, institutions and lawmakers struggled to agree on and clearly articulate what the law requires of universities—mirroring the issues surrounding Title IX today and the ongoing struggle to agree on the best approach to remedy existing ambiguities.

Because of the ambiguities, and the severity and recurrence of such allegations, the OCR and the Supreme Court have since established standards to help govern and assist schools in interpreting Title IX.<sup>33</sup> To keep up with changing interpretations and previously unaddressed issues, the OCR has published a series of guidance documents, to which schools are expected to adhere when handling allegations of sexual misconduct.<sup>34</sup> It is imperative that schools know

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<sup>29</sup> *Overview of Title IX*, *supra* note 4. President Richard Nixon signed Title IX of the Education Amendments of 1972 into law on June 23, 1972. *Id.*

<sup>30</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 19.

<sup>31</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (finding that the Title IX protections against sex discrimination include sexual harassment). The 2011 Dear Colleague Letter was the first guiding document that specified sexual violence is a form of sexual harassment prohibited under Title IX—ten years after the Revised Sexual Harassment Guidance was published and almost forty years after Title IX was passed. Smith, *supra* note 2, at 162, 165 (stating that after the first case decided by the Supreme Court the same year Title IX was enacted, there was a major stall in cases heard by the Supreme Court regarding Title IX “and it was not until 1992 that the Supreme Court again heard a case that drastically impacted the way Title IX was interpreted.”).

<sup>32</sup> Smith, *supra* note 2, at 161.

<sup>33</sup> For OCR standards see, for example, REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at i, 14; U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE ii (2014) [hereinafter QUESTIONS & ANSWERS (2014)]; Dear Colleague Letter (2011), *supra* note 5, at 2. For Supreme Court Standards see, for example, *Davis*, 526 U.S. at 633; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

<sup>34</sup> “Guidance documents” refer to documents published by the OCR to explain, clarify, and later update what Title IX requires of schools. In this Note, these documents include: QUESTIONS & ANSWERS (2014), *supra* note 33, at ii; Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1; REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at i; U.S. DEPT. OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE 1997 (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/6U9D-UTXY>] [hereinafter SEXUAL HARASSMENT GUIDANCE (1997)]; Dear Colleague Letter on Campus Sexual Misconduct, Candice Jackson, Office for Civil Rights, U.S. Dep't of Educ. (Sept. 22, 2017) [hereinafter Dear Colleague Letter (2017)], <https://www2.ed.gov/about/offic>

the most up-to-date Title IX standards and interpretations so that they can adequately abide by the law and ensure such protections to each and every one of their students.

*A. First Caselaw and Guidance Attempts*

The first caselaw on Title IX came from *Cannon v. University of Chicago*—decided the same year the President signed Title IX into law—where the Supreme Court held that Congress intended for Title IX to be enforceable through private right of action.<sup>35</sup> After *Cannon*, over a decade passed before the Supreme Court again rendered a decision that drastically impacted the way Title IX was interpreted, holding in *Franklin v. Gwinnett* that monetary damages could be awarded in Title IX cases.<sup>36</sup> In addition, the Court in *Franklin* applied Title VII<sup>37</sup> principles in determining that a student was entitled to protection from sexual harassment by a teacher in school—a decision that later influenced the OCR in the creation of its 1997 “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.”<sup>38</sup> The *Franklin* decision, was not the last time the Court or the OCR would look to Title VII for guidance in interpreting and adjudicating Title IX claims.<sup>39</sup>

In 1997, the OCR issued “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,” which formally established standards for Title IX compliance, and emphasized that institutions have a responsibility to prevent and punish student-on-student sexual harassment.<sup>40</sup> However, the OCR found itself needing to revise the guidance document just a few short years later after the Supreme Court issued several other important decisions in sexual harassment cases—two of which specifically addressed sexual harassment of students under Title IX.<sup>41</sup>

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es/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/3MNB-Z6XR]; and, Dear Colleague Letter (2011), *supra* note 5, at 2.

<sup>35</sup> *Cannon v. Univ. of Chi.*, 441 U.S. 677, 678 (1979) (“[T]he legislative history of Title IX rather plainly indicates that Congress intended to create a private cause of action. Title IX was patterned after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI, which had already been construed by lower federal courts as creating a private remedy when Title IX was enacted.”); Henrick, *supra* note 9, at 72; Smith, *supra* note 2, at 161–62.

<sup>36</sup> *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 62–63, 76 (1992); Smith, *supra* note 2, at 162.

<sup>37</sup> This “Title VII” refers to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012).

<sup>38</sup> SEXUAL HARASSMENT GUIDANCE (1997), *supra* note 34, at n.2 (“In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the workplace developed under Title VII.”).

<sup>39</sup> See *infra* Section I.B.1, Section I.C.3, and Section IV.A.

<sup>40</sup> SEXUAL HARASSMENT GUIDANCE (1997), *supra* note 34; NAT’L COAL. FOR WOMEN AND GIRLS IN EDUC., TITLE IX AT 35: BEYOND THE HEADLINES 6 (2008).

<sup>41</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at i.



The first of those cases, *Gebser v. Lago Vista Independent School District*, established a clearer standard to determine whether a *school* would be held liable for sexual harassment.<sup>42</sup> In *Gebser*, the Supreme Court held that for a school to be held liable under Title IX after a teacher sexually harasses a student, an official with authority to address the harassment and implement corrective measures must have actual knowledge about the harassment, fail to respond to it, and that failure to respond must amount to “deliberate indifference.”<sup>43</sup>

The following year, the Court announced in *Davis v. Monroe County Board of Education* that another way a school may be liable for monetary damages under Title IX is in instances of *student-on-student* sexual harassment where the conditions of *Gebser* are met.<sup>44</sup> The Court in *Davis* further held that to have a cause of action, the school must have control over the victim, the harasser, and the location where the harassment took place.<sup>45</sup> In many important respects, the Court’s *Gebser* and *Davis* decisions reaffirmed the substance of the 1997 OCR guidance.<sup>46</sup> Moreover, the same year *Gebser* was decided, the Supreme Court confirmed several other fundamental principles from the OCR’s guidance to evaluate the context of harassment—but in a Title VII sexual harassment case.<sup>47</sup> In doing so, the Court illuminated several similarities between the two laws (Title IX as a sort of cousin of Title VII), which continue to influence how we interpret Title IX today.<sup>48</sup>

The Court specified that the liability standards established in *Gebser* and *Davis* are limited to private actions for monetary damages.<sup>49</sup> However, the court acknowledged in *Gebser* that Federal agencies such as the Department of Education have the power to “‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate,’ even in circumstances that would not give rise to a claim for money damages.”<sup>50</sup> In other words, the Supreme Court specifically affirmed the Department’s authority to enforce requirements for nondiscrimination policies and procedures administratively, and to effectively expand Title IX requirements to cover cases that do not give rise to monetary damages as well.<sup>51</sup> Accordingly, after the *Davis* and *Gebser* deci-

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<sup>42</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); Smith, *supra* note 2, at 163.

<sup>43</sup> *Gebser*, 524 U.S. at 290; REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at i–ii; Smith, *supra* note 2, at 163.

<sup>44</sup> See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639, 643 (1999); REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at ii.

<sup>45</sup> *Davis*, 526 U.S. at 645.

<sup>46</sup> See REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at ii.

<sup>47</sup> *Id.* (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)).

<sup>48</sup> See *infra* Section I.B.1.

<sup>49</sup> *Davis*, 526 U.S. at 639; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998).

<sup>50</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at ii (quoting *Gebser*, 524 U.S. at 292).

<sup>51</sup> *Id.* at iii.

sions, the OCR sought to regroup these compliance standards in the Title IX regulations.<sup>52</sup>

*B. 2001 Revised Guidance*

In January 2001, the OCR issued its “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” to replace the 1997 Guidance.<sup>53</sup> The OCR acknowledged in that Guidance that “[t]he Supreme Court, Congress, and Federal executive departments and agencies, including the Department [of Education], have recognized that sexual harassment of students can constitute sex discrimination covered by Title IX.”<sup>54</sup> The Department of Education intended the new document to “reaffirm[] the compliance standards that OCR applies in investigations and administrative enforcement of Title IX . . . regarding sexual harassment.”<sup>55</sup> But the ultimate goal was to strengthen certain areas of the 1997 guidance by further explaining the Title IX regulatory basis.<sup>56</sup>

This Guidance confirmed that as a condition of continued receipt of Federal funding under Title IX and its accompanying regulations, schools have “fundamental compliance responsibilities” to address sexual harassment of students.<sup>57</sup> Like its predecessor, the revised guidance outlines circumstances under which sexual harassment may constitute the very discrimination prohibited by the statute.<sup>58</sup>

The 2001 Guidance acknowledges that “a significant number of students, both male and female, have experienced sexual harassment,” and that sexual harassment “can interfere with a student’s academic performance and emotional and physical well-being.”<sup>59</sup> And the OCR stresses that “[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”<sup>60</sup> By implementing this guidance, the OCR took a significant step forward in the fight for stronger policies and effective grievance procedures, essential both “to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it” if necessary.<sup>61</sup>

Numerous efforts to supplement, clarify, and/or reform Title IX have produced additional ambiguities and inconsistencies with how Title IX is en-

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<sup>52</sup> *Id.* at i.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 2.

<sup>55</sup> *Id.* at i.

<sup>56</sup> *Id.* at ii.

<sup>57</sup> *Id.* at 2.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at ii.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at iii.

forced.<sup>62</sup> However, the 2001 Guidance is especially influential because it remains in force today and continues to provide a foundation for enforcing Title IX in educational institutions.<sup>63</sup>

### 1. *Defining Sexual Harassment*

A good place to start—and always good to reiterate to the general public—is answering the question, “What *is* sexual harassment?” The Guidance defines sexual harassment as “unwelcome conduct of a sexual nature.”<sup>64</sup> It can include “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>65</sup> Sexual harassment is a form of sex discrimination prohibited by Title IX because it, “can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program,” and effectively create a hostile or abusive environment.<sup>66</sup> In determining what constitutes hostile-environment sexual harassment under Title IX, the 2001 Guidance recognizes that the law’s distant cousin—Title VII—remains relevant.<sup>67</sup> Once the existence of such harassment is established, schools are to then look at the “constellation of surrounding circumstances, expectations, and relationships” to determine whether the harassment is actionable.<sup>68</sup>

### 2. *Designating a Coordinator*

Who is keeping track? Whose responsibility is it to *know* these requirements and to facilitate educating everyone else—staff and students alike? The OCR requires schools to designate at least one employee to carry out and coordinate efforts to comply with the school’s Title IX responsibilities.<sup>69</sup> Schools must notify all of their students and employees of the name and contact information of the designated employee(s) so that students and faculty are aware of who to contact and how to reach them if necessary.<sup>70</sup> Furthermore, schools “must make sure that all designated employees have adequate training as to

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<sup>62</sup> See Dear Colleague Letter (2017), *supra* note 34, at 2 (“The guidance has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires.”); Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1; QUESTIONS & ANSWERS (2014), *supra* note 33, at ii; Dear Colleague Letter (2011), *supra* note 5, at 2.; see also *infra* Sections I.C–D; *infra* Parts II–III.

<sup>63</sup> See generally REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at i.

<sup>64</sup> See *id.* at 2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at vi.

<sup>68</sup> *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 651 (1999) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998)); REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at vi.

<sup>69</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 21.

<sup>70</sup> *Id.*

what conduct constitutes sexual harassment and [that they] are able to explain how the grievance procedure operates.”<sup>71</sup>

### 3. *Effective Grievance Procedures*

Title IX requires that schools have effective grievance procedures for handling complaints of sexual discrimination and misconduct.<sup>72</sup> Its regulations require schools to adopt and publish both a policy against sex discrimination, and grievance procedures that provide for prompt and equitable resolution of discrimination complaints.<sup>73</sup> According to the 2001 Guidance, a school’s sex discrimination grievance procedures do not have to be separate from its sexual harassment procedures.<sup>74</sup> But whether a school has separate or comingled grievance procedures, “its nondiscrimination policy and grievance procedures for handling general discrimination complaints must provide effective means for preventing and responding to sexual harassment” as well.<sup>75</sup> If a school does not have the proper procedures and policy in place, it violates this Title IX compliance requirement.<sup>76</sup>

The OCR reiterates in the 2001 Guidance that “a school will be in violation of the Title IX regulations if the school ‘has notice’ of a sexually hostile environment and fails to take immediate and effective corrective action.”<sup>77</sup> The OCR considers a school to have notice where “a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.”<sup>78</sup> A school can receive notice of harassment in different ways—either directly via a student’s filed grievance with the Title IX coordinator, or indirectly via a member of the school staff, educational or local community, or media.<sup>79</sup> Upon notice of harassment, schools have a duty to take “prompt and effective” action to stop the harassment and prevent its recurrence.<sup>80</sup>

But what does the OCR deem effective when evaluating a school’s grievance procedures? The 2001 Guidance explains, “Effectiveness has always been the measure of an adequate response under Title IX,” but that “does not mean a school must overreact out of fear of being judged inadequate.”<sup>81</sup> Rather, the OCR measures effectiveness based on a reasonableness standard.<sup>82</sup> In other words, “effective” requires measures be reasonable, without rising to the level

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at iii.

<sup>73</sup> *Id.* at 19.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 13.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 12.

<sup>81</sup> *Id.* at vi.

<sup>82</sup> *Id.*

of an overreaction. The problem is that opinions differ as to what is reasonable in response to such serious allegations and what is considered an overreaction—so the ambiguity remains.

In addition to disseminating a strict policy against sex discrimination, Title IX requires that schools have effective grievance procedures in place that provide a means for “prompt and *equitable* resolution” of sex discrimination and harassment complaints.<sup>83</sup> The OCR has identified several elements used to evaluate whether a school’s grievance procedures are prompt and equitable.<sup>84</sup> These elements include whether the procedures provide for:

- i. notice to students and employees of the procedures and where one can file a complaint;
- ii. proper application of those procedures when handling harassment complaints;
- iii. adequate, reliable, and impartial investigation of the complaint, including the opportunity to present witnesses and other evidence;
- iv. designated and reasonably prompt timeframes for the stages of the process;
- v. notice to parties of the outcome of the complaint; and
- vi. assurance that the school will take steps to prevent recurrence of any harassment and remedy discriminatory effects on the complainant.<sup>85</sup>

A school’s failure to take the necessary steps allows a student “to be subjected to a hostile environment that denies or limits the student’s ability to participate in or benefit from the school’s program.”<sup>86</sup> And if a school allows students to be subject to such a hostile environment, then the OCR considers the school itself to be engaging in its own discrimination.<sup>87</sup> Thus, the school becomes responsible, “not just for stopping the conduct and preventing it from happening again, but for remedying the effects of the harassment on the student”—effects “that could reasonably have been prevented if the school had responded promptly and effectively.”<sup>88</sup> The Guidance explains, “[a]s long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations.”<sup>89</sup>

#### 4. *Due Process: What Constitutes “Due Process” within the Title IX Context?*

Title IX investigations and procedures are separate from criminal procedures, even if a complainant alleges harassing conduct that constitutes both sex

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<sup>83</sup> *Id.* at 14 (emphasis added).

<sup>84</sup> *Id.* at 20.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 12.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

discrimination and possible criminal conduct.<sup>90</sup> The OCR points out that while “[p]olice investigations or reports may be useful in terms of fact gathering . . . legal standards for criminal investigations are different.”<sup>91</sup> Police investigations or reports do not relieve the school of its duty to respond to a complaint of sexual harassment promptly and effectively, nor may they be determinative of whether harassment occurred under Title IX.<sup>92</sup> Nevertheless, the accused have certain due process rights under the United States Constitution, and the OCR admonishes that schools should be aware of these rights as well as the school’s responsibilities to individuals accused of harassment.<sup>93</sup>

When drafting the 2001 Guidance, the OCR made sure to include Due Process rights of the accused that had been left out of the 1997 version.<sup>94</sup> This was done to address public concerns for the fairness of the investigative and adjudicative process, and potential harm that can be caused by false accusations.<sup>95</sup> Yet the ambiguity remained within the Due Process Rights of the Accused section itself. For example, the OCR explained that a potential conflict arises where an accused individual needs the name of the accuser and information regarding the nature of the allegations in order to defend against the charges, but the Family Educational Rights and Privacy Act (FERPA) protects the privacy of the student accuser.<sup>96</sup> Still, the OCR clarified that its 1997 Guidance “made clear that neither FERPA nor Title IX override any federally protected due process rights of [persons] accused of sexual harassment.”<sup>97</sup> The OCR has acknowledged that the Constitution guarantees due process to students in public and State-supported schools who are accused of certain types of infractions, and further, that “[t]he rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.”<sup>98</sup>

Yet, another major ambiguity within the Revised Guidance that continues to cause conflict is the mandate that schools “ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.”<sup>99</sup> On its own this creates no issue, however, the OCR also posits, “Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions.”<sup>100</sup> Thus, the message is unclear as to how

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<sup>90</sup> *Id.* at 21.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 22.

<sup>94</sup> *Id.* at viii.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 22; for Constitution’s guarantee of due process see U.S. CONST. amend. XIV.

<sup>99</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 22.

<sup>100</sup> *Id.*

much weight to give due process for the accused in particular when adjudicating allegations of sexual misconduct on campus.

The 2001 Guidance has remained an influential guiding document, but it is still imperfect as it lacks clarity in several areas and conflicts with accused students' rights to fair and impartial proceedings.<sup>101</sup> It is silent on what evidentiary standard schools should use when adjudicating claims of sexual misconduct, it does not require schools to conduct formal hearings, it does not afford the right to consult a lawyer, and it does not require schools to provide an opportunity to appeal.<sup>102</sup>

### C. 2011 Dear Colleague Letter on Sexual Violence

Even after the OCR published its 2001 Revised Guidance, universities continue to find themselves the subjects of disparaging news articles and controversial lawsuits for allegations that they failed to comply with Title IX requirements when handling sexual violence and harassment claims.<sup>103</sup> One major issue was the 2001 Guidance's exclusive mention of sexual harassment, while omitting the topics of sexual violence or rape.<sup>104</sup> It describes that sexual harassment can include "physical conduct of a sexual nature," but it defines neither what physical conduct is nor what severity of physical conduct rises to the level of harassment.<sup>105</sup> Accordingly, the 2001 Guidance's failure to clearly define sexual harassment brought with it the "question of whether or not rape and other forms of sexual violence were considered sexual harassment" under Title IX.<sup>106</sup>

In 2011—ten years after the Revised Guidance was published—the OCR issued its Dear Colleague Letter on Sexual Violence, intending to supplement the 2001 Guidance "by providing additional guidance and practical examples" of Title IX requirements for handling complaints of sexual harassment and misconduct.<sup>107</sup> In that Letter, the OCR—for the first time—included rape and other forms of sexual violence in the definition of sexual harassment.<sup>108</sup> Because of the way courts handled rape and sexual harassment in regards to Title VII, an assumption previously existed "that rape would [also] constitute sexual harassment under Title IX."<sup>109</sup> However, before the 2011 Dear Colleague Letter

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<sup>101</sup> Henrick, *supra* note 9, at 53.

<sup>102</sup> See generally REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 5, at 15, 20.; West et al., *supra* note 24, at 510 ("Title IX itself is silent as to evidentiary standards . . ."); Watanabe, *supra* note 15 (noting not all campuses afford the accused a right to an attorney).

<sup>103</sup> Smith, *supra* note 2, at 158.

<sup>104</sup> *Id.* at 165–66.

<sup>105</sup> *Id.* at 166.

<sup>106</sup> *Id.* at 165.

<sup>107</sup> See Dear Colleague Letter (2011), *supra* note 5, at 2.

<sup>108</sup> *Id.* at 1–2; Smith, *supra* note 2, at 165.

<sup>109</sup> Smith, *supra* note 2, at 166.

was published, the OCR had not fully addressed this issue.<sup>110</sup> The 2011 Dear Colleague Letter was a strong indication that a major problem existed with the way(s) universities had been handling sexual harassment claims.<sup>111</sup> Finally, “after decades of inconsistencies and ambiguities as to what was actually covered under Title IX and a seemingly non-existent response to sexual violence claims by university administrations,” the Letter sought to remedy that shortfall.<sup>112</sup>

The OCR’s Assistant Secretary, Russlynn Ali, wrote the letter as a tool to assist school districts, colleges, and university recipients to meet the requirements and regulations of Title IX, and to urge that schools have a duty to provide students with an “educational environment free from discrimination.”<sup>113</sup> She sought to promote proactive efforts that schools could take to prevent sexual harassment and violence and to provide “examples of remedies that schools and [the] OCR may use to end such conduct, prevent its recurrence, and address its effects.”<sup>114</sup> Like the 2001 Guidance, the Letter echoed that sexual harassment is, in fact, a form of sex discrimination prohibited by Title IX, and that the sexual harassment of students quite certainly interferes with students’ right to receive a discrimination-free education.<sup>115</sup> After ten years had passed since the implementation of the 2001 Guidance, it was time to try to clarify some things. The discussion needed to be continued, and the Letter marked the next step in this discussion for several reasons.

### 1. *Honing in on Sexual Violence*

The Letter focused on Title IX requirements related to student-on-student or peer sexual harassment and reiterated that schools have a “responsibility to take immediate and effective steps to end [that] harassment . . . .”<sup>116</sup> Assistant Secretary Ali defined *sexual harassment* as “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>117</sup> Further, she made it clear that sexual violence *is* a form of sex harassment prohibited by Title IX,<sup>118</sup> and she took the initiative to lay out the specific Title IX requirements applicable to sexual violence moving forward.<sup>119</sup> She defined *sexual violence* as, “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol . . . . [or] due to an intellectual or other dis-

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<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 167.

<sup>112</sup> *Id.*

<sup>113</sup> See Dear Colleague Letter (2011), *supra* note 5, at 1–2, 10.

<sup>114</sup> *Id.* at 2.

<sup>115</sup> *Id.* at 1–2.

<sup>116</sup> *Id.* at 2.

<sup>117</sup> *Id.* at 3.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1.



ability.”<sup>120</sup> Specifically, rape, sexual assault, sexual battery, and sexual coercion are forms of sexual harassment covered under Title IX since the implementation of the 2011 Letter.<sup>121</sup>

According to statistics cited in the Letter, approximately one in five women and one in sixteen men “are victims of completed or attempted sexual assault while in college.”<sup>122</sup> Assistant Secretary Ali expressed the Department’s concern about this problem and emphasized the Department’s commitment to ensuring that all students feel safe in their school.<sup>123</sup> Although the Letter revitalized the discussion and ignited a new era of change, the recourse-system in place still left students, male and female alike, feeling unsafe—whether among peers, or among the school’s “justice” system in the event that they should find themselves accused of sexual misconduct.<sup>124</sup>

## 2. *Time Limit: What is Considered “Prompt”?*

In the Letter, the OCR for the first time specified an appropriate timeframe for particular stages of the investigation.<sup>125</sup> The Assistant Secretary reported that, following receipt of the complaint, it was the OCR’s experience that “a typical investigation takes approximately 60 calendar days . . . . Whether [the] OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.”<sup>126</sup> This seemed to be a major step forward in clarifying Title IX requirements whilst still allowing a variance in what can be considered “timely.”

On the other hand, if a school waited to find out whether the OCR would determine that more than sixty days was timely in a particular instance, it would be taking the risk of being found non-compliant and subject to discipline. Thus, schools felt pressure to stick with the 60-day suggested timeframe,<sup>127</sup> possibly out of fear the OCR would even question their process as timely. And so, with only sixty days, schools were expected to conduct a full investigation of the complaint, respond to both parties regarding the outcome of

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<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 1–2.

<sup>122</sup> *Id.* at 2; *see also* NAT’L SEXUAL VIOLENCE RES. CTR., *supra* note 2.

<sup>123</sup> *See* Dear Colleague Letter (2011), *supra* note 5, at 2.

<sup>124</sup> *See infra* Parts II–III.

<sup>125</sup> *See* Dear Colleague Letter (2011), *supra* note 5, at 12; *see generally* REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 5, at 20 (noting the document mentions no time-limit for investigations).

<sup>126</sup> Dear Colleague Letter (2011), *supra* note 5, at 12.

<sup>127</sup> Katherine Mangan, *What You Need to Know About the New Guidance on Title IX*, CHRON. HIGHER EDUC. (Sept. 22, 2017, 4:46 PM), <https://www.chronicle.com/article/What-You-Need-to-Know-About/241277> [<https://perma.cc/UJ3H-2C2T>].

the complaint, and allow either party an opportunity to file an appeal (if appeals were even part of the school's chosen processes).<sup>128</sup>

### 3. *Preponderance of the Evidence*

Perhaps the most notable mandate from the Letter was the requirement that to be consistent with Title IX standards, schools were to “lower the standard by which they judge whether a student is responsible for sexual assault.”<sup>129</sup> The Letter established that schools were to use the preponderance of the evidence standard to determine whether the sexual harassment or violence occurred—a standard that requires only a finding that it was “more likely than not” that sexual misconduct occurred.<sup>130</sup> If a school was under investigation for non-compliance with Title IX, the OCR would review the school's procedures to determine whether it was using the preponderance of the evidence standard to evaluate complaints.<sup>131</sup> Just as the Supreme Court uses the preponderance standard in civil litigation involving discrimination under Title VII, the Letter demanded that school-conducted investigations and hearings do the same.<sup>132</sup> Lowering that standard created an additional safeguard weighing in favor of victims alleging sexual assault.<sup>133</sup>

The Letter insisted that the clear and convincing evidentiary standard used at the time by some schools was too high, “inconsistent with the standard of proof established for violations of the civil rights laws, and . . . thus not equitable under Title IX.”<sup>134</sup> To address concerns about significantly lowering the evidentiary standard, the OCR reasoned that “a campus tribunal's worst punishment is expulsion, not imprisonment,” and for that reason, the procedural protections and legal standards used in criminal cases were not required in school-adjudication proceedings.<sup>135</sup> But, in deciding cases of sexual harassment by more civil standards, the OCR failed to consider that the consequences of a

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<sup>128</sup> *Id.*

<sup>129</sup> See Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html) [<https://perma.cc/5C3H-AXXG>]; Dear Colleague Letter (2011), *supra* note 5, at 11.

<sup>130</sup> See Dear Colleague Letter (2011), *supra* note 5, at 11.

<sup>131</sup> *Id.* at 10.

<sup>132</sup> *Id.* at 10–11.

<sup>133</sup> See *e.g.*, *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (“[T]he lowering of the standard *appears* to have been a deliberate choice by the university to make cases of sexual misconduct easier to prove—and thus more difficult to defend, both for guilty and innocent students alike. It retained the higher standard for virtually all other forms of student misconduct. The lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused.”) (emphasis added).

<sup>134</sup> Dear Colleague Letter (2011), *supra* note 5, at 11.

<sup>135</sup> Yoffe, *supra* note 129.

student's expulsion without due process are more severe than the consequences of a simple civil discrimination suit.

#### 4. *Due Process . . . with Conditions*

The Letter echoed the 2001 Guidance's requirement that "[p]ublic and state-supported schools must provide due process to the alleged perpetrator."<sup>136</sup> At the same time, however, schools were still expected to "ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."<sup>137</sup> This requirement essentially meant that the OCR was "assuring" due process—but only so long as due process would not interfere with the complainant's Title IX protections, which the OCR appeared to favor.<sup>138</sup>

The only apparent due process protections within the Letter seemed to be the requirements that schools ensure parties have an equal opportunity to present relevant witnesses and other evidence, and that the complainant and the alleged perpetrator be afforded similar rights and timely access to any information that will be used at the hearing.<sup>139</sup> Meanwhile, the Letter perpetuated a lack of due process safeguards in a number of ways, for example, the Letter admitted that the OCR did not require schools to permit parties to have lawyers at any stage of the proceedings.<sup>140</sup> In fact, Assistant Secretary Ali wrote, "[the] OCR strongly *discourages* schools from allowing the parties personally to question or cross-examine each other during the hearing."<sup>141</sup> The OCR sought to discourage cross-examination for the noble reason that questioning an alleged victim may be traumatic, intimidating, and could escalate or perpetuate a hostile environment.<sup>142</sup> But the OCR's insistence that the accused and accuser be unable to cross-examine one another is inconsistent also with traditional due process standards during adjudicative proceedings.<sup>143</sup> Additionally, like the 2001 Guidance, the OCR merely recommended that schools provide an appeals process, but did not make it a requirement.<sup>144</sup>

The Letter revolutionized Title IX hearings in sexual violence cases, but not necessarily all for the better.<sup>145</sup> Critics were upset that the OCR used the

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<sup>136</sup> See Dear Colleague Letter (2011), *supra* note 5, at 12.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 11–12.

<sup>140</sup> *Id.* at 12.

<sup>141</sup> *Id.* (emphasis added).

<sup>142</sup> *Id.*

<sup>143</sup> See, e.g., *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400–01 (6th Cir. 2017); see also U.S. CONST. amend. VI.

<sup>144</sup> Dear Colleague Letter (2011), *supra* note 5, at 12.

<sup>145</sup> West et al., *supra* note 24, at 510.

Letter rather than the legislative process to adjust the legal requirements of Title IX.<sup>146</sup> One critic wrote:

Using the letter, rather than the traditional legislative process, the OCR: (1) mandated that Title IX applied to campus policies on sexual violence, (2) required that recipient educational institutions apply a preponderance of the evidence standard when adjudicating sexual violence complaints, and (3) instituted a multitude of protections for complainants. The letter does little to address protections for the due process rights of an accused individual.<sup>147</sup>

The Letter did not come into force through a traditional legislative process—nor did the Department engage in any notice and comment period—yet until the Department of Education withdrew the Letter in 2017, universities had been expected to treat the Dear Colleague Letter as imposing legally binding standards.<sup>148</sup>

Unfortunately, while the OCR had high aspirations that the Letter would bring about positive change, many believe it “seemed to cause even more confusion as to what was actually required from universities.”<sup>149</sup> The Letter still “did not provide a framework narrow enough” for universities to adequately abide by,<sup>150</sup> and accordingly, “universities did not understand what precisely the 2011 Dear Colleague [sic] Letter required of them.”<sup>151</sup>

#### D. 2014 Questions and Answers on Title IX and Sexual Violence

The Dear Colleague Letter sought to clarify and exemplify certain Title IX requirements, but since the 2001 guidance was released, the OCR had not provided universities with any *procedures* for how to be in compliance with Title IX.<sup>152</sup> Because of the remaining confusion about proper procedures, the OCR added yet another document to act in tandem with the 2001 Guidance and the 2011 Dear Colleague Letter.<sup>153</sup> On April 29, 2014, the OCR published its “Questions and Answers on Title IX and Sexual Violence” (hereinafter “2014 Q&A”).<sup>154</sup> There, the OCR explained that both the Dear Colleague Letter and 2001 Guidance remained in full force, and advised that the new 2014 Q&A should be read in conjunction with the previous two guiding documents.<sup>155</sup> Per-

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<sup>146</sup> *See id.*

<sup>147</sup> *Id.*

<sup>148</sup> *Id.* at 510–11; Dear Colleague Letter (2017), *supra* note 34, at 2.

<sup>149</sup> Smith, *supra* note 2, at 167–68.

<sup>150</sup> *Id.* at 172.

<sup>151</sup> *Id.* at 168.

<sup>152</sup> *Id.*

<sup>153</sup> *See* QUESTIONS & ANSWERS (2014), *supra* note 33, at i–ii.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at ii.

haps the most noteworthy clarifications in the 2014 Q&A were in the areas involving grievance procedures, interim measures, and investigations.<sup>156</sup>

### 1. *Grievance Procedures Plus: Additional Obligations*

The 2014 Q&A was an attempt by the OCR to “ensure that students and employees have a clear understanding of what constitutes sexual violence, the potential consequences for such conduct, and how the school processes complaints.”<sup>157</sup> The elements the OCR said should be included in a school’s procedures for responding to complaints of sexual violence were the same six described in the 2001 Guidance.<sup>158</sup> The OCR additionally suggested that schools’ Title IX grievance procedures explicitly include yet another list of obligations, some of which it claims are mandatory under Title IX.<sup>159</sup> Although the document declared only some were mandatory, it neglected to specify which such obligations actually were—further contributing to the law’s ambiguity.

However, the 2014 Q&A was clear on the newest procedural requirement governing a schools’ standard of review. Among the list of arguably mandatory obligations was the requirement that schools use the preponderance of the evidence standard previously addressed in the 2011 Dear Colleague Letter in resolving a complaint.<sup>160</sup> The OCR used the 2014 Q&A to mandate that “any procedures used for sexual violence complaints, including disciplinary procedures, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution . . . *including applying the preponderance of the evidence standard of review.*”<sup>161</sup> It was that requirement that would cause perhaps the most controversy of the document’s changes to Title IX regulations.

### 2. *Interim Measures*

The 2014 Q&A also reminded schools that part of their basic responsibilities to address student-on-student sexual violence includes following a series of interim steps to protect the complainant and ensure his or her safety as necessary before the final outcome of any investigation.<sup>162</sup> The OCR posited that schools should take such interim steps promptly upon receiving notice of sexual violence allegations, and should provide complainants with periodic updates on the investigation’s status.<sup>163</sup> According to the 2014 Q&A, “[i]n general, when taking interim measures, schools should minimize the burden on the

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<sup>156</sup> See *id.* at 12–14 (listing Grievance Procedures); *id.* at 32–33 (listing Interim Measures); *id.* at 24–26 (explaining Investigations).

<sup>157</sup> *Id.* at 13.

<sup>158</sup> See *id.* at 12; see also *supra* Section I.B.3.

<sup>159</sup> QUESTIONS & ANSWERS (2014), *supra* note 33, at 13.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 14 (emphasis added).

<sup>162</sup> *Id.* at 2–3.

<sup>163</sup> *Id.* at 3.

complainant . . . [and] should not, as a matter of course, remove the complainant from the class or housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.”<sup>164</sup>

### 3. *Time Frame for Investigations*

The 2014 Q&A reiterated that an appropriate timeframe for typical investigations was sixty calendar days.<sup>165</sup> This meant that although the OCR could determine whether an investigation was “prompt” on a case-by-case basis, within those sixty days, schools were pressured to conduct the fact-finding investigation, hold a hearing, or engage in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment.<sup>166</sup> Finally, schools had to determine what actions it needed to take to eliminate the hostile environment and prevent its recurrence.<sup>167</sup> These actions could include “imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate.”<sup>168</sup> The timeframe did not include appeals, but the OCR cautioned schools that an unduly long appeals process could “impact whether the school’s response was prompt and equitable as required by Title IX.”<sup>169</sup>

The 2014 Q&A reminded the public that the OCR requires schools’ Title IX investigations to be adequate, reliable, impartial, and prompt in all cases.<sup>170</sup> Part of that meant schools must ensure *both* parties have the opportunity to present witnesses and other evidence.<sup>171</sup> Yet still, even after the 2014 Q&A, Title IX did not explicitly require schools to afford accused students a formal hearing.<sup>172</sup> Instead, the 2014 Q&A merely noted that a school’s investigation *may* include a hearing to determine whether the prohibited conduct occurred.<sup>173</sup>

## II. PROBLEMS, CRITICISMS, AND CALLS FOR REFORM

Even with the 2011 Dear Colleague Letter and the 2014 Q&A supplementing the 2001 Guidance, issues continued to arise, and critics urged for reform.<sup>174</sup> Trying to navigate through the 2001, 2011, and 2014 guiding docu-

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<sup>164</sup> *Id.* at 33.

<sup>165</sup> *Id.* at 31.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 25.

<sup>171</sup> *Id.* (emphasis added).

<sup>172</sup> *Id.*

<sup>173</sup> *Id.*

<sup>174</sup> See, e.g., Henrick, *supra* note 9, at 50; Smith, *supra* note 2, at 167–68; Leef, *supra* note 3; Ariel Sullivan, *Illegal Procedure? Title IX and Sexual Assault*, NEW ENG. BD. HIGHER EDUC. (Jan. 16, 2015), <http://www.nebhe.org/thejournal/illegal-procedure-title-ix-and-sexual-assault/> [https://perma.cc/XQZ5-L2ZL]; Yoffe, *supra* note 129.

ments in tandem “[le]ft colleges vulnerable to claims of negligence and mistreatment by the accused, whose rights are barely recognized by the Office of Civil Rights.”<sup>175</sup> It was not long before the public noticed that—still—significant issues exist with the ways colleges are required to handle cases of sexual misconduct.<sup>176</sup> The added safeguards and supplemental documents had gone so far as to increase risk, harm, and potential issues for the other end of the spectrum—the accused.<sup>177</sup>

Within months after the OCR implemented its 2014 Q&A, critics took to the media to express growing concerns. One critic acknowledged, “[s]exual assault on campus is a serious problem. But efforts to protect [individuals] from a putative epidemic of violence have led to misguided policies that infringe on the civil rights of [the accused].”<sup>178</sup> Meanwhile, a group of Harvard professors criticized Harvard’s new rules for handling sexual assault claims as lacking “the most basic elements of fairness and due process.”<sup>179</sup> The fact that under the new system there would likely “be no hearing for the accused, and thus no opportunity to question witnesses and mount a defense” was and is great cause for concern.<sup>180</sup>

Another critic argued that “despite [the OCR’s] legal duty to ensure that college sexual assault adjudications are ‘equitable’ and ‘impartial’ to all parties including the accused,” the OCR never adequately “defined a university’s obligation to provide due process protections for student defendants.”<sup>181</sup> The only mandate the OCR specified relating to the protections for student defendants was that affording due process rights to the accused “should ‘not restrict or unnecessarily delay’ a complainant’s Title IX rights.”<sup>182</sup> Moreover, there existed “no OCR publication or federal regulation mandating any punishment for false accusations of rape or sexual assault [no matter how malicious or injurious to the reputation and academic standing of the accused]” such claims might turn out to be.<sup>183</sup> The concept of false accusations understandably makes many uncomfortable, because it is our duty not to doubt alleged victims of sexual assault, and to take such claims seriously—but that does not change the fact that

<sup>175</sup> Smith, *supra* note 2, at 168; Sullivan, *supra* note 174.

<sup>176</sup> See, e.g., Henrick, *supra* note 9, at 79–80; Smith, *supra* note 2, at 169; Leaf, *supra* note 3; Sullivan, *supra* note 174; Yoffe, *supra* note 129.

<sup>177</sup> See, e.g., Christina Hoff Sommers, *Protecting Due Process in Sexual-Assault Cases on Campus*, CHRON. HIGHER EDUC. (Sept. 8, 2017), <https://www.chronicle.com/article/Protectin-g-Due-Process-in/241137>; Yoffe, *supra* note 129.

<sup>178</sup> Yoffe, *supra* note 129.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*; QUESTIONS & ANSWERS (2014), *supra* note 33, at 25.

<sup>181</sup> Henrick, *supra* note 9, at 56 (quoting REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 14–15).

<sup>182</sup> *Id.* (internal citations omitted).

<sup>183</sup> *Id.*

false accusations can and do occur.<sup>184</sup> And very few safeguards exist to protect the wrongly accused.

*A. Due Process Concerns*

Due process is guaranteed by both the Fifth and the Fourteenth Amendments to the Constitution.<sup>185</sup> “Those accused of a crime have the right to an unbiased and speedy trial, to be notified of the charges and evidence against them, to cross-examine adverse witnesses, and to be represented by a lawyer.”<sup>186</sup> As the Title IX regulations previously stood, the OCR’s directives seemed to be overwhelmingly stacked against the accused.<sup>187</sup> In 2016, twenty-one law professors from universities across the country wrote an open letter to the Department of Education applauding the OCR’s intent, but criticizing that the OCR “unlawfully expanded the nature and scope of institutions’ responsibility to address sexual harassment, thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding.”<sup>188</sup>

Under the OCR’s direction at the time, “parties [were] not supposed to question or cross examine each other [during proceedings], a prohibition recommended by the federal government in order to protect the accuser.”<sup>189</sup> In addition, although the OCR mandated that schools allow the opportunity to appeal a decision on an equal basis, it did not *require* schools to provide an appeals process.<sup>190</sup> The OCR only required that if a school allows accusers to appeal, it must also allow the accused to appeal as well.<sup>191</sup> One of the most controversial issues was that, “by federal requirement, students [could] be found guilty under the lowest standard of proof: preponderance of the evidence,” and without any chance to appeal the ruling.<sup>192</sup> School adjudicators needed only a 51 percent certainty “for a finding that [could] permanently alter the life of the accused.”<sup>193</sup>

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<sup>184</sup> See Hoff Sommers, *supra* note 177; Watanabe, *supra* note 15.

<sup>185</sup> U.S. CONST. amends. V, XIV.

<sup>186</sup> Hoff Sommers, *supra* note 177; see also U.S. CONST. amends. V, XIV.

<sup>187</sup> Henrick, *supra* note 9, at 72.

<sup>188</sup> Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault, Larry Alexander, Warren Distinguished Professor of Law, University of San Diego, et al., to State and Federal Lawmakers, College Administrators, and Officials at the Office for Civil Rights, U.S. Dep’t of Educ. (June 1, 2016), <http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf> [<https://perma.cc/2ZYU-XYPZ>].

<sup>189</sup> Yoffe, *supra* note 129; see Dear Colleague Letter (2011), *supra* note 5, at 12; see also *supra* Section I.C.4.

<sup>190</sup> QUESTIONS & ANSWERS (2014), *supra* note 33, at 37.

<sup>191</sup> See *id.*

<sup>192</sup> Yoffe, *supra* note 129.

<sup>193</sup> *Id.*



*B. When Procedural Standards Fall Short*

Alarming—perhaps because the OCR failed to explicitly require schools to conduct formal hearings—some schools chose neither to require nor even voluntarily conduct hearings to adjudicate claims of sexual misconduct.<sup>194</sup> Even at schools that held hearings, only some allowed the accuser and the accused to be accompanied by legal counsel, which was in accordance with OCR guidance.<sup>195</sup> And still, amongst those schools that allowed such legal counsel, many schools banned lawyers either from speaking directly to their clients or from speaking on behalf of their clients,<sup>196</sup> further hindering the parties' right to an impartial adjudication.

In one article critiquing the then-current system for schools' handling of sexual misconduct cases, the author tells the story of an engineering student, whose intercourse with a female friend in his dorm one Friday night in March of his freshman year at University of Michigan “set[] off a series of events that would end his college education.”<sup>197</sup> After a group of students had been hanging out in the dorm, a young woman who lived down the hall from the subject student told him that she needed a place to spend the night because her roommate had guests staying in their room.<sup>198</sup> The girl allegedly slipped into the young man's bottom bunk, where the two talked quietly and started kissing before things escalated—the girl then asked the male student about a condom.<sup>199</sup> The two disturbed the student's roommate, in the upper bunk, who then sent the subject student a message around 3 a.m., which read, “Dude, you and [the young woman] are being abnoxiously [sic] loud and inconsiderate, so expect to pay back in full tomorrow . . .”<sup>200</sup> The next morning, the girl allegedly asked the student to keep their encounter private, and believing she was embarrassed over having sex with a friend, the male student agreed.<sup>201</sup>

However, months later, when the male student was home in New York for the summer, a university official contacted him to set up a Skype interview with her and another administrator, but she did not disclose the reason.<sup>202</sup> During the interview, the student became concerned about the tone of the questions and asked the administrators if he should consult a lawyer, but the administrators allegedly responded that if he ended the interview to seek counsel, they

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<sup>194</sup> See *id.*; see also QUESTIONS & ANSWERS (2014), *supra* note 33, at 25 (“The investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.”).

<sup>195</sup> See Dear Colleague Letter (2011), *supra* note 5, at 12; Watanabe, *supra* note 15.

<sup>196</sup> *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1063 (S.D. Ohio 2017); Yoffe, *supra* note 129.

<sup>197</sup> Yoffe, *supra* note 129.

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *Id.*

would inform the university of that fact “and the investigation would continue without his input.”<sup>203</sup> The administrators then told the student, over Skype, that when he returned to campus for his sophomore year, the university would be placing restrictions on him, prohibiting him from being in the vicinity of the young woman, and barring him from the dorm.<sup>204</sup>

The article goes on to detail that later, in an affidavit, a friend of the complainant stated that over the Summer she received a call from the complainant who was “emotionally upset” because her mother had found her diary, which “contained descriptions of romantic and sexual experiences, drug use, and drinking.”<sup>205</sup> During that phone call, the complainant told her friend about the night she had sex with the subject student, claiming she had initially told him “no,” but then gave in.<sup>206</sup> Eventually, the complainant’s mother “called the university to report that [her daughter] would be making a complaint against [the male student].”<sup>207</sup>

Many, including the author of the aforementioned article, criticized the fact that “[t]he single, cryptic Skype interrogation—the one that blindsided [the accused student] over his summer vacation—was to be his sole hearing with campus administrators. He never met them in person.”<sup>208</sup> Nonetheless, the university determined that the accused student “engaged in sexual intercourse with the Complainant without her consent and that [such an] activity is so severe as to create a hostile environment.”<sup>209</sup> He was suspended from the school until after the complainant graduated—a roughly three-year suspension—and “[i]n order for the university to consider reinstating him, he would have to agree that he had engaged in sexual misconduct.”<sup>210</sup> The author of the article pointed out that “[w]hether or not he returned, the finding would stay on his permanent record.”<sup>211</sup> Feeling his constitutional due process rights had been violated, the accused student eventually consulted a lawyer and filed a lawsuit against the university.<sup>212</sup>

Another article tells the story of a 21-year-old senior (Doe) at a different college who was expelled for sexual assault in 2013.<sup>213</sup> In that student’s case, the author recounts the following:

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<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* According to the article, the complainant later “confirmed the contents of [her] diary in her own deposition.” *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* The complaint against the accused was filed in 2012. *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> Hoff Sommers, *supra* note 177.

The young woman, whose roommate was dating Doe at the time, brought charges nearly two years after the alleged event. He vehemently denied them, and her story kept changing. First she described the encounter as consensual, then said it began consensually and turned nonconsensual, then said it was assault. The college acknowledged that he was blackout drunk at the time, and that she wasn't—which means, if anything, that she may have violated sexual-assault policy. In a Kafkaesque trial, without benefit of counsel, cross-examination, or appeal, he was found guilty and expelled.

But then, with the help of a lawyer, the accused student gained access to text messages that the young woman had sent during and immediately after the alleged assault. The texts make it clear that she initiated the encounter. She texted a friend afterward, worried about what would happen if her roommate found out: “She’ll never speak to me again.” The friend had a suggestion: “Put all the blame on [Doe].” But she dismissed that, saying “[My roommate] knows me—pretty obvious I’m not an innocent bystander.” And then she texted another male student and invited him over for sex, immediately after her alleged rape.<sup>214</sup>

When the accused student brought the exculpatory texts to the school’s attention, the school refused to reconsider, “explain[ing] that the college’s disciplinary process was consistent with federal requirements.”<sup>215</sup> Unfortunately, the school was correct: under the existing standards, the school was not required to allow a student to appeal.<sup>216</sup>

The foregoing anecdotes represent just a fraction of what *can* occur—the kind of controversial, unclear territory universities and students may find themselves in while the standards remain vague and their applications inconsistent. It should go without saying, any person who is subject to sexual harassment or assault deserves a fair and thorough investigation of his/her claim, and those found guilty should be punished. But the rules in place at the time drove some of the accused to assert that they, too, were victimized—virtually presumed guilty with few protections or opportunities to prove otherwise.<sup>217</sup>

Many decided to push back.<sup>218</sup> Accused students began to argue that their due process rights had been violated and that *they* had been victims of gender discrimination under Title IX.<sup>219</sup> And such claims began to cost universities.<sup>220</sup> One study conducted by a higher education insurance group, United Educators, showed that of the 262 insurance claims United Educators paid to students be-

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<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> See generally Dear Colleague Letter (2011), *supra* note 5, at 12 (noting the OCR recommends schools provide an appeals process, but never specifies it as a requirement).

<sup>217</sup> See West et al., *supra* note 24, at 511 (“The Dear Colleague Letter presumes that the rights of accusers *and* the accused cannot be simultaneously protected.”); Watanabe, *supra* note 15; Yoffe, *supra* note 129.

<sup>218</sup> Watanabe, *supra* note 15.

<sup>219</sup> *Id.* See, e.g., Doe v. Univ. of Cincinnati, 872 F.3d 393, 398 (6th Cir. 2017); Doe v. Ohio State Univ., 239 F. Supp. 3d 1048, 1064 (S.D. Ohio 2017); Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 573, 593 n.19 (D. Mass. 2016).

<sup>220</sup> Leef, *supra* note 3 (explaining that a U.S. magistrate judge ruled that a school had to pay over \$849,000 in legal expenses the accused student incurred); Yoffe, *supra* note 129.

tween 2006 and 2010 because of campus sexual assault, “[t]he vast majority of the payouts, 72 percent, went to the accused—young men who protested their treatment by universities.”<sup>221</sup>

### C. *Perpetuated Ambiguities*

Institutions continued to face scrutiny “by their campus community and the media for the way that they respond, or fail to respond, to allegations of sexual assault.”<sup>222</sup> In the beginning of 2015, the OCR had nearly 100 open investigations of colleges and universities for possible Title IX violations.<sup>223</sup> Colleges still needed “to be better prepared to respond immediately and appropriately to complaints of student-on-student sexual violence.”<sup>224</sup> Many observed that since the OCR published its forty-six page 2014 Q&A, colleges had been “scrambling to ensure compliance with [that] . . . guidance and avoid becoming the subject of an OCR investigation.”<sup>225</sup>

In 2016, critics remained concerned that certain areas in which colleges could potentially be found in or out of compliance with Title IX remained a mystery even to most college officials.<sup>226</sup> One critic complained that in 2014, only thirteen government investigations of colleges accused of mishandling reports of campus sexual misconduct were resolved, while seventy were opened.<sup>227</sup> In 2015, only seven investigations were resolved, although 106 were opened.<sup>228</sup> “From May 2014 . . . to December 2015, the number of colleges under investigation jumped from 55 to 161,” and “[w]ith some colleges facing multiple inquiries, the number of cases . . . remain[ing] open [in January 2016] ha[d] climbed to 197.”<sup>229</sup> The rapid growth in the number of federal inquiries was especially problematic because it created a backlog for investigators who were already overly burdened with cases.<sup>230</sup>

Although strengthened sexual-assault policies and enhanced commitment to assault victims were brought in good faith and for good reason, and although proponents of the regulations at the time argued the intense federal scrutiny made campuses safer, the changes had an unfortunate negative effect. The 2011 and 2014 documents “led to the deprivation of rights for many students—both accused students denied fair process and victims denied an adequate resolution

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<sup>221</sup> Yoffe, *supra* note 129.

<sup>222</sup> Sullivan, *supra* note 174.

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

<sup>226</sup> Katherine Mangan, *As Federal Sex-Assault Investigations Multiply, Resolutions Remain Elusive*, CHRON. HIGHER EDUC. (Jan. 10, 2016), <https://www.chronicle.com/article/As-Federal-Sex-Assault/234858>.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.*

of their complaints.”<sup>231</sup> The OCR faced backlash by due process advocates and others who feared the strengthened protections created “a rush to judgment.”<sup>232</sup> It appeared that “under the worthy mandate of protecting victims of sexual assault,” the OCR put procedures in place that “presume the guilt of the accused.”<sup>233</sup> Accordingly, the OCR regulations were no longer properly equitable.<sup>234</sup>

### III. MOST RECENT CHANGES: AS OF 2017

The history of Title IX is important not only to show where the law came from, what its purpose is, and what it does, but also to show problems that have developed or simply come to the surface with each attempt to elaborate, supplement, or specify guiding rules. As we move forward, it is important to consider what the OCR has already tried—aspects that were changed because they did not work, and aspects that do not seem to be working in our present-day society. Title IX requirements are now undergoing yet another wave of change under the current administration.<sup>235</sup> But perfecting the Title IX mandates that govern our schools’ ability to adequately handle sexual misconduct claims will likely require additional work. Thus, it is essential to examine what the most recent changes are, consider why the OCR is making such changes, and continue improving on this path of trial and error. Then we must consider whether the current changes are all for the better, or if important aspects are still missing.

#### A. Addressing the Issues and Preparing for Reform

In 2017, the Department of Education felt it was time to try again—to try to respond to these still-existing problems.<sup>236</sup> The Department and its OCR decided to address some of these issues and make additional changes to the governing documents.<sup>237</sup> In promulgating efforts of reform, Secretary of Education, Betsy DeVos, first announced forthcoming changes to the regulations.<sup>238</sup> While addressing the public on issues with the previous system, DeVos recounted the story of an athlete and his girlfriend who had been “playfully roughhousing” when a witness thought otherwise and reported the incident to the university’s

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<sup>231</sup> Dear Colleague Letter (2017), *supra* note 34, at 1–2.

<sup>232</sup> Mangan, *supra* note 226.

<sup>233</sup> See Yoffe, *supra* note 129.

<sup>234</sup> See *id.*

<sup>235</sup> Dear Colleague Letter (2017), *supra* note 34, at 1; see Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 7.

<sup>236</sup> See Betsy DeVos, Sec’y of Educ., U.S. Dep’t of Educ., Secretary DeVos Prepared Remarks on Title IX Enforcement (Sept. 7, 2017) [hereinafter Secretary DeVos Prepared Remarks 2017] (transcript available at <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> [<https://perma.cc/4HT8-EFRM>]).

<sup>237</sup> See *id.*

<sup>238</sup> *Id.*

Title IX coordinator.<sup>239</sup> Although “[t]he young woman repeatedly assured campus officials she had not been abused nor had any misconduct occurred,” the university administrators expelled the young man.<sup>240</sup>

The issues with the previous system did not just unfairly burden the accused. The *victims* were also at a disadvantage by the way the previous system had been run. For example, DeVos explains, “[a]nother student at a different school saw her rapist go free. He was found responsible by the school, but in doing so, the failed system denied him due process. He sued the school, and after several appeals in civil court, he walked free.”<sup>241</sup> Increasing the regulations that weigh against the accused creates an imbalance that denies the accused important aspects of due process; this imbalance opens the door for the accused—whether convicted or not—to sue the school for violations of their due process rights.<sup>242</sup> Our regulations and protocols for handling sexual misconduct should *not* serve as an avenue for anyone to walk free because of due process violations.

The Secretary of Education laid out the problems with the current failed system and “the need to establish a regulatory framework that serves all students.”<sup>243</sup> She stressed, “[t]his conversation may be uncomfortable, but we must have it. It is our moral obligation to get this right.”<sup>244</sup> The Department of Education has received backlash for wanting to make these reforms: anti-sex assault groups have criticized the reform efforts as stripping important protections from victims and favoring the accused or giving attackers an easy way out.<sup>245</sup> While these are understandable concerns, it bears repeating that should the pending changes or the suggestions set forth in this Note tip the scale too far in favor of the accused, the trial and error must then go on. The discussion must continue so as to find the right balance. We need to keep trying to tweak the system because we cannot settle when it comes to such serious matters. The ultimate goal is to keep clarifying the regulations in place and inch toward a more just system.

“[A]cts of sexual misconduct are reprehensible, disgusting, and unacceptable . . . . One assault is one too many. One aggressive act of harassment is one too many. One person denied due process is one too many.”<sup>246</sup> The Secretary reminded the public that the issue is not just “about faceless ‘cases’ . . . [but]

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<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 3; *see, e.g.*, *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396 (6th Cir. 2017); *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1064 (S.D. Ohio 2017); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016).

<sup>243</sup> Press Release, U.S. Dep’t of Educ., Highlights from Secretary DeVos’ Remarks on Title IX Enforcement (Sept. 7, 2017), <https://www.ed.gov/news/press-releases/highlights-secretary-devos-remarks-title-ix-enforcement> [<https://perma.cc/3YXX-EPMU>].

<sup>244</sup> Secretary DeVos Prepared Remarks 2017, *supra* note 236.

<sup>245</sup> Mangan, *supra* note 127.

<sup>246</sup> Secretary DeVos Prepared Remarks 2017, *supra* note 236.

about people's lives."<sup>247</sup> And not only have the lives of victims been lost but lives of the accused as well.<sup>248</sup> The government's push to require that schools establish the quasi-legal structures of the previous system to address sexual misconduct has come up short for far too many students, "[a]nd no student should be forced to sue their way to due process."<sup>249</sup>

The guidance documents' controversial content is one issue, but the procedures by which such controversial standards have been put into place is yet another. The 2011 and 2014 documents "interpreted Title IX to impose new mandates related to the procedures by which educational institutions investigate, adjudicate, and resolve allegations of student-on-student sexual misconduct."<sup>250</sup> But the OCR "imposed these regulatory burdens without affording notice and the opportunity for public comment."<sup>251</sup> Because the Dear Colleague Letter had a legally binding effect on universities since its publication, the Secretary referred to the previous system as "[t]he era of 'rule by letter,'" which she criticized as lacking "even the most basic safeguards to test new ideas with those who know this issue all too well."<sup>252</sup>

The Secretary provided to the public this depiction of what the rule by letter has looked like under the past regulations comprised of the 2001 Guidance, 2011 Dear Colleague Letter, and 2014 Q&A:

[A] student says he or she was sexually assaulted by another student on campus. If he or she isn't urged to keep quiet or discouraged from reporting it to local law enforcement, the case goes to a school administrator who will act as the judge and jury.

The accused may or may not be told of the allegations before a decision is rendered. *If* there is a hearing, both the survivor and the accused may or may not be allowed legal representation.

Whatever evidence is presented may or may not be shown to all parties. Whatever witnesses—if allowed to be called—may or may not be cross-examined. And Washington dictated that schools must use the lowest standard of proof.

And now this campus official—who may or may not have any legal training in adjudicating sexual misconduct—is expected to render a judgement. A judgement that changes the direction of both students' lives.

The right to appeal may or may not be available to either party. And no one is permitted to talk about what went on behind closed doors.<sup>253</sup>

It appears that the failed system has "pushed schools to overreach" through "intimidation and coercion," which in turn interfered with justice and fair outcomes.<sup>254</sup> Of course, "[e]very survivor of sexual misconduct must be taken se-

<sup>247</sup> *Id.*

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

<sup>250</sup> Dear Colleague Letter (2017), *supra* note 34, at 1.

<sup>251</sup> *Id.* at 2.

<sup>252</sup> Secretary DeVos Prepared Remarks 2017, *supra* note 236.

<sup>253</sup> *Id.* (emphasis added).

<sup>254</sup> *Id.*

riously.”<sup>255</sup> But still, “[e]very student accused of sexual misconduct must know that guilt is not predetermined.”<sup>256</sup> Ironically, in the 2014 Q&A, the OCR states, “any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination.”<sup>257</sup> Yet, several of the regulations under the past system enabled and effectively encouraged universities to take measures that were, in fact, biased against the accused.

The Secretary cautioned against punishing the accused before a fair decision has been rendered.<sup>258</sup> She posited that “[d]ue process is the foundation of any system of justice that seeks a fair outcome [and] [d]ue process either protects everyone, or it protects no one.”<sup>259</sup> The current reform comes as an effort “to ensure that America’s schools employ clear, equitable, just, and fair procedures that inspire trust and confidence.”<sup>260</sup> And with that, Secretary DeVos declared the Department’s decision “to incorporate the insights of all parties in developing a better way,” by initiating a notice-and-comment process.<sup>261</sup> There will inevitably be backlash from opponents, but a change is necessary, as the current system appears to depict a sort of “unraveling of justice.”<sup>262</sup> In fact, backlash should be welcomed if it helps continue the discussion to figure out how to solve these issues.

Again, the goal is to improve the system moving forward, to explore alternatives that will protect all students,<sup>263</sup> and to develop a policy “that both strongly condemns and punishes sexual misconduct *and* ensures a fair adjudicatory process.”<sup>264</sup> Such a policy is essential to ensuring consistency and adequacy within Title IX compliance.

### B. *Interim Guidance*

On September 22, 2017, the Department of Education issued a new interim guidance on campus sexual misconduct entitled “Q&A on Campus Sexual Misconduct” (hereinafter “2017 Q&A”).<sup>265</sup> The press release explained that the new Q&A will serve as an interim guide until the notice and comment rulemak-

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<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *See id.*

<sup>264</sup> *Id.* (emphasis added).

<sup>265</sup> Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/5UL8-FSNH>].



ing period comes to a close.<sup>266</sup> The new document withdraws the widely criticized 2011 Dear Colleague Letter and 2014 Q&A, and the OCR intends the document to assist schools in investigating and adjudicating allegations of campus sexual misconduct under federal law.<sup>267</sup> The OCR further intends the interim guidance to help schools as they work to combat sexual misconduct while treating all students fairly.<sup>268</sup> The Secretary of Education asserted, “[s]chools must continue to confront these horrific crimes and behaviors head-on. There will be no more sweeping them under the rug. But the process also must be fair and impartial, giving everyone more confidence in its outcomes.”<sup>269</sup>

Proponents of reform believe “hearing from survivors, campus administrators, parents, students and experts on sexual misconduct will be vital as we work to create a thoughtful rule that will benefit students for years to come.”<sup>270</sup> Thus, during the rulemaking process to determine proper Title IX obligations, the Department will solicit comments from stakeholders and the public—a legal process the OCR did not use when creating the previous obligations specified in the Dear Colleague Letter and 2014 Q&A.<sup>271</sup> The OCR now believes that the failure to engage in the rulemaking process when implementing those documents “created a system that lacked basic elements of due process and failed to ensure fundamental fairness.”<sup>272</sup> The Department of Education will, however, continue to rely on its “Revised Sexual Harassment Guidance” from 2001, which—the Department emphasizes—*was* informed by its public comment process.<sup>273</sup>

The 2017 Q&A is a mere seven pages consisting of twelve questions and answers—significantly shorter than the hefty nineteen-page Dear Colleague

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<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

<sup>268</sup> *Id.*

<sup>269</sup> *Id.*

<sup>270</sup> *Id.*

<sup>271</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1; *see also Notice and Comment 101*, KNOWYOURIX.ORG, <https://www.knowyourix.org/wp-content/uploads/2018/03/Notice-and-Comment-101.pdf> [<https://perma.cc/ZK3Q-JBMC>] (last visited Dec. 10, 2018) (“Notice and comment typically has four stages: a notice of proposed rulemaking (NPRM), a comment period, issuance of the final rule, and a 30-day delay in the date the rule goes into effect. The most important steps for our purposes are the NPRM and the comment period. In order to kick off the notice and comment period, the Department of Education will publish a notice of proposed rulemaking requesting comments on the regulation. The notice will state the date by which all comments must be submitted. Once the comment period opens, individuals and organizations may submit comments to the Department of Education through Regulations.gov.”).

<sup>272</sup> Department of Education Issues New Interim Guidance on Campus Sexual Misconduct, *supra* note 265.

<sup>273</sup> *Id.*

Letter and forty-six-page 2014 Q&A.<sup>274</sup> The 2017 Q&A supplements the 2001 Guidance by providing updated information about how the OCR will assess a school's compliance with Title IX.<sup>275</sup> Although it withdraws the 2011 Dear Colleague Letter and 2014 Q&A, which most notably addressed sexual violence and established preponderance of the evidence as the requisite evidentiary standard, the 2017 Q&A reinforces and clarifies important aspects of the now-withdrawn documents.<sup>276</sup>

Although brief, the document addresses many of the same guiding principles as its predecessors. Peer-on-peer sexual harassment and sexual violence are still included under Title IX prohibitions.<sup>277</sup> We now await the culmination of the rulemaking process and implementation of a new governing document that will better supplement the 2001 guidance, and hopefully, provide better safeguards for more equitable procedures and a fairer process.

The 2017 Q&A still requires schools to publish and implement grievance procedures that provide for a "prompt and equitable" resolution of complaints, but the document goes into further discussion as to what defines "equitable."<sup>278</sup> For the OCR to consider an investigation equitable, "the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred."<sup>279</sup> The document also requires a trained investigator, "free of actual or reasonably perceived conflicts of interest and biases for or against any party," to lead the investigation on behalf of the school.<sup>280</sup> The investigator must "analyze and document the available evidence . . . objectively evaluate the credibility of parties and witnesses, synthesize all available evidence . . . and take into account the unique and complex circumstances of each case."<sup>281</sup> Finally, the OCR still requires reporting and responding parties as well as appropriate officials to "have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings."<sup>282</sup>

Like the 2014 Q&A, the 2017 Q&A describes interim measures that may be appropriate for either party involved in an alleged incident of sexual mis-

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<sup>274</sup> See, e.g., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1, 7; QUESTIONS & ANSWERS (2014), *supra* note 33, at 46; Dear Colleague Letter (2011), *supra* note 5, at 19.

<sup>275</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1.

<sup>276</sup> See *generally id.*; Dear Colleague Letter (2017), *supra* note 34, at 1 (explicitly withdrawing the 2011 and 2014 documents as Title IX guidance).

<sup>277</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 1.

<sup>278</sup> *Id.* at 3–4.

<sup>279</sup> *Id.* at 4.

<sup>280</sup> *Id.*

<sup>281</sup> *Id.* This was the same in the 2014 document at page 25, where "neither Title IX nor the DCL specific[d] who should conduct the investigation [, so] [i]t could be the Title IX coordinator, provided there are no conflicts of interest." QUESTIONS AND ANSWERS (2014), *supra* note 33, at 25.

<sup>282</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 4.

conduct, prior to an investigation or while an investigation is pending.<sup>283</sup> However, the 2017 Q&A no longer *requires* interim measures as the 2014 version had done, and rather explains that such measures *may* be appropriate.<sup>284</sup> More importantly, schools must now take care to ensure they are “making every effort to avoid depriving *any* student of his or her education.”<sup>285</sup> Previously, as described in the 2014 Q&A, schools were required to minimize only the complainant’s burden.<sup>286</sup> The new Q&A’s mandate that schools avoid depriving either party of his or her education acts as an additional safeguard that prevents schools from treating the involved parties unequally pending adjudication.<sup>287</sup>

Also, where the withdrawn documents suggested a sixty-day timeframe for adjudicating complaints,<sup>288</sup> the new document does away with a specified timeframe and explains that the “OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”<sup>289</sup> This change removes the pressure the regulations formerly placed on schools to complete an investigation in just sixty days. Finally, one of the most notable changes the 2017 Q&A employs is that schools now “have the discretion to apply either the preponderance of the evidence standard or the clear and convincing evidence standard.”<sup>290</sup> Still, under the new Q&A the OCR does not require schools to conduct a hearing,<sup>291</sup> and schools continue to have a choice whether to allow appeals or not.<sup>292</sup>

#### IV. STRENGTH IN CONSISTENCY: SUGGESTIONS FOR CLARITY

It has taken many cases, criticisms, and attempts at forming and reforming adequate guidance documents over the past few decades to get the law to where it is now; yet, still too much is left ambiguous and inequitable.<sup>293</sup> Title IX became law in 1972, but it took decades to expand its reach to include protections for sexual harassment and sexual violence.<sup>294</sup> Though the OCR added such obligations, and although the current administration has since realized the implications for due process and flaws within the system, the obligations for Title IX

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<sup>283</sup> *Id.* at 2.

<sup>284</sup> *Id.* at 3.

<sup>285</sup> *Id.* (emphasis added).

<sup>286</sup> QUESTIONS & ANSWERS (2014), *supra* note 33, at 33.

<sup>287</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 3.

<sup>288</sup> QUESTIONS & ANSWERS (2014), *supra* note 33, at 31.

<sup>289</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 3.

<sup>290</sup> Department of Education Issues New Interim Guidance on Campus Sexual Misconduct, *supra* note 265; Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5.

<sup>291</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5.

<sup>292</sup> *Id.* at 7.

<sup>293</sup> *See supra* Part II.

<sup>294</sup> *See* Dear Colleague Letter (2011), *supra* note 5, at 1 (expanding the protections to sexual violence, just short of 40 years since Title IX became law).

compliance remain far from perfect. They are still marred by ambiguity and risks of uncertainty and injustice.

The Secretary of Education was correct to lament that “[t]his conversation may be uncomfortable, but we must have it. It is our moral obligation to get this right.”<sup>295</sup> As uncomfortable as it may be, it is imperative to discuss measures schools should take to adequately handle sexual misconduct allegations, and to try to get the system right. Where a system in place has failed individuals and risks doing so again, it is our duty as a society to go back to the drawing board and try, try again.

We have seen several guiding documents come and go, yet after *all* these new documents the OCR *still* does not require formal hearings, nor does it require schools to afford parties an opportunity to appeal.<sup>296</sup> It may, in theory, make it easier to condemn attackers for the heinous acts of which they have been accused, but at what cost? Failure to require such due process procedures risks wrongful convictions and providing a path in which the accused can get off on a technicality because the school that adjudicated the claims of misconduct did not afford due process rights to the accused. Our criminal system does not operate this way, and for good reason. Due process safeguards protect everyone, promote equality, and prevent injustice.

Although the Dear Colleague Letter asserted that “[p]ublic and state-supported schools must provide due process to the alleged perpetrator,” it specified that “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”<sup>297</sup> This essentially meant that the OCR was “assuring” due process, but only so long as it would not interfere with the complainant’s justice.<sup>298</sup> Such guidelines were not impartial, and neither civil nor criminal litigation would allow the same—to sacrifice an individual’s due process for the sake of speeding up the process in favor of one party to the detriment of the other.<sup>299</sup>

The 2001 Guidance, which is still a valid guiding document, acknowledges that “[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”<sup>300</sup> Ironically, that Guidance also emphasizes that “schools benefit from

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<sup>295</sup> Secretary DeVos Prepared Remarks 2017, *supra* note 236.

<sup>296</sup> See Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5, 7; REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 20.

<sup>297</sup> Dear Colleague Letter (2011), *supra* note 5, at 12.

<sup>298</sup> *See id.*

<sup>299</sup> *See, e.g.*, U.S. CONST. amend. VI (right to an impartial jury); *see* Dear Colleague Letter (2017), *supra* note 34, at 1 (explaining that the now-withdrawn documents enabled schools to adopt procedures that “lack the most basic elements of fairness and due process, [and] are overwhelmingly stacked against the accused . . .”) (citations omitted).

<sup>300</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 20.

consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action,”<sup>301</sup> demonstrating early on that the Department and its OCR favor consistency when handling cases of alleged sexual misconduct. But, the system lacks consistency even after the most recent changes, even if this is just the interim period awaiting the close of the rule-making process. As one critic of the previous system pointed out, “[i]f there is no uniformity or consistency in how the [OCR] handles things then how are thousands of higher education institutions expected to have any type of uniformity or consistency when they try to follow the guideline set out by the [OCR]?”<sup>302</sup>

It bears repeating: any person who is sexually assaulted deserves a fair and thorough investigation of his/her claim, and the guilty should be punished. But, the issues institutions have encountered with interpreting and complying with Title IX in recent years indicate there is more to the story. One critic rightly posits:

We also need to change the culture of discourse around sexual assault on campuses. To stand up for the rights of the accused is not to attack victims or women. Our colleges, like the rest of our society, must be places where you are innocent until proven guilty. The day after graduation, young men and women will be thrown into a world where there is no Gender-Based Misconduct Office. They will have to live by the rules of society at large. Higher education should ready our students for this reality, not shield them from it.<sup>303</sup>

One major quality Title IX regulations need is consistency—that includes consistent due process protections for all parties involved. A uniform evidentiary standard, an ensured opportunity to appeal, and consistent access to a hearing and lawyer are just some of the places to begin when dealing with such severe and sensitive accusations.

#### A. *Uniform Evidentiary Standard*

As of September 2017, the Office of Civil Rights now allows schools to have discretion in deciding whether to use the preponderance of the evidence standard or the clear and convincing standard.<sup>304</sup> The OCR previously required the preponderance of the evidence standard because of Title IX’s relation to Title VII and its classification as a civil suit.<sup>305</sup> Further, the OCR previously asserted that because a campus tribunal’s worst punishment is expulsion, not imprisonment, “the same procedural protections and legal standards are not required” as they would be in a criminal case.<sup>306</sup>

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<sup>301</sup> *Id.* at vi.

<sup>302</sup> Smith, *supra* note 2, at 169.

<sup>303</sup> Yoffe, *supra* note 129.

<sup>304</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5.

<sup>305</sup> Dear Colleague Letter (2011), *supra* note 5, at 10–11.

<sup>306</sup> Yoffe, *supra* note 129.

Critics of the use of the preponderance of the evidence standard recognize that allegations of sexual violence are not simply civil rights violations, as sexual violence is typically a criminal offense.<sup>307</sup> In criminal cases, however, defendants “are protected by the higher evidentiary standard in that setting because a finding of guilt can result in a loss of liberty and sometimes even the perpetual recognition as a ‘sexual offender,’ not just the loss of educational opportunities.”<sup>308</sup> While “a campus tribunal’s worst punishment is expulsion, not imprisonment,”—and thus not quite deserving of a heightened evidentiary standard like the “beyond a reasonable doubt standard”<sup>309</sup>—critics of the, “by a preponderance of the evidence” standard argue that sexual misconduct allegations and potential punishments are yet more serious than that of a civil suit, and thus this standard is inadequate.<sup>310</sup> Before the OCR mandated use of the preponderance of the evidence standard in its 2011 Dear Colleague Letter, “many schools had previously used the ‘clear and convincing evidence’ standard, a significantly higher burden of proof, though still below the ‘beyond a reasonable doubt’ standard used in criminal proceedings.”<sup>311</sup> These schools did so because the punishment for such infractions can be as severe as suspension or in many cases expulsion as well as a permanently marred education record and reputation.<sup>312</sup>

The rights of both the complainant and the accused are crucial to consider as “allegations of sexual assault now result in quasi-criminal proceedings instituted against an accused individual without any of the usual standards or protections found in criminal proceedings.”<sup>313</sup> After all, a close association exists between the charges leveled against students in sexual harassment/violence proceedings, and actual criminal charges.<sup>314</sup> The ramifications of a sexual assault accusation and conviction are more long-lasting and stigmatizing in today’s society than for plagiarism, cheating, or vandalism of university property.<sup>315</sup>

Now that schools have discretion and may choose between the preponderance of the evidence standard or the clear and convincing standard, the OCR is straying even further from the ideals of consistency that it preaches.<sup>316</sup> Such discretion means that some schools in the country will likely choose the preponderance of the evidence standard, and others will choose the clear and convincing standard. Therefore, in effect, students accused of sexual harassment or

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<sup>307</sup> West et al., *supra* note 24, at 510.

<sup>308</sup> *Id.*

<sup>309</sup> Yoffe, *supra* note 129.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> West et al., *supra* note 24, at 510.

<sup>314</sup> *Id.* at 511.

<sup>315</sup> *Id.*

<sup>316</sup> Dear Colleague Letter (2017), *supra* note 34, at 1.

violence at schools that employ the preponderance standard may have a more difficult time refuting the claims against them than students at schools with the clear and convincing standard.

The preponderance standard alone facilitates a lack of due process, but a uniform clear and convincing standard would enable more uniformity in the ways universities nationwide respond to sexual violence claims, while better protecting accused students from the risk of erroneous outcome. The OCR needs to use one uniform evidentiary standard, and in order to both preserve consistency *and* provide due process safeguards that standard should be “clear and convincing.”

### B. *Proper Hearings*

The OCR also needs to require that schools conduct proper hearings to determine whether sexual misconduct occurred. The guidance requires that determinations as to whether harassment occurred should be made based on “the totality of the circumstances.”<sup>317</sup> These circumstances include but are not limited to statements by witnesses, evidence about the credibility of both the complainant and the accused, evidence of the complainant’s reaction to the alleged assault, and other contemporaneous evidence.<sup>318</sup> It specifies that individuals should have the opportunity to present witnesses and other evidence as well.<sup>319</sup> However, the 2001 document never mentions any requirement for a proper hearing—nor does it even mention the word hearing.<sup>320</sup> So one must wonder, when and where will an accused individual even have such opportunities if no hearing is afforded.

Likewise, recall that *some* schools’ procedures include school-conducted investigations and hearings to determine whether the sexual harassment or violence occurred.<sup>321</sup> Although that safeguard appears to be present, the vague Title IX regulations provide no safeguard to prevent schools from conducting severely inadequate hearings or no hearing at all, and thus schools are unable to ensure impartiality in investigating claims of sexual misconduct.<sup>322</sup> Schools’ procedures for handling Title IX claims cannot be equitable unless they are impartial.<sup>323</sup> In fact, as one critic of the previous standards states, “[t]he only real criteria in regards to how these claims should be investigated is that the investigation must be adequate, reliable, impartial, prompt, and include the opportunity for both parties to present evidence and witnesses.”<sup>324</sup> And yet the OCR does

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<sup>317</sup> REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 9.

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *See id.* at 14.

<sup>321</sup> Dear Colleague Letter (2011), *supra* note 5, at 10.

<sup>322</sup> *See, e.g.,* Yoffe, *supra* note 129 (describing the accused student’s “hearing” as a mere Skype interview with only two University personnel).

<sup>323</sup> Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 3–4.

<sup>324</sup> Smith, *supra* note 2, at 170.

not *require* a hearing. It is bizarre that not one OCR guiding document for handling Title IX claims has required a hearing even though parties were required to have an opportunity to present evidence and witnesses. Because of this deficiency in the requirements, students could be expelled without a proper hearing entirely—as the University of Michigan student was.<sup>325</sup>

### C. Appeals

Finally, another area in which Title IX standards require consistency is with the opportunities presented for appeals. The OCR has never *required* schools to provide an appeals process.<sup>326</sup> Even with the possibility that exculpatory evidence is discovered after a school has already rendered its decision,<sup>327</sup> the existing interim guidance still places whether to reserve a right to appeal within schools' discretion.<sup>328</sup> Therefore, a student could be expelled after an unfair hearing or adjudication—or without a hearing at all—but depending on the school, the student may not even have any opportunity to appeal.<sup>329</sup> In cases such as these, students are likely to then file suit against the school for being denied a multitude of procedural due process safeguards.

Schools often lack aspects necessary for hearing sexual misconduct complaints, such as trained adjudicators, sophisticated knowledge of the law, and an understanding of the rules of evidence.<sup>330</sup> Most universities simply do not have these resources.<sup>331</sup> This makes the need for safeguards such as mandatory hearings, a mandatory opportunity to appeal, and a uniform—ideally clear and convincing—evidentiary standard all the more important. The evidentiary standard, hearings, and appeals are just a few grey areas limiting and affecting due process in these situations. The vague guidelines issued by the OCR fail to promote any uniform guide on how universities should handle Title IX claims.<sup>332</sup> Universities must not only take their Title IX obligations seriously, but “also be able to fully comprehend what those responsibilities are.”<sup>333</sup> “[T]he broad requirements issued by the Office of Civil Rights [still] have not accomplished that goal.”<sup>334</sup>

<sup>325</sup> See *supra* Section II.B.

<sup>326</sup> For lack of appeals absolute requirement see Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 3; QUESTIONS & ANSWERS (2014), *supra* note 33, at 37; REVISED SEXUAL HARASSMENT GUIDANCE (2001), *supra* note 5, at 20; Dear Colleague Letter (2011), *supra* note 5, at 12.

<sup>327</sup> See *supra* Section II.B.

<sup>328</sup> See Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), *supra* note 1, at 5 n.21.

<sup>329</sup> *Id.* at 6 (“[I]nstitution’s procedures to appeal . . . if such procedures are available . . . .”) (emphasis added); *id.* at 7 (“[T]he school may choose to allow appeal . . .”).

<sup>330</sup> Smith, *supra* note 2, at 160.

<sup>331</sup> *Id.*

<sup>332</sup> *Id.* at 172.

<sup>333</sup> *Id.*

<sup>334</sup> *Id.*



## CONCLUSION

The OCR's failure to provide clear guidelines and its failure to require hearings, appeals, and a uniform evidentiary standard has left colleges having to decide for themselves how to handle such complaints and risk improperly carrying out their Title IX obligations. More uniformity would exist in how universities nationwide are responding to sexual violence claims if the OCR provided universities with better guidelines to help them meet their Title IX requirements, and determine clearer, uniform practices to help guide them in responding appropriately to reports of student-on-student sexual violence.<sup>335</sup>

Perhaps the issues are not about what evidentiary standard is used—whether preponderance of the evidence or clear and convincing—or the fact that neither hearings nor appeals are required. Rather, the issues are about the policy as a whole, determining the proper procedures, and correcting areas in which the system falls short. If Title IX cases in school tribunals are going to be considered strictly civil cases of discrimination and require a preponderance of the evidence standard, then the Title IX requirements must at least have proper procedures to protect individuals' due process. Not all Title IX regulations should weigh in favor of the complainant and against the accused. Overall, the system needs additional reform to eliminate or at least reduce sexual violence on college campuses, and to ensure that institutions handle it efficiently when it does occur.<sup>336</sup> Wherever such reforms take us, however, the OCR should aim to protect the rights of *all* students involved.<sup>337</sup>

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<sup>335</sup> *Id.* at 171.

<sup>336</sup> *Id.* at 160.

<sup>337</sup> West et al., *supra* note 24, at 510.

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