

Federalism in Campus Sexual Violence: How States Can Protect Their Students When a Trump Administration Will Not

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INTRODUCTION

Title IX has become shorthand for the issue of campus sexual assault. So common is Title IX attention on campus sexual violence that it is easy to forget how recently campus sexual violence was a neglected issue. Only after years of student activism did the federal government begin to address campus sexual violence.¹ In 2014, President Obama created the White House Task Force to Protect Students from Sexual Assault.² In his work on the issue, President Obama likely became the first U.S. president to even mention campus sexual violence, let alone work to combat it.³

Unsurprisingly, then, most governmental work to protect students from campus sexual violence has happened at the federal level. Title IX,⁴ a decades-old law barring institutional recipients of federal education funds from

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1. Two of the most prominent student activist groups are Know Your IX, *Know Your IX: Empowering Students to Stop Sexual Violence*, KNOW YOUR IX, <http://knowyourix.org/> [<https://perma.cc/C5D9-MXT9>], and End Rape on Campus, *End Rape on Campus*, END RAPE ON CAMPUS, <http://endrapeoncampus.org/title-ix/> [<https://perma.cc/RUC6-SEXN>].
 2. President Obama credited student activists for bringing campus sexual assault to the country's attention. Tyler Kingkade, *College Sexual Assault Survivors Hope That Obama's Task Force Will Lead to Real Change*, HUFFPOST, Jan. 22, 2014, 8:40 PM, http://www.huffingtonpost.com/2014/01/22/college-sexual-assault-obama-task-force_n_4646897.html [<https://perma.cc/X2SY-EYF8>] (last updated Jan. 25, 2014). Secretary of Education Arne Duncan also acknowledged student activism as a driving force for the federal government's response. See Katie Zezima & Nia-Malika Henderson, *Personal Conviction and Outside Pressure Led to White House Sexual Assault Push*, WASH. POST, Apr. 30, 2014, <https://www.washingtonpost.com/news/the-fix/wp/2014/04/30/the-white-houses-policies-on-women-have-been-shaped-by-personal-forces/> [<https://perma.cc/NUP9-YDHK>].
 3. See, e.g., Nina Burleigh, *In 2014, Rape Rage Drove Feminism's 'Third Wave'*, CNN, Dec. 9, 2014, <http://www.cnn.com/2014/12/09/opinion/burleigh-feminism-rape-speaking-out/> [<https://perma.cc/7ETZ-7C9J>]; Jen Zoratti, *The Pervasiveness of Sexual Violence*, WINNIPEG FREE PRESS, Aug. 30, 2014, 1:00 AM, <http://www.winnipegfreepress.com/local/The-culture-of-rape-Myths-misconceptions-and-reality-273285621.html> [<https://perma.cc/3523-NDB6>] (quoting Jean Kilbourne saying that "Obama is the first president, as far as I know, to talk about sexual violence").
 4. Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681–88. Title IX states that "[n]o 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." *Id.* § 1681(a). The statute includes a list of exemptions, such as for military academies. *Id.* § 1681(a)(4).

discriminating on the basis of sex, has been the government's main weapon. Title IX's enforcement authority empowers the Department of Education's Office for Civil Rights ("OCR") to withdraw federal funding,⁵ and investigations of schools—the first step in funding withdrawal—have so far been sufficient to push many schools into reform efforts. Private litigation⁶ and media pressure have also prompted reform, but it was the federal government's involvement that set off a wave of schools "scrambl[ing]" to comply.⁷

Supporters of Title IX and the Obama OCR's work should not be complacent, however. Jurisprudential and political shifts have thrown the viability of Title IX and OCR's work into uncertainty. The Supreme Court has hinted at a narrowing of the federal spending power, casting doubt on legislation that depends on threats to withdraw federal funding.⁸ More immediate is the political threat: the Trump Administration has been overtly hostile to Title IX and OCR specifically, as well as freedom from sexual violence generally. President Trump, after all, famously bragged about sexually assaulting women.⁹ Several of his surrogates have targeted OCR: one state co-chairman called OCR "self-perpetuating absolute nonsense."¹⁰ Nor has President Trump shown himself receptive to understanding the needs of communities at the intersection of different identities—troubling, when students of color,¹¹ students with

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5. See 20 U.S.C. § 3413 (2012); 20 U.S.C. § 1682 (2012).
 6. *Cannon v. Univ. of Chicago* held there was an implicit private right of action under Title IX despite the absence of express statutory authorization. 441 U.S. 677, 717 (1979).
 7. Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 902 (2016).
 8. Mark Walsh, *Health-Care Ruling Has Implications for Education Spending*, EDUC. WK., June 28, 2012, 4:44 PM, http://blogs.edweek.org/edweek/school_law/2012/06/medicaid_ruling_has_implicatio.html [<https://perma.cc/6BYR-QDN8>].
 9. See, e.g., Ben Mathis-Lilley, *Trump Was Recorded in 2005 Bragging About Grabbing Women "by the Pussy"*, SLATE, Oct. 7, 2016, 4:27 PM, http://www.slate.com/blogs/the_slatest/2016/10/07/donald_trump_2005_tape_i_grab_women_by_the_pussy.html [<https://perma.cc/T6N6-E3PB>]; Tina Nguyen, *"This Is Sexual Assault": Anderson Cooper Confronts Trump with 2005 Tape, and Trump Lashes Out*, VANITY FAIR, Oct. 9, 2016, 9:39 PM, <http://www.vanityfair.com/news/2016/10/donald-trump-debate-response-lewd-comments> [<https://perma.cc/M9JK-2DQJ>].
 10. Karen Bitar et al., *Title IX Enforcement and Interpretation: The Winds of Change Are Blowing*, JD SUPRA, Dec. 29, 2016, <http://www.jdsupra.com/legalnews/title-ix-enforcement-and-interpretation-43698/> [<https://perma.cc/X76T-F8YP>]. *Breitbart*, a website founded and run by President Trump's Chief Strategist and Senior Counselor, Steve Bannon, has written that OCR has created "kangaroo courts" that subject "male students to one of the most egregious . . . miscarriages of justice in American history." Milo Yiannopolous, *How Donald Trump Can Save the American Campus*, BREITBART, Nov. 14, 2016, <http://www.breitbart.com/milo/2016/11/14/donald-trump-save-american-university/> [<https://perma.cc/B4SN-DVZM>].
 11. For a discussion of how campus sexual assault can affect students of color differently from white students, see Sexual Assault Prevention and Awareness Center, Univ. of Mich., *Communities of Color and the Impacts of Sexual Violence*, <https://sapac.umich.edu/article/57> [<https://perma.cc/R59F-VENB>] (last visited Jan. 31, 2018). For an explanation of why students of color are often reluctant to report sexual assault, see Colleen Murphy, *Another Challenge on Campus Sexual Assault: Getting Minority Students to Report It*, CHRON. OF HIGHER EDUC., June 18, 2015, <http://www.chronicle.com/article/Another-Challenge-on-Campus/230977> [<https://perma.cc/W8VY-6NP3>] (subscription required; for partial text with no subscription required, see <http://www.aacrao.org/resources>

disabilities,¹² or LGBTQIA¹³ students,¹⁴ among others, experience campus sexual assault differently, requiring different responses. Because most governmental progress on addressing campus sexual assault has been in response to OCR's pressure,¹⁵ the new administration could put an end to almost all progress by unilaterally halting federal enforcement efforts. Even if the Trump Administration does not shut down federal enforcement, any federal efforts will likely leave out marginalized communities who suffer a greater incidence of, and more consequences from, campus sexual violence.¹⁶ Indeed, the Department of Education has already rescinded OCR's previous guidance and issued new interim guidance ("2017 Q&A").¹⁷

States should step into the breach. Education and safety are traditional state concerns, and states are empowered to legislate in this area. Even if the federal government were currently working to prevent campus sexual assault, states would still have an important role. States have enforcement authority, and more local expertise. Unlike the federal government, states can tailor broad policy to state-specific characteristics. Following the example of states like Illinois, states

/resources-detail-view/another-challenge-on-campus-sexual-assault--getting-minority-students-to-report-it [https://perma.cc/GV59-QLK6]).

12. See, e.g., Azmat Khan, *The Hidden Victims of Campus Sexual Assault: Students with Disabilities*, AL JAZEERA AM., Feb. 12, 2015, 5:00 AM, <http://america.aljazeera.com/articles/2015/2/12/the-hidden-victims-of-campus-sexual-assault-students-with-disabilities.html> [https://perma.cc/UPE8-V2AF]. For a discussion of how students with disabilities experience campus sexual violence differently from able-bodied students, see generally Patricia A. Findley et al., *Exploring the Experiences of Abuse of College Students with Disabilities*, 31 J. OF INTERPERSONAL VIOLENCE 2801 (2015).
13. This is a common acronym referring to people who are lesbian, gay, bisexual, transgender, queer, intersex, and/or asexual.
14. See, e.g., Tyler Kingkade, *LGBT Students Face More Sexual Harassment and Assault, and More Trouble Reporting It*, HUFFPOST, July 14, 2015, 8:05 AM, http://www.huffingtonpost.com/entry/LGBT-students-sexual-assault_us_55a332dfe4b0ecec71bc5e6a [https://perma.cc/28MQ-268Y] (last updated Sept. 9, 2015); Adrienne Green & Alia Wong, *LGBT Students and Campus Sexual Assault*, ATLANTIC, Sept. 22, 2015, <http://www.theatlantic.com/education/archive/2015/09/campus-sexual-assault-LGBTQIA-students/406684/> [https://perma.cc/LZ6U-7NRW].
15. The DCL was issued in 2011; OCR made its list of investigations public in 2014. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), available at <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix> [https://perma.cc/4VDF-2NVS]. Afterward, "[i]n a scramble to be considered compliant and stay off or resolve OCR investigations, schools rushed to rewrite their policies and procedures." Gersen & Suk, *supra* note 7, at 902.
16. Trump has been consistently hostile to many groups who would need specialized governmental responses, such as disabled people. See Callum Borchers, *Meryl Streep Was Right. Donald Trump Did Mock a Disabled Reporter*, WASH. POST, Jan. 9, 2017, <https://www.washingtonpost.com/news/the-fix/wp/2017/01/09/meryl-streep-was-right-donald-trump-did-mock-a-disabled-reporter/> [https://perma.cc/DYZ9-N6WM]. For a discussion of why certain communities require more support, see *supra* notes 11–14.
17. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT [hereinafter "2017 Q&A"] (Sept. 2017), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [https://perma.cc/SA3X-4G4G].

should protect their students from sexual violence,¹⁸ and should do so transparently, engaging all relevant stakeholders. Acting without seeking community input will result in a policy that misses important concerns, such as the needs and experiences of students from marginalized communities. State legislatures are more informed in local needs than the federal government, but it is student groups themselves who can best articulate specific community needs. No attempt to combat campus sexual violence can be complete without provisions that address the needs of marginalized students—and members of those very communities are the actors most expert in their own needs. These students must have a voice.

Of course, not all states will govern in accordance with Title IX's purpose. When one public university punished students found responsible for sexual violence and racial harassment, the Georgia legislature retaliated in a move that will no doubt deter future university compliance with Title IX's mandate.¹⁹ The resulting Georgia regulations—which, for example, set the standard of proof for expulsion lower than federal guidance does—force schools to risk violating Title IX. Ideally, the federal government would provide oversight, challenging any state legislation preempted by Title IX. Mindful of the political realities that make federal oversight unlikely here, this Article emphasizes that private litigation also has a role to play. Private individuals can and should challenge states that go too far, relying on conflict preemption doctrine to prevent state-level attacks on Title IX's mandate.

This Article explores how states should take action on Title IX, focusing on state authority to act and the procedures that states should follow. This Article is the first legal scholarship to analyze the constitutionality and policy wisdom of various states' legislation or regulation of campus sexual violence. Part I analyzes Title IX's constitutional basis and OCR's authority to use its newest guidance document. Part I concludes that, while Title IX is probably constitutional and OCR's guidance is probably legal, a successful challenge to either cannot be ruled out. Uncertainty surrounding federal authority, of course, makes state action all the more important. Part II therefore establishes that states have the authority to legislate on campus sexual violence, limited only by conflict preemption. Part III catalogues current state legislation on campus violence assault, focusing on two contrasting examples: Illinois, which enacted comprehensive legislation with the input of different stakeholders; and Georgia, which passed a rushed regulatory policy after one state congressman decided a university had been too strict in its expulsion of rapists. Finally, Part IV draws on the strengths and weaknesses of various states' actions and lays out a roadmap

18. See *infra* Part III.

19. For a detailed discussion of the Georgia Board of Regents policy and what provoked it, see *infra* Part III.B.

for states to follow. Part IV critiques even the most progressive of states for failing to fully account for marginalized students, and calls on states to protect all students by giving marginalized groups a real voice when crafting legislation and policies that address campus sexual violence. This Article uniquely reaches across substantive disciplines of administrative law, constitutional law, and antidiscrimination law to create a roadmap for states to protect their students from campus sexual violence.

I. FEDERAL AUTHORITY TO LEGISLATE AND REGULATE

Title IX has, for most of its history, been considered a safely constitutional exercise of the federal spending power. However, recent Spending Clause jurisprudence requires Title IX's supporters to defend it more carefully and to explore its constitutionality under a different enumerated power. This Part therefore analyzes Title IX in light of recent Spending Clause doctrine, concluding that Title IX is probably constitutional spending legislation—but that a successful challenge cannot be ruled out.²⁰ Nevertheless, this Part also argues that Title IX could likely survive under the Fourteenth Amendment—and indeed, it has been ruled by several lower courts to be an exercise of that power.

At the next level, there are questions about the validity of OCR's guidance on campus sexual violence. Until September 2017, OCR's two main guidance documents, the 2011 Dear Colleague Letter²¹ ("DCL") and 2014 Questions and Answers document²² ("2014 Q&A"), drove most federal Title IX enforcement. However, the Trump Administration has revoked the Obama-era guidance documents and issued new guidance. This Part analyzes the procedural validity of the new guidance under the Administrative Procedure Act ("APA") and concludes that a court would most likely rule that OCR acted properly in promulgating and using the 2017 Q&A—the same conclusion a court would probably have reached if faced with the DCL and the 2014 Q&A. As with the constitutionality of Title IX, however, there are legitimate doubts concerning the federal government's actions. This Article cannot conclude that Title IX and OCR's interpretation thereof are bulletproof.

20. As I note later in this Part, Title IX brings up an interesting question on the Spending Clause's unit of analysis. That is, to date Title IX enforcement threats have been against individual universities, not states, meaning that only individual institutions' funds have been at risk. However, states can and do institute statewide policies, putting the entire state's federal education funds at risk.

21. Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: SEXUAL VIOLENCE [hereinafter "Dear Colleague Letter"] (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/4AGB-NZ4Z>].

22. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE [hereinafter "2014 Q&A"] (2014), available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/HC2Q-7SRD>].

*A. Constitutional Authority to Legislate on Campus Sexual Violence**1. Title IX as Spending Clause Legislation*

Until 2012, the legal community was not concerned with whether Title IX was a constitutional exercise of the spending power.²³ In fact, the spending power was the only congressional power that had remained intact through the Rehnquist Court's pattern of restricting such powers.²⁴ The Court had put very few limitations on congressional power to attach conditions to federal funding, and Title IX was not considered in danger of violating those conditions.²⁵ However, the litigation spawned by the Affordable Care Act ("ACA") ultimately led to a new Court pronouncement on the Spending Clause—one that casts doubt on Title IX's ongoing validity.

Before the 2012 case of *NFIB v. Sebelius*,²⁶ *South Dakota v. Dole* was the landmark spending case.²⁷ *Dole* announced a five-part test for spending legislation, which deferred to Congress and was not particularly stringent.²⁸ In brief, the Court demanded that spending legislation be in pursuit of the "general welfare" (deferring substantially to Congress on what the general welfare entailed),²⁹ involve unambiguous conditions for states,³⁰ involve conditions related to federal interest in particular national projects or programs,³¹ violate no independent constitutional bars,³² and not be coercive to the states.³³

In *Dole*, coercion was not a major factor. Almost in passing, the Court noted that the state was at risk of losing, at most, five percent of its federal highway funding—an insufficient amount to be coercive.³⁴ In fact, the amount constituted less than half a percent of the state's total budget.³⁵ Coercion, however, became

23. Courts generally agreed that Title IX was Spending Clause legislation. *See, e.g., Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 287 (1998).

24. *See* Eloise Pasachoff, *Conditional Spending After NFIB v. Sebelius: The Example of Federal Education Law*, 62 AM. U. L. REV. 577, 579 (2013).

25. If academics did seriously worry that Title IX was a Spending Clause violation before 2012, they at least did not see fit to publish articles about it.

26. *Nat'l Fed. of Indep. Bus. v. Sebelius* [hereinafter "NFIB v. Sebelius"], 567 U.S. 519 (2012).

27. 483 U.S. 203 (1987).

28. *See id.* at 207–11 (setting out the five-part test).

29. *Id.* at 207.

30. *Id.*

31. *Id.*

32. *Id.* at 208.

33. *Id.* at 211.

34. *Id.*

35. *NFIB v. Sebelius*, 567 U.S. 519, 581 (2012).

a critical factor in *NFIB*, where the Court struck federal legislation because of coercion for the first time in its history.³⁶

In *NFIB*, the Court focused on two characteristics of the ACA's Medicaid expansion: that the amount of money at stake was too great and that the new condition was not unambiguous—or even foreseeable—when the original Medicaid program began.³⁷ Because Medicaid constituted twenty percent of the average state's annual budget, the threat of its loss was “a gun to the head.”³⁸ Even though Congress had written into the original Social Security Act that Congress reserved “the right to alter, amend, or repeal any provision,” the ACA's Medicaid expansion was “a shift in kind, not merely degree.”³⁹

Almost immediately after *NFIB*, commentators noted that federal education programs were in danger.⁴⁰ Not only had federal education funding come up in oral arguments,⁴¹ but the *NFIB* opinions used education in hypotheticals.⁴² Most critically, elementary and secondary education is the second greatest federal funding line item in state budgets.⁴³ It is therefore the natural target of the next Spending Clause challenge. To be sure, plaintiffs with standing to challenge an exercise of the spending power are rare. The Supreme Court has set out a multi-pronged test in *Flast v. Cohen*, essentially requiring a plaintiff to have a sufficient nexus with the challenged legislation.⁴⁴ Of course, *Dole* shows that states may themselves challenge an exercise of the Spending Clause. A likelier challenge to Title IX, then, would be a state hostile to survivors' rights. Certain state politicians, discussed in a later Part, have certainly shown themselves sufficiently opposed to the law that such a challenge could be politically feasible.

Some Spending Clause experts have analyzed federal education legislation in the wake of *NFIB* and concluded that it is probably safe from legal attack.⁴⁵ However, other commentators have addressed the same question and decided

36. *Id.* at 625 (Ginsburg, J., dissenting).

37. *Id.* at 583–84.

38. *Id.* at 581.

39. *Id.* at 583.

40. Mark Walsh, *In Health-Law Arguments, Justices Also Weigh Education Spending*, EDUC. WK. SCH. L. BLOG, Mar. 28, 2012, 6:43 PM, http://blogs.edweek.org/edweek/school_law/2012/03/in_medicaid_case_justices_also.html [https://perma.cc/UK9N-4BP8].

41. *See id.*

42. Walsh, *In Health-Law Arguments, Justices Also Weigh Education Spending*, *supra* n. 41.

43. *NFIB v. Sebelius*, 567 U.S. 519, 683 (2012) (Scalia, Kennedy, Thomas, and Alito, JJ., dissenting jointly).

44. 392 U.S. 83, 102 (1968).

45. *See, e.g.*, Pasachoff, *supra* note 24, at 582. *Cf.* Samuel R. Bagenstos, *The Anti-Leveraging Principle and the Spending Clause After NFIB*, 101 GEO. L.J. 861 (2013) (similarly assessing the new Spending Clause test but not discussing education).

that Title IX is not necessarily constitutional.⁴⁶ This Article concludes that the Court likely will not strike down Title IX on Spending Clause grounds: even if it is found to be coercive, its conditions are not an unfair surprise for states. *NFIB* emphasized that the Medicaid expansion was a change in the type of condition, not in its degree, and there is no such argument for Title IX, not even as it applies to campus sexual assault. Title IX clearly states that it is about sex discrimination, and it has for decades been settled law that sexual harassment is sexual discrimination—and that a single instance of sexual assault can be sufficiently severe to establish a violation of someone’s equality rights.⁴⁷ Indeed, this concept is the basis for the entire body of Title VII sexual harassment law.⁴⁸ Because Spending Clause scholars are in agreement that a law must be both an unfair surprise and coercive to be unconstitutional,⁴⁹ the lack of unfair surprise ends the inquiry. However, it bears repeating that exactly what qualifies as coercive is unknown. The Supreme Court declined to “fix a line” between persuasive and coercive.⁵⁰ It could very well be an education case that announces where that line is.

An additional wrinkle is that the ACA Medicaid expansion—and *Dole’s* highway funds condition—were both addressed directly to states. Title IX, on the other hand, governs individual academic institutions. Very few states have created statewide sexual misconduct policies—and even in those cases, they apply only to public universities.⁵¹ This structure weakens any challenger’s argument that Title IX is unduly coercive *on states*, because for a state to lose all of its federal education funding because of a Title IX violation, either the state would need a statewide policy that violates Title IX or each school would have to be in violation of Title IX of its own accord. Of course, as states begin to regulate campus sexual violence, more and more states will move towards statewide campus sexual violence policies. More state regulation on the matter is likely to bring more federal-state conflict.

In sum, recent jurisprudence has caused some uncertainty over whether federal education legislation like Title IX remains constitutional. However, under what Spending Clause experts think is the new test, Title IX is safe because

46. See Patrick Haney, Note, *Coercion by the Numbers: Conditional Spending Doctrine and the Future of Federal Education Spending*, 64 CASE W. RES. L. REV. 577, 604 (2013) (arguing that the Supreme Court could find federal education funding coercive). Cf. Ravika Rameshwar, Note, *NFIB’s New Spending Clause: Congress’ Limited Authority to Prevent Campus Sexual Assault Under Title IX*, 70 U. MIAMI L. REV. 390, 394 (2015) (discussing amendments to Title IX, not the original legislation).

47. See, e.g., *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 136 (2d Cir. 2001) (citing *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

48. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986).

49. See Pasachoff, *supra* note 24, at 594; Bagenstos, *supra* note 45, at 864–65.

50. *NFIB v. Sebelius*, 567 U.S. 519, 585 (2012).

51. See *infra* Part III (discussing Georgia and Louisiana).

it is unambiguous. All the same, this Article does not suggest that defenders of Title IX need not worry. *NFIB* was a shock to Spending Clause observers, and it is entirely possible that a Title IX case could be the next surprise. It therefore serves to question whether Title IX might be upheld under a different enumerated power.

2. Title IX as Fourteenth Amendment Legislation

If Title IX does not survive under the Spending Clause, then it could be upheld under Section Five of the Fourteenth Amendment.⁵² Title IX seems like a natural fit for Fourteenth Amendment legislation—for instance, Title IX protects against a type of historic discrimination that the Court has given heightened scrutiny⁵³—but to date, the Court has declined to rule expressly on the matter.⁵⁴ But three courts of appeals have held that Title IX is an exercise of Congress's Fourteenth Amendment authority to abrogate state sovereign immunity.⁵⁵ More importantly, in *Gebser v. Lago Vista Independent School District*, the Court acknowledged in passing that Title IX abrogated state sovereign immunity.⁵⁶ At that time—1998—the Court's rule was that Congress could only abrogate state sovereign immunity under the Fourteenth Amendment.⁵⁷

Since the landmark abrogation case, *Seminole Tribe of Florida v. Florida*, in 1996, the Court has been strict with Congress's attempts to abrogate state sovereign immunity.⁵⁸ Yet there is strong evidence that, were the Court to confront the question directly, it would uphold Title IX under the Fourteenth Amendment. Under the abrogation analysis—perhaps the strictest Fourteenth

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52. Incidentally, Title IX would not be constitutional as an exercise of the Commerce Clause: *United States v. Morrison* established that sexual violence is not economic activity capable of being regulated by the commerce power. 529 U.S. 598, 613 (2000).
 53. *Cf. Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730–32 (2003) (noting the importance of heightened scrutiny to legislation under Section Five of the Fourteenth Amendment).
 54. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 n.8 (1992).
 55. *Franks v. Ky. Sch. for the Deaf*, 142 F.3d 360, 363 (6th Cir. 1998); *Doe v. Univ. of Ill.*, 138 F.3d 653, 659–60 (7th Cir. 1998); *Crawford v. Davis*, 109 F.3d 1281, 1283 (8th Cir. 1997). For a more in-depth analysis of these cases and the relationship between Title IX and the Fourteenth Amendment, see generally Melanie Hochberg, Note, *Protecting Students Against Peer Sexual Harassment: Congress's Constitutional Powers to Pass Title IX*, 74 N.Y.U. L. REV. 235 (1999).
 56. 524 U.S. 274, 284 (1998); *see also* 42 U.S.C. § 2000d-7(a)(1) (2012).
 57. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59–60 (1996). The Court has since ruled that Congress can also abrogate state sovereign immunity under the Bankruptcy Clause, *Central Va. Community College v. Katz*, 546 U.S. 356, 379 (2006), but there is no viable argument that Title IX has anything to do with the Bankruptcy Clause.
 58. *See, e.g., Coleman v. Ct. of App. of Md.*, 566 U.S. 30, 43 (2012); *Bd. of Trs. of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000).

Amendment analysis, as abrogation is an affront to state sovereignty⁵⁹—Congress must meet two conditions. First, its intent to abrogate must be absolutely clear.⁶⁰ Second, abrogation must be a congruent and proportional response to actual civil rights violations.⁶¹

The first prong of the test is not seriously at issue. Congress has spoken clearly, declaring that states do not have sovereign immunity in the face of Title IX violations.⁶² Congruence and proportionality, however, demand a closer analysis, as it is under this requirement that the Court has overturned statute after statute.⁶³ First, Congress must find a series of violations of the rights it intends to protect.⁶⁴ Second, Congress must tailor the remedy to the violation. Title IX has done both of these things.⁶⁵ More importantly, *Nevada Department of Human Resources v. Hibbs* shows that Congress has more leeway to legislate under the Fourteenth Amendment when it is protecting groups to whom the Court has given heightened scrutiny.⁶⁶ Like the legislation in *Hibbs*, Title IX protects against sex discrimination. There is therefore a good chance that the Court would hold it to be constitutional under Congress's Fourteenth Amendment authority.

Title IX is most likely constitutional even under the Supreme Court's new, stricter spending doctrine. Even were Title IX to fail under the Spending Clause, however, it is probably constitutional under the Fourteenth Amendment. All the same, Title IX's constitutionality is by no means guaranteed. The Supreme Court has shown itself more than capable of handing down shocking cases under both the Spending Clause⁶⁷ and the Fourteenth Amendment.⁶⁸ Moreover, Congress's constitutional authority to pass Title IX is not the end of the inquiry, because most of Title IX's "requirements" are articulated in OCR guidance, not Title IX or its regulations. This Article therefore turns to analyze OCR's Title IX regulatory authority.

59. See *Alden v. Maine*, 527 U.S. 706, 749 (1999) (discussing the "indignity of subjecting a nonconsenting state to the coercive process of judicial tribunals").

60. *Coleman*, 566 U.S. at 35.

61. *Id.* at 36.

62. 42 U.S.C. § 2000d-7(a)(1) (2012).

63. See, e.g., *Coleman*, 566 U.S. at 39; *Garrett*, 531 U.S. at 374; *Kimel*, 528 U.S. at 91.

64. See, e.g., *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730–31 (2003) ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny; here . . . the persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation.")

65. For a description of some of the evidence Congress heard before enacting Title IX, see William C. Duncan, *Title IX at Thirty: Unanswered Questions*, 3 U. MD. L.J. RACE RELIG. GENDER & CLASS 211, 213–14 (2003).

66. *Hibbs* distinguished the Family and Medical Leave Act (FMLA) provisions it upheld from the laws the Court struck down in *Garrett* and *Kimel* on the basis that the FMLA dealt with sex, which is analyzed under heightened scrutiny. 538 U.S. at 735.

67. See *NFIB v. Sebelius*, 567 U.S. 519 (2012).

68. See *City of Boerne v. Flores*, 521 U.S. 507 (1997).

B. Statutory and Regulatory Authority to Govern Campus Sexual Violence

Title IX of the Education Amendments of 1982 itself says very little: it bars sex discrimination in federally funded activities, with some exceptions.⁶⁹ OCR, an office within the Department of Education, enforces Title IX, and most of what people think of as “Title IX” is in fact OCR regulations and guidance.⁷⁰ Until September 2017, OCR’s most prominent guidance documents were the DCL and the 2014 Q&A. Both were promulgated during the Obama Administration, and both were controversial. Unlike earlier OCR interpretations of Title IX, neither of these documents went through notice-and-comment procedure.⁷¹ The lack of notice-and-comment procedure, coupled with the way OCR used these documents, led some commentators to argue that OCR was treating at least the DCL as legally binding, in violation of the APA.⁷² Critics of the Obama Administration’s crackdown on campus tolerance of sexual violence hoped to attack the documents on APA grounds.⁷³

For the first several months of the Trump Administration, the ongoing vitality of the guidance documents was very much in doubt. In early September 2017, Betsy DeVos announced that “the era of ‘rule by letter’ is over” and that the Department of Education would engage in notice-and-comment to draft new regulations, presumably ones that contradict the existing guidance.⁷⁴ Proponents of the Obama guidance hoped this meant that DeVos would leave the guidance in place until new regulations issued. In late September, however, the Department of Education revoked both the DCL and the 2014 Q&A, issuing in their place interim guidance (“2017 Q&A”).⁷⁵

Like the DCL and 2014 Q&A, the 2017 Q&A did not go through notice-and-comment procedure, and like those documents, it calls itself a “significant guidance document,” which is not binding.⁷⁶ Also like the previous two guidance documents, the 2017 Q&A is a blend of policy statements and interpretive rules, which do not need notice-and-comment procedure. Nevertheless, a critical factor

69. 20 U.S.C. § 1681 (2012).

70. See 20 U.S.C. § 1682 (2012).

71. Gersen & Suk, *supra* note 7, at 908.

72. *Id.* at 908–09, 911.

73. See, e.g., *id.*

74. Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST, Sept. 7, 2017, <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/> [<https://perma.cc/K423-RVXC>].

75. Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), *available at* <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/9R6K-NY4G>]; 2017 Q&A, *supra* note 17.

76. Compare 2017 Q&A, *supra* note 17, at 7 with Dear Colleague Letter, *supra* note 21, at 1 n.1 and 2014 Q&A, *supra* note 22, at 1 n.1.

in an APA challenge would be how OCR uses the guidance in enforcement, and the 2017 Q&A is too new to rule out a successful challenge based on enforcement realities.⁷⁷ Whether the Department of Education would commit much energy to defending interim guidance is another question.

The APA § 553(b)(3)(A) exempts certain agency documents from notice-and-comment requirements.⁷⁸ Relevant here is its exception for interpretive rules and general statements of policy, because OCR claims that the 2017 Q&A is a “significant guidance document . . . [that] does not add requirements to applicable law.”⁷⁹ The guidance documents it rescinded also so claimed.⁸⁰ All three further refer to the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices,⁸¹ which states that “[a]gencies may provide helpful guidance to interpret existing law through an interpretive rule or to clarify how they tentatively will treat or enforce a governing legal norm through a policy statement.”⁸² OCR, then, treats the 2017 Q&A as both an interpretive rule and a policy statement—just as it treated the DCL and the 2014 Q&A.

The Supreme Court has not spoken on what distinguishes a legislative rule—requiring notice-and-comment—from an interpretive rule or a statement of policy. However, the courts of appeals that have considered the issue are in agreement that the test to distinguish a policy statement from a legislative rule is whether the document has “present binding effect.”⁸³ A two-step inquiry has emerged: whether the document is facially binding and whether the agency applies the document as if it were binding.⁸⁴ By contrast, the distinction between interpretive rules and legislative rules is whether the rule has “legal effect,” which itself has been broken into a four-part test.⁸⁵ The rule is legislative if (1) the agency would have no legislative basis for enforcement without the rule; (2) the agency has published the rule in the Code of Federal Regulations; (3) the agency has “explicitly invoked its general legislative authority;” or (4) the rule “effectively amends a prior legislative rule.”⁸⁶ While the tests are not identical,

77. Any proponent of the Obama-era guidance who might hope to challenge the new guidance is likely to be disappointed: the 2017 Q&A mirrors the DCL and the 2014 Q&A in most administrative procedure respects. There is no APA attack that would succeed against the 2017 Q&A that would not also have overturned the Obama guidance.

78. 5 U.S.C. § 553 (2012).

79. 2017 Q&A, *supra* note 17, at 7.

80. Dear Colleague Letter, *supra* note 21, at 1 n.1; 2014 Q&A, *supra* note 22, at 1 n.1.

81. 2017 Q&A, *supra* note 17, at 7; Dear Colleague Letter, *supra* note 21, at 1 n.1; 2014 Q&A, *supra* note 22, at 1 n.1.

82. 72 Fed. Reg. 3432 (2007).

83. *See, e.g.*, *Elect. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec.*, 653 F.3d 1, 7 (D.C. Cir. 2011).

84. *See id.*; *Profess’ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995).

85. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

86. *Id.*

the information they require is very similar. Ultimately, both tests ask whether the documents themselves purport to bind regulated parties and whether the agency has treated them as binding.

Because OCR has carefully not written the 2017 Q&A as binding—just as it wrote the Obama guidance—the document does not violate the APA in that regard. Whether OCR will treat the document as binding remains to be seen, but given a presumption in favor of the agency’s characterization of the documents and an absence of strong evidence to the contrary, reviewing courts should determine the documents to be policy guidance and interpretive rules.

1. *The Language Prong*

When deciding whether an agency pronouncement is a legislative rule, courts look first to the text of the documents in question.⁸⁷ The document’s language is a “powerful, even potentially dispositive, factor”⁸⁸ for determining whether it is a policy statement. If the document uses mandatory, imperative language—if “[i]t commands, it requires”⁸⁹—then it is more likely to be a legislative rule.⁹⁰ The document itself may, and often does, disclaim that it is not a legislative rule.

However, interpretive rules can use mandatory language without violating the APA. Interpretations “will use imperative language . . . if the interpreted term is part of a command.”⁹¹ The question for interpretive rules is whether they themselves establish a basis for enforcement—in which case, they are legislative rules in disguise.⁹²

All three guidance documents claim that they are “significant guidance,” not legislative rules,⁹³ meaning that in none of them has OCR invoked its rulemaking authority. All three use a blend of discretionary and mandatory language: “must,” “may,” and “should” throughout.⁹⁴ Were the question simply whether they are policy statements or legislative rules, it would be tempting to conclude that they are legislative rules, as they do use mandatory language. However, the

87. *See Profess’ls and Patients*, 56 F.3d at 596; *U.S. Tel. Ass’n v. FCC*, 28 F.3d 1232 (D.C. Cir. 1994).

88. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 947 (D.C. Cir. 1987).

89. *Appalachian Power Co. v. E.P.A.*, 208 F.3d 1015, 1023 (D.C. Cir. 2000).

90. *Cnty. Nutrition Inst.*, 818 F.2d at 947.

91. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

92. *See id.* at 1109.

93. 2017 Q&A, *supra* note 17, at 7; Dear Colleague Letter, *supra* note 21, at 1 n.1; 2014 Q&A, *supra* note 22, at 1 n.1.

94. *See, e.g.*, 2017 Q&A, *supra* note 17, at 1 (“the school must take steps”), 4 (“generalizations may violate Title IX”), 5 (“a decision should be reached separately”); Dear Colleague Letter, *supra* note 21 at 4 (“schools should consider”), 5 (“[s]chools also should inform”), 8 (“a recipient may use”), 11 (“parties must have an equal opportunity”); 2014 Q&A, *supra* note 22, at 10 (“a school should not wait”), 16 (“[e]ach school must”).

mandatory language appears only where previous legislative rules establish a basis for enforcement. In other words, the mandatory language appears only where the documents are interpreting legislative rules or statutes.⁹⁵

Take the Obama OCR's most controversial stance: that schools "must" use a preponderance of the evidence standard in campus adjudications.⁹⁶ The preponderance requirement does not appear in any legislative rule, so critics claimed that OCR was overstepping its regulatory authority in dictating an evidentiary standard.⁹⁷ Yet the DCL begins its discussion of preponderance with a reference to previous regulation, which requires "equitable resolution of student . . . complaints."⁹⁸ OCR insisted that the preponderance standard was consistent with civil discrimination litigation, OCR's own internal investigations, and Title IX.⁹⁹ In other words, the guidance documents were not their own basis for enforcement, but merely OCR's interpretation of "equitable," a requirement from a properly promulgated legislative rule.¹⁰⁰

Of course, the 2017 Q&A has changed the standard of evidence. Where OCR previously set out preponderance of the evidence as the only acceptable standard, the 2017 Q&A says that schools "should" use "either a preponderance of the evidence standard or a clear and convincing evidence standard."¹⁰¹ The document clarifies, however, that whichever standard the school uses "should be consistent with the standard the school applies in other student misconduct cases," referencing a case from the federal District of Massachusetts that held to do otherwise was to deny students "basic fairness."¹⁰² This change is likely to be the most controversial, given the years of dispute over the use of preponderance

95. See, e.g., 2017 Q&A, *supra* note 17, at 1 ("an institution that receives federal funds must ensure that no student suffers a deprivation of her or his access to educational opportunities on the basis of sex"), 2 ("institutions must disclose campus crime statistics"), 3 ("[a] school must adopt and publish grievance procedures"); Dear Colleague Letter, *supra* note 21 at 4 ("the school must process the complaint in accordance with its established procedures"), 5 ("the school's inquiry must in all cases be prompt"), 6 ("[r]ecipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX implementing regulations"); 2014 Q&A, *supra* note 22, at 1 ("[a]ll public and any private . . . [schools] receiving any federal financial assistance . . . must comply with Title IX"), 8 ("[u]nder Title IX, federally funded schools must ensure that students . . . are not denied . . . educational programs or activities on the basis of sex"), 9 ("[a school] must take immediate and appropriate steps to investigate").

96. Dear Colleague Letter, *supra* note 21, at 11.

97. See, e.g., Farnaz F. Thompson, *Eliminating a Hostile Environment Towards Colleges and Universities: An Examination of the Office for Civil Rights' Unconstitutional Process and Practices*, 28 REGENT U. L. REV. 225, 242 (2016); Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 66–67 (2013); Gersen & Suk, *supra* note 8, at 908–11.

98. Dear Colleague Letter, *supra* note 22, at 1. See 34 C.F.R. § 106.8(b) (2012). The 2014 Q&A similarly anchors its preponderance requirement in the same regulations. See 2014 Q&A at 14.

99. Dear Colleague Letter, *supra* note 21, at 10–11.

100. 34 C.F.R. § 106.8(b).

101. 2017 Q&A, *supra* note 17, at 5.

102. *Id.* at 5 n.19 (citing *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016)).

of the evidence.¹⁰³ Yet, if anything, the 2017 Q&A is harder to attack on this point, at least in the field of administrative procedure, than the DCL. The 2017 Q&A has softened the language: it says “should” instead of “must.”¹⁰⁴

Another way of approaching the legislative-interpretive divide is to ask whether the rule establishes legal rights or duties—or whether the rule simply interprets or expounds on existing rights and duties.¹⁰⁵ In *American Mining Congress v. Mine Safety and Health Administration*, an agency issued a document requiring the reporting of a diagnosis when an x-ray came back with certain results.¹⁰⁶ Previous agency regulations already required diagnoses to be reported, but did not specify what qualified as a diagnosis.¹⁰⁷ Because regulations already established the legal duty, i.e. a basis for enforcement, the court held that the agency document defining diagnosis was an interpretive rule.¹⁰⁸ Returning to the preponderance example, we see that a prior regulation already established a legal duty: the duty to provide an equitable grievance procedure.¹⁰⁹ The DCL and 2014 Q&A merely lay out OCR’s interpretation of “equitable,” rather than creating a new legal duty. It is the regulation, not the guidance documents, that is binding. In the case of the 2017 Q&A, not only is there no mandatory language on this point, but there is also a federal decision supporting the document’s conclusion.¹¹⁰

In sum, the 2017 Q&A is not legally binding in and of itself: it creates no legal duties or grounds for enforcement. In this respect, it is just like the Obama-era guidance. All three documents combined elements of policy statements and interpretive rules and are not—at least not by their own language—legislative rules.

2. *The Enforcement Prong*

The text of the documents does not necessarily end the inquiry. Courts also ask whether the “agency acts as if a document . . . is controlling in the field, if it treats the document in the same manner as it treats a legislative rule, if it bases enforcement actions on the . . . document, if it leads [regulated] parties . . . to

103. See *supra* note 97.

104. Compare 2017 Q&A, *supra* note 17, at 5, with Dear Colleague Letter, *supra* note 21, at 11.

105. See *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993).

106. *Id.* at 1107–08.

107. *Id.* at 1107.

108. *Id.* at 1112.

109. See 34 C.F.R. § 106.8(b).

110. See 2017 Q&A, *supra* note 17, at 5 n.19 (citing *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016)).

believe . . . they [must] comply with the terms of the document.”¹¹¹ Alternatively, the agency could be using it to “help identify those [regulated parties] that might be engaged in” violation of the law, as policy documents are permitted to do.¹¹² The key is whether the agency retains discretion despite the document: if the document significantly limits agency discretion, then the agency is treating it as binding.¹¹³ The way the agency treats the document can overcome the document’s language; courts have repeatedly ignored agency disclaimers that the documents are policy statements.¹¹⁴ Finally, while courts owe agency characterizations of their own documents some deference,¹¹⁵ this deference has in some cases transformed into outright “suspicio[n].”¹¹⁶ No evidence of how OCR treats the 2017 Q&A in the field yet exists, but an analysis of how the Obama-era guidance documents would have fared is instructive.

OCR has published none of the three documents in the Code of Federal Regulations. This is a signal that it does not view the documents as binding, as well as a factor in the D.C. Circuit’s test for whether a rule is interpretive or legislative.¹¹⁷ Instead, OCR communicated the documents by publishing the documents online¹¹⁸ and sending them to relevant school officials. Here, however, is where the Obama-era documents and the 2017 Q&A diverge. OCR had several years of work with the Obama-era documents, but the 2017 Q&A is too recent for OCR to have used it in any enforcement actions. In that respect, it is once again more difficult to challenge on administrative procedure grounds than the Obama-era guidance.

Whether the Obama OCR acted in its investigations as though the its guidance documents were binding is extremely controversial.¹¹⁹ Several critics, most prominently Professors Suk and Gersen, claim that OCR acted as if the guidance documents were binding.¹²⁰ However, most of the evidence that Suk and Gersen cite is in fact how *schools* were acting,¹²¹ writing that “[a]s a result,

111. *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1021 (D.C. Cir. 2000).

112. *See Prof’ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 600 (5th Cir. 1995).

113. *See Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

114. *See, e.g., Appalachian Power Co.*, 208 F.3d at 1022–23.

115. *See, e.g., Cmty. Nutrition Institute*, 818 F.2d at 946.

116. *United States v. Texas*, 809 F.3d 134, 171 (5th Cir. 2015), *affirmed by an equally divided Court*, 136 S.Ct. 2271 (2016).

117. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993).

118. Dear Colleague Letter, *supra* note 21, AT 6 n.23.

119. *See, e.g., Jennifer James, We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1341–42 (2016); Corey R. Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 898–99 (2016); Gersen & Suk, *supra* note 7, at 909; Ellis, *supra* note 97, at 81.

120. Gersen & Suk, *supra* note 7, at 909.

121. *E.g., id.* at 908 n.127 (citing Janet Napolitano, President of the University of California), 909 (“all universities have complied”).

the agency achieved compliance with its nonbinding guidance document.”¹²² While it is true that OCR enjoyed some success in getting schools to cooperate, it is not clear that this was because OCR was treating its documents as binding. It is possible that schools believed that a court would have sided with OCR’s interpretation, or that the cost of litigation would have been too high. It is equally possible—in fact, probable—that schools would have been unwilling to fight a well-publicized court battle over campus sexual violence, as Suk and Gersen acknowledge.¹²³ Again, a court would not have analyzed the actions of regulated parties, but of the agency itself.

Importantly, there is no evidence that OCR “bound itself”¹²⁴ with its guidance documents. To the contrary, documentation of OCR investigations show that OCR relied on myriad factors in determining whether to bring enforcement actions.¹²⁵ To be sure, the guidance documents “channel[ed]” agency discretion, as courts of appeals allow non-legislative rules to do.¹²⁶ “[A]ll statements of policy channel discretion to some degree,” one court acknowledged.¹²⁷ To be a legislative rule, the document must “remove[] all, if not most” agency discretion.¹²⁸ OCR never went so far.

It is important to note that a critical category of evidence is not available. In analyzing whether an agency document is a legislative rule, courts have also looked to data on actual agency enforcement.¹²⁹ Because no investigation of campus sexual violence has ever passed the voluntary resolution stage, there have been no hearings before the agency to withdraw federal funding. At the resolution stage—where all campus sexual violence complaints to date have ended—it is impossible to separate the agency’s treatment of the guidance from the school’s treatment of the guidance.

In the absence of evidence to the contrary, courts’ deference to agency characterization of the document should prevail. Of course, the last court of

122. *Id.* at 909.

123. *Id.*

124. *Cnty. Nutrition Inst. v. Young*, 818 F.2d 943, 948 (D.C. Cir. 1987).

125. *See, e.g.*, Letter from Alice B. Wender, Reg’l Office Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Gen. J.H. Binford Peay, III, Superintendent, Va. Military Inst., at 8–22 (May 9, 2014), <https://www2.ed.gov/documents/press-releases/vmi-letter.doc> [https://perma.cc/B67W-33P3] (relying on dozens of factors); 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., at 9–27 (Sept. 11, 2014), <https://www2.ed.gov/documents/press-releases/ohio-state-letter.pdf> [https://perma.cc/3LAU-UPFS] (discussing many factors).

126. *Prof’ls and Patients for Customized Care v. Shalala*, 56 F.3d 592, 600 (5th Cir. 1995).

127. *Id.*

128. *Id.*

129. *See, e.g.*, *U.S. Tel. Ass’n v. FCC*, 28 F.2d 1232, 1234 (D.C. Cir. 1994).

appeals to speak on the matter turned “deference” into “suspicio[n],”¹³⁰ so it is not entirely clear how strong—or alive—that presumption is. However, were evidence to emerge that OCR had begun to treat the 2017 Q&A as binding, a court could easily find the document in violation of the APA. OCR could overstep by, for example, telling schools that the documents were binding or bringing enforcement actions only against schools that did not comply.

Once again, this Article must conclude that while the federal government most likely has the authority to do what it has done, it is not impossible for a court to conclude otherwise. At every turn, the conclusion has been the same: Title IX is most likely constitutional, but a court could disagree. OCR most likely has not violated the APA, but a court could disagree. These minor uncertainties, however, pale in the face of the doubt that the Trump Administration would ever enforce Title IX in favor of survivors.

C. Federal Executive Political Willpower

However well-established it is—and it is a little shaky—federal authority to act will be completely irrelevant if there is no federal *willingness* to act. Federal willpower is critical because federal enforcement depends entirely on threats to withdraw federal funding. Before the Obama Administration cracked down, schools were essentially free from government oversight. The past few years’ progress has been due in great part to the Obama Administration’s publicization of schools under investigation and threats to defund.¹³¹ If the Trump Administration decides to stop these efforts, schools will face *no* federal pressure to comply with Title IX.

Hopes of federal enforcement of Title IX under the Trump Administration are dim. Unlike President Obama, who identifies as a feminist,¹³² and Vice President Joe Biden, who authored the Violence Against Women Act,¹³³ President Trump and Vice President Pence are not known for their support for sex equality. In fact, then-candidate Trump’s campaign was nearly derailed when

130. *United States v. Texas*, 809 F.3d 134, 171 (5th Cir. 2015), *affirmed by an equally divided Court*, 136 S.Ct. 2271 (2016).

131. *See, e.g., Sexual Assault on Campus: Working to Ensure Student Safety: Hearing Before the U.S. Senate Comm. On Health, Education, Labor, and Pensions*, 113th Cong. 4 (2014) (statement of Lhamon, Catherine E., Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ.), <https://www.help.senate.gov/imo/media/doc/Lhamon.pdf> [<https://perma.cc/T3PP-PAF9>].

132. Barack Obama, *President Obama Says, “This Is What a Feminist Looks Like”*, GLAMOUR, Aug. 4, 2016, 8:00 AM, <http://www.glamour.com/story/glamour-exclusive-president-barack-obama-says-this-is-what-a-feminist-looks-like> [<https://perma.cc/7CV3-KUFX>].

133. *About Vice President Biden’s Efforts to End Violence Against Women*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/1is2many/about> [<https://perma.cc/4R48-R2DF>] (last visited Dec. 1, 2017).

a video of him bragging about committing sexual assault went viral.¹³⁴ Trump has not commented on campus sexual violence, but his opinion on workplace sexual harassment is that the victim should quit.¹³⁵ One might conclude that he thinks survivors of campus sexual violence ought to transfer schools rather than seek the expulsion of their attackers. More specific to campus sexual violence, President Trump has suggested defunding OCR entirely.¹³⁶ His surrogates have argued that campuses should not adjudicate campus sexual violence at all.¹³⁷ One called OCR “absolute nonsense.”¹³⁸ The Republican Party platform calls for an end to federal “micromanage[ment]” of campus sexual violence.¹³⁹ And the chairman of the Republican Freedom Caucus has included the DCL on his list of regulations he recommends rescinding.¹⁴⁰

Student-survivor activists have been suspicious of Trump’s Secretary of Education, DeVos, since she emerged as a candidate for the Cabinet.¹⁴¹ Before her nomination, she donated to a group whose mission was to overturn the DCL.¹⁴² And in her confirmation hearing, she opined that schools need not follow federal disability-rights law, because “that is best left to the states.”¹⁴³ DeVos’s view on disability law suggests she either believes campus sexual violence is also a matter for the states—or that, in the event OCR continues to enforce Title IX, it will neglect students with disabilities. More recently, DeVos has made her opposition to her predecessors’ positions on campus sexual

134. See, e.g., Mathis-Lilley, *supra* note 10.

135. Amy D. Sorkin, *Ivanka Trump and the Question of Sexual Harassment*, NEW YORKER, Aug. 3, 2016, <http://www.nyorker.com/news/amy-davidson/ivanka-trump-and-the-question-of-sexual-harassment/> [<https://perma.cc/M84P-45U4>].

136. See Joel Anderson, *Education Civil Rights Advocates Fear “Horror Show” Under Trump*, BUZZFEED, Dec. 20, 2016, 5:32 PM, <https://www.buzzfeed.com/joelanderson/education-civil-rights-advocates-fear-horror-show-under-trum> [<https://perma.cc/Q5GN-4F75>].

137. Bitar et al., *supra* note 10.

138. *Id.*

139. REPUBLICAN PARTY, REPUBLICAN PLATFORM 2016 35 (2016), [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf) [<https://perma.cc/PQ7Z-B6ZA>].

140. Paul Singer, *Rep. Meadows Targets Campus Rape Rule as Unfair to ‘Often-Innocent Accused’*, USA TODAY, Dec. 30, 2016, 10:56 AM, <http://www.usatoday.com/story/news/politics/2016/12/30/rep-meadows-targets-campus-rape-rule/95937320/> [<https://perma.cc/KXC5-GHX9>]; OFFICE OF CONGRESSMAN MARK MEADOWS, RULES, REGULATIONS, AND EXECUTIVE ORDERS TO EXAMINE, REVOKE, AND ISSUE 5 (2016), <https://drive.google.com/file/d/0B-c5aMEjqM1Bek56UVByQ0ISSms/view> [<https://perma.cc/P9ZJ-73ZD>].

141. Molly Redden & Sabrina Siddiqui, *Betsy DeVos Hearing Prompts Fears for Campus Sexual Assault Protections*, GUARDIAN, Jan. 17, 2017, <https://www.theguardian.com/us-news/2017/jan/17/betsy-devos-hearing-prompts-fears-for-campus-sexual-assault-protections> [<https://perma.cc/KGD6-9VQW>].

142. *Id.*

143. Elliot Hannon, *DeVos Says States Shouldn’t Have to Comply with Federal Law Protecting Disabled Students*, SLATE, Jan. 17, 2017, http://www.slate.com/blogs/the_slatest/2017/01/17/devos_says_states_dont_have_to_comply_with_federal_law_protecting_disabled.html [<https://perma.cc/B2B5-JUV2>].

violence clearer. In a speech in September 2017, she announced that the old system “has clearly pushed schools to overreach.”¹⁴⁴ The agency is beginning a notice-and-comment period for new regulations; given DeVos’s view that the current system has swung too far in favor of survivors,¹⁴⁵ the new regulations will no doubt make it more difficult for schools to punish students they determine responsible. For survivors and activists who believe it is still all too unlikely for an assault to be reported, let alone seriously investigated or punished, DeVos’s path looks like undoing years of hard-won progress.¹⁴⁶

One level down, there is more to alarm survivors and their allies. The new head of OCR, Candice Jackson, is not a pick to raise their hopes.¹⁴⁷ Jackson has said publicly that “ninety percent” of campus sexual assault accusations “fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.’”¹⁴⁸ Even if Ms. Jackson has since apologized, it is deeply unfortunate for the head of OCR to repeat outdated stereotypes, including that most women lie about being attacked.¹⁴⁹

Student activism and private litigation will no doubt continue. But in the likely absence of federal pressure, states will remain the only governmental actors capable of ensuring schools protect students from campus sexual violence. This Article therefore turns to an analysis of states’ authority to act.

II. STATE AUTHORITY TO GOVERN CAMPUS SEXUAL VIOLENCE

As this Article has established, the federal government is unlikely to continue enforcing survivor protections under Title IX. Even if there were federal willpower, there are weaknesses in Title IX and OCR’s interpretation thereof for challengers to attack. With the federal government unwilling or unable to protect students from campus sexual violence, states should step in. The question

144. Svrluga, *supra* note 74.

145. *Id.* (“Through intimidation and coercion, the failed system has clearly pushed schools to overreach. With the heavy hand of Washington tipping the balance of her scale, the sad reality is that Lady Justice is not blind on campuses today.”).

146. See, e.g., Dana Bolger & Alexandra Brodsky, *Betsy DeVos’s Title IX Interpretation Is an Attack on Sexual Assault Survivors*, WASH. POST, Sept. 8, 2017, <https://www.washingtonpost.com/news/posteverything/wp/2017/09/08/betsy-devos-title-ix-interpretation-is-an-attack-on-sexual-assault-survivors/> [https://perma.cc/WVX9-38DW].

147. Erica L. Green & Sheryl G. Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear*, N.Y. TIMES, July 12, 2017, <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html> [https://perma.cc/VVQ2-UQ8U].

148. *Id.*

149. Alexandra Wilts, *Trump Official Apologises for Suggesting 90% of Campus Rape Accusations Are Spurious*, INDEP., July 13, 2017, 9:23 PM, <http://www.independent.co.uk/news/world/americas/us-politics/trump-education-campus-rape-candice-jackson-reasons-drunk-break-ups-a7840281.html> [https://perma.cc/46X5-EBUQ].

therefore becomes whether states have the authority to legislate in this area. In brief, the answer is that states are empowered to legislate on campus sexual violence, and that they may do so as long as their legislation does not conflict with Title IX. This Part sets out states' authority and discusses the preemptive effect of Title IX; its regulations; and most importantly, the 2017 Q&A.

State authority to legislate on campus sexual violence is difficult to attack.¹⁵⁰ Both education and physical safety are traditional state concerns, despite significant federal ventures into education.¹⁵¹ The only real potential barrier to state action is preemption, and preemption merely prevents states from acting in conflict with Title IX. States remain free to legislate on campus sexual assault as long as they do not raise obstacles to Title IX compliance or violate individual constitutional rights.

The federal government can preempt state legislation in two ways: field preemption or conflict preemption.¹⁵² The more powerful of these, field preemption, is rare, and occurs only when Congress "occupies an entire field."¹⁵³ Courts find field preemption only where Congress has manifested an intent to block state legislation.¹⁵⁴ There is no evidence of field preemption in Title IX, meaning any preemptive power must be under conflict preemption. Under this doctrine, state legislation is "naturally preempted" whenever it conflicts with federal law.¹⁵⁵ Conflict preemption thus prevents states from legislating only where the state law would conflict with Title IX.

The preemptive effect of policy guidance like the 2017 Q&A is more complex, because the agency's interpretation in a guidance document is not binding, and therefore not necessarily preemptive. In determining whether the 2017 Q&A preempts state law, a court would have to decide which level of deference is due to the agency's interpretation—*Chevron* or its less-deferent analogue, *Skidmore*. Regulations share the preemptive power of statutes.¹⁵⁶ OCR regulations under Title IX are therefore also preemptive. Guidance, by contrast, does not qualify for preemption—the 2017 Q&A is therefore not preemptive.¹⁵⁷ This does not necessarily mean that a state could, for example, require all its

150. The Tenth Amendment flips the inquiry: where the federal government must anchor its authority in an enumerated power, states are presumed to have the power to act unless the Constitution says otherwise. *See* U.S. CONST. AMEND. X.

151. *United States v. Lopez*, 514 U.S. 549, 580 (1995) ("it is well established that education is a traditional concern of the States"); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (explaining that health and safety are traditional state powers).

152. *See, e.g., Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000).

153. *See Arizona v. United States*, 132 S.Ct. 2492, 2502 (2012).

154. *Id.*

155. *Crosby*, 530 U.S. at 372.

156. *See Fid. Fed. Sav. & Loan Ass'n. v. de la Cuesta*, 458 U.S. 141, 153 (1982).

157. *See supra* Part I.B.

universities to use a different standard of evidence than the 2017 Q&A permits—it merely means that a court would have to decide whether that evidentiary standard was in conflict with Title IX, without *Chevron* deference to OCR’s interpretation.¹⁵⁸ In so deciding, a court would likely accord the guidance *Skidmore* deference. Under *Skidmore*, courts give a greater amount of deference to agency interpretations that speak from the agency’s expertise,¹⁵⁹ are thoroughly considered,¹⁶⁰ and do not conflict with prior interpretations.¹⁶¹ The 2014 Q&A, and to a greater extent the DCL, were good candidates for *Skidmore* deference. As longstanding policies developed with OCR’s expertise, they neatly checked the *Skidmore* boxes. The 2017 Q&A, by contrast, is not longstanding, and is thus less likely to merit *Skidmore* deference.

Finally, states are within their authority to provide protection beyond what Title IX demands—again, assuming their requirements do not conflict with Title IX. Generally speaking, courts view federal law as a floor, not a ceiling, and allow states to legislate more protectively.¹⁶² When it comes to campus adjudication, this could be more complicated than it sounds, given the balancing act between the rights of the accuser and the accused. However, states are free to go above and beyond other Title IX requirements, such as by requiring a higher standard of consent or by mandating additional rape-prevention measures.

As of 2017, only a minority of states have exercised their authority to legislate or regulate campus sexual violence.¹⁶³ All told, twenty-one states have acted. Of these, nineteen passed legislation, one acted administratively, and one acted both legislatively and administratively. The next Part analyzes what states have done, comparing the different responses to draw broader conclusions about how states should address campus sexual violence.

158. See *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (“Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”).

159. *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) (refusing to accord deference in part because the interpretation was beyond the Attorney General’s expertise).

160. *Id.*

161. *U.S. v. Mead Corp.*, 533 U.S. 218, 235 (2001) (listing a particular interpretation’s “fit with prior interpretations” as a reason for it to be accorded *Skidmore* deference).

162. See *Ferebee v. Chevron Co.*, 736 F.2d 1529, 1543 (D.C. Cir. 1984).

163. For a partial accounting, see ANDREW MORSE ET AL., *NASPA, STATE LEGISLATIVE DEVELOPMENTS ON CAMPUS SEXUAL VIOLENCE: ISSUES IN THE CONTEXT OF SAFETY* [hereinafter “NASPA Report”] 6 fig.1 (Dec. 2015), http://naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [<https://perma.cc/T3JF-F65X>]. For the remainder, see *infra* note 165.

III. CURRENT STATE LEGISLATION AND REGULATION¹⁶⁴

Having established that states can act to protect their students from campus sexual violence, this Article proceeds by analyzing extant state action. This completes a brief survey of all state work, noting where states fall on the spectrum from survivor-protective to accused-protective (see Figure 1). Next, this Part focuses on Illinois and Georgia as examples of state action on campus sexual violence. Procedurally and substantively, the Illinois and Georgia responses are very different—Illinois’s legislation followed months of community dialogue that emphasized student voices. Georgia, by contrast, had a rushed administrative response to a single state congressman’s personal campaign against a particular university. Student voices were all but shut out entirely. This Article analyzes those two states’ responses and concludes that states should involve all stakeholders. Only by engaging in dialogue with diverse interest groups will states succeed in legislation that addresses the concerns of not just politicians, but also the students who must live under the new regime. Most critically, states must ensure that their legislation pays attention to different student groups, including students of color, disabled students, and LGBTQIA students.

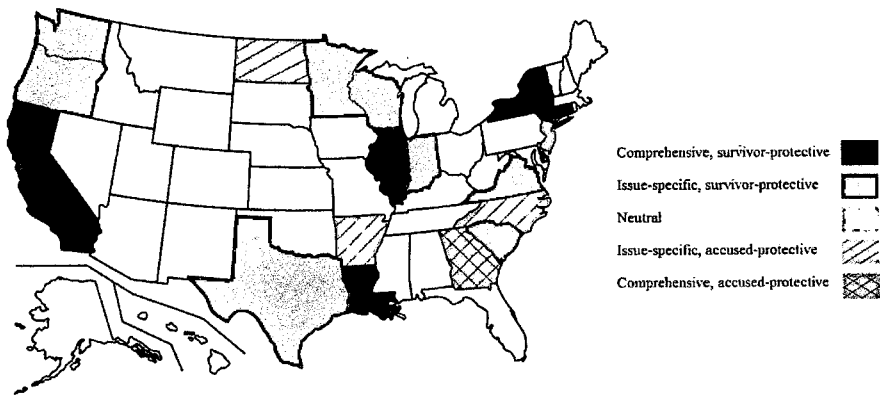
A. State Legislation

Figure 1. States with legislation protecting college students from campus sexual violence.

Twenty-one states have regulated campus sexual violence within their borders: Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Minnesota, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Texas, Virginia, Washington,

164. This Part is current as of October 2017.

and Wisconsin.¹⁶⁵ State action differs in several key respects, both substantively and procedurally. Except for Connecticut, Georgia, Illinois, Louisiana, and New York, states have legislated on just a few topics related to campus sexual assault, and the vast majority of legislation has targeted only public universities.¹⁶⁶ Other states have created comprehensive schemes for universities, regulating issues from the definition of consent, to campus adjudication procedures, to preventative education. Only Georgia, however, has acted in a purely regulatory manner, without accompanying legislation. As this Part will show, the procedure the states use—and not just the substance of their response—impacts the protections survivors can seek from their schools.

1. State Legislation on Specific Topics

With the exception of a few comprehensive responses, state legislation on campus sexual violence addresses one or more of five distinct issues: affirmative consent, the role of law enforcement, transcript notations, the role of attorneys, and school policies.¹⁶⁷ This Section notes each state that has legislated on campus sexual violence but does not exhaustively document each provision. Instead, this Section addresses the more common state responses, leaving out, for example, the relatively rare requirement that schools cooperate with local rape crisis centers¹⁶⁸ or that they protect survivors' confidentiality.¹⁶⁹ Where relevant, states that have legislated comprehensively will also be discussed in the issue-specific Sections. Because Louisiana has taken both legislative and administrative steps, it is discussed throughout. Table 1 provides a summary.

165. The NASPA Report documents some of these, but does not cover regulation in Connecticut, Delaware, Georgia, Indiana, Louisiana, New Jersey, Oregon, South Carolina, Texas or Washington. See generally NASPA Report, *supra* note 163. For Connecticut, see CONN. GEN. STAT. § 10a-55m (2016). For Delaware, see DEL. CODE ANN. tit. 14, §§ 9002A, 9004A (2017). For Georgia, see BD. OF REGENTS OF THE UNIV. SYS. OF GA., POLICY MANUAL [hereinafter "Georgia BOR Policy"] § 4.1.7 (2017), available at http://www.usg.edu/policymanual/section4/C327/#p4.1.7_sexual_misconduct_policy at [https://perma.cc/VS2M-WMCT]. For Indiana, see IND. CODE §§ 35-37-6-9, 35-27-6-2.7, 35-27-6-3.5 (establishing victim's rights in "any judicial, legislative, or administrative proceeding") (2008–16). For Louisiana, see LA. STAT. ANN. §§ 17:3399.11–15 (2015). For New Jersey, see S. 2812, 216th Leg. (N.J. 2015), available at http://www.njleg.state.nj.us/2014/Bills/S3000/2812_11.pdf [https://perma.cc/T66G-3K42]. For Oregon, see OR. REV. STAT. §§ 40.264 (2015) (amended 2017); 350.255 (2016). For Rhode Island, see R.I. GEN. LAWS § 16-76-1 to -3 (2016). For South Carolina, see S.C. CODE ANN. § 59-105-40 (2016). For Texas, see TEX. EDUC. CODE ANN. § 51.9366 (West 2017). For Washington, see WASH. REV. CODE §§ 28B.112.005–30 (2015). For Wisconsin, see WIS. STAT. § 125.07 (2017).

166. See *infra* Section III.A.1.

167. See, e.g., ARK. CODE ANN. § 6-60-109 (2015); CAL. EDUC. CODE § 67386 (West 2016); CONN. GEN. STAT. § 10a-55m (2016); HAW. REV. STAT. § 304A-120 (2017); MINN. STAT. § 135A.15 (2017); N.C. GEN. STAT. § 166-40.11 (2013); N.D. CENT. CODE § 15-10-56 (2015); S.C. CODE ANN. § 59-105-40 (2002); VA. CODE ANN. §§ 23.1-806 to -808 (2016).

168. See, e.g., CAL. EDUC. CODE § 67386(13)(c) (West 2016).

169. See, e.g., IND. CODE §§ 35-37-6-9, 35-27-6-2.7, 35-37-6-3.5 (2016).

i. Affirmative Consent

Affirmative consent is the concept that only a clear agreement to a sexual encounter constitutes consent. Specifically, an affirmative-consent requirement declares that “only yes means yes” in a sexual encounter. The default understanding, in the absence of affirmative consent, is merely that “no means no.” Affirmative consent transforms silence, or any ambiguous response, into “no.” As such, affirmative-consent requirements are survivor-protective: they put a burden on people initiating a sexual encounter to seek consent, as opposed to allowing a lack of refusal to mean consent.

In 2014, California became the first state to mandate an affirmative consent standard in all schools receiving state financial assistance.¹⁷⁰ The legislation sparked a wave of debate; affirmative consent has proved a controversial topic beyond just the education setting.¹⁷¹ Connecticut and New York have since required affirmative consent in state-funded schools.¹⁷² Hawaii has created a task force to study the matter.¹⁷³ Perhaps because of the controversy surrounding affirmative consent, no other states have legislated in this area.

Table 1. Summary of states’ legislative initiatives.

Affirmative consent (survivor-protective)	Role of Law Enforcement (neutral)	Transcript Notations (survivor-protective)	Explicit Right to Representation (accused-protective)	School Policy Requirements (survivor-protective)
<p><i>Required:</i></p> <ul style="list-style-type: none"> • California • Connecticut • New York <p><i>Task force to study issue:</i></p> <ul style="list-style-type: none"> • Hawaii 	<p><i>Memoranda of understanding:</i></p> <ul style="list-style-type: none"> • Louisiana • Minnesota • Virginia • New York <p><i>Reporting threshold:</i></p> <ul style="list-style-type: none"> • New York • Virginia 	<ul style="list-style-type: none"> • Virginia • New York 	<p><i>For accuser and accused:</i></p> <ul style="list-style-type: none"> • North Dakota • Arkansas <p><i>For accused only:</i></p> <ul style="list-style-type: none"> • North Carolina 	<p><i>Policy required:</i></p> <ul style="list-style-type: none"> • California • Connecticut • Illinois • Minnesota • New York • Rhode Island • South Carolina • Virginia <p><i>Minimum policy requirement:</i></p>

170. See CAL. EDUC. CODE § 67386 (a)(1) (West 2016).

171. See, e.g., Amanda Marcotte, *Do Not Fear California’s New Affirmative Consent Law*, SLATE, Sept. 29, 2014, 1:52 PM, http://www.slate.com/blogs/xx_factor/2014/09/29/affirmative_consent_in_california_gov_jerry_brown_signs_the_yes_means_yes.html [https://perma.cc/K5KA-D8SF]; Robert Carle, *How Affirmative Consent Laws Criminalize Everyone*, FEDERALIST, <http://thefederalist.com/2015/03/30/how-affirmative-consent-laws-criminalize-everyone/> [https://perma.cc/UT3Q-YDLE] (last visited Oct. 19, 2017).

172. CONN. GEN. STAT. ANN. § 10a-55m(b)(1) (2016); N.Y. EDUC. L. § 6441 (McKinney 2015).

173. For the Task Force’s latest report, see AFFIRMATIVE CONSENT TASK FORCE, REPORT OF ACT 222 AFFIRMATIVE CONSENT TASK FORCE (2017), http://www.hawaii.edu/govrel/docs/reports/2017/act222-slh2015_2017_affirmative-consent_report.pdf [https://perma.cc/N99R-T2VM].

	<p><i>Accuser's Right to Decide to Report:</i></p> <ul style="list-style-type: none"> • Delaware • Minnesota • New York • Illinois 		<ul style="list-style-type: none"> • California • Illinois • Minnesota • New York • South Carolina <p><i>Review process:</i></p> <ul style="list-style-type: none"> • Connecticut
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ii. The Role of Law Enforcement

The role of law enforcement in campus sexual violence is also critical to survivors. Title IX advocates argue that campus sexual violence is a matter best addressed by schools, not law enforcement.¹⁷⁴ Schools can move more quickly than law enforcement and can thus provide survivors with immediate support.¹⁷⁵ Additionally, survivors often seek support that law enforcement cannot provide. For example, in one high-profile case, a survivor wanted permission to take food out of the dining hall, because her attacker often found her in the dining hall.¹⁷⁶ Other responses that schools can provide include dormitory assignment changes and class changes.¹⁷⁷ Requiring law enforcement to resolve the matter before allowing schools to act would be excessively protective of the accused: it would not only slow down the process considerably, but would ensure that accused students enjoy the full due process requirements of the criminal justice system. Student-survivors and their allies respond that students on campus are not entitled to so many protections, where their liberty is not at stake.¹⁷⁸ At any rate, no state has yet gone so far as to require schools to wait to respond until the conclusion of a criminal matter.

Reporting to law enforcement is an aspect of the role of law enforcement that many states have addressed. Requiring school officials to report campus

174. See, e.g., Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 963–64 (2016) (describing the debate).

175. Academic disciplinary investigations are not held to the slow pace of the courts. For further discussion on this topic, see *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> [https://perma.cc/2E9D-AT5S].

176. Patrick Yeagle, *Battling Rape on Campus*, ILL. TIMES, May 7, 2015, 12:01 AM, <http://illinoistimes.com/article-15444-battling-rape-on-campus.html> [https://perma.cc/X542-R28A]; Edith Brady-Lunny, *Madigan: More Needs to Be Done to Help Sexual Assault Victims*, PANTAGRAPH, Apr. 15, 2015, http://www.pantagraph.com/news/local/crime-and-courts/madigan-more-needs-to-be-done-to-help-sexual-assault/article_57a347a4-841a-58a7-9e75-916304787f9c.html [https://perma.cc/U2T7-RTR8].

177. See Nancy C. Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE J.L. & FEMINISM 281, 294 (2016).

178. See *id.* at 286.

sexual violence to law enforcement does not protect the accused in any direct way, but it can deter reporting.¹⁷⁹ Critically, mandatory reporting provisions have an outsized impact on survivors from marginalized groups, for example, undocumented students, or students of color, who are often skeptical of law enforcement.¹⁸⁰

Seven state legislatures have addressed the question of what role law enforcement should play in campus sexual violence: California, Louisiana, Minnesota, New York, and Virginia, and, to an extent, Delaware and Illinois. The most common requirement is memoranda of understanding between schools and law enforcement. California and Virginia have both mandated that schools report an assault to law enforcement if its “severity” rises above a set threshold.

Louisiana, Minnesota, and Virginia have neutral legislation requiring schools to enter into memoranda of understanding with local law enforcement under certain circumstances.¹⁸¹ California requires reporting to local law enforcement for some forms of sexual violence.¹⁸² Virginia requires reporting where reporting is necessary to protect the health or safety of the student or others. Further, where the alleged act would constitute a felony, Virginia requires a consultation with a prosecutor, in which identifiable information may or may not be disclosed.¹⁸³

Finally, in survivor-protective iterations of campus sexual assault legislation, Delaware, Illinois, Minnesota, and New York allow survivors to choose whether to report to law enforcement.¹⁸⁴

iii. Transcript Notations

Another legislative response is to require notations on the transcripts of students found responsible of campus sexual violence. Such requirements are survivor-protective because they add a deterrent to campus sexual violence and may hinder recidivism. When a student is found responsible of campus sexual violence, in many cases, that student can apply to another school and transfer

179. Open Letter from Kevin Kruger, President, NASPA: Student Affairs Adm'rs in Higher Educ., to Elected Leaders of the 50 United States, https://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf [<https://perma.cc/S35S-D47T>].

180. See, e.g., JON C. ROGOWSKI & CATHY J. COHEN, BLACK YOUTH PROJECT, BLACK MILLENNIALS IN AMERICA 34 (2014), available at <https://blackyouthproject.com/wp-content/uploads/2015/11/BYP-millennials-report-10-27-15-FINAL.pdf> [<https://perma.cc/KF9P-KTXR>] (reporting that only 44.2% of Black youth trust the police, whereas 59.6% of Latino youth and 71.5% of white youth do).

181. LA. STAT. ANN. § 17:3399.14(A) (2015); MINN. STAT. § 135A.15 Subd. 4. (2017); VA. CODE ANN. § 23.1-815(D) (2016).

182. CAL. EDUC. CODE §§ 67380(a) (West 2017).

183. VA. CODE ANN. § 23.1-806(F)–(G) (2016).

184. DEL. CODE ANN. tit. 14, § 9002A (2017); MINN. STAT. § 135A.15 Subd. 2(3); N.Y. EDUC. LAW § 6443 (McKinney 2015).

without the second school ever learning of the finding. Transcript notations allow schools to protect their students by refusing to admit the predatory student.

Only two states require transcript notations when students are found responsible for campus sexual assault, or withdraw from school while an investigation is pending. Virginia has set a statewide policy, whereas New York has created a minimum requirement and allowed schools to develop their own additional policies.

Virginia's law is specific to sexual violence.¹⁸⁵ It requires schools to "include a prominent notation" that a student was suspended or expelled for sexual violence.¹⁸⁶ Moreover, schools must annotate transcripts where students withdrew from school during an investigation for sexual violence.¹⁸⁷ The law also specifies a procedure for removing such notations.¹⁸⁸

New York's bill is broader, requiring notations for any offense that meets the Clery Act's reporting requirements, although it specifies that it includes offenses of sexual violence.¹⁸⁹ Similar to Virginia, New York requires transcript notations for suspension, expulsion, or withdrawal, but leaves some flexibility to schools to create a procedure for removing transcript notations.¹⁹⁰

iv. Rights of the Accused to Legal Representation

Some states require schools to allow accused students to have legal representation in campus proceedings. Some of these accused-protective laws go further than others in their requirements for campus proceedings.

Three states have legislated on the role of attorneys in campus sexual violence adjudications, all in accused-protective ways. North Dakota students and student groups now have a right to be represented by an attorney or "nonattorney advocate" in campus adjudications that could result in suspension or expulsion.¹⁹¹ Interestingly, the law exempts adjudications for academic misconduct¹⁹²; apparently, the North Dakota legislature trusts schools to provide fair process in plagiarism hearings, but not for campus sexual assault. The right extends through appeals and specifies that advisors can "fully participate" in any

185. VA. CODE ANN. § 23.1-900(B) (2016).

186. *Id.*

187. *Id.*

188. *Id.* § 23.1-900(C).

189. N.Y. EDUC. L. § 6444(6) (McKinney 2015).

190. *Id.*

191. N.D. CENT. CODE § 15-10-56(1)-(2) (2015).

192. *Id.* § 15-10-56(1).

proceeding, which includes cross-examining witnesses and making statements.¹⁹³

Arkansas's legislation is practically identical to North Dakota's, providing for a right to an attorney or "non-attorney advocate," who may "fully participate" in any disciplinary proceeding that could result in suspension or expulsion, except for academic "dishonesty" hearings.¹⁹⁴ Unlike North Dakota, Arkansas does not define "fully participate." The only other major difference is that where North Dakota addresses the rights of both students and student groups, Arkansas is directed only to individual students.¹⁹⁵

Finally, North Carolina has provided a right of representation for both students and student organizations.¹⁹⁶ North Carolina also has the exception for academic dishonesty hearings, but adds another for "Student Honor Court[s]."¹⁹⁷ North Carolina does not specify that this right extends to the accuser as well as the accused, but it also does not state that the accuser does *not* have the right to representation.

v. School Policy Requirements

Finally, some states set out requirements for their schools' policies. As a general matter, setting minima for school policies is neither survivor- nor accused-protective. But practically speaking, all of the policies—except for Georgia's, discussed in the next Section—are survivor-protective in their particulars.

Several states' legislation also addresses requirements for school sexual misconduct policies. California, Connecticut, Illinois, Minnesota, New York, Oregon, South Carolina, and Virginia require schools to create or publicize campus sexual violence policies.¹⁹⁸ Louisiana has delegated to its Board of Regents the task of creating a policy for state-funded schools.¹⁹⁹ Several states have minimum requirements; Connecticut has uniquely provided a procedure by which experts and students must review campus policies.²⁰⁰

193. *Id.* § 15-10-56(3)(b), 56(5).

194. ARK. CODE ANN. § 6-60-109 (2015).

195. *See id.*

196. N.C. GEN. STAT. § 116-40.11(a)–(b) (2015).

197. *Id.* § 116-40.11(a)(1).

198. CAL. EDUC. CODE § 67386(a)(13)(d) (West 2016); CONN. GEN. STAT. § 10a-55m(a)(9)(b) (2016); 110 ILL. COMP. STAT. § 155/10 (2016); MINN. STAT. § 135A.15 Subd. 1(b) (2017); N.Y. EDUC. L. § 6440(1)(a), (4) (McKinney 2015); OR. REV. STAT. § 350.255 (2016); S.C. CODE ANN. § 59-105-40(A), (D) (2016); VA. CODE ANN. § 23.1-808 (2016).

199. LA STAT. ANN. § 17:3399.15 (2015).

200. CONN. GEN. STAT. § 10a-55n (2014).

California, Illinois, Minnesota, New York, and South Carolina have minimum requirements for policies.²⁰¹ These requirements generally involve the form or timing of adjudication and often enumerate victims' rights. Minnesota, for example, has a provision dedicated entirely to victims' rights, including the right to notice of the adjudication's outcome, and to protection "from unwanted contact with the alleged assailant."²⁰² California's policy, by contrast, focuses on adjudication, mandating preponderance of the evidence, and specifying that certain excuses are not valid.²⁰³ Illinois specifies notice requirements and goes into some detail about the minimum standard of consent, having declined to require affirmative consent.²⁰⁴

Connecticut has a unique review procedure for its schools' policies. Its act requires schools to form "campus resource team[s]," which must include, for example, a student, a member of the school's women's center, a school counselor, and the school's Title IX coordinator.²⁰⁵ These campus resource teams must be trained on both federal law and on how to "communicat[e] sensitively and compassionately with victims of [sexual] assault."²⁰⁶ Following such training, the campus resource teams are responsible for reviewing their schools' policies and recommending changes.²⁰⁷ While Connecticut does not require, for example, a member of the school's disability office to be on these teams, it does require that schools hear from more diverse actors than school administrators alone.

2. Comprehensive State Legislation

Only Connecticut, Illinois, Louisiana, and New York have gone further and enacted comprehensive schemes, all of which are survivor-protective. Connecticut, Illinois, and New York have purely legislative schemes, but Louisiana combined legislative and regulatory action. Georgia's scheme is entirely regulatory and will be discussed in the next Section. These schemes address definitions of consent, rights of survivors, reporting mechanisms, adjudication procedures, and requirements for school policies.²⁰⁸ Some set a

201. CAL. EDUC. CODE § 67386; 110 ILL. COMP. STAT. § 155/10; MINN. STAT. § 135A.15 Subd. 2; S.C. CODE ANN. § 59-105-40; N.Y. EDUC. LAW § 6440.

202. MINN. STAT. § 135A.15 Subd. 2.

203. CAL. EDUC. CODE § 67386(a).

204. ILL. COMP. STAT. § 155/10.

205. CONN. GEN. STAT. § 10a-55n(a) (2014).

206. *Id.* § 10a-55n(c).

207. *Id.* § 10a-55n(d).

208. *See, e.g.*, LA. STAT. ANN. § 17:3399.15 (2015) (laying out requirements for the Board of Regents relating to reporting and adjudication); N.Y. EDUC. L. § 6441 (McKinney 2015) (addressing

statewide policy; others, only a floor upon which schools can build.²⁰⁹ This Section focuses on Illinois's legislation, which is among the most comprehensive.

Drafted by the Office of Attorney General Lisa Madigan, Illinois's campus sexual violence law is part of her campaign to combat sexual violence in Illinois.²¹⁰ Critically, Madigan sought input from the broader community: the legislation was influenced by three summits.²¹¹ Held in different areas of the state, the summits invited campus officials, police, survivors, and student groups to learn about the legislation.²¹² OCR representatives were also present.²¹³ Survivors' voices were emphasized throughout the drafting process: a survivor was the keynote speaker at each summit.²¹⁴ This is not to say that the process was perfect. There is no evidence that the summits focused on marginalized communities at any point, and the legislation does not specifically address the particular needs of these communities. However, Illinois may be the state that has made the greatest effort to respond to the needs and preferences articulated by survivors and other key actors in its campus sexual violence legislation.

The resulting legislation sets a floor for Illinois schools.²¹⁵ Illinois schools must develop their own policies; if they comply with required minima, states have the freedom to set their own definition of consent, their own reporting and adjudication procedures, and their own sanctions.²¹⁶ State minima are relatively strict. For example, although Illinois does not require affirmative consent, its minimum definition of consent includes provisions that consent can be withdrawn at any time, and that a person's clothing does not constitute

definitions of consent); ILL. COMP. STAT. § 155/10 (2016) (addressing definitions of consent and requirements for school policies).

209. Louisiana created minimum requirements in its law but a system-wide policy in its BOR Policy. *See* LA. BD. OF REGENTS, UNIFORM POLICY ON SEXUAL MISCONDUCT (2015), available at <http://www.regents.la.gov/assets/docs/PRAA/BORSexualMisconductPolicyAct172FINALAugust24.pdf> [<https://perma.cc/76Z4-Z7H5>]. New York and Connecticut created minimum requirements for school-specific policies. N.Y. EDUC. L. § 6440 (McKinney 2015); CONN. GEN. STAT. § 10a-55m (2016).
210. Press Release, Ill. Attorney Gen. Lisa Madigan, Madigan Announces Department of Justice Grant to Improve Response to Sexual Assault Crimes in Illinois (Oct. 5, 2016), http://www.ag.state.il.us/pressroom/2016_10/20161005.html [<https://perma.cc/PG29-XGPP>].
211. Press Release, Ill. Attorney Gen. Lisa Madigan, Madigan Hosts Summit on Campus Sexual Violence, Announces Bill to Strengthen Schools' Response to Incidents (Mar. 23, 2015), http://www.illinoisattorneygeneral.gov/pressroom/2015_03/20150323.html [<https://perma.cc/T5C4-FVSY>].
212. *Id.*
213. *See Madigan Brings Sexual Assault Summit to SIUE Campus*, S. ILL. UNIV. EDWARDSVILLE, Apr. 27, 2015, 4:07 PM, <https://www.siu.edu/news/2015/04/MadiganBringsSexualAssaultSummittoSIUECampus.shtml> [<https://perma.cc/HTD6-55TD>].
214. *See id.*
215. *See* 110 ILL. COMP. STAT. §§ 155/10–30 (2015).
216. *See id.* § 155/10.

consent.²¹⁷ Illinois is more survivor-protective than many states, giving survivors the right to decide whether to report.²¹⁸ While there is no evidence that this provision was driven by concerns for students from marginalized communities who may be especially deterred from reporting by mandatory reporting provisions, the resulting legislation accounts for these students' needs in this respect, at least. Another provision requires that all schools have confidential advisors, who must undergo continuing sexual violence response training.²¹⁹

Illinois's legislation not only addresses the survivor's side of the equation, but also looks to adjudication, balancing the rights of the accuser and the accused. Schools are left to flesh out the details of their adjudication procedures, but the state requires certain features, such as a preponderance of the evidence standard.²²⁰ Other provisions include a ban on allowing parties to cross examine each other directly.²²¹

Nothing in Illinois's legislation conflicts with Title IX or OCR's guidance, allowing schools to comply with both. In fact, Illinois's legislation is in several ways more protective than Title IX, because it maps Obama-era OCR guidance. Thus, Illinois schools will effectively continue to operate under the Obama OCR's policy.²²² The same is true for other states' survivor-protective schemes: in 2018, Connecticut, Illinois, Louisiana, and New York will all continue to protect survivors on their campuses, regardless of policy change at the federal level. Such is not the case with Georgia, the subject of the next Section.

B. State Regulation: Georgia

Alone among the states discussed in this Part, Georgia has taken purely administrative action. The Georgia Board of Regents ("BOR") issued a sexual misconduct policy, preempting all twenty-nine public higher educational institutions' own policies.²²³ Unlike in Louisiana, no legislative acts preceded the BOR's policy or set requirements for it. In fact, the new policy was developed so quickly that, contrary to standard practice, opponents were not given time to

217. *Id.* § 155/10(1).

218. *Id.* § 155/15(a)(1).

219. *Id.* § 155/20.

220. *Id.* § 155/25(b)(5).

221. *Id.* § 155/25(b)(10).

222. See Press Release, Ill. Attorney Gen. Lisa Madigan, Madigan Condemns Action by U.S. Department of Education Secretary DeVos Scrapping Guidance on Campus Sexual Assault (Sept. 7, 2017), http://www.illinoisattorneygeneral.gov/pressroom/2017_09/20170907.html [https://perma.cc/WR24-F85Y].

223. Georgia BOR Policy, *supra* note 165, § 4.1.7.

speak at the BOR full committee meeting in which the policy passed.²²⁴ The resulting document is not only accused-protective, but it also contains at least one provision that clearly puts Georgia schools at risk of being forced to choose between violating state law and violating federal law. Events surrounding the passage of the policy show that the BOR was under pressure to promulgate an accused-protective policy, because the state congressman in charge of the subcommittee that controls the BOR's—and all state universities'—funding wanted to ensure that universities stopped expelling students for rape. This Section details the events that culminated in the BOR's Policy, and concludes that states must use transparent procedures and seek stakeholder input in order to achieve state legislation that does not force schools to risk violating federal law.

1. Background of the Georgia BOR Policy

Before the state legislature took up the topic of campus sexual violence in 2015 and 2016, the Georgia Institute of Technology (“Georgia Tech”) was taking campus sexual violence very seriously. Following a scandal involving a Georgia Tech fraternity and rape,²²⁵ the university became perhaps the most aggressive school in responding to campus sexual violence.²²⁶ With the help of student activists, Georgia Tech created a sexual misconduct policy that required expulsion to be the “First Considered Sanction” upon a finding of responsibility for non-consensual sexual intercourse.²²⁷ The school also sanctioned racial discrimination, issuing a suspension in abeyance for an entire fraternity for racial

224. Interview with Katherine Napier, student activist, Ga. Inst. of Tech., in Atlanta, Ga. (Jan. 9, 2015) (on file with author).

225. A fraternity first got into trouble after an email describing female students as “rapebait” was leaked. Two women then sued, alleging they were raped at the fraternity. See Amanda Hess, *Two Lawsuits Allege Rape at the “Rapebait” Frat House*, SLATE, Oct. 31, 2014, 3:32 PM, http://www.slate.com/blogs/xx_factor/2014/10/31/_rapebait_fraternity_two_lawsuits_allege_rape_at_the_georgia_tech_phi_kappa.html [https://perma.cc/H4GF-G4P5]. The following semester, the Georgia Tech student newspaper published minutes from fraternity meetings and quoted a letter from the Office of Student Integrity describing a “deep-rooted culture within the fraternity that is obscene, indecent and endangers women.” *OSI Disbands Phi Kappa Tau for Continual Violations*, TECHNIQUE, Apr. 4, 2014, <http://nique.net/news/2014/04/04/osi-disbands-phi-kappa-tau-for-continual-violations/> [https://perma.cc/329Y-KVR4]. The fraternity was disbanded for three years. *Id.*

226. See, e.g., Janel Davis & Shannon McCaffrey, *Wrongly Accused of Rape? Students Question Their Expulsions from Tech*, ATLANTA J.-CONST., Jan. 16, 2016, <http://www.myajc.com/news/local/wrongly-accused-rape-students-question-their-expulsions-from-tech/BBvnT55EBWtaCHbhunSxON/> [https://perma.cc/7L58-2ZUQ].

227. GA. INST. OF TECH., STUDENT MISCONDUCT POLICY (2012) (on file with author); see also Davis & McCaffrey, *supra* note 226. The First Considered Sanction was less extreme for other forms of sexual misconduct. See GA. INST. OF TECH., STUDENT MISCONDUCT POLICY, *supra*.

harassment committed by three of its members.²²⁸ While racial discrimination is not governed by Title IX, the school adjudicated the incident through similar procedures to its sexual assault cases, and the racial harassment case became entwined in the same political scandal that led to the BOR Policy.

In 2015, Georgia Tech expelled two students it found responsible of rape.²²⁹ Not only are multiple such sanctions for rape in one year rare in and of themselves, but one expulsion was for rape of a gay student.²³⁰ Although gay students are victimized at much higher rates than straight students, gay students report to schools more rarely.²³¹ The student expelled for this rape claimed he was being discriminated against as a gay man,²³² but the outcome of the case at the university level actually suggests that Georgia Tech was responding to campus sexual assaults without discriminating on the basis of sexual orientation.

Both expelled students sued. Because Georgia Tech is public, the Georgia Attorney General took over litigation; he quickly settled.²³³ However, in neither case were the findings of responsibility overturned, meaning that both students remain as having been found responsible of rape. The suspended fraternity also sought review, claiming that Georgia Tech had violated their due process rights.²³⁴ The combination of these three cases attracted the attention of state Representative Earl Ehrhart, chair of the House Appropriations Subcommittee on Higher Education.²³⁵ Reviewing the fraternity suspension, a former state supreme court chief justice ultimately determined the fraternity had received due

228. Davis & McCaffrey, *supra* note 226. The suspension in abeyance “effectively limit[ed] the fraternity to academic activities and requir[ed] members to undergo training as a qualification of lifting the suspension.” *Id.*

229. Compl. at 6, *Doe v. Bd. of Regents of the Univ. Sys. of Ga.*, 1:15-cv-04354-RWS (Dec. 15, 2015); Order at 8, *Doe*, 1:15-cv-04079-SCJ (Dec. 16, 2015). In total, Georgia Tech punished seven students for rape in or around that same year, but only two sued. Email from Anna Harrison, student activist, Georgia Institute of Technology, to author (Jan. 15, 2017) (on file with author).

230. Compl. at 3, *Doe*, 1:15-cv-04354-RWS (Dec. 15, 2015).

231. For a discussion of what drives lower reporting rates, which in turn creates lower chances of sanction, see Tyler Kingkade, *LGBTQIA Students Face More Sexual Harassment and Assault, and More Trouble Reporting It*, HUFFPOST, July 14, 2015, 8:05 AM, http://www.huffingtonpost.com/entry/LGBTQIA-students-sexual-assault_us_55a332dfe4b0ecec71bc5e6a [https://perma.cc/68T5-T6B4].

232. Compl. at 3, *Doe*, 1:15-cv-04354-RWS (Dec. 15, 2015).

233. See Settlement Agreement, *Doe v. Bd. of Regents of the Univ. Sys. of Ga.*, 1:15-cv-04079-SCJ (July 13, 2016); Janel Davis, *Georgia Tech Settles Two Lawsuits Involving Sexual Assaults*, ATLANTA J.-CONST., July 25, 2016, <http://www.ajc.com/news/local-education/georgia-tech-settles-two-lawsuits-involving-sexual-assaults/XwVWdp6wATImgaCG3kfrRP/> [https://perma.cc/QJ47-LWCW].

234. Janel Davis & Shannon McCaffrey, *Lawmakers Grill Tech Leaders on Student Hearings, Punishment*, ATLANTA J.-CONST., Jan. 25, 2016, <http://www.myajc.com/news/local-education/lawmakers-grill-tech-leaders-student-hearings-punishment/Tmja4LmE1JFWpbMHY2nhMJ/> [https://perma.cc/4ZAM-YTN9].

235. See *id.*; *House Appropriations*, GEORGIA HOUSE OF REPRESENTATIVES, <http://www.house.ga.gov/Committees/en-US/Committee.aspx?Committee=88&Session=25> [https://perma.cc/4YED-BYH3] (last visited Jan. 7, 2018).

process, but recommending ending its suspension.²³⁶ Ehrhart, however, was unwilling to let the issue go.

Ehrhart questioned Georgia Tech President Bud Peterson about campus due process, arguing Georgia Tech had ruined the rapists' lives.²³⁷ In this hearing—the key legislative event that prompted the new policy—the focus was entirely on the accused. The only woman who gave live testimony was the mother of a student suspended for rape.²³⁸ All of the testimony and questions were about due process for accused students.²³⁹ Legislators and witnesses made frequent references to “ruin[ing]” young men’s “lives,” but no one acknowledged the consequences of campus sexual assault to survivors.²⁴⁰

Ehrhart attempted to force Peterson to resign and stripped Georgia Tech of forty-seven million dollars of funding intended to renovate the Georgia Tech library.²⁴¹ Peterson defended Georgia Tech’s adjudication process and its decision to expel rapists; he refused to resign, but Georgia Tech withdrew its request for library funding.²⁴²

Around this time, the BOR announced that it would pass a campus sexual misconduct policy at its next meeting.²⁴³ The policy was not available to the public until after the deadline to request to speak at the meeting had passed.²⁴⁴ One student activist was able to obtain a copy of the policy through Georgia’s

236. Janel Davis, *Review: Tech Frat Got Due Process in Race Case, But Suspension Lifted*, ATLANTA J.-CONST., Feb. 24, 2016, <http://www.ajc.com/news/local-education/review-tech-frat-got-due-process-race-case-but-suspension-lifted/TYz9DfMrX0cBmdSnBn5FhP/> [https://perma.cc/22HT-PZQS].

237. See Davis & McCaffrey, *Lawmakers Grill Tech Leaders*, *supra* note 234; cf. Greg Bluestein & Jim Galloway, *Powerful State Lawmaker Calls for Georgia Tech President’s Ouster*, ATLANTA J.-CONST. (Mar. 7, 2016), http://politics.blog.ajc.com/2016/03/07/powerful-state-lawmaker-calls-for-georgia-tech-presidents-ouster/?icmp=AJC_internallink_003012016_digesttease_0301digest08 [https://perma.cc/X8KZ-V3MP] (quoting Ehrhart as saying “If I have to talk to another brokenhearted mother about their fine son where any allegation is a conviction and they toss these kids out of school after three and a half years, sometimes just before graduation, it’s just tragic.”).

238. Ga. House of Representatives, *Appropriations: Higher Education*, LiveStream at 29:00 (Jan. 25, 2016), http://original.livestream.com/gahln403/video?clipId=pla_d69f82de-76c0-42d2-98a6-82d9fa8b02aa [https://perma.cc/X8DA-TFSY].

239. *Id.*

240. *Id.* Legislators were not sparing with the phrase “ruining their lives,” using it to refer not only to expulsion but also to suspension in abeyance (in which students can participate in class only and are barred from social activities) and even to the social suspension of a fraternity. *Id.* at 00:55:00, 01:11:20, 01:12:28, 01:13:07.

241. Bluestein & Galloway, *supra* note 237.

242. *Tech Withdraws Library Budget Request*, GA. TECH LIBRARY (Feb. 4, 2016), <http://librarynext.gatech.edu/httprenewallibrarygatecheducontentlatest-news-updates/tech-withdraws-library-budget-request> [https://perma.cc/428C-6GYZ]. It is possible that the request will be granted in the future. See Janel Davis, *State Lawmaker, Georgia Tech President Back on Good Terms*, ATLANTA J.-CONST. (Mar. 9, 2016), <http://www.ajc.com/news/local-education/state-lawmaker-georgia-tech-president-back-good-terms/tEoPSRifb9JK0o2waoIomO/> [https://perma.cc/58DL-X3AQ].

243. Interview with Katherine Napier, student activist, Ga. Inst. of Tech., in Atlanta, Ga. (Jan. 9, 2015) (on file with author).

244. *Id.*

open records law and speak against the policy in the subcommittee meeting, which was followed by the full BOR meeting.²⁴⁵ Opponents of the policy attended the full meeting as well, but were told there was no time for them to speak.²⁴⁶ However, there was time for the BOR to show a video about leap years, a topic irrelevant to a meeting about sexual violence that took place in March.²⁴⁷ The policy passed unanimously, with no discussion of potential conflicts with federal law.²⁴⁸

With the exception of the student speaking at a subcommittee meeting, there was no chance for stakeholders to provide input on the new policy. A Campus Safety and Security Committee had previously issued a report that might have informed the policy, but comparing the reports to the new policy shows a drastic change in topic.²⁴⁹ The committee report never even mentions a standard of evidence, and repeatedly insists on Title IX compliance.²⁵⁰ And it is important to note that even were the new policy fully in compliance with Title IX, the manner in which it passed—in which Peterson was almost forced to resign and Georgia Tech lost forty-seven million dollars of funding—will certainly deter Georgia schools from expelling students for campus sexual violence.

In the summer of 2017, the Georgia BOR decided to review its policy.²⁵¹ Despite input from Georgia student-survivors and their allies, however, the BOR passed a policy with very few differences from the previous version.²⁵² At the BOR meeting where it passed, one of the members of the Board of Regents asked whether it would bring the system into compliance with Title IX.²⁵³ The answer

245. *Id.*

246. *Id.*

247. *Id.*

248. Interview with Carol Napier, meeting attendee, in Atlanta, Ga. (Jan. 15, 2017) (on file with author).

249. The report of the Campus Safety and Security Committee focused on prevention of sexual assault, with no hint of the most contentious aspects of the new policy. *Compare* UNIV. SYS. OF GA. CAMPUS SAFETY AND SEC. COMM., REPORT TO C. HENRY M. HUCKABY 7 (2015) (recommending ensuring Title IX compliance and preventative measures) with Georgia BOR Policy, *supra* note 165 (focusing on adjudication and risking Title IX violations).

250. REPORT TO C. HENRY M. HUCKABY, *supra* note 249, at 7, 14, 16.

251. Email from Matthew Wolfsen, Chair, Ga. Inst. of Tech. Sexual Violence Advisory Bd., to author (July 24, 2017) (on file with author).

252. Some substantive changes were made, including adding language that consent can be withdrawn at any time, deleting a list of examples of protective interim measures, and modifying some of the details of investigation and hearing requirements. *Compare* COMM. ON ORG. & LAW, BD. OF REGENTS OF THE UNIV. SYS. OF GA., *Addition to the Policy Manual: 4.1.7 Sexual Misconduct Policy* (2016) (on file with author) with Georgia BOR Policy, *supra* note 165.

253. Students Against House Bill 51, At the Board of Regents Meeting Where the Proposed University System of Georgia Sexual Misconduct Policy Revisions (4.1.7 and 4.6.5) Will Be Voted on and Likely Adopted at 09:55, FACEBOOK LIVE (Aug. 8, 2017), <https://www.facebook.com/studentsagainsthb51/videos/1804949066198659/> [<https://perma.cc/H2Y2-2UQK>].

was yes,²⁵⁴ but as this Article will conclude, the policy forces schools to choose between violating state law and risking violating Title IX.

2. *The Georgia BOR Policy*

For the most part, the BOR Policy does not risk running afoul of Title IX—either the regulations or OCR’s interpretation thereof. However, two provisions in particular have raised substantial criticisms and one provision is in flagrant conflict with OCR’s guidance. This last provision forces Georgia schools into an impossible position: expel a rapist with only a preponderance of the evidence and violate state law, use the higher state standard and violate OCR’s interpretation of Title IX, or not expel an adjudicated rapist and risk violating Title IX itself.

The majority of the BOR Policy focuses on adjudication procedure, but it also addresses definitions of consent, various forms of sexual misconduct, reporting, and interim measures.²⁵⁵ It has two features that are unique among all state legislation surveyed in this Article. First, it has a heavy emphasis on the need for prompt reporting, repeating three times in two pages that victims should report promptly.²⁵⁶ Second, it contains a provision stating that false complaints may be punished with suspension or expulsion.²⁵⁷ While neither of these provisions are facially in violation of Title IX, they have provoked criticism. It is common for survivors not to report quickly, usually because it takes time to process trauma and because reporting itself can be daunting.²⁵⁸ In addition, the false-reporting provision not only deters reporting generally, but also allows alleged rapists to accuse survivors of false reporting.

Finally, one provision has attracted criticism in part because it flatly contradicted the then-existing OCR guidance. The BOR Policy requires institutions to use the preponderance of the evidence standard for adjudication—except when determining whether the sanction of suspension or expulsion should apply.²⁵⁹ Even after a finding of responsibility on a preponderance of the evidence, “substantial evidence” is required to expel a student.²⁶⁰ Until the

254. *Id.*

255. *See* Georgia BOR Policy, *supra* note 165, §§ 4.1.7.1 (definitions); 4.1.7.2 (reporting); 4.1.7.3(B) (interim measures).

256. *Id.* § 4.1.7.2(A).

257. *Id.* § 4.1.7.2(E).

258. *See* Nancy C. Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 213 (2011).

259. Georgia BOR Policy, *supra* note 165, § 4.6.5.2.

260. *Id.*

Department of Education revoked the Obama-era guidance, Georgia institutions were forced to risk their federal funding in order to adhere to the BOR Policy.

Adhering to the BOR Policy during the Obama era would not have automatically put the school in violation of Title IX, because OCR's preponderance requirement was not a binding regulation. However, refusing to apply the preponderance standard would have risked a federal investigation. And in any subsequent lawsuit over the funding withdrawal, a reviewing court would have given *Skidmore* deference to OCR's position on the preponderance standard.²⁶¹ The BOR Policy thus substantially deterred schools from expelling rapists: expelling a rapist in conformance with the state policy would require using a standard of evidence that would have invited OCR attention. Yet not expelling a student-rapist could itself be a Title IX violation, because allowing the presence of an adjudicated rapist on campus could constitute deliberate indifference to sex discrimination under Title IX.²⁶²

The 2017 Q&A changed OCR's position on the required evidentiary standard.²⁶³ It is possible that the Georgia policy was a factor in OCR's decisionmaking; Ehrhart certainly met with DeVos in the months leading up to the new guidance's release.²⁶⁴ But for a year, the BOR put Georgia schools in an impossible position. And the fact that the new OCR guidance removes the threat of federal funding withdrawal does not save Georgia schools entirely. The unfortunate fact remains that a school could find a student responsible for a sexual assault by a preponderance of the evidence, but lack substantial evidence to expel the student. The school would then find itself in the nonsensical situation of hosting an adjudicated rapist on campus. A survivor whose rapist was found responsible, yet allowed to remain on campus, would have a strong case to present in a federal Title IX lawsuit.

Naturally, schools would want to avoid adjudicated rapists remaining students, and would further want to avoid Ehrhart's attention. A more pessimistic observer could imagine, then, that schools might relax their efforts to hold sexual predators accountable, thus avoiding having to acknowledge the predators in their student bodies. Critically, OCR has announced it will no longer publicize

261. See *supra* notes 159–161 and accompanying text.

262. Schools are not required to expel rapists, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648 (1999), but their failure to do so can and often does create a hostile environment, *see, e.g., Doe v. East Haven Bd. of Educ.*, 200 Fed. Appx. 46, 48 (2d Cir. 2006); *Wills v. Brown Univ.*, 184 F.3d 20, 37 (5th Cir. 1999) (“[T]he continuing presence of the harasser may so alter the terms and conditions of education that the victim . . . may be able to establish a claim for sex discrimination.”).

263. See 2017 Q&A, *supra* note 17, at 5.

264. See Kimberly Hefling, *DeVos Meeting with Ga. Legislator Worries Advocates*, POLITICO, Apr. 12, 2017, 10:00 AM, <http://www.politico.com/tipsheets/morning-education/2017/04/devos-meeting-with-ga-legislator-worries-advocates-219731> [<https://perma.cc/B7W7-SPSZ>].

the list of schools under investigation, meaning schools will be under less pressure to hold sexual predators accountable.²⁶⁵

In Georgia, at least, enforcing students' rights under Title IX will fall to students themselves and administrators willing to risk Ehrhart calling for their resignation.²⁶⁶ Any student bringing an individual lawsuit against the Georgia BOR Policy could take some encouragement from administrative law. While Title IX and its regulations likely preempt the Georgia BOR Policy, OCR's guidance cannot itself preempt Title IX: OCR's interpretation of Title IX may prevail, but it would not get *Chevron* deference. At best, the 2017 Q&A would be entitled to *Skidmore* deference—but it bears repeating that a factor in whether guidance deserves *Skidmore* deference is that guidance's "consistency with earlier and later pronouncements."²⁶⁷ As such, the 2017 Q&A is on slightly shakier ground than the Obama-era documents.

All the same, an individual hostile-environment lawsuit would be an uphill battle. Any student survivor would have to face not only the Georgia state government, but also OCR's opposition. On the other hand, student survivor organizations have years of experience with fighting media battles, and the public-relations nightmare that populations of adjudicated rapists on Georgia campuses would trigger is not difficult to imagine.

It is not clear whether the BOR was aware of these problems when the policy passed. If the BOR had taken the time to allow input from the community, the conflicts would have become apparent. Moreover, the community would have been able to point out other policy flaws, such as its complete lack of provisions for groups who are disproportionately impacted by campus sexual assault. Some Georgia schools have vastly different student populations, and therefore different student needs, than other schools.²⁶⁸ The policy leaves no way for schools to adapt it to address their students' needs.

In sum, the BOR Policy puts Georgia schools into a difficult situation in the event that they find a student responsible of sexual violence by a preponderance of the evidence. If anything, the policy—and especially the events surrounding

265. Dana Bolger & Alexandra Brodsky, *Trump's Administration Wants to Hide Colleges That Have Problems with Sexual Assault*, WASH. POST, June 30, 2017, <https://www.washingtonpost.com/news/posteverything/wp/2017/06/30/trumps-administration-wants-to-hide-colleges-that-have-problems-with-sexual-assault/> [https://perma.cc/L4HL-LH3K].

266. Administrators will no doubt be deterred by the example of Georgia Tech President Bud Peterson, who was almost forced to resign when Ehrhart summoned Georgia Tech administrators to testify before his committee. Greg Bluestein & Jim Galloway, *Powerful State Lawmaker Calls for Georgia Tech President's Ouster*, ATLANTA J.-CONST., Mar. 7, 2016, http://politics.blog.ajc.com/2016/03/07/powerful-state-lawmaker-calls-for-georgia-tech-presidents-ouster/?icmp=AJC_internallink_003012016_digesttease_0301digest08 [https://perma.cc/6LCF-JRMZ].

267. *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) (internal citations omitted).

268. Georgia hosts diverse schools, including Historically Black Colleges and Universities ("HBCUs"), men's schools, and women's schools. See *Georgia Colleges*, COLLEGES SIMPLY (2015), <http://www.collegesimply.com/colleges/georgia/> [https://perma.cc/XL9J-X6ZJ].

its initial passage—incentivize schools to reduce their enforcement efforts. The policy also contains several other provisions of questionable wisdom and fails to address the needs of marginalized communities. Had the state sought stakeholder input, for example by holding summits like Illinois did, Georgia policymakers would at least have been aware of the problems.

The BOR Policy may not be the end of Georgia’s resistance to Title IX. Just days before President Trump’s inauguration, Ehrhart introduced a bill that would bar universities from investigating or punishing any potential felony unless and until it is adjudicated in criminal court.²⁶⁹ According to Ehrhart, the bill would not be preempted by Title IX because he has had “preliminary discussions” with the Trump Administration, and does not think the DCL will “hold a heck of a lot of water.”²⁷⁰ In hindsight, this announcement looks like Ehrhart might have been told that the DCL would be revoked. Regardless of the DCL’s status, however, Ehrhart did not speak to how Title IX’s regulations—requiring a “prompt and equitable resolution”—will still be law regardless of the Trump OCR’s policy.²⁷¹ Already, hundreds of Georgia students have organized to oppose the bill,²⁷² which passed in the Georgia House, and has now twice failed in the Senate after concerted opposition by student activists.²⁷³ It was not an easy fight: activist-survivors faced extreme hostility from lawmakers, Ehrhart publicly said things such as “go trigger somewhere else,”²⁷⁴ and another legislator brought one survivor’s attacker to the gallery while she was the invited guest of an opposing legislator.²⁷⁵

269. See Ga. Legis. Reg. Sess. 2016-2017, H.B. 51 (2017), available at <http://www.legis.ga.gov/Legislation/20172018/162774.pdf>.

270. Tyler Kingkade, *Georgia Lawmaker Wants to Stop Colleges from Investigating Rapes*, BUZZFEED, Jan. 13, 2017, <https://www.buzzfeed.com/tylerkingkade/georgia-bill-would-stop-colleges-from-carrying-out-rape-inve> [<https://perma.cc/R5LP-9K33>].

271. *Id.*

272. See Maureen Downey, *Student Survivor of Sexual Assault: Legislators Dismiss and Demean Us. But We Will Be Heard*, ATLANTA J.-CONST., Feb. 27, 2017, <http://getschooled.blog.myajc.com/2017/02/27/student-survivor-of-sexual-assault-legislators-dismiss-and-demean-us-but-we-will-be-heard/> [<https://perma.cc/6DEZ-DQAE>].

273. Nate Harris, *BREAKING: Campus Felony Bill Stalls on Final Georgia Legislative Day*, RED & BLACK, Mar. 31, 2017, https://www.redandblack.com/athensnews/breaking-campus-felony-bill-stalls-on-final-georgia-legislative-day/article_cf6e7346-15cd-11e7-8613-cb0b9f8637a3.html [<https://perma.cc/95UL-CCPB>].

274. For a video of the comment, and of a man testifying that being accused of rape is just as traumatizing as being raped, see Better Georgia, *Ga. Rep. Ehrhart Tells Rape Survivors to “Trigger Somewhere Else”* at 00:53, YOUTUBE (Mar. 14, 2017), <https://www.youtube.com/watch?v=u4sH77HWYuw>. See also Lindsay Gibbs & Casey Quinlan, *The Trump Administration Is Systematically Dismantling Title IX*, THINKPROGRESS, June 23, 2017, 6:08 PM, <https://thinkprogress.org/how-the-trump-administration-is-systematically-attacking-title-ix-21bde2f73fc6/> [<https://perma.cc/7RLS-RPVH>].

275. See Better Georgia, *Assault Survivor Fighting Campus Rape Cover-Up Bill Describes Shocking Experience at GA Capitol* at 1:30, FACEBOOK LIVE (Mar. 30, 2017), <https://www.facebook.com/bettergeorgia/videos/1274216989344044/>.

The Georgia BOR must rescind the policy before it harms students and presents costs to the state in litigation fees and damages. If necessary, the Georgia legislature should step in and legislatively repeal the policy. Georgia legislators must also ensure that Ehrhart's new bill fails if he proposes it again.

Most states that have turned their attention to campus sexual assault have only acted on a few specific issues, such as the role of law enforcement or attorneys in the campus adjudication system. However, a handful of states have created comprehensive schemes for their universities. With the exception of Georgia, these states have all required their schools to comply with Title IX and to be more protective of survivors. Georgia, however, was motivated entirely by the view that one university had been too strict with students adjudicated responsible for sexual assault. Without so much as mentioning survivors, one state congressman pressured the state BOR to pass a system-wide policy. The resulting policy was enacted so quickly that only one student was ever able to formally speak against it. Unsurprisingly, the policy fails to account for federal law or for students of marginalized groups.

No state action is perfect, but several states have made progress. Illinois, for example, hosted summits during the drafting of its law, enabling stakeholders to have input. Connecticut has built a stakeholder-review process into the law. With the various states' mistakes and successes in mind, the next Part creates a roadmap for states to follow when legislating on campus sexual violence.

IV. A ROADMAP FOR STATE ACTION

Having surveyed existing state legislation and regulation for its strengths and weaknesses, this Article synthesizes several states' forays into campus sexual violence and makes a series of recommendations for other states. By creating a roadmap for state legislation on campus sexual violence, this Part hopes to encourage other states to protect their students from campus sexual violence—but to do so transparently and with an eye to the needs of marginalized communities.

The needs of students from marginalized communities must be a part of policymaking from the start. All too often, policies address the “neutral” student—with “neutral” here typically referring to white, cisgender, heterosexual, able-bodied²⁷⁶ students. Students who do not fit into this “neutral” category experience campus sexual violence in ways that “neutral” policies cannot address. The example of an undocumented student survivor is instructive. Contact with law enforcement could lead to deportation proceedings against undocumented students; undocumented survivors might therefore rationally

276. This list is not intended to be exclusive.

avoid any reporting that could lead to contact with police.²⁷⁷ Thus, a campus sexual violence policy that mandates reporting to law enforcement would impact undocumented students in ways that other students would likely not even notice. Undocumented students are not the only ones who rationally fear contact with law enforcement. As Venkayla Haynes, a survivor inspired by her experience to become a student activist, put it,

I was scared to go to law enforcement because the justice system was not made for individuals of marginalized groups, especially black people, and I am a black woman. I can't expect a system that was not created for me to protect my black body.²⁷⁸

Legislators who are not people of color must listen to students like Haynes, or the legislators may simply never understand the stakes for marginalized students.

Another example is that of LGBTQIA students, or even non-LGBTQIA students targeted by a member of the same sex. A policy that refers to victims with female pronouns and attackers with male pronouns could deter a male survivor, or anyone attacked by a woman, from reporting. Failing to make a policy gender-inclusive would thus aggravate the already-low reporting rates for male survivors, who already struggle with societal expectations of masculinity pressuring men to avoid seeming vulnerable.²⁷⁹ As one male survivor explained,

It's one thing to deal with the aftereffect of being raped, but it also was a secondary hit for me—oh, you're a guy, how could you be raped by a woman, that makes no sense. . . . I was afraid to talk to anybody about it because of the stigma I felt I would receive in taking about it.²⁸⁰

When students live at the intersection of multiple non-“neutral” identities, campus sexual assault becomes even more difficult to recover from. To many legislators, intersectionality can come as a dizzying new challenge; they may find it difficult to keep track of the varying identities, let alone legislate to serve them

277. See, e.g., Tyler Kingkade, *28 Groups That Work with Rape Victims Think the Safe Campus Act is Terrible*, HUFFPOST, Sept. 23, 2015, 1:00 PM, http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act_us_55f300cce4b063ecbfa4150b [<https://perma.cc/MM3C-7B6U>].

278. Email from Venkayla Haynes, student survivor and activist, Spelman Coll., to author (Sept. 21, 2017) (on file with author).

279. For a detailed narrative by a male survivor, see Emily Kassie, *Male Victims of Campus Sexual Assault Speak Out: 'We're up Against a System That's Not Designed to Help Us'*, HUFFPOST, Jan. 27, 2016, 7:33 AM, http://www.huffingtonpost.com/2015/01/27/male-victims-sexual-assault_n_6535730.html [<https://perma.cc/EBN2-A4E5>].

280. Emma Brown, *Sexual Assault Survivors Tell Their Stories*, WASH. POST, <https://www.washingtonpost.com/graphics/local/sexual-assault/> (male student, South Carolina school) (last visited Jan. 13, 2018).

effectively. This is why it is critical for legislators and policymakers to give diverse student voices a chance to be heard.

Well-crafted campus sexual violence legislation will have the following four characteristics: flexibility for each school, a procedure to give stakeholders a voice, periodic review, and harmony with federal law.

A. Minimum Requirements

First, this Article recommends that state legislatures create not a statewide policy, but minimum requirements. When schools have flexibility to tailor their policies, students will be better served. Of course, schools may not take campus sexual violence seriously, so state legislation and Title IX should serve as floors. In this regard, Connecticut, Illinois, and New York should be models. A state where schools have a history of particularly poor responses to campus sexual assault might feel the need to be stricter with its requirements; other states could be more trusting of their institutions.

B. Stakeholder Input and School-to-School Flexibility

Second, this Article advocates for deliberate, informed, and transparent procedure in forming the state response, whatever form it takes. Legislation by its nature has transparency and opportunities for input built in, but policymakers should go further. Illinois's summits demonstrate one way to invite diverse stakeholders to collaborate on legislation. Connecticut's campus resource team review process is another method for involving stakeholders, albeit post hoc. Ideally, states should ensure that different groups have a voice in forming policy, both before state legislation is enacted and after. A combination of the Connecticut and Illinois approaches would ensure plenty of opportunities for comment. But states must ensure that the different groups, especially groups representing marginalized communities, actually have an opportunity to be heard. Connecticut's legislation is very specific about the different interests that must be represented in the campus resource teams, but a model state approach would go further. For example, campus resource teams should include a representative from the campus disability office. Other campus actors may not be aware of the specific issues facing marginalized communities and may not have the expertise necessary to address them.

Stakeholder input on the creation and review of policies also highlights the need for schools to have some flexibility. Different schools have different needs. Georgia, for example, is home to historically black colleges and universities ("HBCUs"), which have different experiences and needs from non-HBCUs. One HBCU, Spelman, is a women's college. Another, Morehouse, is a men's college.

Haynes's experience also highlights why schools need flexibility: she attended an HBCU, where she witnessed "respectability politics" lead to campus authorities "not properly addressing and fighting against marginalized groups being impacted by sexual violence."²⁸¹ Respectability politics will likely take on different forms at HBCUs and majority-white schools. For instance, at HBCUs, survivors may receive backlash to reporting, encouraging them to "protect their brothers" or not provoke negative press attention on the universities.²⁸² A campus policy that addresses the specific needs of an HBCU would be a poor fit for non-HBCUs. A single policy for all Georgia schools would be even worse—and would likely better serve the interests of schools that skew white and male,²⁸³ because it will neglect needs specific to HBCUs or women's colleges.

C. Periodic Review

Third, the state should engage in periodic review of the broader legislation as well as the individual schools' policies. The state Attorney General, for example, could lead a periodic review in which representatives from all the different schools and stakeholder groups could meet to learn from each other's successes and failures. Like states, schools could become laboratories for policy. There is no clear solution to campus sexual assault, but some schools have made progress where others have struggled. If schools communicate with each other, progress may move faster. The same is true for states: states should learn from each other. Indeed, it is already becoming clear which states others should learn from: Connecticut, Illinois, Louisiana, and New York are already each good examples.

D. Consistency with Federal Law

Finally, states must not force their schools to risk violating Title IX. Ideally, states will be mindful of the Supremacy Clause and not attempt to do so. As we have seen with Georgia, however, such a hope may be too idealistic. The next line of defense is federal enforcement—but as this Article has discussed, federal enforcement in Title IX is itself at risk. As the Department of Education engages in notice-and-comment to draft new Title IX regulations, survivors and their allies are right to be nervous. Even so, DeVos has claimed she wants "the insights

281. Email from Venkayla Haynes, *supra* note 278.

282. Email from Venkayla Haynes, student survivor and activist, Spelman Coll., to author (Oct. 6, 2017) (on file with author).

283. The current Georgia BOR has only three female members and only two members of color. *Members of the Board*, UNIV. SYSTEM OF GA., <http://www.usg.edu/regents/members> [<https://perma.cc/F895-8XNL>] (last visited Oct. 20, 2017).

of all parties” in the notice-and-comment period.²⁸⁴ She should pay especially close attention to responses from those parties whose insights are all too often ignored: students from marginalized communities. Unfortunately, given the current administration’s treatment of transgender students,²⁸⁵ students brought without documentation to this country when they were children,²⁸⁶ and DeVos’s own comments regarding students with disabilities,²⁸⁷ this Article is pessimistic. Private litigation may therefore become the only real check on state-law conflicts with Title IX, meaning the issue will gradually shift from federal administrative enforcement to federal judicial enforcement.

V. CONCLUSION

After years of progress on campus sexual violence, Title IX is on shaky ground. It is probably constitutional despite stricter Spending Clause jurisprudence, but it is impossible to be certain. OCR’s guidance document is in a similar position: it is probably APA compliant, but a reasonable court could strike it down. Regardless of the legality of current Title IX enforcement, however, the political reality is that the Trump Administration will probably not enforce Title IX, or at least not to the benefit of survivors. More likely is a refusal to hold schools accountable, presaged by the latest OCR guidance.

States, however, have the constitutional authority to act. States should protect their students from sexual violence, modeling their response on states like Illinois. Yet states must go further than even the most progressive state legislation, because no state has yet to legislate in a way that takes into account students that are particularly vulnerable to campus sexual violence. This Article has discussed three groups in particular—students of color, LGBTQIA students, and undocumented students—but other marginalized groups also need attention, such as students with disabilities. The only way for states to legislate in an inclusive manner is for them to actually listen to these students. States should therefore legislate in an open and transparent way, building student voices into both the drafting of the legislation and the review of the resulting documents.

284. Svrluga, *supra* note 74.

285. See Michael A. Memoli & Joy Resmovits, *Trump Administration Rescinds Guidelines on Protections for Transgender Students*, L.A. TIMES, Feb. 22, 2017, 5:10PM, <http://www.latimes.com/politics/la-na-pol-trump-transgender-students-20170222-story.html> [<https://perma.cc/4E22-ATQM>].

286. See Maya Rhodan, *She’s Planning for College. But She’ll Miss President Trump’s Deadline to Avoid Deportation*, TIME, Sept. 21, 2017, <http://time.com/4952594/donald-trump-daca-deadline-dreamers/> [<https://perma.cc/E6MF-JL9P>].

287. Elliot Hannon, *DeVos Says States Shouldn’t Have to Comply with Federal Law Protecting Disabled Students*, SLATE, Jan. 17, 2017, http://www.slate.com/blogs/the_slatest/2017/01/17/devos_says_states_don_t_have_to_comply_with_federal_law_protecting_disabled.html [<https://perma.cc/NN9T9-E8CK>].

Finally, this Article has shown that we cannot simply trust states to protect their students from campus sexual violence. Georgia's administrative action was not only rushed and failed to hear student objections, but forces Georgia schools to choose between violating state and federal law. Because it is unlikely that the Trump Administration will bring preemption suits, the responsibility will fall to private litigants to hold states accountable.

This Article envisions states protecting students from campus sexual violence, transparently and with attention to the intersecting identities that make some students more vulnerable. Perhaps soon, a different administration will pick up where the Obama Administration left off—but for now, the responsibility to protect students falls to states.

