

## The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back Against the Pushback

SARAH EDWARDS\*

### INTRODUCTION

The U.S. Department of Education's Office for Civil Rights (OCR) is currently conducting 97 investigations at 94 universities over concerns that the schools violated Title IX in their handling of sexual violence cases.<sup>1</sup> Title IX prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.<sup>2</sup> The law requires schools to respond to hostile educational environments or risk losing federal funding.<sup>3</sup> In 2014 alone, OCR found six violations of Title IX during reviews examining sexual violence cases.<sup>4</sup> In response to these investigations and violations, universities are beginning to implement stricter policies and procedures in order to comply with Title IX.<sup>5</sup>

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\* Duke University School of Law, J.D. Candidate, Class of 2016.

1. Tyler Kingkade, *Barnard College Joins List of 94 Colleges Under Title IX Investigations*, HUFFINGTON POST (Jan. 7, 2015, 9:59 PM), [http://www.huffingtonpost.com/2015/01/07/barnard-college-title-ix-investigations\\_n\\_6432596.html](http://www.huffingtonpost.com/2015/01/07/barnard-college-title-ix-investigations_n_6432596.html).

2. 20 U.S.C. § 1681 (2014) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .").

3. See U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001) [hereinafter 2001 GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> ("This guidance focuses on a school's fundamental compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding.").

4. Tyler Kingkade, *Harvard Law Gave More Rights to Accused Students in Sexual Harassment Cases, Feds Find*, HUFFINGTON POST (Dec. 30, 2014, 7:59 PM), [http://www.huffingtonpost.com/2014/12/30/harvard-law-harassment-title-ix\\_n\\_6396350.html](http://www.huffingtonpost.com/2014/12/30/harvard-law-harassment-title-ix_n_6396350.html) ("The letter sent from the Education Department to Harvard Law marks the sixth time OCR officials determined in 2014 in a review examining sexual violence cases that a higher education institution violated Title IX."). OCR posted a list of the schools currently under investigation, although it only reflects schools under investigation since May 1, 2014. See Press Release, U.S. Dep't of Educ., U.S. Dep't of Educ. Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

5. See, e.g., Press Release, U.S. Dep't of Educ., Princeton Univ. Found in Violation of Title IX, Reaches Agreement with U.S. Educ. Dep't to Address, Prevent Sexual Assault and Harassment of Students (Nov. 5, 2014) [hereinafter Princeton Univ. Found in Violation of Title IX], <http://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-department-address-prevent-sexual-assault-and-harassment-students> ("This fall, Princeton implemented new consolidated policies and procedures that correct many of the deficiencies identified in OCR's investigation."); Press Release, U.S. Dep't of Educ., Harvard Law

University faculty and the media are resistant to these stricter Title IX policies implemented by universities. In October 2014, 28 members of Harvard Law School's faculty issued a statement in response to Harvard's new university-wide policy aimed at preventing sexual harassment and sexual violence based on gender, sexual orientation, and gender identity.<sup>6</sup> The professors objected to Harvard succumbing to pressure imposed by the federal government in an attempt to comply with Title IX requirements (or else lose funding).<sup>7</sup> Following this letter by Harvard Law School's faculty, some members of the media also began pushing back against stricter Title IX policies. Christina Hoff Sommers with *The Daily Beast* claimed that "[d]ozens of falsely accused young men were subjected to kangaroo court proceedings and expelled from college" due to a federal draconian crusade on campus sexual assault.<sup>8</sup> Sommers determined that one report of campus sexual assault caused OCR to write a 'Dear Colleague' Letter, detailing steps universities should take to combat sexual assault on campus, in turn launching Title IX investigations of universities across the country.<sup>9</sup> In a *New York Times* article, Yale Law Professor Jed Rubenfeld claimed that colleges have been forced by the federal government to conduct rape trials, but that they are not competent to adjudicate these issues.<sup>10</sup> Rubenfeld stated that the adjudication process is inherently unreliable and error-prone because the professors and administrators presiding over these trials know little about the laws relating to sexual assault and rape, or criminal investigations<sup>11</sup>

This article addresses ongoing Title IX investigations into how universities are handling reports of sexual assault, the universities' attempts to comply with Title IX, the backlash against the implementation of stricter sexual misconduct policies, and why OCR's stricter guidelines are appropriate. It focuses on sexual assault of college women, with men as the alleged attackers. This focus is not the

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School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, Including Sexual Assault of Students (Dec. 30, 2014) [hereinafter Harvard Law School Found in Violation of Title IX], <http://www.ed.gov/news/press-releases/harvard-law-school-found-violation-title-ix-agrees-remedy-sexual-harassment-including-sexual-assault-students> ("The Law School has committed to take further specific steps to ensure that it responds to student complaints of sexual harassment and sexual violence promptly and equitably."); Voluntary Resolution Agreement between U.S. Dep't of Educ. Office for Civil Rights and Southern Methodist University 1 (Nov. 16, 2014) [hereinafter SMU Agreement], <http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf> ("OCR's investigation found that SMU has implemented and commits to maintaining a number of policies and procedures . . .").

6. Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZn7nU2UwuUuWmNqbM/story.html>.

7. *Id.*

8. Christina Hoff Sommers, *The Media is Making College Rape Culture Worse*, DAILY BEAST (Jan. 23, 2015), <http://www.thedailybeast.com/articles/2015/01/23/the-media-is-making-college-rape-culture-worse.html>.

9. *See id.* (finding that after a 2008 NPR/CPI report about Laura Dunn, a University of Wisconsin student who was told by OCR that there was insufficient evidence to substantiate her allegations against her alleged attacker, received a flurry of media attention, the Department of Education issued the "Dear Colleague" Letter).

10. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), [http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?\\_r=0](http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html?_r=0).

11. *Id.*

result of a lack of concern for sexual assault on college men. Rather, the focus results from the fact that much of the available research focuses only on college women.

In Part I, I present background information on the prevalence of sexual assault on university campuses, Title IX requirements, Title IX investigations into universities' handlings of sexual assault reports, the universities' responses to these investigations, and the pushback against these responses from those in the legal world and in the media. In Part II, I analyze the pushback against stricter sexual assault policies and focus on the government's ability to condition funding on achieving a social policy goal, the standard of evidence required to continue receiving federal funding, and OCR's intended difference between adjudication in the university context versus the criminal context. I take the position that these stricter policies, for the most part, are appropriate. In Part III, I make recommendations as to how universities can ensure a fair and impartial hearing, including by assigning a lawyer to each hearing panel. I also recommend implementing more general deterrence measures, such as providing education for students on sexual assault and implementing stricter campus alcohol policies. Even with these changes in place, sexual assault policies may not satisfy everyone. However, the recommendations seek to balance the interests of the complaining students with the interests of the accused students in the fairest way for all parties involved.

## I. BACKGROUND

### A. Sexual Assault on College Campuses

Women on college campuses are at greater risk for rape and other forms of sexual assault than women in the general population or in a comparable age group.<sup>12</sup> One out of five women in college experiences an attempted or completed sexual assault.<sup>13</sup> Despite these high statistics, few incidents of sexual victimization are reported to law enforcement officials.<sup>14</sup> A majority of women who are victims of sexual assault attempt to protect themselves against their assailants but are reluctant to report the incident to the police.<sup>15</sup> Some research suggests that women are reluctant to report attacks due to barriers to reporting, such as lack of proof that the incident happened, fear of reprisal by the assailant, fear of being treated with hostility by the police, and anticipation that the police

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12. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, NCJ NO. 182369, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* iii (2000) [hereinafter FISHER REPORT], <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

13. CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY* xiii (2014) [hereinafter CSA STUDY], <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. It must be noted that this percentage is sometimes criticized because it is derived from a single survey, based on the experiences of students at two universities. See Glenn Kessler, *One in Five Women in College Sexually Assaulted: An Update on This Statistic*, WASH. POST (Dec. 17, 2014), <http://www.washingtonpost.com/blogs/fact-checker/wp/2014/12/17/one-in-five-women-in-college-sexually-assaulted-an-update/>.

14. FISHER REPORT, *supra* note 12, at 23.

15. *Id.* at 34.

would not believe the incident was serious enough to constitute sexual assault.<sup>16</sup>

Factors that put college women at an especially high risk of being sexually assaulted include frequently drinking enough to get drunk, being unmarried, having been a victim of sexual assault before the start of the school year, and living on campus (for on-campus victimization only).<sup>17</sup> College campuses have become “hot spots for criminal activity,” and large concentrations of women in college come into contact with men in a variety of public and private settings on campus.<sup>18</sup>

In 90 percent of completed and attempted rapes, the victims knew the person who sexually assaulted them.<sup>19</sup> In most cases a boyfriend, ex-boyfriend, classmate, friend, acquaintance, or coworker commits the sexual assault.<sup>20</sup> Additionally, 12.8 percent of completed rapes, 35 percent of attempted rapes, and 22.9 percent of threatened rapes took place on a date.<sup>21</sup> Perpetrators are able to seek out the victim when she is most vulnerable and when the least amount of force is needed to overcome her lack of consent.<sup>22</sup> For example, Emma Sulkowicz, a former student at Columbia University who graduated in May 2015, claims that a classmate raped her in her dorm, on her own mattress, during the first day of her sophomore year.<sup>23</sup> She says they started having consensual sex in her room, but when she wanted to stop, he became violent; he began choking her, slapping her face, pinning her arms, and penetrating her anally, despite her screams for him to stop.<sup>24</sup> The accused rapist is someone she considered to be a friend, and someone she had consensual sex with twice her freshman year.<sup>25</sup>

#### B. Title IX and the ‘Dear Colleague’ Letter

Title IX prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.<sup>26</sup> If recipients do not adequately respond to hostile educational environments, they risk losing federal funding.<sup>27</sup> In April 2011, the U.S. Department of Education’s Office for

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16. *Id.* at 23.

17. *Id.*

18. *Id.* at 1.

19. *Id.* at 17.

20. *Id.*

21. *Id.*

22. Nancy Chi 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, 220 (2011).

23. Sarah Barness, *Columbia University Student Will Drag Her Mattress Around Campus Until Her Rapist is Gone*, HUFFINGTON POST (Sept. 6, 2014, 5:59 PM), [http://www.huffingtonpost.com/2014/09/03/emma-sulkowicz-mattress-rape-columbia-university\\_n\\_5755612.html](http://www.huffingtonpost.com/2014/09/03/emma-sulkowicz-mattress-rape-columbia-university_n_5755612.html).

24. Richard Perez-Pena & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES (May 3, 2014), [http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html?\\_r=0](http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html?_r=0).

25. *Id.* The man was held not responsible by the university, despite two other women coming forward saying they had been assaulted by the same student. They all believe their cases were mishandled. Barness, *supra* note 23.

26. 20 U.S.C. § 1681(a) (2014) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

27. See 2001 GUIDANCE, *supra* note 3, at 1 (“This guidance focuses on a school’s fundamental

Civil Rights (OCR) imposed procedural requirements on universities when handling reports of sexual harassment and sexual violence.<sup>28</sup> Because sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX,<sup>29</sup> the ‘Dear Colleague’ Letter was issued in an attempt to assist recipients of Title IX funding by “lay[ing] out the specific Title IX requirements applicable to sexual violence.”<sup>30</sup> Additionally, OCR found that “[t]he statistics on sexual violence are both deeply troubling and a call to action for the nation.”<sup>31</sup> One in five women is a victim of completed or attempted sexual assault while in college, and approximately 6.1 percent of men are victims of completed or attempted sexual assault during college.<sup>32</sup>

Title IX requires recipients to take immediate action to eliminate student-on-student harassment that creates a hostile environment when the school knows or reasonably should know about such harassment.<sup>33</sup> Schools are also required to publish a notice of nondiscrimination and adopt and publish grievance procedures.<sup>34</sup> Due to these requirements, schools must ensure that their employees are properly trained so that they know to report harassment to the appropriate school officials and so that employees with authority to address the harassment know how to respond correctly.<sup>35</sup> Further, recipients of Title IX funding must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX.<sup>36</sup> Recipients must also adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.<sup>37</sup> Schools are not supposed to “wait for the conclusion of a criminal investigation or criminal proceeding to begin their own Title IX investigation and, if needed, [the school] must take immediate steps to protect the student in the educational setting.”<sup>38</sup> The investigations must be “[a]dequate, reliable, and impartial,” and parties

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compliance responsibilities under Title IX and the Title IX regulations to address sexual harassment of students as a condition of continued receipt of Federal funding.”).

28. See Letter from Russlyn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. (Apr. 4, 2011) [hereinafter “Dear Colleague” Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (“Regardless of whether a harassed student, his or her parent, or a third party files a complaint under the school’s grievance procedures or otherwise requests action on the student’s behalf, a school that knows, or reasonably should know, about a possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.”).

29. *Id.* at 1.

30. *Id.*

31. *Id.* at 2.

32. *Id.* (citing CSA STUDY, *supra* note 13).

33. *Id.* at 4.

34. *Id.*

35. *Id.* (“Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.”).

36. *Id.* at 6.

37. *Id.*

38. *Id.* at 10.

must have the right to present witnesses and evidence.<sup>39</sup> Additionally, schools are to use a preponderance of the evidence standard when resolving complaints.<sup>40</sup> Persons involved in implementing a recipient's grievance procedures (e.g., Title IX coordinators, investigators, and adjudicators) must have training or experience in handling complaints of sexual harassment and sexual violence, as well as experience with the recipient's grievance procedures.<sup>41</sup> While due process must be provided to the alleged perpetrator of sexual violence, schools must also ensure that steps taken to ensure due process rights do not restrict or unnecessarily delay the Title IX protections for the complainant.<sup>42</sup> OCR will review all aspects of a school's grievance procedures.<sup>43</sup>

### C. Questions and Answers on Title IX and Sexual Violence

In April 2014, OCR issued additional guidance for schools' obligations under Title IX to address sexual violence.<sup>44</sup> This document supplements the 'Dear Colleague' Letter and goes into greater detail by answering questions concerning a school's obligation to respond to sexual violence, which students are protected by Title IX, Title IX procedural requirements, reporting requirements, a school's obligation to respond to sexual violence, investigations and hearings, Title IX training, and more.<sup>45</sup> The document also distinguishes between a school's Title IX investigation into allegations of sexual violence and a criminal investigation.<sup>46</sup> The included questions and answers "further clarify the legal requirements and guidance articulated" in the 'Dear Colleague' Letter and OCR's *2001 Guidance* by providing "examples of proactive efforts schools can take to prevent sexual violence and remedies schools may use to end such conduct, prevent its recurrence, and address its effects."<sup>47</sup>

### D. Violations of Title IX and Universities' Responses

Any person who believes there has been a violation of Title IX is permitted

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39. *Id.* at 9.

40. *Id.* at 11 ("For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX.").

41. *Id.* at 12.

42. *Id.*

43. *Id.* at 9.

44. See U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE ii (Apr. 29, 2014) [hereinafter QUESTIONS AND ANSWERS], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> ("In responding to requests for technical assistance, OCR has determined that elementary and secondary schools and postsecondary institutions would benefit from additional guidance concerning their obligations under Title IX to address sexual violence as a form of sexual harassment.").

45. See generally *id.*

46. See *id.* at 27 ("Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence.").

47. *Id.* at ii.

to file a complaint with OCR under Title IX.<sup>48</sup> The goal of a Title IX investigation is to ensure the university is compliant with federal law.<sup>49</sup> If a school violates Title IX and refuses to address the problems identified by OCR, the school “can lose federal funding or be referred to the U.S. Department of Justice for further action.”<sup>50</sup> OCR is currently conducting 97 investigations at 94 colleges and universities “over concerns that the schools violated . . . Title IX in their handling of sexual violence cases.”<sup>51</sup>

Following an investigation into Harvard Law School in 2014, OCR determined that the school failed to comply with Title IX because it did not respond quickly enough to complaints of sexual assault.<sup>52</sup> The school “did not appropriately respond to two student complaints of sexual assault.”<sup>53</sup> While a finding of a Title IX violation does not carry a sanction, a university found in violation must undergo federal monitoring while it implements changes to its sexual misconduct procedures.<sup>54</sup> In addition to Harvard Law School, Southern Methodist University (SMU) was also found in violation of Title IX in 2014.<sup>55</sup> OCR found that SMU failed to conduct a separate investigation under Title IX (aside from the investigation conducted by SMU police), and did not make any determination as to whether the complainant was subjected to a sexually hostile environment.<sup>56</sup> Further, the file documentation did not support that SMU provided prompt and equitable responses to harassment complaints and reports.<sup>57</sup> Princeton University was similarly found in violation of Title IX around this same time.<sup>58</sup>

In response to these investigations and violations, universities are beginning

48. Annie E. Clark & Miriam Hauser, *How to File a Title IX Complaint*, KNOW YOUR TITLE IX, <http://knowyourix.org/title-ix/how-to-file-a-title-ix-complaint/> (last visited Dec. 21, 2015).

49. Press Release, U.S. Dep’t of Educ., *supra* note 4 (stating that Title IX “demands that students are not denied the ability to participate fully in educational and other opportunities due to sex”).

50. *Id.*

51. Kingkade, *supra* note 1.

52. Harvard Law School Found in Violation of Title IX, *supra* note 5 (finding that “current and prior sexual harassment policies and procedures failed to comply with Title IX’s requirements for prompt and equitable response to complaints of sexual harassment and sexual assault”).

53. *Id.* (finding that the school took over a year to make its final determination and the complainant was not allowed to participate in the extended appeal process, which resulted in a reversal of the initial decision to dismiss the accused student and dismissal of the complaint).

54. *See, e.g.*, SMU Agreement, *supra* note 5, at 15 (“Further, the University understands that during the monitoring of this Agreement, OCR may visit the University, interview staff and students and request additional reports or data as are necessary for OCR to determine whether the University has fulfilled the terms of this Agreement and is in compliance with the regulations implementing Title IX, which were at issue in these complaints.”).

55. Jake New, *When the Victim is Male*, INSIDE HIGHER ED (Dec. 12, 2014), <https://www.insidehighered.com/news/2014/12/12/smu-found-violation-title-ix-after-not-investigating-male-students-claim-sexual> (last visited Dec. 21, 2015).

56. Press Release, U.S. Dep’t of Educ., Southern Methodist Univ. Letter 20 (Dec. 12, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf>.

57. *Id.*

58. Princeton Univ. Found in Violation of Title IX, *supra* note 5 (finding that Princeton failed “to promptly and equitably respond to complaints of sexual violence, including sexual assault, and also failing to end the sexually hostile environment for one student”).

to implement new policies and procedures to comply with Title IX.<sup>59</sup> For example, during OCR's investigation of Harvard Law School, the school adopted revised procedures in compliance with Title IX, using the "preponderance of the evidence" standard for its investigations and affording appeal rights to both parties.<sup>60</sup> The school also complied with Title IX requirements by designating a Title IX coordinator and publishing its non-discrimination notice.<sup>61</sup> Further, Harvard Law School reached a monitoring agreement with OCR, allowing OCR to review and approve the policies and procedures used by the school.<sup>62</sup> The school must also review complaints filed during the 2012-13 and 2013-14 school years to decide whether the school investigated the complaints consistent with Title IX, and the school must provide any additional remedies necessary for the complainants.<sup>63</sup> Duke University created a tougher sexual assault policy without being found in violation of Title IX.<sup>64</sup> Expulsion is now the preferred sanction at Duke and the first penalty considered when a student is found responsible for sexual assault.<sup>65</sup> Duke also adopted a mandatory reporting policy, requiring faculty and staff to report any known incidents of sexual assault.<sup>66</sup>

The resolution agreement between OCR and Harvard Law School did not resolve a pending Title IX investigation into Harvard College.<sup>67</sup> Harvard College adopted a new sexual harassment policy in July 2014, establishing uniform standards for all of its schools and a centralized office to investigate all allegations made.<sup>68</sup> The policy includes a central administrative body of trained investigators who report to the Title IX officer in the Office for Sexual and Gender-Based Dispute Resolution (ODR), which will investigate sexual and gender-based harassment complaints against students.<sup>69</sup> ODR will make findings of fact, determine if there was a violation of the school's policy, determine whether there was a hostile environment, and recommend measures to remedy the hostile environment.<sup>70</sup> Like Harvard Law School's revised policy, the

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59. *See id.* ("This fall, Princeton implemented new consolidated policies and procedures that correct many of the deficiencies identified in OCR's investigation."); Harvard Law School Found in Violation of Title IX, *supra* note 5 ("The Law School has committed to take further specific steps to ensure that it responds to student complaints of sexual harassment and sexual violence promptly and equitably."); SMU Agreement, *supra* note 5, at 1 ("OCR's investigation found that SMU has implemented and commits to maintaining a number of policies and procedures.").

60. Harvard Law School Found in Violation of Title IX, *supra* note 5.

61. *Id.*

62. *Id.*

63. *Id.*

64. Tyler Kingkade, *Duke Univ. Toughens Sexual Assault Penalty*, HUFFINGTON POST (July 12, 2013, 5:37 PM), [http://www.huffingtonpost.com/2013/07/12/duke-sexual-assault-penalty\\_n\\_3588261.html](http://www.huffingtonpost.com/2013/07/12/duke-sexual-assault-penalty_n_3588261.html).

65. DUKE UNIV., STUDENT SEXUAL MISCONDUCT POLICY 10 (2014), <http://studentaffairs.duke.edu/sites/default/files/u122/Student%20Sexual%20Misconduct%20Policy.pdf>; Kingkade, *supra* note 64.

66. DUKE UNIV., *supra* note 65, at 6; Kingkade, *supra* note 64.

67. Harvard Law School Found in Violation of Title IX, *supra* note 5.

68. *A New Sexual Assault Policy*, HARVARD GAZETTE (July 2, 2014), <http://news.harvard.edu/gazette/story/2014/07/a-new-sexual-assault-policy/>.

69. *Id.*

70. *Id.*



findings of fact will be made using a “preponderance of the evidence” standard, meaning that it is more likely than not that the allegations are true.<sup>71</sup> Once the investigation is completed, ODR reports will be referred to the appropriate disciplinary body of the individual school involved.<sup>72</sup> The policy and procedures were produced by Harvard’s Title IX officer and chaired by representatives from Harvard College and Harvard Business School.<sup>73</sup>

#### E. Pushback Against Tougher Sexual Assault Policies

In response to the new policy, a group of 28 Harvard Law School faculty members signed a petition asserting that Harvard adopted procedures that lack basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are not required by Title IX.<sup>74</sup> Specifically, the professors expressed concern over:

- The absence of any adequate opportunity to discover the facts charged and to confront witnesses and present a defense at an adversary hearing.<sup>75</sup>
- The lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial.<sup>76</sup>
- The failure to ensure adequate representation for the accused, particularly for students unable to afford representation.<sup>77</sup>

The professors also voiced concern that Harvard simply deferred to the demands of federal administrative officials instead of exercising independent judgment to develop a sexual harassment policy that would be consistent with Title IX. Further, they asserted that Harvard failed to engage a broad group of faculty from its different schools, including the law school, in the development of the new policy.<sup>78</sup> The professors called on the university to withdraw this new policy and think through “what substantive and procedural rules would best balance the complex issues involved in addressing sexual conduct and misconduct” at Harvard.<sup>79</sup> According to the professors, the goal of the policy should be to “fully address sexual harassment while at the same time protecting students against unfair and inappropriate discipline, honoring individual relationship autonomy, and maintaining the values of academic freedom.”<sup>80</sup>

Following the Harvard Law professors’ letter, other legal professionals spoke out in opposition to stricter campus sexual assault policies. Yale professor Jed Rubinfeld stated that the professors and administrators presiding over these

71. *Id.*

72. *Id.*

73. *Id.*

74. Bartholet et al., *supra* note 6.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

trials know little about laws concerning sexual assault or criminal investigations, and thus the process is inherently unreliable and error-prone.<sup>81</sup> Male students who claim innocence are suing their schools because they were found “guilty” of sexual assault, and according to Professor Rubinfeld, mistaken findings of “guilt” are high possibilities because the federal government is “forcing schools to use a lowered evidentiary standard” (preponderance of the evidence, or more likely than not).<sup>82</sup> Professor Rubinfeld also reported that schools are sending an illogical message to their students about drinking and having sex: intercourse while under the influence of alcohol is always rape.<sup>83</sup> Other members of the legal community have expressed concern that using a preponderance of the evidence standard to adjudicate these claims on campus does not comport with the gravity of the charges against the accused, and the accused should at least be afforded the intermediate protection of clear and convincing evidence.<sup>84</sup> In line with one Harvard Law professor’s concerns,<sup>85</sup> some members of the larger legal community have claimed that schools face incentives to wrongfully convict accused students in cases involving alleged sexual violence on campus.<sup>86</sup> Finding an accused student not responsible for the alleged action “carries the threat that OCR could exercise its enforcement authority and thereby cost a college over half a billion dollars in federal funding.”<sup>87</sup>

The media joined the backlash after a *Rolling Stone* article was released about a University of Virginia (UVA) undergraduate student who was allegedly brutally assaulted by seven men at a fraternity party.<sup>88</sup> The article detailed a three-hour rape by multiple men, the victim’s friends’ skeptical responses to reporting the assault to authorities, and UVA’s systematic failure to adequately respond to reports of sexual assault.<sup>89</sup> It was later discovered that the reporter did not attempt to contact the man whom the victim claimed orchestrated the attack against her, nor any of the other men who allegedly participated, because the victim said she feared retaliation.<sup>90</sup> In light of the flaws in the *Rolling Stone*

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81. Rubinfeld, *supra* note 10.

82. *Id.*

83. *Id.*

84. See Barclay Sutton Hendrix, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 611 (2013).

85. See Bartholet et al., *supra* note 6 (“The university’s sexual harassment policy departs dramatically from these legal principles, jettisoning balance and fairness in the rush to appease certain federal administrative officials.”).

86. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 91 (2013); see also Valerie Richardson, *Men Invoking Anti-Discrimination Title IX to Fight Sex Assault Charges*, WASH. TIMES (Dec. 1, 2014), <http://www.washingtontimes.com/news/2014/dec/1/title-ix-invoked-by-male-university-of-colorado-st/?page=all> (“I think if advocates have accomplished anything on this, it’s changing the incentives structure so now it’s predominantly for schools to crack down on accused students to make sure that they get the feds off of their back . . .”).

87. Henrick, *supra* note 86, at 81.

88. See Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119> (describing the incident).

89. *Id.*

90. *Id.*

reporting, news outlets began exposing the discrepancies in the victim's account.<sup>91</sup> A police investigation of the fraternity allegedly involved in the rape determined that there was no basis to believe the incident as told by the victim occurred at the fraternity house, and a months-long freeze on UVA Greek life was lifted.<sup>92</sup> However, UVA remains under a Title IX investigation stemming from a previous 2011 sexual assault.<sup>93</sup>

## II. PUSHING BACK AGAINST THE PUSHBACK: WHY TOUGHER SEXUAL ASSAULT POLICIES ON CAMPUS ARE APPROPRIATE

### A. OCR Conditions Title IX Funding on Policy Compliance, Not Quotas

At the heart of many of the objections to the recent federal pressure on colleges and universities to reform their campus sexual assault policies is the concern that this pressure incentivizes universities to side with accusers and to presume the accused guilty.<sup>94</sup> However, OCR's Title IX enforcement rarely becomes adversarial.<sup>95</sup> In fact, OCR has never once used its power to terminate federal funds to a university.<sup>96</sup> Congress previously expressed that federal funds should not be revoked until the department or agency (here, OCR) has advised the person (here, universities receiving Title IX funding) of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.<sup>97</sup> Federal enforcement has influenced entities through other means, such as complaint investigations, compliance reviews, and the issuance of policy guidance.<sup>98</sup> Instead of pulling funding, OCR's approach to Title IX enforcement emphasizes collaboration and negotiation, consistent with statutory requirements to attempt to secure compliance by voluntary means.<sup>99</sup>

OCR conditioning Title IX funding on universities' compliance with tougher adjudicatory criteria does not mean universities will feel the need to find

91. *Id.*; see also T. Rees Shapiro, *Key Elements of Rolling Stone's U-Va. Gang Rape Allegations in Doubt*, WASH. POST (Dec. 5, 2014), [http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc\\_story.html](http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html); Michael Calderone & Jason Cherkis, *Rolling Stone Fact-Checker Didn't Ask About Alleged Rape Victims in Emails With UVA Officials*, HUFFINGTON POST (Dec. 19, 2014, 9:59 PM), [http://www.huffingtonpost.com/2014/12/19/rolling-stone-uva-emails\\_n\\_6358034.html](http://www.huffingtonpost.com/2014/12/19/rolling-stone-uva-emails_n_6358034.html).

92. T. Rees Shapiro, *Police Clear U-Va. Fraternity, Say Rape Did Not Happen There*, WASH. POST (Jan. 12, 2015), [http://www.washingtonpost.com/local/education/phi-kappa-psi-fraternity-reinstated-at-university-of-virginia/2015/01/12/1b6ddd50-9a69-11e4-96cc-e858eba91ced\\_story.html](http://www.washingtonpost.com/local/education/phi-kappa-psi-fraternity-reinstated-at-university-of-virginia/2015/01/12/1b6ddd50-9a69-11e4-96cc-e858eba91ced_story.html).

93. Dani Kass, *Gang Rape Allegation Puts Title IX Investigation Back in Spotlight*, DAILY PROGRESS (Dec. 2, 2014, 10:00 PM), [http://www.dailyprogress.com/news/local/gang-rape-allegation-puts-title-ix-investigation-back-in-spotlight/article\\_8514fd6a-7a98-11e4-a2b4-737222960938.html](http://www.dailyprogress.com/news/local/gang-rape-allegation-puts-title-ix-investigation-back-in-spotlight/article_8514fd6a-7a98-11e4-a2b4-737222960938.html).

94. See Henrick, *supra* note 86, at 50-51 ("Unfortunately, institutions of higher learning are hindered by several powerful and problematic incentives to falsely convict accused students in these types of cases.").

95. *Id.* at 55 (citing Nat'l Wrestling Coaches Ass'n v. U.S. Dep't of Educ., 263 F. Supp. 2d 82, 88 (D.D.C. 2003)).

96. *Id.*

97. See 20 U.S.C. § 1682 (2014).

98. U.S. GOV'T ACCOUNTABILITY OFF., GAO-01-128, GENDER EQUITY: MEN'S AND WOMEN'S PARTICIPATION IN HIGHER EDUC. 5 (2000), <http://www.gao.gov/assets/240/231026.pdf>.

99. *Id.*

innocent students responsible for sexual assault in order to retain funding. While OCR is investigating 94 schools for Title IX violations,<sup>100</sup> OCR is investigating the schools because they may not be complying with Title IX's requirements to apply a "preponderance of the evidence" standard, to prove prompt and equitable responses to complaints of sexual harassment and sexual assault, or to end a sexually hostile environment for the student who filed a report.<sup>101</sup> OCR does not force schools to meet a quota of students found responsible for sexual harassment or sexual assault in order to retain funding. As long as schools adopt Title IX's standards and fashion their adjudicatory processes accordingly, the school will not lose federal funding.<sup>102</sup> OCR is not investigating universities based on the number of students held "responsible" (or held "not responsible") for sexual harassment and sexual assault; it is investigating schools based on their adjudicatory processes, which must be in line with Title IX.

### B. Preponderance of the Evidence Standard and Due Process

Also central to the critiques of campus sexual assault policy reforms is the concern that schools will be more inclined to erroneously find accused students guilty because of OCR's "preponderance of the evidence" standard employed by the 'Dear Colleague' Letter.<sup>103</sup> While some schools use the higher standard of "clear and convincing" (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred) to find a student responsible for sexual assault, this standard is inconsistent with the standard of proof established for violations of civil rights laws and therefore not equitable under Title IX.<sup>104</sup> While the clear and convincing evidence standard is more difficult to meet, the preponderance of the evidence standard, if employed correctly, balances the need to protect both victims of sexual assault and the interests of the accused.<sup>105</sup>

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100. Kingkade, *supra* note 1.

101. See Harvard Law School Found in Violation of Title IX, *supra* note 5 ("Following its investigation, OCR determined that the Law School's current and prior sexual harassment policies and procedures failed to comply with Title IX's requirements for prompt and equitable response to complaints of sexual harassment and sexual assault."); New, *supra* note 55 ("Southern Methodist University violated Title IX when it failed to provide a 'prompt and equitable response' to the alleged sexual assault of a male student by another male student in 2012. . . ."); Princeton Univ. Found in Violation of Title IX, *supra* note 5 ("OCR's investigation determined Princeton to be in violation of Title IX for failing to promptly and equitably respond to complaints of sexual violence, including sexual assault, and also failing to end the sexually hostile environment for one student.").

102. See, e.g., Harvard Law School Found in Violation of Title IX, *supra* note 5 ("As part of its monitoring of the agreement, OCR will review and approve all of the policies and procedures to be used by the Law School, including the Law School's use of the new University-wide sexual harassment policies and procedures adopted for this academic year.").

103. See "Dear Colleague" Letter, *supra* note 28, at 11 ("Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred) . . .").

104. *Id.*

105. Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for Univ. Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1655 (2012) ("The preponderance of the evidence standard properly balances the accused student's interests in reputation and continued education with the school's equally weighty concerns for promoting just proceedings and a safe learning environment along with preserving scarce administrative resources.").

Universities may use other mechanisms to ensure that the standard of proof has been met. For example, at Duke University, if the case is resolved through a hearing panel, a finding of responsibility must be based on a unanimous vote, and any resulting sanction must be decided by a majority vote (with the exception of suspension or expulsion, which must be supported unanimously).<sup>106</sup> Members of the hearing panel must be properly trained to assure that all protections are appropriately extended, including the preponderance of the evidence standard. This may be more feasible at a wealthier university, such as private universities like Duke and Harvard, than at a public university that is more dependent on tuitions and state budgets. Although the clear and convincing evidence standard sets a higher burden, the preponderance of the evidence standard is not easy to meet if the hearing panel is well trained and relies on a unanimous vote. The complaining student receives the benefit of a “more likely than not” standard instead of “highly probable or reasonably certain,” while the accused student receives the benefit of the hearing panel requiring a unanimous vote in order to find the student not responsible.

OCR’s preponderance of the evidence standard is well reviewed.<sup>107</sup> While the Harvard Law professors believe OCR’s standard lacks basic elements of fairness and due process and overwhelmingly stacks the procedures against the accused,<sup>108</sup> “no court has found clear and convincing evidence necessary to protect students’ due process rights.”<sup>109</sup> Courts also recognize that an appropriate standard of proof to satisfy procedural due process must be assessed using the balancing test set out by the U.S. Supreme Court in *Mathews v. Eldridge*.<sup>110</sup> Under the *Mathews* balancing test, analysis of due process deprivation requires consideration of three distinct factors: first, the private interest that will be affected by official action; second, the risk of erroneous deprivation of such interest through procedures used, and probable value, if any, of additional or substitute procedural safeguards; and third, the government’s interest, including the function involved and fiscal and administrative burdens that additional or substitute procedural requirements would entail.<sup>111</sup> Here, the interests of the accused student should be weighed against the interests of the school.<sup>112</sup>

Under the first factor of the *Mathews* balancing test (the individual or private interests that will be affected by the state action at issue), we must look only to the individual interests of the accused student by focusing on the accused’s property and liberty interests in continued enrollment at the university.<sup>113</sup> Many things are at stake for the accused student, including his

106. DUKE UNIV., *supra* note 65, at 9.

107. See generally Weizel, *supra* note 105, at 1618 (“This Note examines the constitutional due process rights of public college and university students and argues that the preponderance of the evidence standard is a sufficient minimum standard to ensure due process protections for accused students in campus disciplinary proceedings . . .”).

108. Bartholet et al., *supra* note 6.

109. Weizel, *supra* note 105, at 1641.

110. *Id.*

111. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

112. Weizel, *supra* note 105, at 1641.

113. *Id.* at 1645–46 (“The *Mathews* analysis does not seek to balance the interests of the accused against the interests of the victim because only the accused student is subject to direct state action in

“reputation, career goals, educational advancement, and relationships with faculty and peers.”<sup>114</sup> The Supreme Court has found that when important rights are at stake, beyond mere financial loss associated with a typical civil law suit, the clear and convincing evidence standard should be implemented.<sup>115</sup> However, the Court tends to reserve the clear and convincing evidence standard for cases in which fundamental liberty interests are foreclosed.<sup>116</sup> A student’s reputational interest is not as fundamental as permanent civil commitment or the irrevocable termination of one’s parental rights.<sup>117</sup>

The second *Mathews* factor (the risk of erroneous deprivation of a student’s private interest in continued education) is an inquiry into the “fairness and reliability” of the existing procedures and the “probable value, if any, of additional procedural safeguards.”<sup>118</sup> Here, we must look to “the risk that an erroneous deprivation of the individual’s private interest will result from the use of a particular procedure and whether an alternative procedure would reduce that risk.”<sup>119</sup> Because there is usually very limited evidence available in sexual assault adjudications, the preponderance of the evidence standard does not present an impermissibly high risk of erroneous sanctioning of innocent students.<sup>120</sup> These incidents usually occur in dormitory rooms, where third-party eyewitnesses are rare.<sup>121</sup> Hearings are often “he said/she said” credibility contests because the presence of physical evidence of intercourse may not be dispositive of sexual assault.<sup>122</sup> This is because alcohol is often involved and consensual foreplay between the complaining student and the accused typically precedes an acquaintance rape.<sup>123</sup> For example, Emma Sulkowicz and her alleged attacker started having consensual sex before he began choking her, slapping her face, pinning her arms, and penetrating her anally.<sup>124</sup> Because hearing committees expect more physical or testimonial evidence than will probably be available, a preponderance of the evidence standard is unlikely to find innocent students responsible (and unlikely to hold actual perpetrators responsible for their actions).<sup>125</sup> An error in these hearings may occur in two ways. First, sanctioning an innocent student for the perpetration of sexual assault could harm the student’s property interest in continuing education, as well as stigmatize the

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the disciplinary proceeding.”).

114. *Id.*

115. *Id.* at 1647 (citing *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982); *Addington v. Texas*, 441 U.S. 418, 424 (1979)).

116. *Id.* (citing *Santosky*, 455 U.S. at 747–48; *Addington*, 441 U.S. at 427).

117. *Id.* (citing *Santosky*, 455 U.S. at 758–59; *Addington*, 441 U.S. 425–26; *Tigrett v. Rectors & Visitors of the Univ. of Va.*, 290 F.3d 620, 628 (4th Cir. 2002) (holding that a disciplinary proceeding’s potential reputational harm to students, without an accompanying deprivation of a property interest, did not warrant due process protections)).

118. *Id.* at 1648 (citing *Mathews v. Eldridge*, 424 U.S. 319, 343 (1976)).

119. *Id.* (citing *Santosky*, 455 U.S. at 761; *Mathews*, 424 U.S. at 343).

120. *Id.*

121. Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 661 (2001).

122. *Id.*

123. *Id.*

124. Perez-Pena & Taylor, *supra* note 24.

125. Weizel, *supra* note 105, at 1650.

student and harm his reputation.<sup>126</sup> Second, erroneously finding a perpetrator not responsible may force the victim to remain on campus with the perpetrator, while the perpetrator goes unpunished.<sup>127</sup> The interests at stake are significant for both the accused and the complaining student, and the preponderance of the evidence standard “allocates the risk of error equally between the accused student and the school” under *Mathews*’ second factor.<sup>128</sup>

Finally, according to the third *Mathews* factor (the public interests that would be affected by requiring alternative or additional procedures in a particular state action), public interests encompass both substantive and administrative costs.<sup>129</sup> Under the substantive prong, “schools have an interest in promoting their educational mission by embodying fundamental democratic values in their disciplinary proceedings and ensuring a safe learning environment” for their students.<sup>130</sup> If disciplinary proceedings for sexual misconduct allow a disproportionate amount of perpetrators to remain on campus, the school will send a message to its students, and to the community, that it does not take sexual assault seriously.<sup>131</sup> Therefore, the preponderance of the evidence standard best shows a university’s concern for erroneous findings. Additionally, a school that does not sanction perpetrators for sexual assault risks that those students will commit further acts of violence on campus, endangering students and perpetuating “a discriminatory and hostile learning environment.”<sup>132</sup> Under the administrative prong, “schools have an interest in preserving their limited resources through disciplinary proceedings that are not highly formalistic or difficult to implement.”<sup>133</sup> Implementing a clear and convincing evidence standard may burden a school in that it will be required “to present evidence of significant quantity and quality in order to meet its burden” of proof.<sup>134</sup> Most hearing committees are made up of lay fact-finders serving as both judge and jury, and courts hesitate to require schools to utilize formal rules of evidence.<sup>135</sup> Therefore, universities’ substantive and administrative interests are better protected by a preponderance of the evidence standard under *Mathews*’ third factor. However, putting an experienced lawyer on the hearing committee who thoroughly understands the “preponderance of the evidence” standard will help the other committee members avoid an erroneous finding. This requirement would help ensure that an innocent student is not found responsible for sexual assault but would not burden the school by requiring evidence of significant quantity or quality.

Despite the concern that a preponderance of the evidence standard in campus adjudications “lack[s] the most basic elements of fairness and due

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126. *Id.*

127. *Id.*

128. *Id.* at 1651.

129. *Id.*

130. *Id.* at 1651–52 (citing *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14–15 (1st Cir. 1988); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d, 6, 16–17 (D. Me. 2005)).

131. *Id.* at 1652.

132. *Id.* at 1652–53.

133. *Id.* at 1652 (citing *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Gorman*, 837 F.2d at 15).

134. *Id.* at 1653.

135. *Id.* at 1654 (citing *Smyth v. Lubbers*, 398 F. Supp. 777, 800 (W.D. Mich. 1975)).

process” and is “overwhelmingly stacked against the accused,”<sup>136</sup> this standard allows a school to consider the interests of the accused perpetrator, as well as the interests of the complaining student, while conforming with due process.

### C. Adjudication in the Criminal Context vs. the University Context

Sexual assault, while a crime, is also a Title IX issue that schools must and should address without waiting for a criminal charge to be brought first. As previously stated, Title IX prohibits sex discrimination in educational institutions that receive federal funding.<sup>137</sup> Congress enacted Title IX with two main objectives in mind: to avoid the use of federal resources to support discriminatory practices and to provide individual citizens effective protection against those practices.<sup>138</sup> Schools are legally required to respond and remedy hostile educational environments, and failure to remedy these environments is a violation that puts the school at risk for losing federal funding.<sup>139</sup> Federally funded schools must ensure that its students are not denied or limited in their ability to participate in or benefit from the school’s educational programs or activities on the basis of sex.<sup>140</sup> A student’s rights to an environment free from discrimination based on sex are violated when: (1) the alleged conduct is sufficiently serious to limit or deny a student’s ability to participate in or benefit from the school’s educational program (creates a hostile environment), and (2) the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and remedy its effects (as appropriate).<sup>141</sup> Sexual assault creates a hostile environment because it can deny or limit, on the basis of sex, the student’s ability to participate in or to receive benefits, services, or opportunities in the school’s program.<sup>142</sup> Schools receiving federal funding, therefore, have more incentive than the criminal justice system to prevent and efficiently investigate sexual assault.

Rape and other forms of gender-based violence can manifest and perpetuate inequality. Women are disproportionately the victims of sexual harassment and violence, leading to gender disparities in students’ access to education.<sup>143</sup> A student who is sexually assaulted by another student may share classes with her attacker, live in the same dorm as her attacker, or may simply cross paths with her attacker on campus. The victim might reasonably try to avoid her attacker by dropping out of these shared classes, moving to a different dorm, or changing

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136. Bartholet et al., *supra* note 6.

137. 20 U.S.C. § 1681(a) (2014) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

138. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 704 (1979).

139. KNOW YOUR TITLE IX, *Title IX in Detail*, <http://knowyourix.org/title-ix/title-ix-in-detail/> (last visited Dec. 21, 2015).

140. QUESTIONS AND ANSWERS, *supra* note 44, at 1.

141. *Id.*

142. 2001 GUIDANCE, *supra* note 3, at 2.

143. Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294.html#.VP4ASr7i7wx>.



her schedule so as to avoid ever seeing her attacker. Unlike the criminal justice system, universities have the power to separate the victim from her attacker once a report is received, thus minimizing the risk that the victim will be deprived of access to education and the ability to succeed at her school.<sup>144</sup> University adjudication is not supposed to be a parallel to the criminal justice system, which is evident from students' ability to report attacks to both the university and to the police.<sup>145</sup> Instead, campus adjudication of sexual violence is an anti-discrimination right, protecting students' access to educational opportunities at their respective schools.<sup>146</sup> Alternatively, criminal prosecutions are not about protecting the victim, and whether prosecution of the accused proceeds depends on the prosecutor.<sup>147</sup>

Although Title IX's "more likely than not" standard "is much less exacting than criminal law's 'proof beyond a reasonable doubt' requirement," it is for good reason that universities do not have the same evidentiary standard as criminal adjudications.<sup>148</sup> OCR makes it clear that a university's adjudication of sexual assault is not meant to mimic a criminal adjudication, even if parallel investigations are taking place. A criminal investigation is intended to determine whether an individual violated criminal law.<sup>149</sup> If at the end of the criminal investigation, the individual is tried and found guilty, he or she may be imprisoned or subject to criminal penalties.<sup>150</sup> The Constitution gives criminal defendants facing incarceration many protections, including the right to counsel, the right to a speedy trial, the right to a jury trial, the right against self-incrimination, and the right to confrontation.<sup>151</sup> Finally, government officials responsible for criminal investigations (including police and prosecutors) tend to have discretion as to which complaints they will investigate.<sup>152</sup>

In contrast, a Title IX investigation will never result in incarceration of the accused, and so the same procedural protections and legal standards are not required.<sup>153</sup> Instead of being found "guilty," the accused can be found

144. See, e.g., DUKE UNIV., *supra* note 65, at 6 ("Once a report is received, an investigation and possible remedial actions may occur, including . . . interim measures (e.g., a "no contact" directive, trespass from campus, interim suspension), reasonable academic or housing modifications, or other remedies designed to reasonably minimize the recurrence of such conduct as well as mitigate the effects of the alleged behavior.").

145. Brodsky & Deutsch, *supra* note 143.

146. *Id.*

147. *Id.* ("The state, not the survivor, is the plaintiff, and prosecution is not required. Indeed, only about 8 percent of rapes are ever actually prosecuted."); see also KNOW YOUR IX, *Why Schools Handle Sexual Violence Reports*, <http://knowyourix.org/why-schools-handle-sexual-violence-reports/> (last visited Dec. 21, 2015) ("A criminal trial is brought against a defendant by the state – not the victim – in defense of the state's interests. That means that what the survivor needs is sidelined. In contrast, schools, unlike criminal courts, are focused on the victim and are required to make sure he or she has everything they need to continue their education . . . the police just can't get a survivor an extension on her English paper due the week after he or she was raped.").

148. Rubinfeld, *supra* note 10.

149. QUESTIONS AND ANSWERS, *supra* note 44, at 27.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

“responsible,” resulting in sanctions such as expulsion, suspension, disciplinary probation, recommended counseling, and/or other educational sanctions.<sup>154</sup> These sanctions do not have nearly the same repercussions as being found “guilty” in a criminal trial. Further, unlike criminal investigations, which are initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary.<sup>155</sup> Under Title IX, a university wanting to maintain its federal funding has a duty to resolve complaints promptly and equitably.<sup>156</sup> The university must provide a safe and nondiscriminatory environment for each student, free from sexual harassment and sexual violence.<sup>157</sup> Therefore, even if there is no criminal investigation, a school must still follow through with a Title IX investigation. Finally, if a criminal investigation is terminated without an arrest or conviction, there is no effect on a university’s Title IX obligations.<sup>158</sup>

A university has no obligation to wait for the conclusion of a criminal investigation to begin its own Title IX investigation.<sup>159</sup> While a school might have to temporarily delay the fact-finding portion of a Title IX investigation while police are gathering evidence for their own criminal investigation, the school must take interim measures to protect the complainant in the educational setting.<sup>160</sup> Criminal investigations may be useful to the university for fact-gathering if the criminal investigation occurs within the recommended timeframe for Title IX investigations, but a school must still conduct its own investigation.<sup>161</sup> To make sure that students and university employees understand the potential consequences for sexual violence, schools’ Title IX grievance procedures should explicitly include the notice of a student’s right to file a criminal complaint and a Title IX complaint simultaneously.<sup>162</sup> For example, Duke University includes in its student sexual misconduct policy that “[t]he alleged conduct may also be criminal in nature, and complainants have the right to report such conduct to Duke Police, Durham Police, or other appropriate law enforcement agency.”<sup>163</sup>

While “[e]verything possible should be done to encourage victims to participate in a criminal investigation,”<sup>164</sup> many victims are reluctant to do so.

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154. DUKE UNIV., *supra* note 65, at 10.

155. QUESTIONS AND ANSWERS, *supra* note 44, at 27.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.* at 28.

160. *Id.*

161. *Id.* at 27. There is a 60-calendar day timeframe for investigations, which refers to the entire investigation process, including conducting the fact-finding investigation, holding a hearing or engaging in another decision-making process to determine whether the alleged sexual violence occurred and created a hostile environment, and determining what actions the school will take to eliminate the hostile environment and prevent its recurrence, including imposing sanctions against the perpetrator and providing remedies for the complainant and school community, as appropriate. *Id.* at 31.

162. *Id.* at 13.

163. DUKE UNIV., *supra* note 65, at 7. Further, the policy states that a criminal report does not preclude university disciplinary action, and regardless of whether a complainant pursues a criminal complaint, Duke University may investigate the incident in question. *Id.* at 7–8.

164. Rubinfeld, *supra* note 10.

Very few incidents of sexual victimization are reported to law enforcement officials.<sup>165</sup> Just over half of rape victims do not report the crime to the police.<sup>166</sup> In one study, fewer than five percent of completed and attempted rapes of college women were reported to law enforcement.<sup>167</sup> In the same study, victims gave many reasons for not reporting their victimizations to law enforcement, including not seeing the incidents as harmful or important enough to bring to the authorities.<sup>168</sup> Other suggested barriers to reporting include not wanting family or others to know about the incident, lack of proof that the incident happened, fear of reprisal by the assailant, fear of being treated with hostility by the police, and anticipation that the police would not believe the incident was serious enough to investigate and/or would not want to be bothered with the facts.<sup>169</sup> Further, many victims may not want to go through the ordeal of a long criminal trial.<sup>170</sup> Criminal trials can be very expensive, and many victims may be unable to afford a lawyer. Only one-quarter of all reported rapes lead to an arrest, only one-fifth lead to prosecution, and only half of those prosecutions result in felony convictions.<sup>171</sup>

Requiring universities to adjudicate sexual assault reports gives them a necessary and appropriate role in a phenomenon of very significant relevance to the welfare of their students. First, universities have the ability and incentive to educate their students about what is considered sexual assault. This way, students who are sexually assaulted will not feel that what happened to them is unimportant or not serious enough to bring to the attention of the university (or the police). Further, by educating about and preventing sexual assault, schools are allowing students to receive an education in an environment that is free from hostility, as required by Title IX, and they are promoting their campus as a safe community. Second, a victim of sexual assault does not need a lawyer in order to report the incident to the university.<sup>172</sup> The student need only report the incident to the university in order for the university to open an investigation into the incident.<sup>173</sup> This gives victims who are unable to afford a lawyer an avenue to hold their attackers responsible. Third, instead of waiting for the criminal trial to conclude to punish the attacker, the university can sanction the student found responsible with expulsion, suspension, or other educational sanctions. While this does not go as far as putting the attacker behind bars, it allows the victim to remain on campus without fear of running into her attacker.

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165. FISHERREPORT, *supra* note 12, at 23.

166. RAINN, *Reporting Rates*, <https://www.rainn.org/get-information/statistics/reporting-rates> (last visited Dec. 21, 2015).

167. FISHER REPORT, *supra* note 12, at 23.

168. *Id.*

169. *Id.*

170. KNOW YOUR IX, *supra* note 147.

171. *Id.*

172. DUKE UNIV., *supra* note 65, at 6 (“A student may confidentially report a violation of this policy to those who serve in a professional role in which communication is privileged under North Carolina law and to those whom the university has designated as confidential reporters consistent with Title IX.”).

173. *Id.* (“Once a report is received, an investigation and possible remedial actions may occur, including adjudication through the disciplinary process . . .”).

It is untrue that “college rape trials [will] become a substitute for criminal prosecution.”<sup>174</sup> As previously stated, Title IX adjudications are not meant to replace criminal prosecutions for sexual assault. Further, it would be strange if a university decided *not* to handle reports of sexual assault. Universities have policies for numerous types of misconduct, including but not limited to: alcohol; drugs; hazing; physical abuse, fighting and endangerment; stalking; unauthorized surveillance/photography; weapons, firearms, and explosives; academic dishonesty; and gambling.<sup>175</sup> The fact that sexual assault is a criminal act does not alter a university’s obligation to punish the misconduct with educational sanctions as it does with other types of misconduct.

### III. RECOMMENDATIONS

#### A. Ensure Proper Training and Understanding of Title IX Grievance Procedures

While adjudication of sexual assault can be appropriate in the university context, the process must be performed correctly so as to protect both the complaining student and the accused student. Most importantly, because “the functions of investigation, prosecution, fact-finding, and appellate review” are lodged in one office,<sup>176</sup> it is crucial that the office be impartial. In order for this to be possible, all persons involved in implementing a school’s Title IX grievance procedures must have enhanced levels of training or experience in handling sexual violence complaints.<sup>177</sup> The training must include:

- The proper standard of review (preponderance of the evidence).<sup>178</sup>
- Information on consent and the role drugs or alcohol can play in the ability to consent.<sup>179</sup>
- Information on working with and interviewing persons subjected to sexual violence.<sup>180</sup>
- Information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence.<sup>181</sup>
- The importance of accountability for individuals found to have committed sexual violence.<sup>182</sup>
- The need for remedial actions for the perpetrator, complainant, and school community.<sup>183</sup>
- How to determine credibility.<sup>184</sup>
- How to determine evidence and weigh it in an impartial manner.<sup>185</sup>

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174. Rubinfeld, *supra* note 10.

175. See, e.g., DUKE UNIV., *A-Z Policies*, <http://studentaffairs.duke.edu/conduct/z-policies> (last visited Dec. 21, 2015).

176. Bartholet et al., *supra* note 6.

177. QUESTIONS AND ANSWERS, *supra* note 44, at 40.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

- How to conduct investigations.<sup>186</sup>
- The effects of trauma, including neurobiological change.<sup>187</sup>
- Cultural awareness training regarding how sexual violence may impact students differently depending on their cultural backgrounds.<sup>188</sup>

It is likely easier for private schools with greater financial resources, such as Harvard University and Duke University, to bring in outside expertise needed to fully train all persons involved in implementing the school's Title IX grievance procedures. Schools that are more tuition-dependent simply may not have the money necessary to implement an impartial grievance procedure. If OCR wants each school receiving Title IX funding to implement its grievance procedure for all sexual assault reports, OCR must find a way for less well-resourced schools to obtain the means to properly train their investigators and panels. If schools have the resources to properly train their investigators and panels, the risk of finding innocent students responsible for sexual assault is minimized, and the opportunity to hold perpetrators responsible is maximized.

#### B. Put a Lawyer on Each Hearing Panel

Although hearing officers and appellate panel members can be trained about what "preponderance of the evidence" means, putting at least one experienced attorney on each hearing and appellate panel will help ensure that the panels do not erroneously find an innocent student responsible. OCR defers to schools in allowing parties to have lawyers present at any stage of the proceedings.<sup>189</sup> This inconsistent treatment of access to counsel can be ameliorated when a lawyer is present on the hearing panel. A lawyer has more than just training in the preponderance of the evidence standard. He or she will have extensive experience in understanding what evidence is important, what evidence is irrelevant, and what tips the incident into the "more likely than not" realm.

#### C. Implement More General Deterrence Measures

OCR's mandated Title IX procedures act as specific deterrence for sexual assault, but general deterrence can prevent sexual assault from happening at all. While OCR finds that "a school should provide age-appropriate training to its students regarding Title IX and sexual violence," it is not mandated.<sup>190</sup> Instead, OCR only recommends that schools include this training in their orientation programs for new students, as well as for student athletes and members of

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.* at 26 ("If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.")

190. *See id.* at 41.

student organizations.<sup>191</sup> Additionally, OCR recommends that schools consider educational methods that are most likely to help students retain information, including repeating the training at regular intervals.<sup>192</sup> At a minimum, OCR recommends that certain topics should be covered in training, such as:

- Title IX and what acts constitute sexual violence, including same-sex sexual violence, under the school's policies.<sup>193</sup>
- The school's definition of consent applicable to sexual conduct, including examples.<sup>194</sup>
- How the school analyzes whether conduct was unwelcome under Title IX.<sup>195</sup>
- How the school analyzes whether unwelcome sexual conduct creates a hostile environment.<sup>196</sup>
- The role alcohol and drugs often play in sexual violence incidents, including the deliberate use of alcohol and/or other drugs to perpetrate sexual violence.<sup>197</sup>
- Strategies and skills for bystanders to intervene to prevent possible sexual violence.<sup>198</sup>

OCR should mandate this training for students to help prevent sexual assault from occurring at all, instead of just focusing on resolving the problem through Title IX adjudications. In focusing on prevention, a campus sexual assault education program should include comprehensive education about rape myths, common circumstances under which assault occurs, rapist characteristics, prevention strategies, rape trauma responses, and support services.<sup>199</sup> In order to reach as many students as possible, these messages should be disseminated in several forms, such as through orientation, curriculum infusion, resource center trainings, campus events, and public information materials.<sup>200</sup>

Additionally, because many incidents of sexual assault involve alcohol, schools can implement harsher alcohol policies in order to deter dangerous behavior from occurring. Dartmouth College is in the process of implementing one such policy, banning hard alcohol after OCR found that the school was not adequately responding to instances of sexual assault.<sup>201</sup> The school currently requires fraternities and sororities hosting parties in their houses to register with campus police what kind of alcohol they will serve, students of age are given

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191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. HEATHER M. KARJANE ET AL., U.S. DEP'T OF JUSTICE, NCJ No. 205521, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 12 (2002) [hereinafter KARJANE REPORT], <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

200. *Id.*

201. Morgan Baskin, *Dartmouth Bans Hard Liquor in Effort to End High-Risk and Harmful Behavior*, USA TODAY (Jan. 31, 2015, 9:05 PM), <http://college.usatoday.com/2015/01/31/dartmouth-bans-hard-liquor-in-effort-to-end-high-risk-and-harmful-behavior/>.

wristbands once inside, and university police officers come by at least two times a night.<sup>202</sup> Dartmouth also hires sober monitors, whose job is to go to Greek parties and aid any students who appear highly intoxicated.<sup>203</sup> Schools should also be aware that victims might be deterred from reporting incidents if violations of campus rules regarding alcohol were involved.<sup>204</sup> Schools must ensure that their disciplinary policies do not have a chilling effect on victims' reporting of sexual violence offenses or participating as witnesses.<sup>205</sup> In this situation, OCR recommends that universities inform their students that the school's primary concern is student safety, and that use of alcohol (or drugs) never makes the victim at fault for sexual violence.<sup>206</sup>

#### CONCLUSION

OCR's mandated policies may not find every perpetrator responsible for sexual assault, but the policies will help to reduce the number of wrongdoers slipping through the cracks of the Title IX system. Despite concerns that universities will be pressured to find more students responsible for sexual assault as a result of stricter policies required by OCR, these investigations are a result of universities not complying with mandated procedures. Universities do not have to find more students responsible for sexual assault in order to fill a quota. Instead, they simply must comply with OCR's procedures, as required by Title IX.<sup>207</sup>

A preponderance of the evidence standard, while less strict than the clear and convincing evidence standard, is still not an easy burden for victims to meet. There tends to be very limited evidence available in sexual assault adjudications, and therefore the preponderance of the evidence standard does not present an impermissibly high risk of erroneous sanctioning of innocent students. Further, under the *Mathews* balancing test, given the reputational interests of the accused, the risk of an erroneous ruling for both parties, and the public interest in promoting a safe educational environment, accused students are not deprived of their due process rights under the preponderance of the evidence standard.

While there is a concern that the Title IX system will usurp the purpose of

202. *Id.*

203. *Id.*

204. See QUESTIONS AND ANSWERS, *supra* note 44, at 42; KARJANE REPORT, *supra* note 199, at 8 ("Campus policies on drug and alcohol use have been adopted at three-fourths of the schools studied. At more than half of these schools, administrators say these policies inhibit reporting.").

205. QUESTIONS AND ANSWERS, *supra* note 44, at 42.

206. *Id.*

207. See Harvard Law School Found in Violation of Title IX, *supra* note 5 ("Following its investigation, OCR determined that the Law School's current and prior sexual harassment policies and procedures failed to comply with Title IX's requirements for prompt and equitable response to complaints of sexual harassment and sexual assault."); New, *supra* note 55 ("Southern Methodist University violated Title IX when it failed to provide a 'prompt and equitable response' to the alleged sexual assault of a male student by another male student in 2012 . . ."); Princeton Univ. Found in Violation of Title IX, *supra* note 5 ("OCR's investigation determined Princeton to be in violation of Title IX for failing to promptly and equitably respond to complaints of sexual violence, including sexual assault, and also failing to end the sexually hostile environment for one student.").

the criminal system, the two are not intended to be substitutes for each other. Instead, the university adjudication system allows victims to be in an environment free from sexual harassment and sexual assault. Additionally, allowing a victim to report an incident to the university navigates around many of the problems encountered in the criminal system, such as cost and time. The process and punishment for the two systems are meant to be different, giving victims many opportunities to hold their attackers accountable.

Sexual assault on campus is a prevalent problem throughout the country and must be handled correctly by universities. OCR's recent guidance is a large step forward in protecting students from incidents of sexual assault. However, this specific deterrence must be accompanied by more general deterrence in order to prevent sexual assaults from occurring at all.