Penn State Law Review

Volume 122 | Issue 3 Article 9

7-1-2018

The Safe Campus Act: Safe for Whom? An Analysis of Title IX and Conservative Efforts to Roll Back Progressive Campus Sexual Misconduct Reform

Sidney E. McCoy

Comments

The Safe Campus Act: Safe for Whom? An Analysis of Title IX and Conservative Efforts to Roll Back Progressive Campus Sexual Misconduct Reform

Sidney E. McCoy*

ABSTRACT

Title IX of the Education Amendments of 1972 (Title IX) prohibits educational institutions receiving federal funds from discriminating against persons on the basis of sex. The broad language of Title IX has been interpreted to include sexual misconduct as a form of sex discrimination for the purposes of Title IX. Additionally, federally funded educational institutions have a duty to independently and adequately respond to instances of sexual misconduct, or these institutions will face potential litigation or loss of federal funding.

Newly proposed legislation known as the Safe Campus Act, if passed, would amend the Higher Education Act of 1965 to require institutions of higher education receiving federal assistance to refer any sexual misconduct allegations to law enforcement to perform a full

* J.D. Candidate, The Pennsylvania State University School of Law, 2018. I would like to thank my colleagues of the *Penn State Law Review* for their countless edits to this Comment, and to survivors everywhere whose strength and resilience inspire me every day.

investigation. During this police investigation, an institution of higher education would be forbidden from taking any independent action to investigate or remedy the alleged misconduct.

This Comment first examines the statutory language and legislative history of Title IX. This Comment then examines the Supreme Court decisions and administrative responses interpreting Title IX's coverage of sexual misconduct. Next, this Comment discusses conservative efforts to roll back progressive campus sexual misconduct reform, including the Safe Campus Act. Finally, this Comment concludes that the Safe Campus Act should not be passed because it conflates the criminality of sexual misconduct with the civil rights and anti-discrimination remedies afforded under Title IX. Instead, institutions of higher education should maintain their duty to independently investigate and adjudicate instances of sexual misconduct in a way that is consistent with Title IX's statutory scheme, as well as the case law and administrative responses that have interpreted the scope of Title IX.

Table of Contents

I. INTRODUCTION

"Have as much mercy for the rapist as he did for me the night of the sexual assault, which was none. . . . [T]he rapist chose to ruin his life. But like the sexual assault itself, my life has been ruined without my consent."[1] The woman who was raped while she was unconscious by a man who attended the same university as her "asked the judge to send her rapist to prison."[2] Unfortunately, the judge did not grant her wish, and her rapist was sentenced to serve just two years of jail-work release and twenty years of probation.[3]

In 2014, President Obama established the White House Task Force to Protect Students from Sexual Assault, stating that "[t]he prevalence of rape and sexual assault at our Nation's institutions of higher education is both deeply troubling and a call to action."[4] Statistics gathered by the National Institute of Justice have found that about one in five women are survivors of completed or attempted sexual assault while in college.[5] Additionally, the data recorded showed that approximately 6.1 percent of men are survivors of completed or attempted sexual assault during

1. Tyler Kingkade, *'My Life Was Ruined Without My Consent': Read the CU Boulder Survivor's Statement*, HUFFINGTON POST (Aug. 11, 2016, 7:34 PM), http://www.huffingtonpost.com/entry/survivor-statement-austin-wilkerson-boulder-case_us_57ad01e3e4b0718404109ca3?section=&.

2. *See id.*

3. *See id.*

4. Press Release, Office of the Press Sec'y of the White House, Memorandum—Establishing a White House Task Force To Protect Students From Sexual Assault (Jan. 22, 2014).

5. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 2 (2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

college.[6] Furthermore, data recorded by the Bureau of Justice Statistics has found that 80 percent of student sexual assaults are not reported to law enforcement.[7]

Title IX of the Education Amendments of 1972[8] (Title IX) requires educational institutions receiving federal funding to adequately and reliably respond to known instances of sexual misconduct[9] in order to prevent discrimination on the basis of sex.[10] Moreover, Congress has enacted additional legislation in response to the harrowing statistics of the growing problem of campus sexual misconduct.[11] However, there have been a number of recent conservative efforts to roll back progressive campus sexual misconduct reform. For example, Secretary of Education Betsy DeVos recently rescinded all Obama-era Title IX guidance, citing concern for adequate due process of accused students.[12] Additionally, proposed legislation known as the Safe Campus Act,[13] if passed, would "amend the Higher Education Act of 1965[14] to [purportedly] protect victims of sexual violence, to improve the adjudication of allegations related to sexual violence, and for other purposes."[15]

This Comment will analyze interpretations of Title IX as applied to sexual misconduct against the current administrative and legislative responses attempting to push back against progressive campus sexual misconduct adjudication reform.[16] Part II of this Comment will discuss the legislative history, scope, and enforcement of Title IX.[17] Additionally, Part II will discuss key Supreme Court precedent interpreting Title IX's application to sexual misconduct, and will also examine administrative responses from the Department of Education's Office for Civil Rights (OCR) regarding Title IX and sexual

6. *Id.*

7. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES 1995–2013, at 1 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf.

8. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

9. For the purposes of this Comment, "sexual misconduct" indicates a spectrum of conduct ranging from the creation of a hostile educational environment verbally to sexual abuse, including rape and statutory rape.

10. *See* 20 U.S.C. § 1681.

11. *See, e.g.*, Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92.

12. *See* Stephanie Saul & Katie Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html.

13. Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

14. Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219.

15. H.R. 3403.

16. *See infra* Sections II.C–.D, Part III.

17. *See infra* Sections II.A–.B.

misconduct.[18] Finally, Part II will introduce newly proposed legislation, known as the Safe Campus Act, that works to provide unique procedural protections in campus disciplinary hearings on sexual misconduct.[19]

Part III of this Comment will argue that conservative attempts to roll back progressive campus sexual misconduct reform, and specifically the Safe Campus Act, are misguided because they conflate the criminality of sexual misconduct with the civil rights and anti-discrimination remedies afforded under Title IX.[20] In particular, Part III will argue that the Safe Campus Act's provision requiring educational institutions to refer allegations of sexual misconduct to law enforcement for investigation is inconsistent with the statutory scheme and purposes of Title IX.[21] Additionally, Part III will argue that the Safe Campus Act's provision permitting educational institutions to set any standard of proof they deem reasonable for the adjudication of sexual misconduct is inconsistent with the legislative intent, as well as the statutory requirements, of Title IX as interpreted by OCR.[22]

Further, Part III will argue that passing the Safe Campus Act will threaten the progressive reforms made in educational equity by discouraging survivors of sexual misconduct from reporting their assaults, and that the purpose of the Safe Campus Act is largely pretextual.[23] Finally, Part III will recommend certain procedural protections that educational institutions should incorporate into their disciplinary proceedings to ensure meaningful due process to both parties involved.[24] Institutions of higher education should adopt mandatory preventative programming, such as bystander intervention workshops, and affirmative consent policies to foster a culture that promotes sexual autonomy and communication.[25]

II. BACKGROUND

Title IX, as amended, is anti-discrimination legislation that prohibits any federally funded education program from discriminating against any person "on the basis of sex."[26] Since the enactment of Title IX, U.S. Supreme Court decisions, as well as administrative responses, have expanded the scope of the legislation, providing individuals who have

18. *See infra* Section II.C.
19. *See infra* Section II.D.
20. *See infra* Part III.
21. *See infra* Section III.A.1.
22. *See infra* Section III.A.2.
23. *See infra* Sections III.B.1–.2.
24. *See infra* Section III.C.
25. *See infra* Section III.C.
26. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

suffered from discrimination on the basis of sex with powerful tools to remedy such treatment.[27] Understanding Title IX's broad language requires an in-depth analysis of the legislative history, case law, and guidance accompanying the legislation. This Part examines the legislative, judicial, and administrative impacts on Title IX and its enforcement, as well as introducing the proposed legislation that could potentially threaten the progress of achieving true educational equality.[28]

A. Legislative History of Title IX

In 1970, Representative Edith Green of Oregon, Chairperson of the House Special Subcommittee on Education, proposed to amend Title VI of the Civil Rights Act[29] to prohibit discrimination on the basis of sex in all federally funded programs.[30] Representative Green stood before the House Special Subcommittee on Education and presented evidence documenting the prevalence of sex discrimination in educational institutions.[31] The evidence indicated that:

> [T]he average financial aid awards to women were lower than awards to men; women were only 29.3 [percent] of the freshman class of the [35] most selective universities in the nation; despite having higher average grade point averages at the undergraduate level, far fewer women than men were admitted to graduate institutions; 96 [percent] of the professional degrees earned in 1968–69 were conferred on men; and female instructors earned less than males with equal qualifications.[32]

Despite this uncontested evidence, the bill never passed through the House.[33] However, in the next legislative term, instead of proposing to amend Title VI to include a prohibition on sex discrimination, Representative Green introduced an entirely new bill specifically aimed at combatting discrimination on the basis of sex in educational

---

27. *See infra* Section II.B.

28. *See infra* Sections II.A–.D.

29. Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d (2012) ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.").

30. Roak J. Parker, *Compensatory Relief Under Title IX of the Education Amendments of 1972*, 68 EDUC. L. REP. 557, 558 (1991).

31. *See id.* (citing *Discrimination Against Women: Hearings on § 805 of H.R. 16098 Before the Spec. Subcomm. on Educ. of the H. Comm. on Educ. & Labor*, 91st Cong. (1970) [hereinafter *Hearings on Discrimination Against Women*]).

32. *Id.* at 559 (citing 118 CONG. REC. 5805–09 tbls. (1972)).

33. *See id.* at 558.

institutions.[34] This bill was the House version of Title IX.[35] Together with Senator Birch Bayh of Indiana, Representative Green presented the evidence from the previous year, and after some compromise,[36] Title IX of the Education Amendments of 1972 was enacted into law.[37]

B. Scope and Enforcement of Title IX

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."[38] Title IX has two primary objectives: first, to avoid using federal funds to support discriminatory practices in educational institutions, and second, to provide individuals with solutions to remedy such discrimination.[39] As with most civil rights legislation, the drafters intended that the language be construed broadly so as to effectuate the statute's goals and purposes.[40]

1. *Cannon v. University of Chicago*: A Private Right of Action is Born

Not long after Title IX was enacted, courts began to deal with the issue of whether the legislation provided a private right of action to individuals who alleged that they suffered from discrimination.[41] Due to a lack of guidance in the language of the statute and the statute's legislative history, courts interpreted Title IX differently, resulting in conflicting decisions and a circuit split.[42] Fortunately, the Supreme Court

34. *See* Title IX, H.R. 7248, 92d Cong., 117 CONG. REC. 39364–65 (1971) (enacted); *see also* Parker, *supra* note 30, at 558.

35. *See* Title IX, H.R. 7248, 92d Cong., 117 CONG. REC. 39364–65 (1971) (enacted); *see also* Parker, *supra* note 30, at 558.

36. Title IX excludes certain organizations entirely and excludes admissions policies of other organizations. *See* 20 U.S.C. § 1681(a)(3)–(9) (2012). These include, in part: religious schools, if the application of Title IX would be inconsistent with the tenets of the religion; military schools; social sororities and fraternities; and voluntary youth organizations whose membership has traditionally been limited to one sex. *See id.*

37. *See id.* § 1681.

38. *Id.* § 1681(a).

39. *See* Alison Renfrew, Comment, *The Building Blocks of Reform: Strengthening Office of Civil Rights to Achieve Title IX's Objectives*, 117 PENN ST. L. REV. 563, 568 (2012) (citing Claudia S. Lewis, Note, *Title IX of the 1972 Education Amendments: Harmonizing Its Restrictive Language with Its Broad Remedial Purpose*, 51 FORDHAM L. REV. 1043, 1046 (1983)).

40. *See id.*; *see also* 118 CONG. REC. 5803, 5806–07 (1972) (statement of Sen. Bayh) (stating that Title IX was intended to be "a strong and comprehensive measure").

41. Renfrew, *supra* note 39, at 568.

42. *See, e.g.*, Cannon v. Univ. of Chi., 559 F.2d 1063, 1072–73 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979) (finding that Title IX did not imply a private right of action because Congress, by establishing an administrative proceeding to terminate federal

resolved the split in *Cannon v. University of Chicago*[43] by determining that Title IX does imply a private right of action.[44]

In *Cannon*, the petitioner alleged that she was denied acceptance into medical school because she was a woman.[45] After the United States District Court for the Northern District of Illinois and the Court of Appeals for the Seventh Circuit both concluded that Title IX did not confer an implied right to a private remedy,[46] the Supreme Court reversed both lower courts.[47] The Supreme Court reasoned that the legislative history plainly indicated a congressional intent to create a private right of action because Title IX was modeled after Title VI of the Civil Rights Act of 1964, and "the drafters of Title IX explicitly assumed that it would be interpreted and applied" in the same manner as Title VI.[48] Thus, the Court determined that because Title VI had been construed to create a private right of action,[49] Title IX similarly created a private remedy when it was enacted.[50] Additionally, the Court reasoned that allowing a private remedy would assist in achieving Title IX's purposes and legislative scheme.[51]

The *Cannon* decision and its progeny[52] created powerful enforcement tools for Title IX compliance.[53] As a result of this precedent, private litigation has become abundant, and the threats of litigation and large monetary awards serve as incentives for educational institutions to comply with Title IX's requirements.[54]

---

funding for institutions that violate Title IX's prohibition on sex discrimination, intended that proceeding to be the exclusive means of enforcement to manage complaints). *But see* Alexander v. Yale Univ., 459 F. Supp. 1, 5 (D. Conn. 1977) (determining that the plaintiffs could bring a private suit because Congress neither precluded nor prohibited such action).

43. Cannon v. Univ. of Chi., 441 U.S. 677 (1979).

44. *Id.* at 709.

45. *Id.* at 680.

46. *See Cannon*, 559 F.2d at 683, *aff'g* 406 F. Supp. 1257 (N.D. Ill. 1976), *rev'd*, 441 U.S. 677 (1979).

47. *Cannon*, 441 U.S. at 717.

48. *Id.* at 694–96.

49. *See* Bossier Par. Sch. Bd. v. Lemon, 370 F.2d 847, 852 (5th Cir. 1967).

50. *Cannon*, 441 U.S. at 694–96.

51. *See id.* at 705–08 (noting the inability of the Department of Health, Education, and Welfare to redress every individual injury and explaining that an implied right of action will necessarily serve as an effective deterrent).

52. *See, e.g.*, Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 76 (1992) (concluding that monetary damages are available for intentional violations of Title IX).

53. *See infra* Section II.C.

54. *See* Parker, *supra* note 30, at 570.

2. Administrative Enforcement: Filing a Complaint with the Office for Civil Rights

In addition to the private cause of action afforded under Title IX, OCR provides an alternative solution for enforcing Title IX.[55] Title IX permits individuals who believe they have been subjected to discrimination to file complaints directly with OCR.[56] Upon receipt of the complaint, OCR will determine the timeliness, jurisdiction, and merit of the complaint.[57] If it finds that the complaint satisfies these requirements, OCR will initiate an investigation into the educational institution.[58] If OCR determines that the educational institution violated Title IX, it will negotiate a resolution plan with the institution.[59] Failure to reach an agreement or to comply with the agreement may result in additional sanctions, such as the U.S. Department of Justice suspending or terminating federal funding.[60]

C. From the Workplace to the Classroom: Applying Title IX to Sexual Misconduct in Educational Institutions

After its enactment, Title IX was primarily focused on ensuring that women's academic and athletic opportunities, as well as their access to financial aid, were equal to those of men.[61] However, because similar legislation preventing workplace sex discrimination had been interpreted to extend to sexual misconduct,[62] the question of whether Title IX prohibited sexual misconduct in the educational context arose.[63]

---

55. *See* Renfrew, *supra* note 39, at 571.
56. *Id.* at 571–72.
57. *Id.* at 572.
58. *See id.* at 573.
59. *Id.*
60. *Id.* at 573–74.
61. *See* Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. L. REP. 1, 2 (2004) ("During the first twenty years of Title IX's history, the case law concentrated on two main areas: first the jurisdictional issue of whether Title IX applied to a specific defendant; and secondarily, the statute's application to extracurricular athletic activities offered through interscholastic or intercollegiate athletic programs.").
62. Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate against employees or applicants for employment on the basis of race, color, religion, sex, or national origin. *See* 42 U.S.C. § 2000e-2 (2012). The Supreme Court has routinely concluded that sexual misconduct in the workplace constitutes sex discrimination for the purposes of Title VII. *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 752 (1998).
63. *See* Heckman, *supra* note 61, at 2.

1. Examining the Case Law: The *Franklin-Gebser-Davis* Axis

Title IX cases involving issues of sexual misconduct were sparse after the amendment was first enacted.[64] However, individuals subjected to sexual misconduct eventually sought civil remedies in the form of injunctive relief and monetary damages against the educational institutions that harbored the offensive behavior.[65] The following Supreme Court decisions demonstrate that Title IX's language prohibiting discrimination on the basis of sex extends to instances of sexual misconduct.[66] The cases further define the standards under which a federally funded educational institution will be held individually liable for such conduct.[67]

a. *Franklin* and *Gebser*: Imposing Institutional Liability and Setting the Standard

Although the principal issue in *Franklin v. Gwinnett County Public Schools*[68] involved whether Title IX authorizes monetary damages when intentional discrimination is proven, the case also became the first Supreme Court opinion to assert that continual sexual harassment and abuse constitutes discrimination on the basis of sex for Title IX purposes.[69] In *Franklin*, a female high school student alleged that Andrew Hill, a sports coach and teacher, initiated conversations in which he asked about the student's sexual experiences and whether she would have sexual intercourse with an older man.[70] The student alleged that Hill forcibly kissed her in the school parking lot, and on three separate occasions, removed her from her classes and subjected her to coercive intercourse.[71]

The Supreme Court decided that sexual misconduct is discrimination on the basis of sex, and said:

> Unquestionably, Title IX placed on Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminates' on the basis of sex." . . . We believe the same rule should apply when a teacher sexually harasses and abuses a

64. *See id.* at 2 ("Historically, situations of sexual [misconduct] . . . were generally litigated in the criminal courts.").
65. *See id.*
66. *See infra* Section II.C.1.a.
67. *See infra* Section II.C.1.a.
68. Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60 (1992).
69. *See id.* at 75–76.
70. *Id.* at 63.
71. *Id.*

> student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe.[72]

The Court used reasoning analogous to that applied to workplace sexual harassment prohibited by Title VII of the Civil Rights Act[73] to clarify that the prohibition against discrimination on the basis of sex in federally funded education programs forecloses intentional sexual misconduct committed by teachers against students, and was thus actionable under Title IX.[74]

The Supreme Court later articulated a strict standard for establishing liability under Title IX for instances of sexual misconduct.[75] In *Gebser v. Lago Vista Independent School District*,[76] Alida Star Gebser, a female high school student, engaged in a sexual relationship with her teacher, Frank Waldrop.[77] Although Gebser never reported the conduct to an administrator, other students' parents complained to the principal about offensive comments Waldrop made in class.[78] The principal met with Waldrop and instructed him to be more careful about his remarks made during classroom discussions, but never reported the complaints to the Lago Vista superintendent.[79] Eventually, after a police officer discovered Gebser and Waldrop engaging in sexual intercourse, Lago Vista terminated Waldrop's employment, and Gebser and her mother brought an action seeking compensatory and punitive damages under Title IX.[80]

The United States District Court for the Western District of Texas granted summary judgment in favor of the school district, and the Court of Appeals for the Fifth Circuit affirmed.[81] Both courts concluded that "[o]nly if school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a policy of [discrimination]."[82] The Supreme Court affirmed[83] and, departing from its previous analogies to Title VII, raised

72. *Id.* at 75 (citation omitted) (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

73. 42 U.S.C. § 2000e (2012).

74. *See Franklin*, 503 U.S. at 75.

75. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

76. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

77. *Id.* at 277–78.

78. *Id.* at 278.

79. *Id.*

80. *Id.* at 278–79.

81. *See* Doe v. Lago Vista Indep. Sch. Dist., 106 F.3d 1223, 1225 (5th Cir. 1997), *aff'd*, 524 U.S. 274 (1998).

82. *Gebser*, 524 U.S. at 279 (alteration in original).

83. *Id.* at 293. Actual notice requires that a person or entity have actual knowledge of such conduct in order for liability to be assigned. *See, e.g.*, *Notice*, BLACK'S LAW

the bar by requiring actual notice rather than constructive notice.[84] The Court reasoned:

> Title IX was modeled after Title VI of the Civil Rights Act of 1964, which prohibits race discrimination in programs receiving federal funds. Both statutes condition federal funding on a recipient's promise not to discriminate, in what amounts essentially to a contract between the [g]overnment and the recipient. In contrast, Title VII is framed as an outright prohibition. . . . When Congress conditions the award of federal funds under its spending power, the Court closely examines the propriety of private actions holding recipients liable in damages for violating the condition. It is sensible to assume that Congress did not envision a recipient's liability in damages where the recipient was unaware of the discrimination.[85]

In addition to the requirement of actual notice, the Court imposed a requirement that the individual receiving actual notice be an "official who at a minimum has authority . . . to institute corrective measures on the recipient's behalf."[86] Furthermore, the Court concluded that the educational institution's response must amount to "deliberate indifference to discrimination"[87] because under a lower standard, an educational institution would risk liability for the independent actions of its employees.[88] Thus, under the *Gebser* decision, to recover damages for teacher-student sexual misconduct, the plaintiff must prove that (1) an official with authority to institute corrective measures (2) had actual knowledge of a sexual misconduct allegation by a student against a teacher and, (3) despite actual knowledge, responded with deliberate indifference to the alleged behavior.[89]

In applying this framework to the facts in *Gebser*, the Supreme Court ultimately found that the Lago Vista School District did not have actual notice of the discrimination and thus was not liable for damages for the discrimination.[90] However, the *Gebser* opinion would prove to be

---

DICTIONARY (10th ed. 2014). It is not enough that the person or entity reasonably should have known about such conduct. *See id.*

84. *See Gebser*, 524 U.S at 285.

85. *Id.* at 275.

86. *Id.* at 290.

87. Deliberate indifference, specifically in the Title IX context, occurs when an official is advised of a violation and refuses to remedy the violation. *See id.*; *see also Indifference*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining deliberate indifference, in the context of criminal law, as "awareness of and disregard for the risk of harm to another person's life, body, or property").

88. *Gebser*, 524 U.S. at 290–91.

89. *Id.* at 290.

90. *Id.* at 291.

a pivotal decision in further expanding the scope of Title IX enforcement.[91]

b. *Davis v. Monroe County Board of Education*: Institutional Liability for Peer Sexual Misconduct

Following the Supreme Court's decisions in *Franklin* and *Gebser* allowing a cause of action for employee-student sexual misconduct, courts began to grapple with the issue of whether Title IX should prohibit peer sexual misconduct.[92] As with previous issues, lower courts began rendering inconsistent decisions, resulting in a circuit split.[93] This split in authority prompted the Supreme Court to grant certiorari in *Davis v. Monroe County Board of Education*.[94]

In *Davis*, the petitioner brought an action against the school board alleging a Title IX violation after a classmate subjected her to prolonged sexual misconduct.[95] The complaint alleged:

> "[T]he persistent sexual advances and harassment by the student . . . upon [petitioner] interfered with her ability to attend school and perform her studies and activities," and that "[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon [petitioner] created an intimidating, hostile, offensive, and abus[ive] school in violation of Title IX."[96]

Over a five-month period of time, a male classmate attempted to touch the petitioner's breasts and genital area, made repeated vulgar statements and gestures toward the petitioner in class, and rubbed his body on her in a sexually suggestive way.[97] Despite telling her teachers and principal about the incidents, no remedial action was taken.[98] In fact, three months of reported harassment went by before the petitioner was even permitted to change seats in the classroom so that she was no longer seated next to the accused.[99] Furthermore, the complaint alleged that the continued

91. *See* Heckman, *supra* note 61, at 6.
92. *See id.*
93. *See* Bruneau v. S. Kortright Cent. Sch. Dist., 163 F.3d 749, 755 (2d. Cir. 1998) (affirming the lower court decision that concluded Title IX does not impose a duty on school officials to stop peer sexual misconduct). *But see* Bosley v. Kearney R-1 Sch. Dist., 140 F.3d 776, 779 (8th Cir. 1998) (maintaining that a Title IX action for peer sexual misconduct could be entertained).
94. Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 637 (1999).
95. *Id.* at 632.
96. *Id.* at 636 (alterations in original).
97. *Id.* at 633–34.
98. *Id.* at 634.
99. *Id.* at 635.

harassment caused the petitioner's grades to suffer because she was no longer able to concentrate on her school work.[100]

The District Court for the Middle District of Georgia granted the respondent's motion to dismiss, stating that Title IX provided no basis for liability for student-on-student sexual misconduct, and the Eleventh Circuit affirmed.[101] However, the Supreme Court reversed and determined that an educational institution may be liable for a failure to respond to peer sexual misconduct.[102]

In reaffirming the standard used in *Gebser*, the Court decided that "recipients of federal funding may be liable for 'subject[ing]' their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual [misconduct] and the [wrongdoer] is under the school's disciplinary authority."[103] In addition, the Court reasoned that a recipient of federal funding is only properly held liable when a plaintiff demonstrates that the sexual misconduct is so "severe, pervasive, and objectively offensive" that it effectively denies equal access to education.[104] However, the Court maintained that, at least in theory, a single instance of sufficiently severe peer sexual misconduct could rise to the level of effectively denying the right of a student to equal access to education.[105]

Thus, the *Franklin-Gebser-Davis* axis demonstrates that sexual misconduct is a form of sex discrimination for Title IX purposes.[106] Additionally, the case law indicates that a federally funded educational institution has a duty to adequately respond to instances of both teacher-on-student and peer sexual misconduct.[107] If this duty is not satisfied, the educational institution will potentially face litigation by way of the private right of action afforded under Title IX.[108]

100. *Id.* at 634.

101. Davis v. Monroe Cty. Bd. of Educ., 120 F.3d 1390, 1401 (11th Cir. 1997), *aff'g* 862 F. Supp. 363 (M.D. Ga. 1994), *rev'd*, 526 U.S. 629 (1999).

102. *Davis*, 526 U.S. at 646–47.

103. *Id.* (alterations in original).

104. *Id.* at 650–51 (explaining that it is not necessary for a plaintiff to show physical exclusion to demonstrate a deprivation of educational opportunity, and that it is enough that the misconduct sufficiently "undermines and detracts from the victims' educational experience").

105. *Id.* at 654.

106. *See* 20 U.S.C. § 1681 (2012).

107. *See Davis*, 526 U.S. at 643.

108. *See id.*; *see also* Franklin v. Gwinnett Cty. Pub. Sch., 503 U.S. 60, 75 (1992).

2. Administrative Responses: OCR's Revised Sexual Harassment Guidance and Dear Colleague Letter

In response to the Supreme Court decisions regarding sexual misconduct in educational institutions, OCR issued a general statement of policy called the Revised Sexual Harassment Guidance ("Guidance") in 2001.[109] The Guidance was set forth to reinforce that "[t]he Supreme Court, Congress, and Federal executive departments and agencies . . . have recognized that sexual [misconduct] of students can constitute discrimination prohibited by Title IX."[110] Additionally, the Guidance set forth compliance responsibilities, outlined examples of what constitutes sexual misconduct, and provided prevention strategies.[111]

More notably, in April 2011, after a report prepared for the National Institute of Justice found that about one in five women are survivors of sexual assault or attempted sexual assault while in college,[112] OCR issued what is commonly known as the Dear Colleague Letter.[113] The Dear Colleague Letter and other statistics[114] opened the eyes of the public to the harrowing issue of sexual misconduct at American universities.[115] In response to these statistics, OCR supplemented their original Guidance with a much more in-depth discussion of Title IX's requirements.[116] One new requirement created the Title IX coordinator position[117] by ordering all educational institutions receiving federal funding to designate or assign one employee to oversee all Title IX complaints.[118] Additionally, the employee designated to serve as Title IX

109. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYERS, OTHER STUDENTS, OR THIRD PARTIES i (2001), https://www2.ed.gov/offices/OCR/archives/pdf/shguide.pdf.

110. *Id.* at 2.

111. *See id.*

112. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 2 (citing CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xiii (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf).

113. *See generally id.*

114. *See, e.g.*, KREBS ET AL., *supra* note 112, at 5-5 (reporting that approximately 6.1 percent of males were also subjected to unwanted sexual contact while in college); *see also* OFFICE OF POSTSECONDARY EDUC., U.S. DEP'T OF EDUC., SUMMARY CAMPUS CRIME DATA 6 (2009), https://www2.ed.gov/admins/lead/safety/criminal2007-09.pdf (finding from the data compiled from reports submitted in compliance with the Clery Act that in 2009, college campuses reported nearly 3,300 forcible sex offenses).

115. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 2 (expressing deep concern about the issue of sexual misconduct in education and the Department of Education's commitment to ensuring safety in schools).

116. *See id.* at 6–14.

117. *See id.* at 7–8.

118. *Id.* at 7.

coordinator must be adequately trained on what constitutes sexual misconduct and the individual institution's grievance procedures.[119]

In terms of grievance procedures, the Dear Colleague Letter elaborated on many of the already-established requirements from the 2001 Guidance.[120] In discussing the requirement of adequate, reliable, and impartial investigation, OCR stressed that Title IX required an independent investigation into allegations of sexual misconduct, regardless of whether a criminal investigation is occurring concurrently.[121] Additionally, OCR clarified that, when responding to allegations of sexual misconduct, an educational institution must use a preponderance of the evidence standard to resolve complaints and that "[g]rievance procedures that use [a clear and convincing] standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX."[122]

Furthermore, the Dear Colleague Letter allowed institutions to permit parties in school hearings to have lawyers at any stage of the proceedings, recommended that schools provide an appeals process, and stressed the importance of due process to all parties involved.[123] Finally, the Dear Colleague Letter encouraged educational institutions to take proactive measures in preventing sexual misconduct and to make comprehensive services available to survivors of sexual misconduct.[124]

D. Conservative Push Back: Rescinding the OCR Guidance and the Safe Campus Act

The national news media coverage on the high rates of sexual misconduct in institutions of higher education sparked a national conversation on how best to handle instances of campus sexual misconduct.[125] Many legal scholars, politicians, and individual rights organizations criticized the procedures required by OCR, arguing that there was a lack of protection for the accused.[126] This criticism, coupled

119. *Id.*

120. *See generally* OFFICE FOR CIVIL RIGHTS, *supra* note 109.

121. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 10 ("[A] criminal investigation into allegations of sexual violence does not relieve the school of its duty under Title IX to resolve complaints promptly and equitably.").

122. *Id.* at 11.

123. *See id.* at 12.

124. *See id.* at 14.

125. *See* Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair? The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2292–93 (2016).

126. *See id.* at 2293; *see also* Joe Cohn, *Congress Introduces Due Process Legislation: The Safe Campus Act*, FOUND. FOR INDIVIDUAL RTS. EDUC. (July 29, 2015),

with a change in party leadership, prompted newly appointed Secretary of Education Betsy DeVos to rescind the Obama-era OCR guidance on campus sexual misconduct.[127] In rescinding the Dear Colleague Letter and its procedures, DeVos stated that the old rules "lacked basic elements of fairness" and that they treated accused students unfairly.[128] The interim guidance promulgated by OCR still requires universities to promptly investigate instances of sexual misconduct; however, universities are no longer obligated to use the preponderance of the evidence standard and must no longer complete the investigation within 60 days.[129]

Additionally, Congress has introduced legislation that would afford additional due process protection to the accused.[130] In July 2015, Republican Representative Matt Salmon of Arizona introduced House Resolution 3403, commonly referred to as the Safe Campus Act.[131] The bill was intended to "amend the Higher Education Act of 1965 to protect victims of sexual violence, to improve the adjudication of allegations related to sexual violence, and for other purposes."[132] Among other mandates, the bill requires institutions of higher education receiving federal assistance to alert and refer any sexual misconduct allegations to law enforcement and to allow law enforcement to perform a full investigation of any allegation.[133]

Additionally, the Safe Campus Act restricts any investigation or disciplinary proceeding by the institution during the period of the law enforcement investigation.[134] If an accusing student does not want to have the allegation investigated by the police, then the student forfeits his or her right to have the university investigate the allegation altogether.[135] Furthermore, the legislation, if passed, would allow an institution of higher education to establish any "such standard of proof as it considers appropriate" when investigating and adjudicating sexual misconduct claims.[136]

---

https://www.thefire.org/congress-introduces-due-process-legislation-the-safe-campus-act/.

127. *See* Saul & Taylor, *supra* note 12.

128. *Id.*

129. *See id.*; *see also* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 3 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf .

130. *See* Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

131. *See id.*

132. *Id.*

133. *See id.* § 163.

134. *See id.* § 163(a)(1)–(2).

135. *See id.* § 163(a)(2).

136. *See id.* § 164(b).

The Safe Campus Act has proven to be very controversial.[137] The bill received nearly universal opposition from groups that represent survivors of sexual misconduct, as well as groups that represent colleges and universities.[138] Shockingly, even groups such as the National Panhellenic Conference and the North-American Interfraternity Conference, who lobbied for the bill, withdrew their support after individual Greek organizations vehemently spoke out against the legislation.[139] Opponents of the Safe Campus Act argue that requiring a student alleging misconduct to report the allegation to law enforcement will discourage the reporting of an already underreported issue.[140] Thus, while the Safe Campus Act was arguably well intended, passing the legislation could be detrimental to the efforts made by Congress and institutions of higher education to combat campus sexual misconduct.[141]

As the law regarding Title IX and its application to sexual misconduct have developed, it is clear that the legislature and the courts primarily want to ensure that educational institutions receiving federal funding adequately respond to instances of sexual misconduct.[142] However, as the law has continued to develop, legitimate concerns about the due process protections of accused students have become an issue warranting discussion and legislative action.[143] In striking the balance between these competing interests, the legislature must ensure that the progress made to ensure educational equity does not become outweighed by special procedural protections for the accused.

137. *See* Jake New, *Opposition to Safe Campus Act Continues*, INSIDE HIGHER ED. (Nov. 16, 2015), https://www.insidehighered.com/quicktakes/2015/11/16/opposition-safe-campus-act-continues-update.

138. *See* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1995 (2016); *see also* Tyler Kingkade, *28 Groups that Work with Rape Victims Think the Safe Campus Act Is Terrible*, HUFFINGTON POST (Sept. 13, 2015, 1:00 PM), http://www.huffingtonpost.com/entry/rape-victims-safe-campus-act_us_55f300cce4b063ecbfa4150b (arguing that colleges and universities have long had the authority to independently sanction students for conduct violations, regardless of whether the conduct is also criminal, and should continue to have that authority).

139. *See* Tyler Bishop, *Forcing Colleges to Involve Police in Sexual-Assault Investigations?*, ATLANTIC (Nov. 19, 2015), http://www.theatlantic.com/education/archive/2015/11/forcing-colleges-to-involve-police-in-sexual-assault-investigations/416736/ (explaining that the Safe Campus Act, if passed, would discourage survivors from reporting and ultimately would prevent them from seeking the help they need).

140. *See id.*

141. *See infra* Section III.B.2.

142. *See supra* Section II.C.

143. *See generally* Safko, *supra* note 125.

III. ANALYSIS

Conservative attempts to roll back campus sexual misconduct reform, particularly the Safe Campus Act, should not be passed because they are inconsistent with Title IX's statutory scheme.[144] The legislative history and case law support the idea that educational institutions receiving federal funding have a duty to independently and adequately investigate and resolve instances of sexual misconduct or face institutional liability, either through private action by the victim or loss of federal funding.[145] Further, policy considerations support giving survivors of sexual misconduct the choice of how the alleged misconduct is handled and rejecting special due process protections for students accused of sexual misconduct.[146] Finally, educational institutions concerned with ensuring accused students are afforded meaningful due process can do so in a way that is consistent with Title IX without requiring the involvement of law enforcement or higher standards of proof.[147]

A. The Safe Campus Act is Inconsistent with Title IX's Statutory Scheme Because it Conflates the Criminal Violation with the Civil Remedy

The Safe Campus Act and other conservative attempts to roll back campus sexual misconduct reform, by requiring law enforcement involvement and creating special procedural due process protections for accused students, conflate the criminal violation of sexual misconduct with the anti-discrimination civil rights remedy afforded under Title IX, and are therefore misguided and should not be passed. Moreover, the Safe Campus Act is bad policy because it will discourage reporting of campus sexual misconduct.

1. Requiring Institutions to Refer Sexual Misconduct Allegations to Law Enforcement is Inconsistent with the Purposes and Statutory Scheme of Title IX

Perhaps the most obvious way the Safe Campus Act conflates the criminal violation of sexual misconduct with the civil rights remedy afforded under Title IX is by requiring universities to refer all sexual misconduct allegations to law enforcement agencies to investigate before

144. *See infra* Section III.A.
145. *See infra* Section III.A.
146. *See infra* Section III.B.
147. *See infra* Section III.C.

the university's Title IX office can initiate its own investigation.[148] Section 163 of the Safe Campus Act states that "if an institution of higher education . . . receives a covered allegation, along with written consent to proceed from the alleged victim, the institution shall report and refer the allegation to the law enforcement agency of the unit of local government with jurisdiction to respond to such allegations."[149]

Additionally, the Safe Campus Act states that an educational institution may not "initiate or otherwise carry out any institutional disciplinary proceeding with respect to the allegation" while a law enforcement agency is investigating an allegation.[150] While the Safe Campus Act does require the alleged victim's consent before any law enforcement agency investigates an allegation, if a student does not give written permission to have the allegation investigated by law enforcement, that student forfeits his or her right to seek institutional disciplinary action against the perpetrator.[151] Therefore, an alleging student has two options, either: (1) give consent to law enforcement to investigate the allegation, or (2) lose any institutional recourse the student may have had.[152]

The law enforcement referral provision of the Safe Campus Act is inconsistent with Title IX in a number of ways. First, compliance with Title IX requires educational institutions receiving federal funding to independently investigate allegations of sexual misconduct.[153] This requirement is supported by the legislative history of Title IX, which indicates that one of the purposes of Title IX is to ensure that federal funds are not used to support discriminatory practices in education.[154] This position is further supported by Supreme Court precedent allowing educational institutions to be held liable for failing to resolve known instances of sexual misconduct by recognizing a private right of action under Title IX.[155]

However, the drafters of the Safe Campus Act clearly considered Title IX's mandate because the Act includes an amnesty provision,

148. *See* Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 163 (2015).

149. *Id.* § 163(a)(1).

150. *Id.* § 163(b)(1).

151. *Id.* § 163(a)(2)(B) ("If an individual provides a notification to the institution [that the individual does not want the allegation to be investigated by a law enforcement agency], the institution may not initiate or otherwise carry out any institutional disciplinary proceeding with respect to the allegation . . . .").

152. *See id.* § 163(a)(1)–(2).

153. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643 (1999) (stating that "Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to . . . discriminatory acts").

154. *See* Renfrew, *supra* note 39, at 568.

155. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 709 (1979); *see also Davis*, 526 U.S. at 646–47.

which guarantees that institutions of higher education will not be in violation of Title IX for complying with the law enforcement referral provision of the Safe Campus Act.[156] Thus, if passed, the Safe Campus Act will effectively dissolve Title IX's scope and enforcement as it pertains to sexual misconduct in higher education. The Safe Campus Act's amnesty provision would create an exception whereby educational institutions would no longer be required to take immediate steps to resolve sexual misconduct allegations, while at the same time facing no institutional liability or threat of loss of federal funding. This is a clear departure from the legislative intent and purposes of Title IX, as well as precedent imposing a duty on educational institutions receiving federal funds to respond to known instances of sexual misconduct.[157]

Further, requiring institutions of higher education to refer sexual misconduct allegations to law enforcement is inconsistent with the spirit of Title IX because it mistakes the goals of the legislation and the remedies afforded under the statute.[158] Legislators must distinguish between the goals of Title IX and those of the criminal justice system. The criminal justice system is focused on the detention and punishment of criminals,[159] whereas Title IX is anti-discrimination legislation focused on educational equity.[160] It is understandably easy to conflate the two systems of law, especially when many instances of sexual misconduct may also have a criminal component.[161] However, legislators must understand that as civil rights legislation, Title IX is concerned with

156. *See* H.R. 3403 § 163(d)(1). The amnesty provision states:

> No institution of higher education . . . shall be considered to have violated any provision of [T]itle IX . . . or any policy or regulation implementing any such provision on the grounds that the institution did not investigate or adjudicate a covered allegation . . . to the extent that the institution was prohibited under this section . . . .

Id.

157. *See supra* Part II.

158. *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2012).

159. *See* Anderson, *supra* note 138, at 1998. In Anderson's article, she describes the differences between the interests of colleges and the state as follows:

> Colleges do not have the penological interest of the state. Their interest is educational opportunity, and Title IX requires them to provide it to students equally. Title IX is about institutional accountability, a civil rights mechanism to hold institutions accountable for providing equal education. The criminal justice system, by contrast, is about the individual accountability of a person accused of a crime.

Id.

160. *See id.*

161. For example, sexual assault and rape are both forms of sexual misconduct prohibited under Title IX and criminal offenses. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 3.

ensuring educational equity, not with punishing students for any alleged conduct, regardless of whether the conduct rises to the criminal level.[162]

By enacting legislation that requires a student who alleges sexual misconduct to either consent to a criminal investigation or forfeit their right to institutional redress, the legislature is not effectuating the goals and purposes of Title IX.[163] The criminal justice system cannot ensure equality, and it cannot remedy inequality.[164] While institutions of higher education should encourage accusing students to report incidents to law enforcement, institutional investigations and disciplinary proceedings should not be contingent on the student's willingness to file criminal charges because that is not what Title IX is trying to accomplish.[165] Having an institutional grievance process in place is vital to affording students alleging sexual misconduct the chance to seek redress in the educational setting so as to protect their right to equal access to education, free from discrimination.[166]

2. Allowing Universities to Set the Standard of Proof is Inconsistent with the Statutory Scheme of Title IX

A second way in which conservative attempts to roll back campus sexual misconduct reform, and particularly the Safe Campus Act, are inconsistent with Title IX is the policies that allow educational institutions to set any standard of proof they deem reasonable for the adjudication of allegations of sexual misconduct.[167] The recent rescinding of Obama-era Title IX guidance, including the Dear Colleague Letter, allows educational institutions to implement any standard of proof in the investigation and adjudication of sexual misconduct allegations.[168] Additionally, under the Safe Campus Act, after the law enforcement agency has completed its formal investigation of the alleged sexual misconduct,[169] the Act enumerates certain due

162. *See* Anderson, *supra* note 138, at 1998; *see also* 20 U.S.C. § 1681; Renfrew, *supra* note 39, at 568.

163. *See* Anderson, *supra* note 138, at 1998.

164. *See id.* at 1999.

165. *See* 20 U.S.C. § 1681; *see also* Renfrew, *supra* note 39, at 568 (indicating that Title IX's purpose is to avoid using federal funds to support discriminatory practices in education, as well as to provide a remedy for those who have been discriminated against).

166. *See* 20 U.S.C. § 1681.

167. *See, e.g.*, Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 164(b) (2015).

168. *See* Saul & Taylor, *supra* note 12; *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 129, at 5 & n.19.

169. It is unclear in the legislation when a law enforcement investigation is considered completed. *See* H.R. 3403 § 163(b)(2). The initial investigatory period is to be "the 30-day period beginning on the date on which the institution reported the allegation to the agency." *Id.* However, it appears that the legislation allows the law enforcement agency to renew the investigation every 30 days if "public interest is best served by

process requirements for institutional disciplinary proceedings.[170] Among these requirements is a provision that allows an institution of higher education to "establish and apply such standard of proof as it considers appropriate for purposes of any [sexual misconduct] adjudication."[171]

However, policies allowing educational institutions to set any standard of proof they deem reasonable are inconsistent with Title IX because Title IX is a civil rights statute that requires the use of the preponderance of the evidence standard.[172] The preponderance of the evidence standard has consistently been the standard of proof necessary for establishing violations of civil rights law.[173] For example, the Supreme Court has applied the preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act.[174] Additionally:

> [W]hile *Gebser* and *Davis* made clear that Title VII agency principles do not apply in determining liability for money damages under Title IX, the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual [misconduct] under Title IX.[175]

The preponderance of the evidence standard is controlling in Title VII cases, and is therefore appropriate in Title IX cases.[176]

Furthermore, the legislative history of Title IX plainly indicates that Title IX was modeled after Title VI of the Civil Rights Act of 1964, and the drafters of Title IX explicitly assumed that it would be interpreted and applied in the same manner as Title VI.[177] Courts have interpreted Title VI to require plaintiffs to show intentional discrimination or

---

preventing the institution from beginning its own investigation and disciplinary proceeding." *Id.*

170. *See id.* § 164.

171. *Id.* § 164(b).

172. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 10–11, 11 n.26 (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003)).

173. *See id.* (discussing specifically the application of the preponderance of the evidence standard in cases involving Title VII).

174. *See Desert Palace*, 539 U.S. at 99 (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII).

175. OFFICE FOR CIVIL RIGHTS, *supra* note 5, at 11 n.26 (second alteration in original) (quoting OFFICE FOR CIVIL RIGHTS, *supra* note 109, at vi); *see also* Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.").

176. *See Desert Palace*, 539 U.S. at 99; *see also* Price Waterhouse v. Hopkins, 490 U.S. 228, 252–55 (1989) (plurality opinion) (approving of the preponderance standard in a Title VII sex discrimination case).

177. 117 CONG. REC. 30407 (1971) (statement of Sen. Bayh) ("This is identical language, specifically taken from [T]itle VI of the 1964 Civil Rights Act . . . .").

disparate treatment by a preponderance of the evidence.[178] Because Title IX has been interpreted and applied in the same manner as Title VI, Title IX should similarly use the preponderance of the evidence standard. In conclusion, allowing an educational institution to set a higher standard for adjudicating sexual misconduct allegations is inconsistent with civil rights law and thus is not equitable under Title IX.

B. Policy Considerations: A Step Backward for Educational Equity

The drafters of the Safe Campus Act explained that the purpose of the Act was "to protect victims of sexual violence, [and] to improve the adjudication of allegations related to sexual violence,"[179] but the question remains: Who does the Act *really* protect?

Proponents of campus sexual misconduct adjudication reform typically argue that the process mandated by Title IX is "inherently unreliable and error-prone."[180] Specifically, supporters believe that (1) accused students are often denied sufficient due process, (2) campuses are ill-equipped to handle complaints of sexual misconduct, and (3) such complaints should be directed toward the criminal justice system.[181] However, how much better is the criminal justice system at investigating and prosecuting sexual misconduct? Further, why is there less concern for students accused of other nonsexual misconduct that also carries potential criminal liability?[182] As will be demonstrated below, the answers to these questions show that the stated purposes of the Safe Campus Act do not comport with what would be its practical effect.

1. The Discouragement of Reporting Sexual Misconduct Due to the Criminal Justice System's Failure

Advocates for the Safe Campus Act argue that the criminal justice system is the more appropriate forum for investigating and resolving complaints of alleged sexual misconduct.[183] However, the criminal justice system is littered with inadequacies of its own.[184] For example, law enforcement often demotes reported sex crimes to non-crimes that

178. *See e.g.*, Elston v. Talladega Cty. Bd. of Educ., 997 F.2d 1394, 1407 (11th Cir. 2013) (citing Ga. State Conference of Branches of NAACP v. Georgia, 775 F.2d 1403, 1417 (11th Cir. 1992)).

179. H.R. 3403.

180. *See* Anderson, *supra* note 138, at 1984 (citing Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html).

181. *See id.* at 1984, 1994.

182. *See infra* III.B.2.

183. *See* Anderson, *supra* note 138, at 1984, 1994.

184. *See id.* at 1959–62.

they do not investigate.[185] Additionally, law enforcement officers frequently disbelieve survivors, blame them for their assaults, and refuse to act on complaints.[186]

Moreover, even if law enforcement is willing to investigate an alleged sexual assault, the likelihood of the investigation being conducted swiftly and efficiently is questionable.[187] Despite an appropriation of hundreds of millions of dollars by Congress to help with the current backlog, law enforcement has failed to process hundreds of thousands of forensic sexual assault examination kits.[188] Finally, the criminal justice system frequently fails to address the most common form of sexual misconduct in the campus setting: misconduct committed by acquaintances.[189]

In short, the issues with the criminal justice system's response to allegations of sexual misconduct contribute to the fact that "[s]exual offenses rank among the least reported of serious crimes, and, once reported, they experience a high attrition rate."[190] Studies suggest that most campus sexual assault survivors never report assaults to the police, and one of the top reasons why is that they fear that the criminal justice system will not deliver them justice.[191] How, then, will giving students the choice between reporting their assaults to law enforcement and giving up any remedy through the university encourage survivors to report?

---

185. *See id.* at 1959–60 (citing *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 246–49 (2010) [hereinafter *Hearing on Rape in the United States*] (statement of Carol E. Tracy, Executive Director, Women's Law Project)).

186. *See id.* (citing *Hearing on Rape in the United States*, *supra* note 185, at 246–49 (statement of Carol E. Tracy, Executive Director, Women's Law Project)); *see also* U.S. DEP'T OF JUSTICE, IDENTIFYING AND PREVENTING GENDER BIAS IN LAW ENFORCEMENT RESPONSE TO SEXUAL ASSAULT AND DOMESTIC VIOLENCE 3 (2015), https://www.justice.gov/opa/file/799366/download.

187. *See* U.S. DEP'T OF JUSTICE, *supra* note 186, at 3 (discussing law enforcement misclassifying or underreporting sexual assault, inappropriately concluding that sexual assault cases are unfounded, and failing to test sexual assault kits).

188. *See* Press Release, Office of the Press Sec'y of the White House, Fact Sheet: Investments to Reduce National Rape Kit Backlog and Combat Violence Against Women (Mar. 16, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/03/16/fact-sheet-investments-reduce-national-rape-kit-backlog-and-combat-viole; *see also* 34 U.S.C. § 40701 (2012) (authorizing the Attorney General to grant funds for this purpose).

189. *See* Anderson, *supra* note 138, at 1959 (citing David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196 (1997)).

190. *Id.* at 1961–62 (citing JODY RAPHAEL, RAPE IS RAPE: HOW DENIAL, DISTORTION, AND VICTIM BLAMING ARE FUELING A HIDDEN ACQUAINTANCE RAPE CRISIS 138–39 (2013)).

191. *See id.*

Arguing for the involvement of law enforcement in campus sexual misconduct disciplinary proceedings again conflates the criminal violation of sexual misconduct with the equitable remedies afforded under Title IX. Requiring educational institutions to refer sexual misconduct allegations to law enforcement agencies, which have continuously failed to adequately address the most prevalent forms of sexual misconduct on university campuses, will discourage students alleging sexual misconduct from reporting their assaults. Consequently, alleging students will be foreclosed from seeking redress through their educational institutions, effectuating neither the goals of Title IX nor the goals purportedly advanced by the Safe Campus Act.[192] The Safe Campus Act is therefore misguided and should not become law.

2. Pretextual Paternalism: Who Does This Protect?

Colleges and universities have independently disciplined students since the early part of the 19th century.[193] The types of misconduct that educational institutions adjudicate range from plagiarism to nonsexual assault to homicide.[194] If the legislature believes that college campuses are not equipped to investigate and handle an independent adjudication of sexual misconduct that constitutes criminal activity, it should be drafting legislation to require universities to refer *all* alleged misconduct that carries potential criminal liability to law enforcement agencies. However, it is troubling that the legislature only seems concerned with providing students accused of sexual misconduct with unique procedural protections. Given the history of the criminal justice system's inadequacies in handling cases involving sexual misconduct,[195] we should be wary of the legislature creating laws that seem inherently pretextual. Creating such laws merely heightens the protections of an accused student, while lowering the protections of accusing students by restricting the remedies available to them under Title IX.

There is no denying that universities do not have access to the kinds of investigatory tools that law enforcement has.[196] For example, universities do not have forensic laboratories or the ability to subpoena witnesses.[197] However, this argument misses the point. Educational institutions do not have the penological interests of the state, and therefore need only use the resources they have available to ensure

192. *See* Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015) (stating that one of the purposes of the proposed legislation is to "protect victims of sexual violence").
193. *See* Anderson, *supra* note 138, at 1997.
194. *See id.*
195. *See supra* III.B.1.
196. *See* Anderson, *supra* note 138, at 1994–95.
197. *See id.* at 1994.

educational equity, per Title IX's goal.[198] Proponents of the Safe Campus Act must stop conflating the criminal violation of sexual assault with the equitable remedies afforded under Title IX. They must allow educational institutions to continue campus disciplinary proceedings without law enforcement involvement or heightened standards of proof to ensure that sexual misconduct survivors are not being denied their civil right to equal education.

C. Recommendations: What Institutions of Higher Education Can Do to Balance the Interests

While ensuring meaningful due process for accused students is a legitimate goal, passing the Safe Campus Act would do little to effectuate its goal of protecting survivors of sexual misconduct and would severely limit the scope and enforcement of Title IX as it pertains to sexual misconduct in higher education. Educational institutions must do their part to balance the interests of both the accused and accusing students. Although the unique procedural hurdles[199] that the Safe Campus Act proposes are misguided, there are procedural protections that educational institutions can put in place to ensure meaningful due process while still complying with Title IX and its goals.[200]

In fact, OCR requires adequate, reliable, and impartial investigations of complaints.[201] Along with its requirements of notice and the opportunity for both parties to present witnesses and other evidence, OCR outlines additional procedures that educational institutions may incorporate into their grievance procedures that are in compliance with Title IX.[202] These procedures include allowing both parties to: secure legal counsel, cross-examine witnesses, and go through an appeals process by which an independent party can review the findings of fact for error.[203] These added protections, though not constitutionally or

198. *See id.* at 1998.

199. Specifically, some hurdles include the law enforcement referral requirement under Section 163 and the provision allowing educational institutions to set any standard of proof they find appropriate for the investigation and adjudication of sexual misconduct under Section 164. *See* Safe Campus Act of 2015, H.R. 3403, 114th Cong. §§ 163–164 (2015).

200. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 109, at 14; *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 129, at 3–4.

201. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 109, at 20; *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 129, at 3.

202. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 109, at 20; *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 129, at 3–4.

203. *See* OFFICE FOR CIVIL RIGHTS, *supra* note 129, at 5.

statutorily required,[204] may be incorporated into an educational institution's grievance procedures to ensure that each student has meaningful due process, while at the same time effectuating the equitable goals and purposes of Title IX.

Furthermore, institutions of higher education should implement mandatory preventative programming to attempt to reduce instances of sexual misconduct on campus. Examples of preventative programming may include workshops on effective bystander intervention, where students learn how to intervene in situations that may lead to unwanted and nonconsensual sexual contact.[205] Additionally, institutions of higher education should consider adopting affirmative consent policies that encourage students to obtain meaningful consent through positive verbal or nonverbal agreement to engage in sexual activity.[206] Adopting affirmative consent policies protects a person's sexual autonomy and fosters a culture that encourages communication before sexual activity, which prevents mistakes about consent, and consequently leads to fewer instances of sexual misconduct.[207] Thus, there are many ways that educational institutions can both adequately and independently investigate, adjudicate, and prevent instances of sexual misconduct while simultaneously ensuring meaningful due process for all parties involved in their grievance procedures.

IV. CONCLUSION

Conservative efforts to roll back progressive sexual misconduct reform, such as the Safe Campus Act, should not become law because they conflate the criminality of sexual misconduct with the civil rights and anti-discrimination remedies afforded under Title IX.[208] While broad interpretations of Title IX and progressive reform regarding sexual

204. *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (concluding that, at a minimum, a student charged with a disciplinary violation must be provided with notice and a fair opportunity to be heard).

205. *See Sex Signals*, CATHARSIS PRODUCTIONS, http://www.catharsisproductions.com/programs/sex-signals (last visited Feb. 27, 2017).

206. *See* Anderson, *supra* note 138, at 1978. For example, California law has defined affirmative consent as follows:

> "Affirmative consent" means affirmative, conscious, and voluntary agreement to engage in sexual activity. . . . Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.

CAL. EDUC. CODE § 67386 (West 2015).

207. *See* Anderson, *supra* note 138, at 1979.

208. *See supra* Part III.

misconduct in higher education raise legitimate concerns about the due process of accused students, legislators must not lose sight of the purpose of Title IX: educational equality.[209]

In balancing the interests of the parties, institutions of higher education should implement procedural protections in campus disciplinary proceedings that comport with Title IX and OCR's requirements regarding the adequate, reliable, and impartial investigation of complaints.[210] Furthermore, institutions of higher education should consider implementing mandatory preventative programming, such as bystander intervention workshops, and adopting affirmative consent policies to reduce instances of sexual misconduct.[211] Any attempt by Congress to pass legislation regarding sexual misconduct in higher education should similarly balance the accusing student's interest in access to discrimination-free education with the accused student's interest in meaningful due process, and ensure that one does not outweigh the other.

209. *See* 20 U.S.C. § 1681 (2012); *see also Hearings on Discrimination Against Women*, *supra* note 31, at 657.

210. *See supra* Section III.C.

211. *See supra* Section III.C.

***