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## Saving Title IX: Designing More Equitable and Efficient Investigation Procedures

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## NOTE

### SAVING TITLE IX: DESIGNING MORE EQUITABLE AND EFFICIENT INVESTIGATION PROCEDURES

*Emma Ellman-Golan\**

*In 2011, the Department of Education’s Office of Civil Rights (OCR) issued guidance on Title IX compliance. This guidance has resulted in the creation of investigative and adjudicatory tribunals at colleges and universities receiving federal funds to hear claims of sexual assault, harassment, and violence. OCR’s enforcement efforts are a laudable response to an epidemic of sexual violence on college campuses, but they have faced criticism from administrators, law professors, and potential members of the Trump Administration. This Note suggests ways to alter current Title IX enforcement mechanisms to placate critics and to maintain OCR enforcement as a bulwark against sexual violence on college campuses.*

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#### INTRODUCTION

In recent years, the problem of sexual assaults on college campuses has attracted widespread attention.<sup>1</sup> An estimated one in five women is sexually

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1. See Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365, 366 (2016); Keri Smith, Comment, *Title IX and Sexual Violence on College Campuses: The Need for*

assaulted while in college.<sup>2</sup> These assaults are overwhelmingly perpetrated by people known to the victim, such as friends, classmates, hallmates, and dates.<sup>3</sup> Ninety percent of campus sexual assaults are not reported.<sup>4</sup> Whether the rate of sexual assaults on college campuses has suddenly increased or whether the media has simply devoted more attention to the problem, reports of the prevalence of sexual assaults on college campuses have resulted in dramatic changes from both school administrations and the federal government.

Many entities have drawn attention to this problem. Student activists have founded organizations dedicated to raising awareness of campus sexual assault, building networks among sexual assault victims, documenting universities' inadequate responses, and encouraging students to file Title IX complaints against their schools with the Federal Department of Education.<sup>5</sup> Journalists, too, have drawn attention to the issue. Since 2009, the Center for Public Integrity has been investigating university responses to students' sexual assault complaints.<sup>6</sup> This investigation led to a series of stories exposing the degree to which schools actively protected accused students and failed to impose any consequences on students found to have engaged in sexual harassment or violence.<sup>7</sup> The stories detailed lenient consequences for students

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*Uniform On-Campus Reporting, Investigation, and Disciplinary Procedures*, 35 ST. LOUIS U. PUB. L. REV. 157, 157–58 (2015); Emily Suran, Article, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 276 (2014); see also *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 180 (D.R.I. 2016).

2. NAT'L SEXUAL VIOLENCE RES. CTR., STATISTICS ABOUT SEXUAL VIOLENCE 2 (2015), [http://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) [<https://perma.cc/MAY2-8JSR>]. Sexual assault victims are not exclusively female. *Id.* at 1–2. This Note will use feminine pronouns to refer to students who experience sexual harassment or violence and masculine pronouns to refer to perpetrators of sexual acts because most victims are female and most perpetrators are male, but the author recognizes that there are many exceptions to this generalization.

3. Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 487 (2012).

4. *Id.* at 485.

5. Suran, *supra* note 1, at 304 (highlighting the “measurable impact” that “activists[’ attention] ha[s] brought to sexual violence on college campuses”); Tierney Sneed, “The Hunting Ground” *Subjects Defend Title IX Campaign*, U.S. NEWS & WORLD REP. (Feb. 27, 2015, 4:58 PM), <http://www.usnews.com/news/articles/2015/02/27/the-hunting-ground-subjects-defend-title-ix-campaign> [<https://perma.cc/VDN8-ZJBP>] (explaining that student activism has led to an increase in the filing of Title IX complaints made against universities with seventeen complaints filed in 2012—by 2014, that number grew to ninety-six); Tyler Kingkade, *106 Colleges Are Under Federal Investigation for Sexual Assault Cases*, HUFFINGTON POST (Apr. 6, 2015, 3:03 PM), [http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106\\_n\\_7011422.html](http://www.huffingtonpost.com/2015/04/06/colleges-federal-investigation-title-ix-106_n_7011422.html) [<https://perma.cc/RJQ7-MH6P>] (noting that fifty-five schools were under investigation in May 2014, eighty-five in October 2014, and ninety-four in January 2015).

6. *Sexual Assault on Campus: About This Project*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/2010/02/24/8932/about-project> [<https://perma.cc/HT63-VM4F>].

7. *Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY, <https://www.publicintegrity.org/accountability/education/sexual-assault-campus> [<https://perma.cc/YS4W-MPVM>]; see also Kristin Jones, *Barriers Curb Reporting on Campus Sexual Assault*, CTR. FOR PUB. INTEGRITY

found responsible for acts of sexual violence against other students. Students were punished with suspensions during the summer semester, alcohol treatment, or assignments to “write a letter of apology, or make a presentation to a campus advocacy group, or write a research paper on sexual violence.”<sup>8</sup>

Other news reports based on incidents around that time similarly suggest a climate tolerant of sexual assault. In one, a student who reported an assault to a campus police officer claimed that the officer responded, “[W]omen need to stop spreading their legs like peanut butter or rape is going to keep on happening ‘til the cows come home.”<sup>9</sup> In another, a school administration stopped all communication with a student who had reported a sexual assault to an administrator once the administrator found the student filed a formal complaint.<sup>10</sup> After multiple follow-ups from the student, the university not only chose not to proceed with her complaint but dismissed her for poor academic performance, which she claimed was a result of her psychological trauma because of the assault.<sup>11</sup>

Subsequent Department of Education investigations corroborated the media’s findings, particularly as to the inadequacy of schools’ responses to complaints about sexual harassment and violence. At multiple schools, officials ignored complaints of sexual harassment.<sup>12</sup> They prevented prompt and equitable resolutions of complaints by placing significant administrative

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(Dec. 2, 2009, 11:02 AM) <https://www.publicintegrity.org/2009/12/02/9046/barriers-curb-reporting-campus-sexual-assault> [<https://perma.cc/B5U5-YHTS>]. Subsequent pieces by the Center for Public Integrity included, among many findings, the revelation that schools went to great lengths to protect student athletes by delaying investigations. *E.g.*, Kristen Lombardi, *Notre Dame Case Highlights Complexities of Campus Sexual Assault Investigations*, *CTR. FOR PUB. INTEGRITY* (Jan. 7, 2013, 6:00 AM) <https://www.publicintegrity.org/2013/01/07/11998/notre-dame-case-highlights-complexities-campus-sexual-assault-investigations> [<https://perma.cc/W3YY-8V72>].

8. Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, *CTR. FOR PUB. INTEGRITY* (Feb. 24, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [<https://perma.cc/A3XZ-J3UC>].

9. Tyler Kingkade, *UConn Failed to Investigate Sexual Assault Reports and Protect Victims, Complaint Claims*, *HUFFINGTON POST* (Oct. 21, 2013, 4:16 PM), [http://www.huffingtonpost.com/2013/10/21/uconn-sexual-assault-complaint\\_n\\_4133713.html](http://www.huffingtonpost.com/2013/10/21/uconn-sexual-assault-complaint_n_4133713.html) [<https://perma.cc/2EAT-TA4M>].

10. See Alexandra Flanagan & Phoenix Tso, *Inside the Student Activist Movement: Tufts and Sexual Violence*, *JEZEBEL* (Feb. 19, 2014, 5:00 PM), <http://jezebel.com/inside-the-student-activist-movement-tufts-university-1526094401> [<https://perma.cc/J93J-TMN8>].

11. *Id.*

12. See, e.g., Letter from Catherine D. Criswell, Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dave L. Armstrong, Vice President for Enrollment & Legal Counsel, Notre Dame Coll. 4 (Sept. 24, 2010) [hereinafter *Notre Dame Letter*], <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096001-a.pdf> [<https://perma.cc/9VDR-7DBF>] (criticizing administrators for treating sexual harassment as a simple student code violation); Letter from Catherine D. Criswell, Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Gloria A. Hague, Gen. Counsel, E. Mich. Univ. 5–6 (Nov. 22, 2010) [hereinafter *Eastern Michigan Letter*], <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/15096002-a.pdf> [<https://perma.cc/C8SD-ZK64>] (criticizing the school for allowing multiple complaints to go uninvestigated).

burdens in front of students or staff members who sought to report an incident.<sup>13</sup> They improperly encouraged alleged rape victims to attend mediation with their alleged rapists.<sup>14</sup> They discouraged students from filing complaints by insinuating that an investigation would be too disruptive to the students' lives.<sup>15</sup> They failed to protect students against retaliation by friends of the accused.<sup>16</sup> They gave preferential treatment to accused student-athletes.<sup>17</sup> In one case, school administrators took eighteen months after a claim was filed to determine that there was insufficient evidence to support the student's allegation of sexual assault.<sup>18</sup> Further, administrators imposed sanctions on the complaining student for fraud and misrepresentation to school officials.<sup>19</sup> And one school allowed its marching band to haze its recruits in sexualized rituals of which the band's director, a school employee, was aware.<sup>20</sup>

The Department of Education's Office of Civil Rights (OCR) under President Obama was troubled by these practices that took place at schools across the country.<sup>21</sup> OCR believed that schools' insufficient attempts to prevent or remedy sexual harassment and violence on college campuses constituted violations of Title IX of the Education Amendments of 1972,<sup>22</sup> the

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13. See, e.g., Notre Dame Letter, *supra* note 12, at 5 (criticizing administrators failing to provide a "prompt and equitable determination" for alleged victims of sexual assault); Eastern Michigan Letter, *supra* note 12, at 4–7 (criticizing the school for decentralizing the reporting process such that harassment claims and assault claims were handled in different offices and yet other offices were responsible if the incident took place in campus housing or involved a student athlete).

14. See, e.g., Letter from Timothy C.J. Blanchard, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Nancy L. Zimpher, Chancellor, State Univ. of N.Y. 16 (Oct. 31, 2013) [hereinafter SUNY Letter], <http://www2.ed.gov/documents/press-releases/suny-new-york-letter.doc> [<https://perma.cc/9E8Y-3CK9>].

15. Letter from Timothy C.J. Blanchard, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Christopher L. Eisgruber, President, Princeton Univ. 16 & n.12 (Nov. 5, 2014) [hereinafter Princeton Letter], <http://www2.ed.gov/documents/press-releases/princeton-letter.pdf> [<https://perma.cc/7TXN-NXLH>].

16. Letter from Thomas J. Hibino, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Anthony P. Monaco, President, Tufts Univ. 11, 20 (Apr. 28, 2014) [hereinafter Tufts Letter], <http://www2.ed.gov/documents/press-releases/tufts-university-letter.doc> [<https://perma.cc/3MC3-VTRC>].

17. See Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice & Gary Jackson, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. & Lucy France, Univ. Counsel, Univ. of Mont. 24 (May 9, 2013) [hereinafter Montana Letter], <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> [<https://perma.cc/32KJ-LXGR>] (noting that the University of Montana waited almost a year to initiate proceedings against three football players accused of sexual assault).

18. Tufts Letter, *supra* note 16, at 12.

19. *Id.* at 14.

20. Letter from Meena Morey Chandra, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Michael V. Drake, President, Ohio State Univ. 20–21 (Sept. 11, 2014), <http://www2.ed.gov/documents/press-releases/ohio-state-letter.pdf> [<https://perma.cc/CTG2-4XF8>].

21. See *supra* notes 12–20 and accompanying text.

22. See *supra* notes 12–20 and accompanying text.

federal statute designed to eliminate sex-based barriers to educational equality.<sup>23</sup> OCR likely viewed the prevalence of sexual assaults on campuses as a result of shortfalls in its existing guidance.<sup>24</sup>

In April of 2011, OCR issued a Dear Colleague Letter (DCL) that called on school administrators to “take immediate and effective steps to end sexual harassment and sexual violence.”<sup>25</sup> The letter took the form of guidance: it explained that OCR’s interpretation of schools’ obligation under Title IX is to prevent and remedy sexual harassment and discrimination.<sup>26</sup> It also suggested ways for schools to alter their sexual misconduct policies and reporting and investigation procedures to achieve compliance with the department’s interpretation of Title IX.<sup>27</sup>

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23. See 20 U.S.C § 1681(a) (2012) (“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 . . . .”); see also 34 C.F.R. § 106.1 (2013) (“[T]itle IX . . . is designed to eliminate . . . discrimination on the basis of sex in any education program or activity receiving Federal financial assistance . . . .”). Title IX was originally intended to combat sex discrimination in “admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.” See 118 CONG. REC. 5803 (1972) (statement of Sen. Bayh).

24. While in the 1980s and ’90s, OCR enforcement focused on equal opportunities for women in athletics departments at colleges, universities, and elementary and secondary schools, by the late 1990s and early 2000s, OCR began issuing guidance indicating that it believed Title IX covered sexual harassment as well. See Norma V. Cantú, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Clarification of Intercollegiate Athletics Policy Guidance (Jan. 16, 1996), <https://www2.ed.gov/about/offices/list/ocr/docs/clarific.html> [<https://perma.cc/3WHV-M6WA>]. In 1997, twenty years after a district court in *Alexander v. Yale University* first indicated that quid-pro-quo sexual harassment might be actionable under Title IX, 459 F. Supp. 1 (D. Conn. 1977), OCR released its first guidance on sexual harassment. That guidance stated that sexual harassment—whether initiated by a teacher, a peer, or a third party—violates Title IX if the school knew or should have known of its existence and if it is “sufficiently severe, persistent, or pervasive” such that it adversely affects a student’s education or creates “a hostile environment.” OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/GH3R-274J>]. OCR revised its guidance in 2001 through notice and comment. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter 2001 GUIDANCE], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/4GGQ-AAMF>]; see also Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66092 (Nov. 2, 2000). The 2001 Guidance imposed on schools a requirement to take “immediate effective action to eliminate the hostile environment and prevent its recurrence” when made aware of its existence and to establish grievance procedures for handling allegations of sexual harassment. 2001 GUIDANCE, *supra*, at 12, 19.

25. Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter on Sexual Violence 2 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/Q959-PH8N>].

26. *Id.* at 1 (“Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.”).

27. *Id.* at 16–19.

The DCL changed the landscape of Title IX enforcement: in response, schools hastily revised or rewrote their policies to achieve compliance and established quasi bureaucracies within each institution to investigate and resolve complaints of sexual harassment or violence.<sup>28</sup> It also led to a significant increase in OCR investigations of institutions of higher learning for possible Title IX violations.<sup>29</sup> The DCL does not carry the force of law; it is administrative guidance that explains the agency's interpretation of existing law<sup>30</sup>—but since noncompliance with its directives can put schools' federal funds at risk,<sup>31</sup> it has had the effect of imposing new regulations on schools.

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28. See Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html> [https://perma.cc/QPK8-MWTT].

29. As of February 16, 2017, OCR has begun 365 investigations into institutions of higher education. See *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> [https://perma.cc/7QCX-934L]; see also Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., & James W. Runcie, Chief Operating Officer, Fed. Student Aid, U.S. Dep't of Educ., to Barbara Boxer, Senator, U.S. Senate 2 (Apr. 28, 2015) [hereinafter Senator Boxer Letter], <http://www.boxer.senate.gov/press/related/150428EducationDepartmentReponsetoLetter.pdf> [https://perma.cc/LLV5-DURW] (indicating that while in 2009, only nine complaints against colleges of sexual violence had been filed with OCR, a total of 241 complaints had been filed by April 8, 2015, and providing data that OCR has opened investigation into the issues in approximately 60% of the filed complaints). OCR received 164 complaints of sexual violence at schools of higher education in fiscal year 2015 (which lasts until October of that year). OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *DELIVERING JUSTICE: REPORT TO THE PRESIDENT AND SECRETARY OF EDUCATION, FY 2015*, at 11 (2016), <http://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2015.pdf> [https://perma.cc/UMM4-CXUX]. Some of the 164 complaints filed in FY 2015 are included in the figure of 241 complaints filed by April 28, 2015, mentioned in the letter to Senator Boxer. See Senator Boxer Letter, *supra*, at 2.

30. Since the DCL did not create new regulations, it was issued without going through notice-and-comment rulemaking. The Department of Education maintains that its 2011 Dear Colleague Letter and the 2014 Q&A are merely clarifications of existing law and do not represent new policy, and thus neither document needed to go through notice-and-comment rulemaking. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1-2* (2014) [hereinafter Q&A], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [https://perma.cc/KE4D-6ME9] (“The following questions and answers further clarify the legal requirements and guidance articulated in the DCL . . . .”); Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Francisco M. Negrón, Jr., Gen. Counsel, Nat'l Sch. Bds. Ass'n 1-2 (Mar. 25, 2011) [hereinafter National School Boards Letter], [http://www.edweek.org/media/response\\_to\\_nsba.pdf](http://www.edweek.org/media/response_to_nsba.pdf) [https://perma.cc/46TM-BNE7] (“[T]he standards articulated in the DCL are not new, and do not expand the standard of liability for administrative enforcement of federal civil rights laws with respect to harassment.”). Critics, however, maintain that the DCL and the Q&A contain significant departures from previous OCR policy, particularly with respect to setting an evidentiary standard and extending Title IX to cover sexual violence, and thus the public should have been given notice and an opportunity to comment. See, e.g., Jacob E. Gersen, *How the Feds Use Title IX to Bully Universities*, WALL STREET J. (Jan. 24, 2016, 4:08 PM), [http://www.wsj.com/article\\_email/how-the-feds-use-title-ix-to-bully-universities-1453669725-1MyQjAxMTA2NjEzMDUxNTAzWj](http://www.wsj.com/article_email/how-the-feds-use-title-ix-to-bully-universities-1453669725-1MyQjAxMTA2NjEzMDUxNTAzWj) (on file with the *Michigan Law Review*).

31. Dear Colleague Letter, *supra* note 25, at 6, 16 (“Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations.”).

OCR's new requirements have received significant backlash from those who believe that schools should not be in the business of investigating sexual harassment or assault claims, or that the investigations OCR recommends infringe on accused students' due process rights.<sup>32</sup> And because OCR's steps to curtail sexual violence on college campuses have been by administrative fiat, rather than by legislation, its post-2011 changes can easily be undone by the Trump Administration, whose surrogates have signaled that they are considering halting OCR's enforcement of Title IX.<sup>33</sup>

This Note argues that Title IX enforcement is necessary to promote school<sup>34</sup> policies that prevent the epidemic of sexual violence on college campuses. Part I outlines the new landscape of OCR enforcement after the Dear Colleague Letter. Part II argues that universities should investigate and adjudicate complaints of sexual violence and acknowledges some of the shortcomings of the current approach. Part III offers solutions to the concerns that schools do not have the resources to investigate effectively and that their investigations violate the rights of accused students. It suggests

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32. See *infra* Section II.B.

33. See *Full Committee Hearing: Nomination of Betsy DeVos to Serve as Secretary of Education*, U.S. SENATE COMM. ON HEALTH, EDUC., LABOR & PENSIONS 1:54:15–1:54:42, 1:58:23–1:58:56 (Jan. 17, 2017, 5:00 PM), <http://www.help.senate.gov/hearings/nomination-of-betsy-devos-to-serve-as-secretary-of-education> [<https://perma.cc/4CWB-MQSQ>]. Ms. DeVos testified that “it would be premature” of her to commit to upholding the DCL’s requirements and that her goal is implementing a system that “recognizes both . . . the rights of the victims as well as those who are accused as well.” *Id.* This second comment echoes the position of the organization Foundation for Individual Rights in Education (FIRE), to which Ms. DeVos is a contributor. See Anna Orso, *Trump’s Education Pick Donated to Philly Group with Controversial Campus Rape Stance*, POLITIFACT PA. (Jan. 19, 2017, 11:00 AM), <http://www.politifact.com/pennsylvania/statements/2017/jan/19/bob-casey/trumps-education-pick-donated-philly-group-controv/> [<https://perma.cc/4FJ5-P5QM>]. FIRE sponsored a suit against the Department of Education that claimed that the Dear Colleague Letter violates the Administrative Procedures Act, and it has been an outspoken critic of OCR enforcement mechanisms. See *Complaint, Doe v. Lhamon*, No. 1:16-cv-01158 (D.D.C. June 16, 2016), 2016 WL 3536792; Caity Seed, *Former U.Va. Law Student Files Suit Against DOE: Complaint Challenges Sexual Assault Directive*, CAVALIER DAILY (June 16, 2016, 7:15 PM), <http://www.cavalierdaily.com/article/2016/06/former-u-va-law-student-files-suit-against-doe> [<https://perma.cc/Y4TA-ASHH>] (“The complaint is formally sponsored by the Foundation for Individual Rights in Education, or FIRE . . . .”); see also Emma Brown, *Trump Surrogate: GOP Candidate Would Dismantle ‘Corrupted, Incompetent Urban School Systems’*, WASH. POST (Oct. 22, 2016), [https://www.washingtonpost.com/news/education/wp/2016/10/22/trump-surrogate-gop-candidate-would-dismantle-corrupted-incompetent-urban-school-systems/?utm\\_term=.ff4bf8718a25](https://www.washingtonpost.com/news/education/wp/2016/10/22/trump-surrogate-gop-candidate-would-dismantle-corrupted-incompetent-urban-school-systems/?utm_term=.ff4bf8718a25) [<https://perma.cc/H9TK-S6YX>] (quoting Trump campaign surrogate, Carl Paladino, describing OCR as “self-perpetuating absolute nonsense,” and suggesting that all of its investigations should be turned over to the Department of Justice); Scott Jaschick, *Trump’s Emerging Higher Ed Platform*, INSIDE HIGHER ED (May 13, 2016), <https://www.insidehighered.com/news/2016/05/13/trumps-campaign-co-chair-describes-higher-education-policies-being-developed> [<https://perma.cc/LFU5-SX28>] (interviewing Donald Trump’s campaign policy chairman, who expressed interest in granting the Department of Justice exclusive jurisdiction over complaints of campus sexual assault).

34. In this Note, I use the terms college, university, campus, and school interchangeably. Though Title IX applies to all educational institutions that receive federal funds, this Note focuses on Title IX as it affects institutions of higher education.



alternative means of conducting investigations and determining responsibility, which may placate OCR's critics and persuade the Trump Administration to continue the trend of Title IX enforcement.

#### I. THE NEW LANDSCAPE OF TITLE IX ENFORCEMENT AT UNIVERSITIES

The Department of Education's Office of Civil Rights ensures compliance with federal civil rights laws by entities receiving Federal Department of Education funds.<sup>35</sup> The agency periodically releases letters and documents that it deems "significant guidance documents."<sup>36</sup> These documents "do[ ] not add requirements to applicable law, but provide[ ] information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations."<sup>37</sup> This Part details the two main forms of OCR guidance. Section I.A discusses OCR's 2011 Dear Colleague Letter and 2014 Questions & Answers on Sexual Violence (Q&A). Section I.B analyzes OCR's letters to specific university administrators at the culmination of its investigations of those particular schools.

##### A. OCR Guidance

OCR's release of the Dear Colleague Letter in 2011 began the current trend<sup>38</sup> of heightened agency enforcement of Title IX. The DCL used statistics on the prevalence of sexual violence on college campuses to draw the inference that schools' existing efforts to address the problem were inadequate, and it called on schools to take "immediate and effective steps to end sexual harassment and sexual violence."<sup>39</sup> The DCL imposed increasingly stringent requirements on universities by describing how schools should investigate complaints of sexual harassment and violence.<sup>40</sup>

The DCL created new obligations for universities. It requires universities to respond to and prevent sexual harassment and violence that has the potential to create a hostile environment.<sup>41</sup> It reiterates that a "hostile environment" is one in which harassment is sufficiently severe, persistent, or pervasive, but notes that a "hostile environment" can be defined based on the severity of the conduct at issue. It emphasizes that "a single or isolated

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35. See Dear Colleague Letter, *supra* note 25, at 6 ("Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations.").

36. See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007); see also Q&A, *supra* note 30, at 1 n.1; Dear Colleague Letter, *supra* note 25, at 1 n.1.

37. Dear Colleague Letter, *supra* note 25, at 1 n.1.

38. See *supra* note 26 and accompanying text.

39. Dear Colleague Letter, *supra* note 25, at 2.

40. *Id.* at 9–14.

41. *Id.* at 3–4.

incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.<sup>42</sup> Once a school “knows or reasonably should know” about an incident of sexual violence affecting a student, the school must “take immediate action” to investigate and eliminate the reported behavior, regardless of whether the incident took place on or off campus.<sup>43</sup> The DCL also reminds schools that Title IX explicitly prohibits retaliation against anyone who files a complaint.<sup>44</sup>

More specifically, the DCL calls upon schools to publish a notice of nondiscrimination, designate an employee to coordinate Title IX compliance, and adopt and publish grievance procedures.<sup>45</sup> It requires that universities conduct prompt, thorough, and impartial investigations into allegations of sexual harassment or violence, regardless of whether a law enforcement agency has opened an investigation.<sup>46</sup> It suggests that these investigations should occur even in spite of a complainant’s request that the investigation be stopped, in the interest of preventing the alleged incident from reoccurring.<sup>47</sup> It mandates that schools use the preponderance-of-the-evidence standard when resolving allegations of sexual harassment or violence.<sup>48</sup> It strongly suggests that an investigation should be completed in under sixty days.<sup>49</sup> It recommends that universities implement interim remedies—such as a no-contact order or, if need be, an alteration of housing or class-scheduling arrangements—while the investigation is being completed.<sup>50</sup> And it cautions that schools should “minimize the burden on the complainant” when imposing interim remedies.<sup>51</sup> It strongly discourages mediation in cases of sexual assault and “discourages schools from allowing the parties personally to question or cross-examine each other.”<sup>52</sup> It requires schools to provide the same benefits and burdens (such as the right to have an advisor present or the right to appeal) to each party.<sup>53</sup>

The DCL has significantly altered the ways schools handle allegations of sexual harassment and violence. Before the DCL, most schools grouped sexual misconduct with other conduct violations and adjudicated disputes accordingly. Some used the higher clear-and-convincing standard of

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42. *Id.* at 3.

43. *Id.* at 4.

44. *Id.*

45. *Id.* at 5.

46. *Id.* at 4–5.

47. *Id.* at 5.

48. *Id.* at 10–11 (noting that preponderance of the evidence is the standard generally applied in Title VII cases).

49. *Id.* at 12.

50. *Id.* at 15–16.

51. *Id.*

52. *Id.* at 12.

53. *Id.* The DCL also provides for unspecified due process rights for the accused. *Id.*

evidentiary proof.<sup>54</sup> Some adjudicated sexual misconduct in front of misconduct boards composed of other students, presenting issues of confidentiality and peer pressure.<sup>55</sup> Some required the complaining student to move out of her dorm or switch out of her classes if she wanted to avoid the accused student, potentially further chilling complaints.<sup>56</sup> The DCL called for an end to those practices. And it had the effect of requiring each school to develop a bureaucracy specifically designed to adjudicate issues of sexual harassment and assault.<sup>57</sup>

Three years later, OCR issued its newest guidance, a forty-six-page question-and-answer document.<sup>58</sup> The Q&A contains additional, more specific directives for schools. For example, the Q&A clarifies that a school is considered to be on notice when the victim (who, in the Title IX context, is called the “complainant”) or a third party reports the incident to a “responsible employee.”<sup>59</sup> It also notes that determinations of whether a hostile environment exists should be made “from the perspective of a reasonable person in the alleged victim’s position.”<sup>60</sup> Further, it emphasizes that many due process rights for the accused are relaxed, stating that “a Title IX investigation

54. See, e.g., Princeton Letter, *supra* note 15, at 11.

55. See, e.g., Letter from Alice B. Wender, Reg'l Director, Office for Civil Rights, U.S. Dep't of Educ., to Teresa A. Sullivan, President, Univ. of Va. 10 (Sept. 21, 2015) [hereinafter UVA Letter], <http://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf> [<https://perma.cc/82P9-8E8C>]; see also Q&A, *supra* note 30, at 30 n.30.

56. See, e.g., Tufts Letter, *supra* note 16, at 22–23 (criticizing the school’s policy of refusing to restrict an accused student from attending class with the complainant until the school reached a final determination in the case as effectively forcing the complainant to drop out of a leadership program or else face the accused in the program’s mandatory weekly seminars); see also Dear Colleague Letter, *supra* note 25, at 16.

57. Samuel R. Bagenstos, *What Went Wrong with Title IX?*, WASH. MONTHLY, [http://www.washingtonmonthly.com/magazine/septemberoctober\\_2015/features/what\\_went\\_wrong\\_with\\_title\\_ix057187.php?page=all](http://www.washingtonmonthly.com/magazine/septemberoctober_2015/features/what_went_wrong_with_title_ix057187.php?page=all) [<https://perma.cc/886R-WFHQ>].

58. Q&A, *supra* note 30. The Q&A was released the same month the White House Task Force to Protect Students from Sexual Assault produced a report detailing efforts the federal government would be taking to combat the problem of sexual violence on college campuses, indicating support for this initiative by the Obama Administration. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 2 (2014) [hereinafter NOT ALONE REPORT], <https://www.justice.gov/ovw/page/file/905942/download> [<https://perma.cc/Q4NR-2NS2>]. Vice President Joe Biden led the Task Force, and Secretary of Education Arne Duncan was a member. Memorandum Establishing a White House Task Force to Protect Students from Sexual Assault, 2014 DAILY COMP. PRES. DOC. 1–2 (Jan. 22, 2014).

59. Q&A, *supra* note 30, at 2 (“OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew . . .”). A responsible employee is a university employee who either has the authority or is perceived by the student to have the authority to trigger an investigation into sexual discrimination or misconduct. *Id.* In practice, professors, deans, and residential advisors are usually considered to be responsible employees, though OCR indicated in its Resolution Agreement with the University of Montana that it considers any employee not statutorily barred from reporting a responsible employee. Montana Letter, *supra* note 17, at 3.

60. Q&A, *supra* note 30, at 1.

will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required.”<sup>61</sup>

The Q&A goes further than the DCL in prescribing how schools interact with complainants. The Q&A strongly suggests that all university employees who might receive reports of sexual misconduct<sup>62</sup> should be trained in “the impact of trauma on victims,” in “the use of nonjudgmental language,” and in “the potential for revictimization by responders and its effect on students.”<sup>63</sup> This recommendation reflects the integration of new research on the neurobiology of sexual assault, which suggests that victims of sexual assault may behave atypically due to trauma.<sup>64</sup>

The integration of this research into OCR policy is a response to the most prominent problem the White House Task Force to Protect Students from Sexual Assault uncovered: that schools’ typical responses to complainants tended to exacerbate, rather than address, the “hostile environment” that Title IX prohibits. Students reported raising complaints of sexual harassment or violence to school officials who responded with “[i]nsensitive or judgmental comments [or asked] questions that focus[ed] on [the] victim’s behavior (e.g., what she was wearing, her prior sexual history) rather than on the alleged perpetrator’s.”<sup>65</sup> The Task Force cautioned that such responses could “compound a victim’s distress,”<sup>66</sup> which creates a hostile environment in violation of Title IX.

OCR’s emphasis on training regarding the impact of trauma sends powerful signals to universities, but it also raises a few concerns. The Q&A and the DCL respond to outdated misconceptions about rape, but the combined guidance arguably leads school to infer that they should believe all complaints or risk a finding of noncompliance. Further, OCR’s requirements open the door to the criticism that the agency has required schools to amass an army of social workers, nurses, lawyers, and experienced investigators to operate an investigative and adjudicatory bureaucracy—a function far beyond a university’s traditional role of providing education.

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61. *Id.* at 27.

62. That is, a responsible employee. *Id.* at 14–15.

63. *Id.* at 38.

64. Rebecca Campbell, Professor of Psychology, Mich. State Univ., NIJ Research for the Real World Seminar: The Neurobiology of Sexual Assault, (Dec. 3, 2012), <https://nij.gov/multimedia/presenter/presenter-campbell/pages/presenter-campbell-transcript.aspx> [https://perma.cc/393Z-CADH]. Victims may be unable to move or scream during the assault or to remember details about the assault, and may experience mood swings or recall details out of order when talking about the assault. *Id.* Further, the research cautions that victims who are disbelieved, as rape victims traditionally have been, can experience “secondary victimization,” a lack of control that retraumatizes the individual and causes her to disengage with the person to whom she is reporting, who may see the disengagement as confirmation that the alleged assault never happened. *Id.*

65. NOT ALONE REPORT, *supra* note 58, at 13 (emphasis omitted).

66. *Id.*

The DCL and Q&A articulate schools' obligations under Title IX.<sup>67</sup> They also offer guidelines to schools for best practices to ensure compliance.<sup>68</sup> And indeed, these two documents led universities to establish Title IX coordinator positions and hire investigators to meet with complainants, respondents, and witnesses and to make factual determinations of responsibility.<sup>69</sup> But these documents are not the only source of OCR guidance. OCR's case-by-case applications of its requirements to schools' policies and procedures similarly supply administrators with guidance.

### B. OCR Investigations and Resolutions

The Dear Colleague Letter and the 2014 Q&A have created the current Title IX enforcement mechanism. This guidance has prompted schools to create departments tasked with administering investigations per OCR's directives.<sup>70</sup> But OCR's letters to universities after it completes investigations of those schools' Title IX compliance also contain directives about how schools should design and implement their respective sexual misconduct policies and procedures.<sup>71</sup> These documents—OCR's guidance and its public correspondence with schools—do not carry the force of law,<sup>72</sup> but they effectively form the body of rules schools must follow. This is because schools found not in compliance invariably reach settlement agreements with the Department of Education through the issuance of resolution letters; these disputes are not resolved in court.<sup>73</sup> Thus, OCR case resolution letters, written and released at the culmination of an investigation, are similarly authoritative sources of schools' obligations under Title IX.

There are many case resolution letters that define OCR policy. Since 2011, OCR has completed forty-nine investigations at forty-four institutions of higher learning (some schools were investigated more than once).<sup>74</sup> In twenty-nine of those investigations, OCR found the school in violation of Title IX, which resulted in a resolution agreement between the agency and the school.<sup>75</sup>

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67. Q&A, *supra* note 30, at ii; Dear Colleague Letter, *supra* note 25, at 1.

68. *See supra* note 67.

69. *See infra* Section III.B for a discussion of different investigative methods and, in particular, a discussion of the differences between the single-investigator model and the hearing-panel model.

70. *See* Bagenstos, *supra* note 57.

71. *See, e.g., supra* notes 12–20.

72. *See supra* notes 36–37 and accompanying text.

73. *See* Amy Chmielewski, Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 147.

74. These numbers are accurate as of February 4, 2017. *Title IX: Tracking Sexual Assault Investigation Tracker*, CHRON. OF HIGHER EDUC., [http://projects.chronicle.com/titleix/investigations/?search\\_term&status=resolved&start=01%2F01%2F2011&end=02%2F04%2F2017](http://projects.chronicle.com/titleix/investigations/?search_term&status=resolved&start=01%2F01%2F2011&end=02%2F04%2F2017) [<https://perma.cc/YB53-3XZC>].

75. *Id.* (for relevant data select “Resolution agreement” under the “Resolved by” tag).

When OCR conducts investigations, it looks at the specifics of a given allegation. The agency interviews the complainant, witnesses, and university administrators to determine if the school was on notice of an incident of sexual harassment or violence and failed to take action reasonably calculated to stop, prevent, and remedy the hostile environment.<sup>76</sup> OCR also reviews all of the school's policies and procedures relating to sexual misconduct and, in some cases, conducts focus groups with students to determine whether the university has adequately educated students about its policies.<sup>77</sup> When OCR has completed its investigation, its lawyers write a case resolution letter,<sup>78</sup> which informs the university of its determination. Since institutions do not want to risk losing their federal funding, schools found in violation of Title IX settle with OCR.<sup>79</sup> Settlements are generally resolution agreements in which the university promises to alter its policies and report certain metrics to OCR at certain intervals in exchange for OCR agreeing not to withhold funds from the school.<sup>80</sup>

OCR's case resolution letters apply the requirements articulated in the DCL and the Q&A. In the press release about OCR's resolution letter regarding the University of Montana, the agency made clear that it was writing for a broader audience: it called the letter a "blueprint for colleges and universities across the country to take effective steps to prevent and address sexual assault and harassment on their campuses."<sup>81</sup> In the letter, OCR criticized the school for using a clear-and-convincing evidentiary standard,<sup>82</sup> failing to impose interim measures,<sup>83</sup> lengthening the resolution process by

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76. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL (CPM) 17–18 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<https://perma.cc/CH59-YZ9H>].

77. See, e.g., SUNY Letter, *supra* note 14, at 9–17.

78. These letters are also known as letters of findings. OCR uses the two terms interchangeably.

79. See Chmielewski, *supra* note 73, at 147.

80. See, e.g., State Univ. of N.Y., *Voluntary Resolution Agreement*, OCR Docket No. 02-11-6001, U.S. DEP'T EDUC. (Sept. 30, 2013), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/02116001-b.html> [<https://perma.cc/4YMF-CKCF>]; Univ. of Va., *Voluntary Resolution Agreement*, OCR Docket No. 11-11-6001, U.S. DEP'T EDUC. (Sept. 17, 2015), <https://www2.ed.gov/documents/press-releases/university-virginia-agreement.pdf> [<https://perma.cc/32DA-QU4D>].

81. Press Release, U.S. Dep't of Educ., Departments of Justice and Education Reach Settlement to Address and Prevent Sexual Assault and Harassment of Students at the University of Montana in Missoula (May 9, 2013), <http://www.ed.gov/news/press-releases/departments-justice-and-education-reach-settlement-address-and-prevent-sexual-as> [<https://perma.cc/82U9-H3PU>].

82. Montana Letter, *supra* note 17, at 17.

83. *Id.* at 16.

allowing the respondent five separate appeals processes,<sup>84</sup> halting investigations,<sup>85</sup> failing to offer students counseling services,<sup>86</sup> and giving athletes preferential treatment.<sup>87</sup>

OCR's case resolution letter to the University of Virginia<sup>88</sup> similarly contains guidance. OCR praised the school for complying with the DCL and Q&A by hiring a dedicated Title IX coordinator, expanding investigative capacity, establishing and filling a prevention coordinator position, enhancing its training and prevention strategies, and developing a website dedicated to disseminating information about Title IX at the University.<sup>89</sup> The DCL and the Q&A mandate all of these actions.<sup>90</sup>

The significance of the Dear Colleague Letter, the Q&A, and the OCR's resolution letters cannot be overstated. For activists who have lobbied for stricter enforcement of Title IX, the guidance represents a victory: OCR is taking compliance with Title IX very seriously and has instructed schools that they must investigate all complaints, prevent retaliation against a complainant, and use the preponderance evidentiary standard. But for those who think that Title IX infringes on the First Amendment or due process rights of students accused of sexual harassment or violence, the guidance signifies a drastic expansion of enforcement action based on sua sponte agency interpretations of Title IX that did not go through notice and comment.<sup>91</sup> These critics see "[p]olicymaking by agency threat."<sup>92</sup> For now, OCR's interpretations are effectively binding on all schools receiving federal funds from the Department of Education.

## II. THE DEBATE OVER THE PROPER ROLE FOR UNIVERSITIES

OCR's increased enforcement of Title IX with respect to sexual assault has generated substantial criticism—specifically, that the resulting investigations carried out by schools are unjust. Significantly, this criticism comes from prominent legal thinkers and scholars who are in a position to influence future OCR policy. Their criticism, which is echoed by organizations that have received financial support from Secretary of Education Betsy DeVos,<sup>93</sup> could serve as the basis for the Trump Administration to reverse OCR policy and decline to complete existing or initiate new investigations

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84. *Id.* at 13–14, 20.

85. *Id.* at 15.

86. *Id.*

87. *See id.* at 24.

88. UVA Letter, *supra* note 55.

89. *Id.* at 1–2.

90. Q&A, *supra* note 30, at ii, 7, 24–31, 38–41; Dear Colleague Letter, *supra* note 25, at 5, 7, 9–10.

91. For a discussion of these opposing views, see *supra* note 30.

92. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 911 (2016).

93. *See supra* note 33.

for failure to comply with Title IX. This backlash poses the question of the proper role for universities in efforts to curtail campus sexual violence. Section II.A argues that universities should maintain a role in investigating complaints of sexual violence on their campuses. Section II.B identifies weaknesses with existing investigation policies and procedures.

#### A. *Universities as Investigators*

Universities play an important role in remedying and preventing the conditions that give rise to sex-based discrimination. Universities can place a complainant and an accused student in separate housing facilities or alter their class schedules so that a student who suffered violence as a result of his or her sex will not suffer academically and emotionally, and thus be deprived of equal educational opportunities.<sup>94</sup> Accordingly, OCR sees sexual violence as a quintessential barrier to educational equity on the basis of sex, and it sees universities as the actors best suited to prevent that violence or deter its collateral effects.

A common response by many university administrators and law professors is that rape is not discrimination; it is a crime and should be adjudicated as such. Janet Napolitano, president of the University of California system, writes, “[T]he federal government’s expectations, especially related to investigations and adjudication, seem better-suited to a law enforcement model rather than the complex, diversely populated academic community found on a modern American campus.”<sup>95</sup> She notes that colleges cannot possibly investigate sexual violence and assault allegations adequately without subpoena power, the ability to collect and preserve evidence, and specialized (and expensive) training.<sup>96</sup> Crimes are crimes, and universities should not present themselves as an alternative forum for handling criminal investigations.<sup>97</sup> Rape allegations are complicated matters, and universities should not put themselves in the position of considering whether a complaint is inspired by regret, remorse, or shame.<sup>98</sup> One solution is “to reduce the Title IX Office to a compliance-monitoring role, and get it out of the business of adjudicating cases.”<sup>99</sup>

Indeed, there are substantial differences between police investigations and Title IX investigations of sexual assault. Unlike police officers, whose

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94. OCR specifically cautions against subjecting a student who complains of sexual assault by a fellow student to “remain in classes with the other student,” perhaps creating a situation in which “the complaining student’s grades suffer because he or she was unable to concentrate in these classes.” Q&A, *supra* note 30, at 3.

95. Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387, 398–99 (2015).

96. *Id.* at 399–400.

97. *See id.* at 400–01.

98. *See* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 *HARV. L. REV. F.* 103, 107–08 (2015).

99. *Id.* at 108.



sexual assault investigations usually cannot go forward without the victim,<sup>100</sup> university officials are required to investigate every complaint, even if the complainant asks that the investigation be closed, to determine whether a hostile environment exists or could exist and prevent further harassment or violence.<sup>101</sup> Criminal investigations are aided by search warrants and the ability to conduct forensic testing; Title IX investigations rely entirely on evidence produced by the parties themselves.<sup>102</sup> Police investigations use a higher standard of proof when determining whether the suspect violated the statutory definition of sexual assault;<sup>103</sup> Title IX investigations use the preponderance-of-the-evidence standard and look for violations of the school's misconduct policy,<sup>104</sup> which is not necessarily aligned to statutory definitions of crimes. Defendants in the criminal justice system may be provided indigent counsel;<sup>105</sup> respondents in a Title IX investigation have no similar guarantee.<sup>106</sup> Criminal investigations may result in prison time; the harshest punishment a university can dole out is expulsion.<sup>107</sup>

Rather than allowing two parallel systems to operate, the argument goes, schools should rely solely on the criminal justice system to adjudicate claims of sexual violence.<sup>108</sup> The criminal justice system has actors with the training, resources, and institutional capacity to adjudicate allegations of rape

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100. In rape cases, the victim's body is inextricably linked to the crime scene, so prosecutions for rape generally necessitate the participation of the victim.

101. See, e.g., Q&A, *supra* note 30, at 20 (noting that even when a complainant requests that the school not investigate, the school must consider whether it can honor this request while still providing a "safe and nondiscriminatory environment for all students").

102. See Dear Colleague Letter, *supra* note 25, at 19.

103. See, e.g., MODEL PENAL CODE § 1.12 (AM. LAW INST. 1985).

104. See Dear Colleague Letter, *supra* note 25, at 10–11. Sexual misconduct policies are written by university administrators and consultants; criminal statutes are creations of federal, state, and local legislatures.

105. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

106. Neither the DCL nor the Q&A requires schools to provide the accused student with counsel; in fact, both documents contemplate not only that schools will not provide counsel but also that they may not allow privately retained counsel to participate in the school's proceedings. See Q&A, *supra* note 30, at 26 ("If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally."); Dear Colleague Letter, *supra* note 25, at 12 ("While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties."); see also Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 *FORDHAM L. REV.* 2289, 2307 (2016) ("Courts have generally found that students do not have a right to counsel in the context of school disciplinary proceedings and that a student's counsel need not be permitted to take part in disciplinary hearings." (footnotes omitted)).

107. Napolitano, *supra* note 95, at 401 ("The most serious sanction that a college can impose is dismissal, which is wholly inadequate where a crime has been committed."); see also Q&A, *supra* note 30, at 27 ("Title IX investigation[s] will never result in incarceration of an individual . . ."); Dear Colleague Letter, *supra* note 25, at 15–17.

108. See Napolitano, *supra* note 95, at 398–99.

properly.<sup>109</sup> As universities are not adequately equipped to conduct investigations, these institutions should focus on areas within their strength: education and prevention of sexual assault.<sup>110</sup>

The argument that students should rely solely on the criminal justice system to adjudicate claims of sexual violence is predicated on institutional capacity: that the criminal justice system is best suited to resolve their complaints. But this argument fails to consider the fact that the criminal justice system struggles to prosecute rape,<sup>111</sup> and that much of the conduct covered by Title IX—such as sexual harassment—does not rise to the level of a crime.<sup>112</sup> Additionally, this argument fails to recognize the institutional capacity of schools to protect their students from future and ongoing harm.

As OCR's guidelines recognize, the school is the entity most capable of addressing sexual harassment and violence on campus.<sup>113</sup> OCR's increased enforcement activity stems from the premise that schools were not doing enough with the power they already had to address students' legitimate grievances.<sup>114</sup> OCR resolution letters indicate that prior to OCR's increased

109. The criminal justice's system of police and prosecutors contains far more resources than do universities. *See id.* at 388 (“[U]niversity student conduct processes may be inadequate if they end up supplanting the criminal justice system. . . . [T]hey possess considerable limitations—from a lack of subpoena power to a lack of clarity over authority regarding off-campus incidents, and from restricted investigative abilities to limitations on what sanctions they can impose.”).

110. *See, e.g.,* John D. Foubert, *The Longitudinal Effects of a Rape-Prevention Program on Fraternity Men's Attitudes, Behavioral Intent, and Behavior*, 48 J. AM. C. HEALTH 158, 158 (2000) (finding that fraternity members who participated in a rape-prevention study displayed “significant 7-month declines in rape myth acceptance and the likelihood of committing rape”).

111. *See, e.g.,* Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631, 1657–68 (2012) (discussing the low reporting and conviction rates of sexual assault in the United States and other Western countries); Tania Tetlow, *Granting Prosecutors Constitutional Rights to Combat Discrimination*, 14 U. PA. J. CONST. L. 1117, 1124 (2012) (positing that “the conviction rate for rape and domestic violence is demonstrably lower than other kinds of violent crimes” because juries tend to focus on the “perceived virtue of the victim and whether she behaved as a properly obedient woman.”); Shauna R. Prewitt, Note, *Giving Birth to a “Rapist's Child”: A Discussion and Analysis of the Limited Legal Protections Afforded to Women Who Become Mothers Through Rape*, 98 GEO. L.J. 827, 836 (2010) (“[T]he conviction rate for rape is remarkably lower than the conviction rate for other serious crimes . . .”).

112. Generally, sexual harassment itself is not a crime. *See, e.g.,* Carrie N. Baker, *Sexual Extortion: Criminalizing Quid Pro Quo Sexual Harassment*, 13 LAW & INEQ. 213 (1994) (calling for a criminal penalty for quid pro quo sexual harassment); Galia Schneebaum, *What Is Wrong with Sex in Authority Relations? A Study in Law and Social Theory*, 105 J. CRIM. L. & CRIMINOLOGY 345, 354 n.52 (2015) (“Sexual harassment in employment is treated in American law as a form of (civil) sex discrimination . . .”); *see also* Juliana Garcia, Comment, *Invisible Behind a Bandana: U-Visa Solution for Sexual Harassment of Female Farmworkers*, 46 U.S.F. L. REV. 855, 877 (2012) (discussing the relationship between sexual harassment and criminal sexual behavior by noting that “harassment often occurs in tandem to these crimes”).

113. 2001 GUIDANCE, *supra* note 24, at ii.

114. *See* Dear Colleague Letter, *supra* note 25, at 14–19.

enforcement in 2011, schools' adjudication methods focused more on providing rights and accommodations, including the opportunity to appeal adverse decisions, to the accused student only.<sup>115</sup> The DCL was an attempted correction of a preexisting imbalance: it aimed to fix what OCR saw as too much accommodation for the accused student at the expense of a prompt and equitable resolution for the complainant.<sup>116</sup> OCR attempted to remedy this situation by requiring that universities provide rights and impose restrictions equally on both parties,<sup>117</sup> recognizing that in a Title IX investigation, the party against the accused is not the government but another student who has a legitimate interest in adjudicating her civil rights claim. And what is at stake is protection against ongoing discrimination, rather than criminal justice.

Schools—not police or prosecutors—are uniquely positioned to respond to and prevent behavior that creates a hostile environment on campus. They have an obligation to do so,<sup>118</sup> but, moreover, they should do so because of their ability to address the specific issue facing a complainant—the inability to obtain an education free from sex discrimination—and to impose remedies or consequences that solve that problem. Schools are not simply an alternative, parallel forum for adjudicating rape claims. The university has greater control over the educational environment than does any other actor—certainly more than the police. It can remedy the hostile environment with interim or permanent measures that reduce the impact of the incident on the complainant's educational experience, while imposing the least restrictive sanctions on the respondent so that he may also enjoy his full educational experience.<sup>119</sup>

OCR has carved out a vital role for schools to address the concerns of students who want the harassment or violence they face to stop but do not want to participate in a criminal proceeding. This is not an uncommon concern; indeed, 65 percent of rapes and sexual assaults go unreported to the police.<sup>120</sup> On college campuses, the numbers are even worse: under 5 percent

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115. See, e.g., Montana Letter, *supra* note 17, at 9–18; Letter from Thomas J. Hibino, Reg'l Dir., Office for Civil Rights, U.S. Dep't of Educ., to Dorothy K. Robinson, Vice President & Gen. Counsel, Yale Univ. 7 (June 15, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf> [<https://perma.cc/CY8D-7ZZ3>].

116. See Dear Colleague Letter, *supra* note 25, at 12 (“[S]chools 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.”).

117. *Id.* at 11–12.

118. See 20 U.S.C. § 1681(a) (2012) (“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 . . .”).

119. For example, the university can limit his hours at the dining hall or move him to a different dorm. See Dear Colleague Letter, *supra* note 25, at 16–17 (listing possible remedies schools may provide for the complainant).

120. LYNN LANGTON ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 238536, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010, at 4 (2013), <http://bjs.ojp.usdoj.gov/content/pub/pdf/vnrp0610.pdf> [<https://perma.cc/4WCT-E26S>].

of sexual assaults and attempted sexual assaults are reported to the police.<sup>121</sup> There are many reasons why the reporting rate for rape is so low: victims wonder if what happened to them qualifies as sexual assault,<sup>122</sup> worry they will not be taken seriously by police officers,<sup>123</sup> experience shame and embarrassment, and do not want to discuss the assault publicly or testify in open court.<sup>124</sup> In the college setting, rape victims often know their attacker<sup>125</sup> and, despite the attack, do not want to subject him to incarceration.<sup>126</sup> They simply want to attend class or use the bathroom in the hallway of their dorm without having to interact with their attacker. As OCR notes, a victim of sexual assault who is then forced to face the perpetrator of that assault in the course of her educational activities will not gain full enjoyment of those educational opportunities.<sup>127</sup> These are problems a school is uniquely situated to solve.

Critics respond that universities are in a poor position to carry out fair investigations. Critics note that OCR's guidance around the development of Title IX investigative processes has created a strong presumption against the accused student. Nancy Gertner, a Harvard law professor and former federal judge and criminal defense attorney, sums up the concerns about Title IX investigation procedures—Harvard's in particular—shared by many of her colleagues:

[T]his procedure does not remotely resemble any fair decision-making process with which any of us were familiar: All of the functions of the sexual assault disciplinary proceeding—investigation, prosecution, fact-finding, and appellate review—are in one office . . . and that office is a Title IX compliance office, hardly an impartial entity. This is, after all, the office whose job it is to see to it that Harvard's funding is not jeopardized on account of Title IX violations, an office which has every incentive to see the complaint entirely through the eyes of the complainant.<sup>128</sup>

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121. BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, NCJ182369, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 10, 23 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> [<https://perma.cc/EB8L-J8UF>].

122. Robin Hattersley Gray, *How to Investigate Campus Sexual Assaults*, *CAMPUS SAFETY* (June 4, 2012), <http://www.campusafety.com/article/sexual-assault-investigation-basics> [<https://perma.cc/8VU7-YBJJ>].

123. LANGTON ET AL., *supra* note 120, at 8.

124. Cantalupo, *supra* note 3, at 485; Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, *TIME* (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/> [<https://perma.cc/9SGD-GRDY>].

125. E.g., Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 *SUFFOLK U. L. REV.* 395, 396 (2005).

126. See Douglas Evan Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 *UTAH L. REV.* 289, 314 ("The victim may wish to choose victim-offender mediation over the retributive model of the formal criminal process because restorative justice may lead to greater benefits for the victim." (footnotes omitted)).

127. See Q&A, *supra* note 30, at 2–3.

128. Nancy Gertner, *Sex, Lies and Justice*, *AM. PROSPECT*, Winter 2015, at 32, 35.

Gertner argues that the preponderance evidentiary standard (which is lower than the beyond-a-reasonable-doubt standard required in criminal prosecutions), has effectively created a presumption in favor of the complainant—a presumption heightened even more by the degree to which universities are being closely watched by OCR and the media.<sup>129</sup> The media, in amplifying stories of victims of sexual assault, has put “pressure on schools to hold students responsible for serious harm even when [evidence is inconclusive].”<sup>130</sup> Schools’ focus on investigating complaints of sexual assault when both parties were intoxicated similarly exemplifies the presumption in favor of the usually female complainant: as Janet Halley argues, even when both parties voluntarily consumed intoxicants, universities are far more likely to see alcohol as a factor that clouded the female’s ability to give consent.<sup>131</sup> Voluntary cointoxication, then, provides the female with a cause of action and the male with no defense.<sup>132</sup>

Critics further see a presumption in favor of the complainant in universities’ adoption of trauma-informed training at OCR’s recommendation.<sup>133</sup> By training Title IX investigators on the lower evidentiary standard and on research that shows sexual assault victims may retell their stories atypically and should not be disbelieved for doing so, universities have trained their investigators to always believe complainants, “precisely when they seem unreliable and incoherent.”<sup>134</sup>

These criticisms suggest that universities have no appropriate role in addressing sexual assault on college campuses. President Trump’s surrogates have echoed these critiques.<sup>135</sup> Yet, their criticism belies the vital role schools play in combating sexual violence. Schools have the ability to change the culture on their campuses in a way that the criminal justice system cannot.<sup>136</sup> Therefore, action or inaction by school officials can affect the level of sexual misconduct on a campus. When young men see their peers face meager or no sanctions for incidents of sexual harassment or violence, campus rape no longer seems as taboo to them.<sup>137</sup> The lack of accountability for perpetrators of campus sexual assault also has a chilling effect on victims who are less likely to report incidents of violence if they believe that the perpetrator will face no consequences.<sup>138</sup>

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129. *Id.*

130. Halley, *supra* note 98, at 106.

131. *Id.* at 113.

132. *See id.*

133. *See supra* notes 61–63 and accompanying text.

134. Halley, *supra* note 98, at 109–10 (emphasis omitted).

135. *See supra* note 33 and accompanying text.

136. *See supra* Section II.A.

137. *See* Teri Aronowitz et al., *The Role of Rape Myth Acceptance in the Social Norms Regarding Sexual Behavior Among College Students*, 29 J. COMMUNITY HEALTH NURSING 173, 179 (2012).

138. *See* Richard Pérez-Peña & Ian Lovett, *2 More Colleges Accused of Mishandling Assaults*, N.Y. TIMES (Apr. 18, 2013), <http://www.nytimes.com/2013/04/19/education/swarthmore-and-occidental-colleges-are-accused-of-mishandling-sexual-assault-cases.html> [<https://perma.cc/>

Yet, so many of the criticisms of Title IX investigations evoke comparisons with criminal proceedings. This is a critical problem with current Title IX investigations: OCR sees them as civil disputes, and critics see them as quasi-criminal proceedings. In effect, both are right. At issue in a Title IX investigation is whether the complainant has had her right to remain free from sex harassment abridged. She files the complaint with her school through its grievance process, having already suffered an injury, and seeks a remedy for her injury. If she is successful, however, she will not receive the type of civil remedy she would were she to bring the claim in court under Title VII or Title IX; she will not be awarded damages or back pay or a remedy similar to employment reinstatement.<sup>139</sup> Her remedy will often come directly at the expense of the respondent, who will see his own rights curtailed. He may be forced, even as an interim measure, to move out of university housing or to withdraw from certain classes or to avoid a certain dining hall during certain periods of time. He may be suspended or expelled from school.<sup>140</sup> He may be rendered ineligible for certain honors.<sup>141</sup> And as some states—like New York and Virginia for now—begin to pass legislation requiring schools to note on a student’s transcript whether the student was suspended or expelled for sexual misconduct, he may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree.<sup>142</sup>

But a Title IX investigation is not a criminal investigation. It imposes academic consequences for violations of an academic regulation, and it intends to preserve the complainant’s right to an education free from discrimination—a right that has been abridged by the actions of another student.<sup>143</sup> Furthermore, Title IX adjudications protect students from harmful behavior, like harassment, that may not constitute a crime.<sup>144</sup> OCR’s role in overseeing Title IX enforcement is essential: it does what the Department of Justice and state prosecutors cannot do by protecting students from conduct that may not constitute a crime or that cannot be proven with admissible evidence.<sup>145</sup>

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ZKP2-GXFS] (indicating that when students found responsible for sexual assault are allowed back on campus without consequences, victims are dissuaded from reporting incidents).

139. See BARBARA L. JOHNSON, AM. BAR ASS’N, TYPES OF DAMAGES AVAILABLE IN EMPLOYMENT CASES 1–16 (2011), [http://www.americanbar.org/content/dam/aba/administrative/labor\\_law/meetings/2011/annualmeeting/004.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/annualmeeting/004.authcheckdam.pdf) [<https://perma.cc/KY57-SSP5>].

140. See *supra* note 107 and accompanying text.

141. See, e.g., Jenna Wang, *Penn Made Two Major Policy Changes Relating to Sexual Violence over the Summer*, DAILY PENNSYLVANIAN (Aug. 24, 2016, 12:16 AM), <http://www.thedp.com/article/2016/08/sexual-violence-policy> [<https://perma.cc/YAP4-R52J>].

142. See Tovia Smith, *Push Grows for a ‘Scarlet Letter’ on Transcripts of Campus Sexual Offenders*, NPR (May 11, 2016, 4:27 PM), <http://www.npr.org/2016/05/11/477656378/push-grows-for-a-scarlet-letter-on-transcripts-of-campus-sexual-offenders> [<https://perma.cc/B744-LG99>].

143. Dear Colleague Letter, *supra* note 25, at 1–2.

144. *Id.* at 1.

145. *But cf. supra* note 33 and accompanying text.

Rather than recede into a “compliance-monitoring role,”<sup>146</sup> schools should simply fix the problems with the way they conduct their investigations.<sup>147</sup>

B. *Investigative Procedures and Students’ Due Process Rights*

OCR’s obligations have spurred schools to create quasi bureaucracies to adjudicate complaints of sexual violence, and these creations have generated significant backlash. OCR dictates the process through which schools must carry out investigations and has directed schools to revise their procedures in order to conform to OCR’s very specific guidelines.<sup>148</sup> Through the DCL and Q&A, OCR has instructed schools to use the preponderance-of-the-evidence standard<sup>149</sup> when adjudicating cases arising under Title IX and has continued to remind schools under investigation that, according to OCR’s interpretation of Title IX, preponderance of the evidence is the only appropriate evidentiary standard.<sup>150</sup>

OCR’s justification for the standard is twofold. First, the preponderance-of-the-evidence standard has always been the appropriate standard for a civil adjudication.<sup>151</sup> Second, the DCL and subsequent documents suggest that universities, when operating under a higher evidentiary standard, overwhelmingly failed to find sufficient evidence that sexual harassment or violence—offenses that tend not to produce witnesses or concrete evidence—took place.<sup>152</sup> OCR’s recommendations and modifications, then, represent attempts to make Title IX investigations more equitable for the complainant and the respondent.

For complainants, these policies have been favorable, removing the burden to prove assertions by a higher standard than in a civil trial. But requiring universities to use the preponderance-of-the-evidence standard simply because that is the standard used in civil actions may go too far, particularly when adjudications concern conduct that meets the statutory definition of a crime. OCR has also informed schools that they need not provide to an accused student “the same procedural protections and legal standards” as a

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146. Halley, *supra* note 98, at 108.

147. *See infra* Part III.

148. *See generally* Q&A, *supra* note 30; Dear Colleague Letter, *supra* note 25.

149. *See generally* Addington v. Texas, 441 U.S. 418, 423–25 (1979) (describing the distinctions between the three evidentiary standards: preponderance of the evidence, beyond a reasonable doubt, and clear and convincing, which falls in between).

150. Q&A, *supra* note 30, at 13; Dear Colleague Letter, *supra* note 25, at 11.

151. Dear Colleague Letter, *supra* note 25, at 10–11, 11 n.26 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) and *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) as standing for the proposition that preponderance of the evidence is the appropriate standard to use when adjudicating claims of sex discrimination under Title VII).

152. *See, e.g.*, Tufts Letter, *supra* note 16, at 12 (“The Dean concluded based on the report of the Fact-Finding that there was insufficient evidence to sustain her allegations of ‘sexual assault, assault or harassment’ against the Accused.”); *supra* note 12 and accompanying text.

court would provide to a criminal defendant since “a Title IX investigation will never result in incarceration of an individual.”<sup>153</sup>

Both of these specific instructions have attracted significant criticism. In July 2014, Harvard University adopted a new university-wide sexual misconduct policy that closely followed OCR’s recommendations<sup>154</sup> and was criticized for adopting the preponderance evidentiary standard. Jacob Gersen and Jeannie Suk call the standard an “invention” of the DCL.<sup>155</sup> Law professors at the University of Pennsylvania criticize the standard as unduly harsh as it “requires a finding of responsibility even if the fact finder is almost 50% sure that the accused student is not guilty.”<sup>156</sup> Jed Rubenfeld cautions that this lower standard<sup>157</sup> can make “[m]istaken findings of guilt . . . a real possibility.”<sup>158</sup> The American Association of University Professors criticizes the standard as applied to cases of harassment accusations against professors. It notes that “accusations of harassment and sexual violence . . . even false ones, [have the potential] to ruin a faculty member’s career”<sup>159</sup> and argues that a higher standard of proof is necessary given the given the severity of the consequences to the accused.<sup>160</sup> This pronouncement could just as easily refer to a student’s academic and budding professional career. Despite this criticism from Harvard, Yale, and Penn professors, it is worth noting that almost all schools that identified a standard of proof in their sexual misconduct codes before issuance of the DCL, with the exception of schools in the Ivy League, used the preponderance-of-the-evidence standard.<sup>161</sup>

The preponderance-of-the-evidence standard bothers many critics precisely because it is so different from the beyond a reasonable doubt standard

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153. Q&A, *supra* note 30, at 27.

154. *A New Sexual Assault Policy*, HARV. GAZETTE (July 2, 2014), <http://news.harvard.edu/gazette/story/2014/07/a-new-sexual-assault-policy/> [<https://perma.cc/VEN4-ARG6>]; HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY (2014), [https://hls.harvard.edu/content/uploads/2014/09/harvard\\_sexual\\_harassment\\_policy1.pdf](https://hls.harvard.edu/content/uploads/2014/09/harvard_sexual_harassment_policy1.pdf) [<https://perma.cc/AB6T-2DHE>].

155. Gersen & Suk, *supra* note 92, at 901.

156. DAVID RUDOVSKY ET AL., OPEN LETTER FROM MEMBERS OF THE PENN LAW SCHOOL FACULTY 2 (2015), <http://media.philly.com/documents/OpenLetter.pdf> [<https://perma.cc/G5RR-W74K>].

157. Preponderance of the evidence is a lower standard than is beyond a reasonable doubt, the standard used in criminal prosecutions. *Addington v. Texas*, 441 U.S. 418, 423 (1979) (defining the standards of proof).

158. Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014) <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> (on file with the *Michigan Law Review*).

159. Risa L. Lieberwitz et al., *The History, Uses, and Abuses of Title IX*, 102 BULL. AM. ASS’N U. PROFESSORS 69, 94 (2016) (quoting remarks of AAUP Associate Secretary Anita Levy).

160. *Id.*

161. Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1986–87 (2016).



the accused would face if on trial for criminal sexual assault.<sup>162</sup> Indeed, there are many other ways in which Title IX proceedings provide fewer protections for the accused than would a criminal trial. A Title IX respondent is not provided indigent counsel,<sup>163</sup> is not necessarily allowed to discover evidence against him, and is not allowed to confront the complainant.<sup>164</sup> In October 2014 and February 2015, law school professors from Harvard and the University of Pennsylvania, respectively, penned open letters criticizing the lack of due process protections for students accused of sexual harassment or violence under Title IX. Both letters noted that OCR discourages schools from allowing the respondent to confront the complainant (since OCR believes such a confrontation could easily retraumatize a victim of sexual assault), which the letters claimed violate the individual's constitutional right to confront his accuser.<sup>165</sup> OCR also requires that universities conduct their investigations promptly, even if that requires the university to complete its investigation before the police have completed theirs.<sup>166</sup> University investigations, of course, must be on a short time frame since students move away most summers and graduate within a few years. But the University of Pennsylvania letter raised the concern that respondents who are also defendants in a criminal investigation covering the same conduct might be forced, in order to defend themselves, to make statements during the Title IX process that could then compromise their criminal defense.<sup>167</sup> The open letter from Harvard law professors criticized any adjudication without the aforementioned protections as “lack[ing] the most basic elements of fairness and due process.”<sup>168</sup>

In the eyes of these critics, the Department of Education has spurred universities to create a series of “kangaroo courts” tasked with investigating sexual assaults that virtually require that complainants be believed, and that

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162. Chmielewski, *supra* note 73, at 149 (“Critics of the Dear Colleague Letter have emphasized the alleged criminal conduct of an accused student to argue that educational institutions should use a heightened evidentiary standard when adjudicating cases of rape or sexual assault.”).

163. To be fair, OCR technically does not prohibit the imposition of indigent counsel or the process of discovery, but does require that, if provided, it be provided to the complainant and the respondent equally. See Dear Colleague Letter, *supra* note 25, at 12. *But see* Russcol, *supra* note 106.

164. See Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (on file with the *Michigan Law Review*).

165. *Id.* (noting “[t]he absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing”); see also RUDOVSKY ET AL., *supra* note 156, at 5 (“Due process of law is not window dressing; it is the distillation of centuries of experience, and we ignore the lessons of history at our peril.”).

166. Dear Colleague Letter, *supra* note 25, at 10 (“Schools should not wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation . . .”).

167. RUDOVSKY ET AL., *supra* note 156, at 5.

168. Bartholet et al., *supra* note 164.

respondents be denied the opportunity to defend themselves.<sup>169</sup> A redesigned Title IX investigative system must address these critiques. For Title IX investigations of sexual harassment and violence to be viewed as legitimate, they cannot give off the perception that they place accused students in untenable and indefensible positions.

### III. MAINTAINING SCHOOL-BASED INVESTIGATIONS WHILE PLACATING CONCERNS OF BIAS OR VIOLATIONS OF DUE PROCESS RIGHTS

Sexual harassment and violence on college campuses have the potential to ruin victims' educational experience, and Title IX investigations of the offending conduct play an essential role in both remedying harm done to the complainant and preventing the respondent from committing similar acts in the future.<sup>170</sup> Universities should not eschew their Title IX responsibilities and leave all investigative responsibility to the police, for reasons described above. But for these investigations to be respected, they must become fair: they must not give off the appearance of bias or suggest that the school has violated the accused student's rights to a fair proceeding.

This Part argues that Title IX investigations should be restructured, not eliminated, in response to criticism, and proposes ways to maintain OCR enforcement and school-based investigations, while eliminating the elements that raise legitimate and pressing criticism. This Part proposes two ways for schools to restructure Title IX investigations—by outsourcing the fact-finding component to specialized investigative centers and by using a higher evidentiary standard for cases in which a student is accused of conduct that could also be a felony—in order to address prevailing criticism.

#### A. *Outsource Fact-Finding to Investigation Centers*

Universities are uniquely equipped to remedy and prevent harm resulting from sexual violence,<sup>171</sup> but they simultaneously need investigative help. At present, universities tend to investigate complaints through one of two models, each with its own flaws. Rather than use either of these methods, which raise concerns of unreliability and bias, schools should outsource the fact-finding portion of their investigations to specialized investigation centers.

Title IX investigations evoke comparisons with criminal investigations because an accused student is tried for conduct that violates both university policy and, in cases of sexual violence, the law. At some campuses, this “trial” takes place in front of a panel of investigators who ask questions and

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169. See Sarah Edwards, Note, *The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL'Y 121, 122 (2015).

170. See NOT ALONE REPORT, *supra* note 58, at 2–3. ?

171. See *supra* Section II.A.

hear from witnesses called by the party.<sup>172</sup> This panel may allow students to present remarks; a representative of the school's Title IX investigation office may also present to this panel his or her opinion on the facts and the credibility of the parties' accounts of the case based on earlier conversations with the complainant and respondent.<sup>173</sup>

Many schools have tried better ways to conduct their investigations. Some schools, including those that have resolved complaints with OCR,<sup>174</sup> have adopted the single-investigator model of investigation.<sup>175</sup> Under the single-investigator model, a single, trained member of the university's Title IX investigation office conducts in-person interviews with each of the parties, reviews evidence, meets with witnesses, and prepares a report detailing his or her determination of the credibility of each party's account.<sup>176</sup> The report is then reviewed by both parties and by the Title IX coordinator and is then adopted as the final determination of whether the university's policy was violated.<sup>177</sup>

The single-investigator model has both administrative and substantive benefits. Single investigators develop expertise in the areas of Title IX and of conducting sensitive interviews, and thus are more skilled than the average panel member at making credibility determinations.<sup>178</sup> Moreover, an investigation performed by one person can be completed more quickly because of the scheduling ease the model offers over the hearing-panel model.<sup>179</sup> Single investigators can conduct in-person interviews in unobtrusive ways, such as in an office or in a space convenient to the party or witness.<sup>180</sup> These interviews are not only unlike a formal hearing panel but also so different from criminal justice proceedings that they hardly lend themselves to comparison.

Despite these benefits, the model has drawbacks. Single investigator-run investigations, by placing the ultimate decision of responsibility in the hands

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172. See, e.g., CATHOLIC UNIV. OF AM., GRIEVANCE PROCEDURES FOR REPORTED SEXUAL OFFENSES 8–9 (2015), <http://deanofstudents.cua.edu/res/docs/Sexual%20Offenses%20Grievance%20Procedure%20May%202015%20.pdf> [https://perma.cc/7UUU-LBSM].

173. See, e.g., BUTLER UNIV., CIVIL RIGHTS EQUITY GRIEVANCE RESOLUTION PROCESS FOR FACULTY, STUDENTS AND STAFF 18 (2014), <https://www.butler.edu/file/88479/download> [https://perma.cc/JJA9-UPYV].

174. Montana Letter, *supra* note 17; UVA Letter, *supra* note 55.

175. See, e.g., UNIV. OF MONT., DISCRIMINATION GRIEVANCE PROCEDURES 3, 5 (2013), <http://www.umt.edu/eo/documents/discriminationprocedures.docx> [http://perma.cc/S8TM-UWEE]; UNIV. OF VA., THE PATH OF A REPORT OF STUDENT PROHIBITED CONDUCT 2 (2016), <https://eocr.virginia.edu/sites/eop.virginia.edu/files/University%20of%20Virginia%20Flowchart%20for%20Students.July2016.pdf> [https://perma.cc/LGC2-HEEW] (noting that the investigation will be “directed by the [i]nvestigator”).

176. See, e.g., *Formal Resolution*, U. MICH. [hereinafter *Michigan Resolution Process*], <https://studentsexualmisconductpolicy.umich.edu/content/formal-resolution> [https://perma.cc/3E5C-BX8R].

177. See *id.*

178. Interview with Rebecca Leitman Veidlinger, Title IX Investigator & Consultant, in Ann Arbor, Mich. (Jan. 26, 2016; Feb. 2, 2016).

179. *Id.*

180. *Id.*

of one individual, may give off the perception of unfairness. The model opens the door to respondents blaming an adverse decision on a personality conflict<sup>181</sup> or to Gertner's concern that one individual holds the power of the judge, jury, and executioner.<sup>182</sup>

To alleviate concerns of potentially biased or inappropriate investigations, while preserving the benefits of expertise and of a procedure that looks *unlike* a criminal justice investigation, universities should borrow from the method used to investigate child sexual assault. In many jurisdictions, regional child advocacy centers operate to provide careful investigations of allegations of sexual abuse of children.<sup>183</sup> These centers employ psychologists, psychiatrists, counselors, and social workers, all who are trained in talking to children about possible sexual trauma; these centers coordinate their respective services with those of law enforcement officials.<sup>184</sup> To be clear, campus sexual assault and child sexual abuse are different issues. The issue in Title IX investigations is often whether consent was given,<sup>185</sup> which is moot when child abuse is at issue because children are legally incapable of giving consent<sup>186</sup>—but the model presents a useful paradigm for adjudicating sexual assault cases.

Investigation centers solve many of the problems presented by the panel and single-investigator models. They allow for professional investigations of complaints of sexual harassment or violence by a team with the experience and competence to make an accurate credibility determination.<sup>187</sup> They provide the resources to conduct investigations promptly.<sup>188</sup> And they allow the investigators to reach a decision without considering repercussions to the university.<sup>189</sup> These centers would be able to conduct forensic investigations, leaving universities to focus on providing support services to the complainant and the accused.<sup>190</sup> Universities would contract with investigation centers to conduct the fact-finding part of investigations, and centers would be able

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181. *Id.*

182. See Gertner, *supra* note 128 at 36.

183. See, e.g., COTTAGE SEXUAL ASSAULT CTR. & CHILD. ADVOC. CTR., <http://www.northgeorgiacottage.org/> [<https://perma.cc/HZ5J-WWYX>]; GWINNETT SEXUAL ASSAULT CTR. & CHILD. ADVOC. CENTER, <http://www.gsac-cac.org/> [<https://perma.cc/NM4P-97AR>].

184. Interview with Rebecca Leitman Veidlinger, *supra* note 178.

185. See, e.g., *Michigan Resolution Process*, *supra* note 176.

186. See, e.g., MODEL PENAL CODE § 213.5 (AM. LAW INST. Preliminary Draft No. 5, 2015).

187. Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 22 DISP. RESOL. MAG., Spring 2016, at 27, 31–32.

188. *Id.* at 32.

189. See *id.* at 31.

190. See Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN ST. L. REV. 977, 997–1000 (2016).

to perform investigations for multiple schools, which would encourage conversations about best practices between campuses.<sup>191</sup>

The idea of outsourcing investigations is not new. Universities already hire external counsel and consultants to recommend changes to their sexual misconduct and grievance policies and audit their own Title IX compliance. The White House Task Force, too, suggested outsourcing: specifically, that universities prepare memoranda of understanding to memorialize partnerships between schools and rape crisis centers so that the centers can provide students—particularly at smaller schools<sup>192</sup>—who have experienced sexual assault with the necessary medical and psychological care.<sup>193</sup> In addition, two former prosecutors who currently consult with universities on Title IX disputes have advocated for the regional investigation-center model.<sup>194</sup> They note that regional centers can coordinate care between clinicians, law enforcement officials, and educational institutions to provide adequate care while allowing schools to avoid the perception that university administrators are biased and make mistakes to protect their institutions.<sup>195</sup>

Under this model, the independent centers would make fact-finding determinations and recommendations of responsibility and sanctions, but the school's Title IX coordinator or hearing panel would make the ultimate determination of responsibility and appropriate sanctions on the basis of the center's recommendation. This system would allow schools to maintain control over the application of the proper evidentiary standards. To deviate from the recommendations, the Title IX coordinator would need to provide justifications, which would be subject to OCR review if the school were to be investigated. This would discourage deviation for improper reasons. This model would not undermine the Title IX coordinator's authority since he or she would serve as a quality check on the work done by the independent

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191. Smith & Gomez, *supra* note 187, at 32 (“The potential long-term benefits of increased collaboration could be educational for campus and law enforcement processes, enhance relationship building, and provide greater transparency throughout.”).

192. Smaller schools tend to have fewer institutional resources—such as medical and psychiatric care—at their disposal; a shared investigatory center would allow small schools to share those resources.

193. NOT ALONE REPORT, *supra* note 58, at 15. This solution echoes the White House Task Force's goal, but provides for the investigation of sexual harassment and assault that does not rise to the level of rape.

194. See Smith & Gomez, *supra* note 187, at 27–28, 31–32.

195. See *id.* at 30–32. John Banzhaf has similarly advocated for independent investigation centers; he has even suggested that centers employ retired judges and lawyers to make determinations about appropriate punishments, in order to remove all perception of university bias. See Janna Paramore, *Law Professor's Proposal for Reporting Sexual Violence Funded in Virginia*, GW HATCHET (Jan. 31, 2016, 11:00 PM), <http://www.gwhatchet.com/2016/01/31/law-professors-proposal-for-reporting-sexual-violence-funded-in-virginia/> [https://perma.cc/9KHD-7MYQ]. His proposal has drawn the attention of Virginia Governor Terry McAuliffe, who recently allocated \$100,000 to study and develop an investigatory center in Virginia. See Jake New, *Investigating Sexual Assault, Regionally*, INSIDE HIGHER ED (Jan. 25, 2016), <https://www.insidehighered.com/news/2016/01/25/virginia-may-create-regional-center-investigating-sexual-assaults> [https://perma.cc/89BA-8NP9].

centers. Title IX coordinators could refuse to adopt inaccurate findings and even terminate contracts with centers for inadequate work. Further, regional centers would have the capability to preserve evidence in case the complainant were to report the incident to the police.

The regional-center model would not require any new guidance from OCR in order to be implemented. Under OCR's current position, schools must oversee Title IX investigations but can hire independent contractors to conduct the investigations.<sup>196</sup> A shift to the regional-center model would require geographic buy-in to make it financially sustainable, but would not require new policies to take effect. It is a simple solution that would promote thorough, experienced investigations and mitigate concerns of bias.

### B. Evidentiary Standards

Furthermore, to address criticisms that OCR has forced schools to curtail respondents' rights, OCR and the schools it regulates should tweak the current standards for evidentiary findings. The DCL and the Q&A require that schools investigate complaints of sexual harassment or violence under the preponderance-of-the-evidence standard.<sup>197</sup> This current standard addresses the concern that allegations of sexual misconduct are hard to prove under any evidentiary standard.<sup>198</sup> But it does not, as a rule, adequately balance the needs of victims with those of accused students. Preponderance of the evidence is the typical civil evidentiary standard, but perhaps it is too low of a bar for a process intended to determine whether an individual is personally responsible for committing an act of sexual harassment or violence. This concern is especially weighty when the low evidentiary standard is used to assign consequences that may follow the respondent for life.<sup>199</sup>

OCR imposes the preponderance-of-the-evidence standard because it is the civil evidentiary standard. But preponderance of the evidence should not apply in all situations. Instead, universities should bifurcate the related questions: one of responsibility for the conduct, and the other of the presence of a hostile environment. Title IX investigators should use the preponderance-of-the-evidence standard when determining whether the accused student engaged in conduct that was sufficiently severe, persistent, or pervasive to create a hostile environment, and they should impose sanctions short of expulsion or suspension for such a finding. An investigation into an act or

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196. See 34 C.F.R. § 106.4(c) (2013) (noting specifically that obligations may extend to "contractors[ or] subcontractors"); Q&A, *supra* note 30, at 25 ("[N]either Title IX nor the DCL specifies who should conduct the investigation. It could be the Title IX coordinator . . . but it does not have to be.").

197. See *supra* notes 148–151 and accompanying text.

198. See, e.g., Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 REGENT U. L. REV. 185, 191–96 (2016).

199. See Smith, *supra* note 142 (giving the example of a student who was expelled for sexual misconduct and who, despite having a 3.9 GPA from an Ivy League university, was unable to find any school to accept his transfer application).

pattern of sexual harassment would fall under this standard, as would questions about the presence of a hostile environment before and after an alleged sexual assault. But when determining whether the student is responsible for an act of sexual violence, investigators should use the clear-and-convincing standard of proof. This would tie the civil standard to the civil action—the deprivation of an opportunity to fully enjoy the benefits of the educational institution because of the hostile environment—but would require a stricter standard for the question that has the ability to impose lifelong consequences on the respondent.

A school's Title IX obligation is to protect its students from hostile environment created by severe, persistent, and pervasive conduct on the basis of sex.<sup>200</sup> A school does this by preventing and remedying such conduct. Bifurcating the findings allows schools to respond to the complainant and the accused individually. Schools can separate the question of personal responsibility for acts of sexual violence from the question of whether a victim has been given the resources he or she needs. If an investigation does not lead to a finding of responsibility, schools can still provide resources to complainants who experience a hostile environment. If a complainant reports an incident of sexual harassment or violence, the school cannot prevent the incident, but it can remedy the situation through the imposition of interim measures<sup>201</sup> without even conducting an investigation.<sup>202</sup> A finding that the accused student engaged in severe, persistent, or pervasive conduct on the basis of sex that created a hostile environment would allow the school to remedy the situation by making the interim measures permanent and imposing other academic consequences (e.g., completion of educational programs on consent) to prevent the student from committing similar offenses in the future.<sup>203</sup>

There is precedent for using a lower evidentiary bar to determine whether one has created a hostile environment that is sufficiently severe, persistent, or pervasive. Since fostering a hostile environment is, by definition, a civil rights violation,<sup>204</sup> it makes sense that the civil standard would apply. In fact, the behavior that would lead a university to conclude that an accused student has created a hostile environment is the same behavior that would allow a court to issue a domestic violence protective order.<sup>205</sup> And all fifty states use either preponderance of the evidence or a lower evidentiary

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200. See 20 U.S.C. § 1681 (2012).

201. For example, forbidding the accused student from using the dining hall during certain hours, requiring the accused student to move to another dorm, or to switch out of certain classes.

202. See Q&A, *supra* note 30, at 32–33; Dear Colleague Letter, *supra* note 25, at 15–17.

203. See Q&A, *supra* note 30, at 34–36.

204. Dear Colleague Letter, *supra* note 25, at 3 & n.10.

205. See generally Aaron H. Caplan, *Free Speech and Civil Harassment Orders*, 64 *HASTINGS L.J.* 781 app. at 856–62 (2013) (collecting state statutes outlining conduct warranting a court-issued protective injunction against the actor).

standard (such as “discretion of the court based on good cause”) when determining whether to issue a protective order.<sup>206</sup>

Universities would still need to use the clear-and-convincing standard to hold individuals responsible for acts of sexual violence—that is, acts that may meet the statutory definitions of crimes and that can result in the imposition of sanctions like suspension and expulsion. To address the concern that such a finding could be used against a student in the event the student is criminally prosecuted after the school makes its determination, the finding could include the caveat that it is based on evidence inadmissible in a criminal proceeding (e.g., statements made by the accused student without the presence of counsel) and that it is based on a lower evidentiary standard. The clear-and-convincing evidentiary standard would satisfy critics who worry about accused students’ due process rights by placing the evidentiary burden on the complainant before imposing sanctions with permanent consequences.

Furthermore, using the higher evidentiary standard for questions of personal responsibility for sexual violence would address the concerns of critics who fear that respondents are unfairly punished or even that accused men have become the new population most victimized as a result of sex-based discrimination. A higher evidentiary standard would allow OCR to validate complainants’ allegations without raising questions about sham proceedings. Moreover, having two evidentiary standards would help clarify which activities actually violate Title IX. By forcing an analytical separation between sexually violent conduct and the creation of a hostile environment, universities and their students will gain a better understanding of the types of behavior that actually violate the law.

In many ways, this proposal of two evidentiary standards mimics the longstanding distinction between criminal and tort liability. An individual charged with murder gains the benefit of the beyond-a-reasonable-doubt standard, and, if convicted, faces permanent sanctions (e.g., incarceration, a felony conviction, and the loss of rights that stems from it). That same individual, if sued in a wrongful death suit, would have his responsibility determined under a preponderance-of-the-evidence standard. If found responsible, he would have to pay a sum of money in order to return the decedent’s heirs to as similar a position as possible to that which they held before the incident.<sup>207</sup>

Severing the question of responsibility for committing sexual violence against another student from the question of responsibility for creating a hostile environment for another student because of her sex fits this well-

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206. See COMM’N ON DOMESTIC VIOLENCE, AM. BAR ASS’N, STANDARDS OF PROOF FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDERS (CPOs) BY STATE (2009), [http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards\\_of\\_Proof\\_by\\_State.pdf](http://www.americanbar.org/content/dam/aba/migrated/domviol/pdfs/Standards_of_Proof_by_State.pdf) [<https://perma.cc/XS6Q-WG4T>].

207. See, e.g., Cantalupo, *supra* note 198, at 195.



established pattern. It distinguishes between the complainant's right to receive educational services on the one hand and alleged violations of the student conduct code on the other. It allows schools to use the civil evidentiary standard to answer the question of whether a civil right was denied, while recognizing that adjudicating responsibility for an act that could constitute a crime requires a higher threshold. And finally, it promotes fair process by allowing a lower evidentiary standard for a question that can only result in academic sanctions (none of which abridges rights to which the accused student is entitled) and by asking the school and the complainant to meet a higher burden before imposing consequences that could permanently affect the accused student's academic and professional career.

To effectuate this change, OCR will need to release new guidance restating its evidentiary requirements for Title IX investigations. There is reason to believe the incoming Trump Administration, whose surrogates have expressed distaste with OCR's handling of sexual assault investigations, will issue new guidance.<sup>208</sup> Rather than eliminate OCR's vital role in responding to and eliminating the pressing problem of campus sexual harassment and violence, the new administration should carve out protections for accused students and take measures to ensure that resulting investigations are just, fair, and legally sound.

#### CONCLUSION

OCR has played a commendable role in drawing increased attention to the obstacles sexual harassment and violence can place in front of one's ability to obtain an education and advance in an academic field. In response to these problems, OCR has designed a process to hold schools accountable for maintaining a campus free from gender discrimination.

OCR's responses have garnered extensive criticism from academics and lawyers who worry that the process unfairly targets and punishes men for such conduct without affording them sufficient rights. The Trump Administration and its surrogates echo these concerns and have gone as far as to call for the elimination of OCR enforcement of Title IX. But criticisms about overextending university staff and violating due process rights do not justify halting OCR enforcement or removing university oversight of the adjudication process. Instead, by tweaking aspects of Title IX investigations to address those criticisms, OCR can maintain fair and just enforcement of Title IX.

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208. See *supra* note 33 and accompanying text.