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## (Un)Due Process: Adversarial Cross-Examination in Title IX Adjudications

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# (UN)DUE PROCESS: ADVERSARIAL CROSS-EXAMINATION IN TITLE IX ADJUDICATIONS

*Suzannah Dowling\**

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## ABSTRACT

Campus sexual assault grievance procedures, governed by Title IX, have become a hotspot for recent debates about the contours of due process on college campuses. The Obama administration substantially revised Title IX grievance procedures to encourage reporting and adjudication of campus sexual assaults. Less than a decade later, the Trump administration rolled out its own Title IX guidance to undo many of those requirements, in the name of enhancing due process protections for accused students. One particularly controversial new requirement in the 2020 Title IX regulations is for adversarial cross-examination. This Comment argues that adversarial cross-examination in campus sexual assault adjudications is not required by due process and undermines the mandate of Title IX. Indirect, non-adversarial cross-examination would sufficiently protect the due process rights of accused students while also ensuring that accusing students are not re-traumatized by the adjudication process.

## INTRODUCTION

There is a crisis regarding sexual assault on college campuses—but just what that crisis is, exactly, depends on whom you ask. One side points to oft-cited evidence that sexual assault occurs all too frequently on college campuses<sup>1</sup> and often either is not addressed at all or is handled poorly.<sup>2</sup> In response to these failures, the Obama administration substantially enhanced its Title IX guidance through a Dear Colleague Letter issued in 2011, with an aim toward providing greater protection for

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1. See, e.g., Heather M. Karjane et al., *Sexual Assault on Campus: What Colleges and Universities Are Doing About It*, NAT'L INST. JUST. (Dec. 2005), <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf> [<https://perma.cc/6LVX-B54G>] (estimating that “one in five young women experiences rape during college”); RAINN, *Campus Sexual Violence: Statistics*, <https://www.rainn.org/statistics/campus-sexual-violence> [<https://perma.cc/5Z5E-B96F>] (last visited Nov. 11, 2020) [hereinafter RAINN, *Campus Sexual Violence*]. These statistics have been criticized as overreporting the prevalence of campus sexual assault. See, e.g., *New DOJ Data on Sexual Assaults: College Students are Actually Less Likely to be Victimized*, THE FEDERALIST (Dec. 11, 2014), <https://thefederalist.com/2014/12/11/new-doj-data-on-sexual-assaults-college-students-are-actually-less-likely-to-be-victimized/> [<https://perma.cc/3U92-S4BP>]; Libby Nelson, *‘1 in 5’: How a Study of 2 Colleges Became the Most Cited Campus Sexual Assault Statistic*, VOX, (Dec. 11, 2014, 2:00 PM), <https://www.vox.com/2014/12/11/7377055/campus-sexual-assault-statistics> [<https://perma.cc/ZN66-49EQ>]. But see Charlene L. Muehlenhard et al., *Evaluating the One-in-Five Statistic: Women’s Risk of Sexual Assault While in College*, 54:4-5 J. OF SEX RES. 549, 566 (2017) (“Many women are sexually assaulted while in college. Based on a review of the studies that most directly addressed this question, one in five (20%) is a reasonable estimate of the percentage of undergraduate women sexually assaulted while in college.”).

2. See, e.g., Kelley A. Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims’ Attorneys*, 65 DRAKE L. REV. 293, 319 (2017) (“Although the precise percentage of cases in which students are found responsible for sexual misconduct is unknown, a recent survey found that one-third of colleges and universities have never expelled a student for sexual misconduct.”); Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 113 (2017) (“In addition to the harm inflicted by the assault itself, there are harms from the institutional failures of colleges and universities to adequately respond to reports of sexual assault. Many survivors experience such institutional betrayal that they feel they have no choice but to leave their institutions, either by transferring to another school, often with loss of academic credit and money, or dropping out of college entirely.”).

survivors.<sup>3</sup> On the other side, though, a vocal minority argue that the pendulum has swung too far, and that now universities are discriminating against male students accused of sexual assault, unfairly using Title IX as a cudgel to violate the due process rights of men.<sup>4</sup> This debate has come to a head over the issue of whether adversarial cross-examination should be required during Title IX grievance procedures, culminating in a nearly simultaneous circuit split and flip-flop by the Department of Education with respect to Title IX guidance and regulations.

Cross-examination is often referred to as the “greatest legal engine” for truth seeking<sup>5</sup> in the criminal and civil systems. It makes sense, then, that it has been imported in various permutations into the school disciplinary process realm. But, because cross-examination too often weaponizes rape myths to erroneously undermine the credibility of accusers, adversarial cross-examination actually solidifies the harms of campus sexual assault, while achieving only minimal truth-seeking value and therefore failing to ensure due process either for accusing or accused students. Both the Title IX regulations promulgated in 2020 and recent split between the First and Sixth Circuits deal directly with this issue, making it ripe for clarification both judicially and administratively.<sup>6</sup>

Part I of this Comment examines Title IX’s evolution to cover campus sexual assault and explores both the harms of campus sexual assault and the reasons why it remains underreported. Part II examines the role of the Office for Civil Rights in shaping and enforcing universities’ obligations under Title IX, due process protections in school disciplinary decisions, cross-examination and the ways in which it has failed to serve as an engine for truth-seeking in the sexual misconduct context, and the split between the First and Sixth Circuits over whether adversarial cross-examination is required in school disciplinary proceedings. Part III is a focused analysis of adversarial cross-examination under the *Mathews v. Eldridge* framework. This Part argues that the adversarial cross-examination in Title IX grievance procedures is not required by due process and, if implemented, will deter reporting of sexual assault and will further sex-based discrimination on campus, in

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3. Letter from Russlynn Ali, Asst. Sec’y for C.R., to Colleagues, U.S. DEPT. OF EDUC., OFF. C.R. 2 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/Q28W-RJ9L>] [hereinafter *2011 Dear Colleague Letter*]; Tanya Somanader, *President Obama Launches the “It’s On Us” Campaign to End Sexual Assault on Campus*, THE WHITE HOUSE, PRESIDENT BARACK OBAMA (Sept. 19, 2014, 2:40 PM), <https://obamawhitehouse.archives.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus> [<https://perma.cc/TLQ4-FFEX>].

4. Glenn Harlan Reynolds, *Higher Education Discriminates Against Men, But Title IX Complaints May Change That*, USA TODAY (Feb. 12, 2019, 6:00 AM), <https://www.usatoday.com/story/opinion/2019/02/12/colleges-universities-discriminate-men-title-ix-complaints-toxic-masculinity-column/2831834002/> [<https://perma.cc/JQ95-XQD3>]; Allie Grasgreen, *Going on Offense With Title IX*, INSIDE HIGHER ED (Aug. 9, 2013), <https://www.insidehighered.com/news/2013/08/09/accused-rape-men-allege-discrimination-under-title-ix> [<https://perma.cc/S4GD-Y78J>].

5. See Jules Epstein, *Cross-Examination: Seemingly Ubiquitous, Purportedly Omnipotent, and “At Risk,”* 14 WIDENER L. REV. 427, 427 (2009) (citation omitted).

6. Although constitutional due process applies only to public universities, Title IX applies to virtually all higher education institutions, both public and private. Therefore, although the circuit split due process question applies only to public universities, the larger issue of Title IX’s obligations imposed on all recipients of federal funding with respect to grievance procedures applies almost universally.

direct contravention of Title IX's mandates. Instead, a less adversarial indirect form of cross-examination meets the goals of all parties in fairly adjudicating Title IX cases without subjecting complaining students to a hostile environment.

## I. TITLE IX AND CAMPUS SEXUAL ASSAULT

### A. *Title IX's Evolution to Cover Campus Sexual Assault*

Title IX was passed in 1972, in the wake of the landmark Civil Rights Act of 1964,<sup>7</sup> to bar sex-based discrimination in education.<sup>8</sup> The purpose of the legislation was twofold—first, to prohibit the use of federal resources to carry out sex-based discriminatory practices; and second, to provide protection for individuals victimized by such practices.<sup>9</sup> Additionally, it reflects a recognition that “sex discrimination . . . has historically impeded women’s equal access to education.”<sup>10</sup> The statute is succinct, reading:

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 assistance.<sup>11</sup>

The brevity of the Act belies its complexity. Title IX has come to apply “to a host of activities and programs within higher education, including admissions and financial aid, sexual harassment, and athletics.”<sup>12</sup> If a student suffers from sexual harassment that impacts “[her] ability to access her education” in a negative way, she may have a cause of action under Title IX.<sup>13</sup> Because receipt of federal funding is conditioned upon compliance with the statute,<sup>14</sup> Title IX applies to nearly all colleges and universities in the United States.<sup>15</sup>

Although Title IX was written with gender neutral language, at the time of its passage it was understood specifically to prohibit sex-based discrimination against women, and for the first twenty years of its existence all cases brought under the

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7. The legislation was initially introduced as “the Women’s Equality Act of 1971 (Title IX) in order to extend the provisions of the 1964 and 1968 Civil Rights Acts to cover instances of sex discrimination and to strengthen the existing civil rights legislation.” Paul C. Sweeney, *Abuse Misuse & Abrogation of the Use of Legislative History: Title IX & Peer Sexual Harassment*, 66 UMKC L. REV. 41, 54 (1997).

8. 20 U.S.C. § 1681(a) (2012).

9. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (holding that Title IX provides a private right of action for individuals against their schools in some circumstances).

10. Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 634 (2018).

11. § 1681(a).

12. Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 495 (2012).

13. Mann, *supra* note 10, at 641 (noting that “one instance of sexual assault may be sufficient to constitute sexual harassment, if it is ‘sufficiently severe.’ The complainant must allege (and demonstrate, in order to prevail) that the sexual assault negatively affected her education.”).

14. § 1681(a).

15. Katie Jo Baumgardner, *Resisting Rulemaking: Challenging the Montana Settlement’s Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1814 (2014) (“Every university and college across the nation – with the exception of three – accepts federal financial assistance.”).

statute were brought by women.<sup>16</sup> In 1994 the Second Circuit construed Title IX as a gender neutral statute that allows men to bring claims.<sup>17</sup> However, in 94% of cases the victim is female and in 99% of cases the alleged perpetrator is male.<sup>18</sup> Because of these stark gender differences, and the ways in which gender norms have shaped the adjudication of sexual assaults both on campuses and in the larger legal system, this Comment uses gendered language and refers generally to Title IX complainants as female and accused students as male.

Title IX was written broadly, and through advocacy, agency interpretation, and judicial decisions has come to encompass peer sexual assault,<sup>19</sup> bringing colleges into the uncomfortable dual role of investigator and adjudicator for often complicated cases.<sup>20</sup> This evolution was in large part driven by the feminist movement's push for increased societal recognition that sexual violence was a pervasive and highly consequential aspect of women's lives, which had a detrimental impact on their educational pursuits.<sup>21</sup> Title IX's primary purpose is "to protect and promote equal educational opportunity for all students, including both the alleged perpetrators and the victims of gender-based violence."<sup>22</sup> At its core, Title IX recognizes the right of all students to be free from sex-based discrimination in

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16. Peggy Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling "Due Process" Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN'S RTS. L. REP. 126, 135 (2018).

17. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 716 (2d Cir. 1994) (holding that a male student accused of sexual assault may bring a Title IX claim to challenge alleged gender bias in the school's disciplinary process).

18. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS, 3-4, (2015), [http://www.ncdsv.org/ERS\\_Confronting-Campus-Sexual-Assault\\_2015.pdf](http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf) [<https://perma.cc/NW95-K6R6>].

19. 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, 225 (2011); see also Jacob Gersen & Jeannie Suk Gersen, *The Sex Bureaucracy*, CHRON. HIGHER EDUC. (Jan. 6, 2017), <http://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805> [<https://perma.cc/A96F-F26D>] ("Today the phrase 'Title IX complaint' commonly refers to an allegation of sexual misconduct by one college student against another, but this view was alien at the time of the law's enactment."). The Office for Civil Rights, which administers Title IX, first asserted that Title IX had jurisdiction over complaints of sexual harassment in an August 1981 policy memorandum. Sweeney, *supra* note 7, at 70. The Supreme Court came to the same conclusion in 1992. *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 63, 76 (1992) (judicially construing a private cause of action for monetary damages under Title IX in cases of sexual harassment of a student by a teacher).

20. One recent study found that forty-three percent of Title IX coordinators both conducted investigations and adjudicated the final decisions in those cases. Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI., Apr. 5, 2018, at 1, 7.

21. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 284 (2016) [hereinafter Cantalupo, *Congratulations and Cautions*]; Alexandra Brodsky & Elizabeth Deutsch, *The Promise of Title IX: Sexual Violence and the Law*, DISSENT (Fall 2015), <https://www.dissentmagazine.org/article/title-ix-activism-sexual-violence-law> [<https://perma.cc/DRM2-Q4TY>]; see also Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> [<https://perma.cc/M66S-6GNZ>] ("Sexual misconduct impairs a woman's ability to function as an equal in an academic environment—and by extension menaces all women. Unless a woman is safe, all the other guarantees of equal treatment are irrelevant.")

22. Cantalupo, *Congratulations and Cautions*, *supra* note 21, at 284.

educational settings, to further equal opportunity in education.<sup>23</sup> Both administrative agencies and courts define sex-based discrimination to include sexual harassment, which in turn encompasses sexual assault.<sup>24</sup> Therefore, Title IX recognizes a complicated right of students to be free from sexual harassment and sexual assault in educational settings, and in some circumstances provides a cause of action should this right be violated by a university that fails to address and rectify reported sexual harassment.<sup>25</sup>

Much of the tension in Title IX debates arises from the complicated interplay of the rights of students—both accusing and accused—and the corresponding obligations of their universities to protect these rights. Because universities must protect often directly adverse rights and interests of students on both sides of a sexual assault complaint, they are placed in a delicate balancing position of attempting to follow their Title IX obligations to protect the rights of complainants without denying due process rights to accused students. The rights of Title IX complainants “don’t exist in a vacuum, but rather in relation to other rights, including those of the respondent (the student accused of sexual assault).”<sup>26</sup> For this reason, students’ Title IX rights have evolved as Title IX has been construed through definitions of what constitutes actionable sex-based discrimination and through understandings of the due process rights of the accused, as well as obligations of the educational university.

### B. Campus Sexual Assault

In 2019, the Association of American Universities released a campus climate survey on sexual assault and misconduct which revealed that 25.9% of women undergraduate students “reported experiencing nonconsensual penetration, attempted penetration, sexual touching by force, or inability to consent since they have been enrolled in their respective school.”<sup>27</sup> Additionally, over 41% of all students reported experiencing sexual harassment, and “[18.9%] of students reported sexually harassing behavior that either ‘interfered with their academic or professional performance,’ ‘limited their ability to participate in an academic program’ or ‘created an intimidating, hostile or offensive social, academic or work environment.’”<sup>28</sup>

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23. 20 U.S.C. § 1681(a) (2012).

24. Cantalupo, *Congratulations and Cautions*, *supra* note 21, at 282 (“Included in Title IX’s definition of sex discrimination are sexual and other forms of gender-based violence, which are commonly considered severe forms of sexual harassment, itself a type of sex discrimination that violates Title IX.”). This Comment specifically focuses on campus sexual assault as defined by the Office for Civil Rights as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent.” U.S. DEPT. OF EDUC., OFF. C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1 (Apr. 29, 2014).

25. *See infra* note 60.

26. Mann, *supra* note 10, at 634.

27. DAVID CANTOR ET AL., ASS’N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT 14 (2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7\\_\(01-16-2020\\_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf) [<https://perma.cc/428W-ZL7Z>].

28. *Id.* at xiii.

Despite protestations that Title IX has been taken too far in the past decade,<sup>29</sup> 44.8% of women and 36% of TGQN (transgender, genderqueer, nonconforming) college students report that sexual assault and misconduct is “‘very’ or ‘extremely’ problematic at their school.”<sup>30</sup> Even as of 2014, approximately 41% of schools in a national sample had failed to conduct even a single sexual misconduct investigation during the preceding five years.<sup>31</sup>

Muddying the picture further, campus sexual assaults are often difficult to investigate because they frequently occur when one or both parties is under the influence of alcohol, or when they are in an existing relationship.<sup>32</sup> This complication is directly relevant to the debate over the appropriateness of cross-examination for Title IX grievance procedures, because “[i]t is incredibly difficult for anyone ever to know what happened when the only people who were there do not remember.”<sup>33</sup>

College students who experience sexual assault disproportionately suffer academic consequences, including lower GPAs and higher dropout rates.<sup>34</sup> Victims of sexual assault in college, like victims of sexual assault more broadly, have higher rates of subsequent emotional distress and mental health challenges and suffer from increased economic burdens stemming from the assault.<sup>35</sup> College sexual assault

29. See, e.g., Stuart Taylor Jr. & KC Johnson, *End the Bias in Campus Sexual-Misconduct Tribunals*, REALCLEAR POL. (Feb. 5, 2018), [https://www.realclearpolitics.com/articles/2018/02/05/end\\_the\\_bias\\_in\\_campus\\_sexual-misconduct\\_tribunals\\_136186.html](https://www.realclearpolitics.com/articles/2018/02/05/end_the_bias_in_campus_sexual-misconduct_tribunals_136186.html) [<https://perma.cc/NCS9-M7ZN>]; Editorial, *Campus Kangaroo Courts*, WASH. EXAM’R (Sept. 15, 2017, 4:00 AM), <https://www.washingtonexaminer.com/weekly-standard/campus-kangaroo-courts> [<https://perma.cc/C4JK-NXM3>]; Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> [<https://perma.cc/Y37V-2T25>].

30. CANTOR ET AL., *supra* note 27, at xv.

31. CLAIRE MCCASKILL, *SEXUAL VIOLENCE ON CAMPUS*, U.S. SENATE, 8 (Jul. 9, 2014), <http://dcrcc.org/wp-content/uploads/2014/10/Sen.-McCaskills-Sexual-Violence-on-Campus-Survey-Report1.pdf> [<https://perma.cc/7BHQ-PFY2>] [hereinafter *Senate Report*].

32. See, e.g., Katharine K. Baker, *Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of it All*, 66 J. LEGAL EDUC. 777, 788-89 (2017) [hereinafter Baker, *Essential Sexuality*] (“Approximately seventy-eight percent of all sexual misconduct incidents involve either one or both parties drinking,” and “[s]tudies indicate that thirty-three percent of all alleged incidents of sexual assault involved victims who were drunk, passed out, or asleep.”); Lori E. Shah, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should “Yes” Mean “No”?*, 91 IND. L.J. 1363, 1371 (2016) (“[M]any, if not most, campus sexual assaults take place in the context of a ‘hookup.’”).

33. Baker, *Essential Sexuality*, *supra* note 32, at 796.

34. Cecilia Mengo & Beverly Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. C. STUDENT RETENTION: RES., THEORY & PRAC. 234, 244 (2015); Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE & ABUSE 191, 196-97 (2014).

35. Cora Peterson et al., *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTATIVE MED., 2017, at 697-98 (“The present-value, per-victim estimated lifetime cost of rape was \$122,471,” which represents costs incurred over the victim’s lifetime and does not include intangible costs like a monetized version of pain and suffering.); CANTOR ET AL., *supra* note 27, at 26-27 (“For incidents involving penetration, [62%] of women, [75.7%] of TGQN students, and [48.2%] of men reported at least one academic or professional consequence. The most common reactions reported by those reporting at least one consequence were decreased class attendance (36.3% women, 54.1% TGQN students, and 28.0% men), difficulty concentrating on studies, assignments, and exams (55.5%

victims are significantly more likely to drop out of school than their peers.<sup>36</sup> Specifically, college victims of sexual assault may suffer from declines in educational performance and drops in grades which can lead to loss of scholarships; reduced opportunities for admission to future competitive graduate programs; delayed degree completion; transfer to other, often less prestigious, schools; academic probation; and even expulsion.<sup>37</sup> Thus, unless colleges take action to ensure that victims receive services and accommodations necessary to recover from trauma, they may lose access to education.

### 1. Underreporting of Sexual Assault

Sexual assault is notoriously underreported to law enforcement. According to the Bureau of Justice Statistics published in 2019, 33.9% of victims of rape/sexual assault report to law enforcement, down from what may have been a #MeToo spike in 2017 of 40.4%.<sup>38</sup> Female college students have a lower reporting rate of 20% than nonstudent females age 18-24.<sup>39</sup> The reasons for underreporting of sexual assault are numerous, and for college students often relate to feelings that the student can handle the situation herself, was too ashamed or embarrassed, felt reporting would be too emotionally difficult, or perceived that the incident was not sufficiently serious to warrant reporting.<sup>40</sup> When students felt that their assaults were insufficiently serious to report, they most frequently based this on the fact that they were not physically injured,<sup>41</sup> even though “virtually all victims of penetration and most victims of sexual touching reported behavioral, emotional, academic, or

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women, 68.7% TGQN students, and 38.2% men), and difficulty going to work (23.2% women, 39.0% TGQN students, and 17.7% men) . . . The prevalence of academic and professional consequences for sexual touching was significantly lower, although a significant number were affected in some way (32.8% women, 57.2% TGQN students, and 27.5% men).”).

36. Corey Bowman, *How Colleges Can Prevent Students from Dropping Out After a Sexual Assault Incident* HUFFPOST (Jul. 23, 2016), [https://www.huffpost.com/entry/sexual-assault-hurting-retention-and-recruitment\\_b\\_5792383be4b0a1917a6e7cbb](https://www.huffpost.com/entry/sexual-assault-hurting-retention-and-recruitment_b_5792383be4b0a1917a6e7cbb) [https://perma.cc/7HNQ-5P8R].

37. Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2116-18 (2016); see also Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think/> [https://perma.cc/BB3A-JVJY].

38. RACHEL E. MORGAN & JENNIFER TRUMAN, BUREAU JUST. STAT., CRIMINAL VICTIMIZATION, 2019, at 8 (2020), <https://www.bjs.gov/content/pub/pdf/cv19.pdf> [https://perma.cc/9ADJ-TTWQ]; Susan Milligan, *Sexual Assault Reports Spike in #MeToo Era*, U.S. NEWS & WORLD REP. (Dec. 17, 2018, 3:32 PM), <https://www.usnews.com/news/national-news/articles/2018-12-27/sexual-assault-reports-spike-in-metoo-era> [https://perma.cc/K65T-P6LF].

39. RAINN, *Campus Sexual Violence*, *supra* note 1 (stating that 20% of female student victims report to law enforcement, compared with thirty-two percent of nonstudent females in the same age range).

40. CTR. PUB. INTEGRITY, *SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE* 30 (Gordon Witkin & David Donald eds., 2010), <https://cloudfront-files-1.publicintegrity.org/documents/pdfs/Sexual%20Assault%20on%20Campus.pdf> [https://perma.cc/D5MX-K6B6].

41. CANTOR ET AL., *supra* note 27, at 31 (“The most common reason given for why an incident was ‘not serious enough’ or ‘other’ for sexual penetration was that the student was not injured (69.8% women, 59.4% TGQN students, and 67.9% men).”).

professional consequences of the incident.”<sup>42</sup> Women were also less likely to report when alcohol was involved, when the event began consensually, or when they felt that “events like this seem common.”<sup>43</sup> This fits with other research confirming “that victims are more likely to report to law enforcement if the characteristics of the rape make it likely to seem more believable to others.”<sup>44</sup> Because only 1.6% of rape complaints end in trial,<sup>45</sup> this is a logical, if depressing, calculus made by victims—why go through the process of reporting and investigation if the odds that your efforts will result in a trial, let alone a conviction, are so small?<sup>46</sup>

In sum, approximately 80% of rape and sexual assault victimizations of students are not reported to the police,<sup>47</sup> making campus investigations and adjudications critical, as often these are the only investigations and adjudications that will occur.<sup>48</sup> And yet, these too are rare. Prior to the 2011 Dear Colleague Letter,<sup>49</sup> students rarely reported assaults to their universities, and subsequent investigations and adjudications were even rarer.<sup>50</sup> Despite widespread criticism that the 2011 Dear Colleague Letter pushed colleges to go too far in investigating and adjudicating campus assaults,<sup>51</sup> a 2014 Senate Report found that:

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42. *Id.* at 30-31. (“Across the genders, the most common responses for penetration was that they could handle it themselves (48.8% women, 60.4% men, 40.1% TGQN students), the incident was not serious enough to contact a program or resource (47.4% women, 42.5% men, 42.0% TGQN students), and because the person felt embarrassed, ashamed, or that it would be too emotionally difficult to report (41.7% women, 27.9% men, 36.0% TGQN students). Other prevalent reasons given were, the victim did not think the resources could help them (21.9% women, 19.6% men, 36.3% TGQN students) and the victim did not want to get the perpetrator in trouble (24.5% women, 22.7% men, 26.0% TGQN students).”).

43. *Id.* (“The other most common reasons reported related to the circumstances of the incident. For example, [54%] of women who reported penetration did not contact a program or resource because alcohol was involved, [49.9%] because the event began consensually, and [45.1%] because ‘events like this seem common.’”).

44. MELISSA S. MORABITO ET AL., DECISION MAKING IN SEXUAL ASSAULT CASES: REPLICATION RESEARCH ON SEXUAL VIOLENCE CASE ATTRITION IN THE U.S. 108 (2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/252689.pdf> [<https://perma.cc/GQ6S-6BF7>].

45. *Id.*

46. RAINN, *Campus Sexual Violence*, *supra* note 1 (“Out of every 1000 sexual assaults, 995 perpetrators will walk free.”).

47. SOFI SINOZICH & LYNN LANGTON, BUREAU OF JUST. STAT., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, at 1 (2014).

48. CTR. PUB. INTEGRITY, *supra* note 40, at 19 (“Most cases involving campus rape allegations come down to he-said-she-said accounts of sexual acts that clearly occurred; they lack independent corroboration like physical evidence or eyewitness testimony. At times, alcohol and drugs play such a central role, students can’t remember details. Given all this, says Gary Pavela, who ran judicial programs at the University of Maryland, College Park, ‘[a] prosecutor says, ‘I’m not going to take this to a jury.’ Often, the only venues in which to resolve these cases are on campus.”).

49. *See infra* Part II(A)(1).

50. CTR. PUB. INTEGRITY, *supra* note 40, at 32-33.

51. *See, e.g.*, ELIZABETH BARTHOLET ET AL., FAIRNESS FOR ALL STUDENTS UNDER TITLE IX, (Aug. 21, 2017), <https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y> [<https://perma.cc/8693-MZG9>]; KC JOHNSON, HERITAGE FOUND., HOW AMERICAN COLLEGE CAMPUSES HAVE BECOME ANTI-DUE PROCESS (Aug. 2, 2016), <http://thf-reports.s3.amazonaws.com/2016/BG3113.pdf>; FIRE *Response to OCR ‘Dear Colleague’ Letter on Universities’ Obligations Regarding Sexual Harassment and Sexual Assault*, FIRE (Apr. 4, 2011), <https://www.thefire.org/fire-response-to-ocr-dear-colleague-letter-on-universities-obligations-regarding-sexual-harassment-and-sexual-assault/> [<https://perma.cc/ZR99-37P5>].

Despite the prevalence of campus sexual assaults, about 41% of schools in the national sample reported not having conducted a single investigation in the past five years. More than 81% of private for-profit schools and 77% of institutions with fewer than 1000 students have not conducted any investigations. Interestingly, approximately 6% of the nation's largest public institutions also have not conducted any investigations in the last five years.<sup>52</sup>

Additionally, the Senate Report “found that 21% of the nation’s largest private institutions conducted fewer investigations than the number of incidents reported to the Department of Education, with some institutions reporting as many as seven times more incidents of sexual violence than they have investigated.”<sup>53</sup> Feminist legal scholars argue that the tepid response of universities to sexual assault, and the reason that Title IX campus adjudicatory processes are so contested, can be explained by the lack of societal agreement on the harms, if any, suffered by victims of sexual assault. As Katharine Baker notes:

schools should be mindful that much of the criticism of the reform attempts, while sounding in process, have more to do with skepticism about the existence of the injury. If we believe that at least some women are substantially injured when sex is taken from them without their consent, we must be prepared to accept the subjective, psychological, and random nature of the injury. . . . Once we accept that women are harmed and that they are harmed by college students because those students transgress reasonable norms of appropriate and respectful conduct, calls for criminal-process protections should dissipate. In nonsexual contexts, no controversy is attached to schools that discipline students without affording them traditional criminal process.<sup>54</sup>

It is crucial to highlight the harms faced by victims of campus sexual assault, and the failures of colleges to encourage reporting and adequately investigate and adjudicate these cases. Unless the legitimacy and extent of campus sexual assault is recognized, there will only be a weak foundation for arguing that the alleged perpetrators of this “harm” should be punished—and an inversely compelling argument that the due process rights of these alleged perpetrators must be protected. If we cannot be sure that what the alleged perpetrator did is wrong, even if he did commit the alleged act, then we will inevitably be queasy about adjudicatory and disciplinary processes.<sup>55</sup>

And yet, by refusing to recognize the harms of campus sexual assault, and thereby overly weighting due process concerns of the accused, policymakers and universities ensure these harms will continue. Much of the concern regarding the new Title IX regulations is that they will have a chilling effect on Title IX reporting on campuses,<sup>56</sup> pushing the investigation and adjudication process back into the

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52. *Senate Report*, *supra* note 31, at 8.

53. *Id.* at 9.

54. Baker, *Essential Sexuality*, *supra* note 32, at 803.

55. See Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 829 (2017) (“[T]he long-term realization of accused and victimized students’ interests depends on the perceived legitimacy of disciplinary procedures for gender violence.”).

56. See, e.g., *Reasons to Oppose Proposed Changes to Title IX, Part Four: They Discourage Students from Reporting*, BOS. AREA RAPE CRISIS CTR. (Jan. 23, 2019), <https://barcc.org/blog/details>

“culture of secrecy”<sup>57</sup> it so recently inhabited prior to the 2011 Dear Colleague Letter. This will exacerbate the direct and indirect harms caused by campus sexual assault and, more broadly, perpetuate dangerous campus cultures that create a breeding ground for sexual assault.<sup>58</sup> Further, and as described in detail in Part II, improperly handled Title IX campus investigations and grievance procedures can further harm victims of sexual assault.

## II. TITLE IX, DUE PROCESS, AND CROSS-EXAMINATION

### A. *The Office for Civil Rights and Title IX Enforcement: University Obligations*

Title IX applies broadly to all colleges and universities receiving federal funding, so its obligations to protect students from sex-based discrimination apply to nearly all higher education institutions.<sup>59</sup> These obligations are delineated by the Office for Civil Rights (OCR) within the Department of Education, the agency with

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/reasons-to-oppose-proposed-changes-to-title-ix-part-four-they-discourage-st [https://perma.cc/ME5W-2YQW]; Anna North, *Betsy DeVos’s New Sexual Harassment Rules Might Already be Hurting Students*, VOX (Jan. 31, 2019, 11:40AM), https://www.vox.com/2019/1/31/18202447/sexual-assault-title-ix-betsy-devos-drew [https://perma.cc/4E3H-AANW]; Gabrielle Schwartz, *POV: Proposed Title IX Rules Will Discourage Victims From Coming Forward*, BU TODAY (Dec. 12, 2018), http://www.bu.edu/articles/2018/pov-proposed-title-ix-rules-will-discourage-victims-from-coming-forward/ [https://perma.cc/2AZW-XDGN].

57. CTR. PUB. INTEGRITY, *supra* note 40, at 7-8.

58. See, e.g., Alexandra H. Solomon, *Talking to College Students About “The Red Zone,”* PSYCH. TODAY (Aug. 10, 2018), https://www.psychologytoday.com/us/blog/loving-bravely/201808/talking-college-students-about-the-red-zone [https://perma.cc/3D2Y-2TJY]; Jeremy Bauer-Wolf, *Avoiding the Red Zone*, INSIDE HIGHER ED (Sept. 12, 2019), https://www.insidehighered.com/news/2019/09/12/experts-say-new-methods-needed-combat-red-zone-campus [https://perma.cc/3PLQ-QW4H] (discussing the campus “red zone,” the period between the start of school in August and Thanksgiving break, when freshman students, particularly females, are most likely to be sexually assaulted, an issue that remains a problem even after the increased Obama-era attention to Title IX compliance); Hillary Hunter, *Strike Three: Calling Out College Officials for Sexual Assault on Campus*, 50 TEX. TECH L. REV. 277, 280 (2018) (“Athletic participation fosters the type of masculine aggression trademark of the sexually-aggressive culture. In fact, ‘[a] startling 54 percent of . . . student-athletes admitted to committing at least one ‘sexually coercive’ act in their lifetime[.]’” (quoting Ed Cara, *Half of Male College Athletes Admit History of ‘Sexually Coercive’ Behavior Such as Sexual Assault, Rape*, MED. DAILY (June 2, 2016, 8:59 PM), http://www.medicaldaily.com/college-athletes-sexual-assault-rape-myths-388585 [https://perma.cc/GK4C-APQJ])).

59. See Baumgardner, *supra* note 15 and accompanying text. Title IX is a floor rather than a ceiling, and sexual assaults can be dealt with on campus without implicating Title IX because, fundamentally, Title IX requires educational institutions not to discriminate on the basis of sex, which in the context of sexual harassment means failing to respond to known sexual harassment thereby interfering with the respondent’s ability to equally access education. See, e.g., Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 903 (2016) (“Title IX’s role in university sexual assault cases is uncertain and actively evolving. Importantly, it is possible that Title IX need not be applied at all to university sexual assault by and against students. Its role in regard to student-to-student sexual assault cases is a very recent development. For decades, universities addressed sexual assault accusations and punished those found responsible without any acknowledgement of Title IX. The long-standing mechanism used to address sexual assault allegations between students has been and remains student codes of conduct. The use of student codes has left much to be desired and questions remain about their continued utility as well.”).

statutory jurisdiction over the Act.<sup>60</sup> Broadly, Title IX imposes four requirements on universities: (1) publication of notices of nondiscrimination, (2) appointment and training of Title IX Coordinators, (3) adoption and publication of grievance procedures to resolve complaints based on sex-discrimination, and (4) prompt responses to reports of violations.<sup>61</sup> This Comment is concerned specifically with the grievance procedures required by Title IX, because it is at this point in the adjudication process that the due process debate over cross-examination arises. Within the specific context of potential Title IX liability for student-on-student sexual assault, a university that fails to comply with Title IX may be subject to either administrative sanctions imposed by OCR,<sup>62</sup> or to a lawsuit brought by the complaining student seeking either injunctive relief or monetary damages.<sup>63</sup>

Because Title IX is administered and enforced by the OCR, the agency “has accordingly promulgated official regulations that interpret and expound upon the statute itself.”<sup>64</sup> In 1997, OCR formally established Title IX compliance standards, including a requirement that universities address student-on-student sexual harassment.<sup>65</sup> In 2001, OCR issued further guidance to clarify that physical sexual assault qualified as sexual harassment, emphasizing that

[t]he more severe the conduct, the less the need to show a repetitive series of incidents; this is particularly true if the harassment is physical. For instance, if the conduct is more severe, e.g., attempts to grab a female student’s breasts or attempts to grab any student’s genital area or buttocks, it need not be as persistent to create a hostile environment. Indeed, a single or isolated incident of sexual harassment may,

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60. “[T]he OCR’s jurisdiction is established by Section 106.31(b) of the Title IX regulations . . . .” Sweeney, *supra* note 7, at 69.

61. U.S. DEP’T OF EDUC., OFF. C.R., Q&A ON CAMPUS SEXUAL MISCONDUCT, at 3 (Sept. 2017) [hereinafter 2017 Q&A].

62. Because federal education funding is conditioned on compliance with Title IX, if a school is found to have violated Title IX, the ultimate sanction is termination or suspension of federal funds, rather than a legal judgment requiring payment of damages to a particular student. 34 C.F.R. § 106.2(h), (i) (2010); *see also* JARED P. COLE & CHRISTINE J. BACK, CONG. RSCH. SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 1, 19-21 (2019). During the Obama era there was a marked attempt at enforcing Title IX, and from April 2011 to March 2018, OCR conducted 502 investigations of colleges for potentially violating Title IX through mishandling reported cases of sexual harassment; a number which includes lawsuits brought by accused students. *Title IX, Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> [<https://perma.cc/HF8G-USBX>] (last visited Oct. 9, 2020).

63. An institution may be liable for monetary damages under a judicially recognized private cause of action under Title IX if the plaintiff can meet the high burden of showing that the institution: (1) had actual knowledge of the peer-on-peer sexual harassment, (2) “exercise[d] substantial control over both the harasser and the context in which the known harassment occurs,” (3) that the harassment was “severe, pervasive, and objectively offensive,” and (4) that the harassment “so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities.” *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 645, 650, 651 (1999).

64. Triplett, *supra* note 12, at 495-96. This guidance is accorded *Chevron* deference by courts. *See, e.g.*, *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir. 1993) (“The degree of deference is particularly high in Title IX cases because Congress explicitly delegated to the agency the task of prescribing standards . . .”).

65. U.S. DEPT. OF EDUC., SEXUAL HARASSMENT GUIDANCE 1997 (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/8QKV-7ZFL>].

if sufficiently severe, create a hostile environment.<sup>66</sup>

The recognition that sexual harassment, including physical sexual assault, was actionable under Title IX was not accompanied by meaningful enforcement efforts.<sup>67</sup> According to data received in response to Freedom of Information Act requests, approximately twenty-four Title IX investigations at college campuses were resolved from 1998 to 2008, and of the five schools found to have violated Title IX in these investigations, none were punished.<sup>68</sup>

### 1. 2011 Dear Colleague Letter & 2014 Q&A: A Victim-Centered Approach

In 2011, the Obama-era OCR published a twenty-page Dear Colleague Letter (hereinafter 2011 Dear Colleague Letter)<sup>69</sup> providing, for the first time, guidance to colleges and universities on schools' obligations with respect to peer sexual harassment investigation and adjudication.<sup>70</sup> Prior to the 2011 Dear Colleague Letter, there was no universal standard requiring colleges and universities to maintain grievance procedures to resolve student complaints of sexual harassment.<sup>71</sup> For this reason, "[b]y 2010 many colleges lacked clear grievance procedures to resolve students' complaints," resulting in haphazard and inconsistent sexual harassment investigation and adjudication procedures.<sup>72</sup> Responding to a concern about the prevalence of sexual violence on college campuses, the OCR published the

66. U.S. DEPT. OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES: TITLE IX 6 (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> [<https://perma.cc/73R3-Z3JN>]; *see also* Gersen & Gersen, *supra* note 19. ("According to this legal logic, if a college did not have effective policies and procedures in place to address harassing conduct that is pervasive or severe enough to create a hostile environment, the college would be discriminating on the basis of sex and in violation of Title IX.")

67. *See* R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS. (Summer 2018), <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix> [<https://perma.cc/A8M3-39B5>].

68. CTR. PUB. INTEGRITY, *supra* note 40, at 74.

69. Administrative agencies, including the Department of Education, frequently issue such letters to clarify existing regulations and guidance. However, these letters are subject to challenge if they go beyond providing guidance and effect new rules, as these interpretations are not considered binding unless they follow the Administrative Procedure Act requirements for promulgating new rules, including a required notice-and-comment period. *See, e.g.*, Blake Emerson, *The Claims of Official Reason: Administrative Guidance on Social Inclusion*, 128 YALE L. J. 2122, 2126-27 (2019) ("The distinction between regulations and guidance is grounded in the Administrative Procedure Act of 1946 (APA), which lays out procedural requirements for agency rulemaking, including provision of notice and opportunity for public comment. The APA exempts from these requirements interpretive rules and 'general statements of policy.' The courts have interpreted this 'guidance exemption' to apply to agency documents that lack legal force either because the agency does not 'intend[] to bind itself' by those documents or because they do not have 'binding effect.' Whether guidance issued without notice and comment is procedurally valid therefore depends in the first instance on whether it has such binding qualities. If it does, then the guidance may be an invalid legislative rule, issued outside the procedures required by the APA. Disputes over guidance documents thus often turn on whether their terms are binding or whether they are applied in a binding way to the regulated public.").

70. Robin Wilson, *One Letter Changed Colleges' Response to Rape Cases*, CHRON. OF HIGHER EDUC., Feb. 17, 2017, at A22.

71. *Id.*

72. *Id.*

2011 Dear Colleague Letter to establish a clear universal standard for colleges and universities to use in adjudicating peer sexual harassment complaints, and this standard was unequivocally victim-centered.<sup>73</sup>

The 2011 Dear Colleague Letter addressed concerns regarding the potential of harm to accusers through cross-examination and emphasized that “OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”<sup>74</sup>

The 2011 Dear Colleague Letter generated substantial controversy, with victims’ advocates applauding the guidance as a fair and necessary step forward, and criminal defense attorneys and due process advocates arguing that the guidance violated the due process rights of the accused.<sup>75</sup>

In 2014, the Department of Education issued Questions and Answers on Title IX and Sexual Violence (2014 Q&A) to serve as a sister document to the 2011 DCL, which provided further technical guidance to schools regarding their obligations under Title IX, specifically with respect to complaints of sexual violence.<sup>76</sup> In this guidance, the OCR reiterated that schools must implement and adhere to grievance procedures which utilize a preponderance of the evidence standard (“*i.e.*, more likely than not that sexual violence occurred.”).<sup>77</sup> The Q&A notes that “[t]he investigation may include a hearing to determine whether the conduct occurred, but Title IX does not necessarily require a hearing.”<sup>78</sup> As in the 2011 DCL, the OCR reinforced within the 2014 Q&A that cross-examination should not be conducted by the parties because “[a]llowing an alleged perpetrator to question a complainant directly may be traumatic or intimidating, and may perpetuate a hostile environment.”<sup>79</sup> Although the Q&A did not require that schools follow a particular method for handling cross-examination in the alternative, it provided as a suggestion that “[a] school may choose, instead, to allow the parties to submit questions to a trained third party (*e.g.*, the hearing panel) to ask the questions on their behalf,” and to have those questions screened so that only “appropriate and relevant” questions are posed.<sup>80</sup>

The 2011 Dear Colleague Letter and 2014 Q&A prompted action at colleges and universities across the country, with approximately 120 revising their policies.<sup>81</sup>

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73. 2011 Dear Colleague Letter, *supra* note 3, at 9-12.

74. *Id.* at 11.

75. Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 67 (2017) (“[M]any of the post-2011 Title IX sexual assault trials that took place, and still are taking place, all over the country were and are unconstitutional.”); *see also* Kelly Rice, *Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims*, 67 DEPAUL L. REV. 763, 766 (2018) (“Women who are sexually assaulted deserve justice and men who are accused of sexual assault deserve to have their due process rights protected. It seems that the DCL is unable to accomplish both.”).

76. U.S. DEP’T OF EDUC., OFF. C. R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, at ii (Apr. 29, 2014).

77. *Id.* at 13.

78. *Id.* at 25.

79. *Id.* at 31.

80. *Id.*

81. Venetis, *supra* note 16, at 147 (estimating this number from public comments made by university officials on the DeVos proposed regulations).

Because the 2011 Dear Colleague Letter and 2014 Q&A were not notice-and-comment regulations, and therefore did not carry the weight of law, critics argued they violated administrative law requirements and were both procedurally and substantively invalid.<sup>82</sup>

## 2. Reaction to the 2011 Dear Colleague Letter and 2014 Q&A: Enforcement and Backlash

Universities have been held accountable in high profile court actions and by OCR for failing to uphold their Title IX obligations for victims of sexual assault at universities.<sup>83</sup> But the recent trend in Title IX litigation against universities involves cases brought by students accused of sexual assault arguing that their institutions failed to adequately protect them under Title IX, usually through failing to provide adequate procedural protections.<sup>84</sup> These complainants, almost entirely male, allege that their institutions' Title IX investigations and grievance procedures discriminate against them on the basis of sex by being improperly weighted toward protecting the interests of female victims.<sup>85</sup> As of 2015, 32% of Title IX lawsuits filed against universities were brought by alleged perpetrators.<sup>86</sup>

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82. See, e.g., Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 60-61 (2013) (arguing that the DCL imposes new legal obligations on universities, but does not carry the force of law because it was not promulgated through notice-and-comment rulemaking); Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 908-11 (2016) (arguing that in bypassing notice-and-comment rulemaking, the 2011 DCL and 2014 Q&A documents effectively represent “[p]olicymaking by agency threat” which required universities to comply with new requirements while being unable to challenge them through public comment and other administrative law norms).

83. See, e.g., Bernie Pazanowski, *Yale Must Face Suit Over Groping at Off-Campus Fraternity Party*, BLOOMBERG L. (Jan. 31, 2020), <https://news.bloomberglaw.com/us-law-week/yale-must-face-suit-over-groping-at-off-campus-fraternity-party> [<https://perma.cc/AV9E-BWBH>]; Marc Tracy & Dan Barry, *The Rise, Then Shame, of Baylor Nation*, N.Y. TIMES (Mar. 9, 2017), <https://www.nytimes.com/2017/03/09/sports/baylor-football-sexual-assault.html> [<https://perma.cc/AVL3-D3PE>]; Edwin Rios & Madison Pauly, *This Explosive Lawsuit Could Change How Colleges Deal with Athletes Accused of Sexual Assault*, MOTHER JONES (Mar. 3, 2016), <https://www.motherjones.com/politics/2016/03/sexual-assault-case-against-university-tennessee-explained/> [<https://perma.cc/Q8U4-6PCF>]; Marc Tracy, *Florida State Settles Suit over Jameis Winston Rape Inquiry*, N.Y. TIMES (Jan. 25, 2016), <https://www.nytimes.com/2016/01/26/sports/football/florida-state-to-pay-jameis-winstons-accuser-950000-in-settlement.html> [<https://perma.cc/FU8Z-TQAY>].

84. Olivia Messer, *How Hundreds of Campus #MeToo Punishments Could Get Tossed*, DAILY BEAST (Aug. 13, 2019), <https://www.thedailybeast.com/campus-men-were-punished-over-metoo-allegations-now-theyre-suing> [<https://perma.cc/YZ39-KBE3>].

85. James Moore & Kursat Christoff Peko, *The Unfairer Sex*, INSIDE HIGHER ED (Dec. 18, 2019), <https://www.insidehighered.com/views/2019/12/18/men-are-banding-together-class-action-lawsuits-against-discrimination-title-ix> [<https://perma.cc/H4PT-KXQB>]. Courts in every circuit have held that male students can bring Title IX gender discrimination claims when they are disciplined for sexual harassment on the theory of either “erroneous outcome” or “selective enforcement.” Venetis, *supra* note 16, at 135 (“To establish an ‘erroneous outcome’ claim, a student must allege that he or she is innocent, and that ‘but for’ a discriminatory process, the student would not have been disciplined. A ‘selective enforcement’ claim must establish that, regardless of the student’s wrongdoing, the decision to originate the proceeding and/or the severity of the punishment was influenced by the student’s gender.”).

86. Confronting Campus Sexual Assault, *supra* note 18, at 17-18 (“Nearly one-third [32%] of the litigation against institutions was initiated by students accused of sexual assault. Sanctions often drove

In February 2017, President Trump issued Executive Order 13777, establishing a federal policy “to lower regulatory burdens on the American people by implementing and enforcing regulatory reform,”<sup>87</sup> in part through tasking all agencies with reviewing existing regulations and making recommendations “regarding their repeal, replacement, or modification.”<sup>88</sup> This Executive Order included a call for public comments, and, in response, 12,035 of the 16,376 comments received specifically addressed Title IX.<sup>89</sup>

As part of a broader reversal of Obama-era Department of Education Guidelines,<sup>90</sup> Trump Administration Secretary of Education Betsy DeVos withdrew the 2011 Dear Colleague Letter in September 2017, supplanting it with new Q&A guidance on campus sexual misconduct, stating this was required because the prior guidance “created a system that lacked basic elements of due process and failed to ensure fundamental fairness.”<sup>91</sup> Additionally, the Department of Education announced its intention to engage in Title IX notice-and-comment rulemaking to promulgate new regulations that would carry the force of law.<sup>92</sup>

Prior to determining that the Obama-era guidance was procedurally unfair, Secretary DeVos met with multiple men’s rights organizations.<sup>93</sup> Additionally,

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the litigation. More than half of the perpetrators who brought litigation had been expelled from the institution. However, a little more than a third of the perpetrators were given light sanctions or no sanctions at all.”)

87. Exec. Ord. No. 13,777, 82 Fed. Reg. 12,285, 12,285 (Feb. 24, 2017).

88. *Id.* at 12,286.

89. Tiffany Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71, 75 (2019).

90. See, e.g., Anya Kamenetz, *DeVos to Rescind Obama-Era Guidance on School Discipline*, NPR (Dec. 18, 2018), <https://www.npr.org/2018/12/18/675556455/devos-to-rescind-obama-era-guidance-on-school-discipline> [<https://perma.cc/YM7Y-JK36>] (school discipline); Erica L. Green, *DeVos Repeals Obama-Era Rule Cracking Down on For-Profit Colleges*, N.Y. TIMES (June 28, 2019), <https://www.nytimes.com/2019/06/28/us/politics/betsy-devos-for-profit-colleges.html> [<https://perma.cc/CZ2P-HK4A>] (regulation of for-profit colleges); Ella Nilsen & Carly Sitrin, *How Betsy DeVos is Quietly Erasing Obama’s Education Legacy*, VOX (Oct. 2, 2017, 8:30 AM), <https://www.vox.com/policy-and-politics/2017/10/2/16229474/devos-erasing-obamas-education-legacy> [<https://perma.cc/73ZF-NZVU>] (overview); Tal Axelrod, *Federal Judge Rules DeVos Illegally Delayed Obama-Era Special Education Rule*, THE HILL (Mar. 8, 2019, 8:04 PM), <https://thehill.com/homenews/administration/433312-federal-judge-rules-devos-illegally-delayed-obama-era-special> [<https://perma.cc/4MW2-YCB4>] (racial disparities in special education); Jeremy W. Peters et al., *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html> [<https://perma.cc/338U-JV53>] (transgender student rights).

91. Press Release, U.S. Dep’t of Educ., Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <http://ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/YN85-8DC9>] [hereinafter Press Release Sept. 22, 2017]. Despite Secretary DeVos’s claims that the Department of Education’s revocation of prior Title IX guidance and proposal of new regulations was a response to wide criticisms of the 2011 Dear Colleague Letter, an analysis of these comments shows that “the system of Title IX enforcement implemented by the Obama administration was in fact widely welcomed and supported by the public.” Buffkin et al., *supra* note 89, at 72 (emphasis omitted).

92. Press Release Sept. 22, 2017, *supra* note 91.

93. Erin Dooley et al., *Betsy DeVos’ Meetings with ‘Men’s Rights’ Groups Over Campus Sex Assault Policies Spark Controversy*, ABC NEWS (Jul. 14, 2017, 4:29 AM), <https://abcnews.go.com>

Candice Jackson, the top civil rights official at DeVos's Department of Education, opined that campus sexual misconduct investigations pursuant to the 2011 DCL were not "fairly balanced between the accusing victim and the accused student," resulting in (mostly male) students being labeled as rapists "when the facts just don't back that up."<sup>94</sup> Ms. Jackson further noted that "the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"<sup>95</sup> DeVos's actions and Jackson's statements prompted concerns from civil rights and women's groups that the Department of Education was basing its revised Title IX guidance on outdated and disproven rape myths that women frequently falsely report sexual assault.<sup>96</sup>

### 3. A New Era: Trump Administration Title IX Regulations

The Department published its proposed regulations on November 29, 2018 and accepted public comments through January 30, 2019,<sup>97</sup> receiving a total of 124,196 comments.<sup>98</sup> This response vastly exceeded the number of comments typically received in response to regulatory proposals from the Department of Education.<sup>99</sup> Notably, the bulk of the comments received were in opposition to the proposed

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/Politics/betsy-devos-meetings-mens-rights-groups-sex-assault/story?id=48611688 [https://perma.cc/MG5E-GKCH].

94. Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), <http://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html> [https://perma.cc/539Y-SRHC].

95. *Id.*

96. Venetis, *supra* note 16, at 146-47 ("In August of 2018, a copy of the proposed draft rules that would overhaul the way schools should treat sexual assault claims was leaked to *The New York Times*. . . Secretary DeVos also cited the high-profile UVA and Duke cases as justification for the need for sweeping changes in campus sexual assault disciplinary procedures, stating that: . . . 'equally high-profile revelations of rape allegations later shown to be false (for instance, concerning the Duke University lacrosse team and the fraternity at the University of Virginia) provide additional evidence that the approach created under the Department's sub regulatory guidance has failed to protect victims and innocent accused persons alike.'").

97. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 84 Fed. Reg. 4018 (proposed Nov. 29, 2018) (codified at 34 C.F.R. 106). The original deadline for submitting comments was January 28, 2019 but was extended to January 30, 2019 due to issues with the website. Laura Meckler, *Education Department Allows Extra Day for Comments on Title IX Rules*, WASH. POST (Feb. 12, 2019, 9:05 PM), [https://www.washingtonpost.com/local/education/education-department-allows-extra-day-for-comments-on-title-ix-rules/2019/02/12/f7817734-2f16-11e9-813a-0ab2f17e305b\\_story.html](https://www.washingtonpost.com/local/education/education-department-allows-extra-day-for-comments-on-title-ix-rules/2019/02/12/f7817734-2f16-11e9-813a-0ab2f17e305b_story.html) [https://perma.cc/8NX4-3CHF].

98. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Assistance*, REGULATIONS.GOV, <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001> [https://perma.cc/M3PD-9STX] (last visited Oct. 9, 2020).

99. Laura Meckler & Susan Svrluga, *Comments Pour in Amid Proposed Changes to Title IX Sex Assault Reporting*, BANGOR DAILY NEWS (Jan. 31, 2019), <https://bangordailynews.com/2019/01/31/national-politics/comments-pour-in-amid-proposed-changes-to-title-ix-sex-assault-reporting/> [https://perma.cc/4Z99-DDP3] ("This is the most controversial regulatory undertaking in the history of the Department of Education," said Terry Hartle of the American Council on Education, which represents university presidents. He estimated the volume of submissions would total 20 times what is typically received for a major regulatory proposal.").

regulations.<sup>100</sup> Despite this strong opposition, in May 2020 the regulations were promulgated and became effective August 14, 2020.<sup>101</sup>

The new regulations represent a drastic departure from the Obama-era guidance and aim to enhance procedural due process, heighten the standards that trigger institutions' obligations to respond to sexual harassment, and narrow the potential liability of institutions for those responses.<sup>102</sup> In addition to dramatically narrowing the pool of potential cases that can be brought under Title IX, the new regulations address cross-examination in Title IX cases with an eye toward enhancing the due process rights of the accused.<sup>103</sup> Of the myriad Title IX changes included in the new regulations, two are particularly relevant for the purposes of this comment.

First, drawing from Supreme Court case law specifically addressing institutional liability for a private right of action under Title IX, the new regulations do not require institutions to respond to sexual harassment unless they have "actual knowledge" of its occurrence.<sup>104</sup> Even then, institutions will only incur liability if their response is deliberately indifferent.<sup>105</sup> This is in contrast to the Obama-era guidance, which required a school to take action based on either actual or constructive knowledge of "student-on-student harassment that creates a hostile environment."<sup>106</sup> Further, under the Obama-era guidance a student could report sexual harassment to any school employee "likely to witness or receive reports of sexual harassment and violence."<sup>107</sup> However, an institution has no obligation to act under the new regulations unless a formal complaint is filed with the Title IX coordinator or another person who "has authority to institute corrective measures on behalf of the recipient,"<sup>108</sup> effectively taking from many students the option to report to a trusted

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100. Erik Ortiz, *Public Comments Reopen for DeVos' Campus Sexual Assault Rules—But Only for One Day*, NBC NEWS (Feb. 13, 2019, 9:11 AM), <https://www.nbcnews.com/news/us-news/public-comments-reopen-devos-campus-sexual-assault-rules-only-one-n970956> [<https://perma.cc/9LVL-GFJU>] ("The majority of comments received appear to oppose the Education Department's reworking of the federal guidelines known as Title IX.").

101. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,026 (May 19, 2020) [hereinafter 2018 Proposed Title IX Regulations] (codified at 34 C.F.R. pt. 106).

102. See 34 C.F.R. pt. 106 (2020).

103. 2018 Proposed Title IX Regulations, *supra* note 101, at 61,472. These due process enhancements include requiring schools to apply "a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination," to be conducted not by the parties themselves but by their advisors. Press Release, U.S. Dep't of Educ., Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all> [<https://perma.cc/JPB6-F3DH>] [hereinafter Press Release Nov. 16, 2018].

104. 34 C.F.R. § 106.44(a) (2020) ("A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States must respond in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.").

105. *Id.*

106. 2011 Dear Colleague Letter, *supra* note 3, at 4.

107. *Id.*

108. 34 C.F.R. § 106.30(a) (2020).

teacher or coach.<sup>109</sup> This change, although beyond the scope of this Comment, substantially limits schools' responsibilities under Title IX to respond to sexual harassment and assault on campus.

Most importantly for the purposes of this Comment, the new regulations require that post-secondary institutions provide live hearings, with direct cross-examination of adversarial witnesses, as part of the Title IX grievance procedures.<sup>110</sup> Under this adversarial model, "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."<sup>111</sup> This cross-examination may be conducted "by the party's advisor of choice," and cannot be conducted by the party themselves.<sup>112</sup> A party who does not have an advisor present at the live hearing must be provided with an advisor of their choice by the institution.<sup>113</sup> Parties may choose to have an attorney serve in the role of advisor.<sup>114</sup> Even though the new regulations allow institutions to "establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties," a university must allow that advisor to be present at all grievance proceedings and cannot "limit the choice . . . of advisor" for either party.<sup>115</sup> As the Chancellor of the State University of New York noted, this "would allow the fraternity brother or sorority sister, parent, roommate, or anyone else to conduct cross-examination."<sup>116</sup>

The new regulations import the Federal Rules of Evidence's rape shield rule,<sup>117</sup> prohibiting "evidence about the complainant's sexual predisposition or prior sexual behavior" in cross-examination and include the same exceptions proscribed for criminal cases.<sup>118</sup> These exceptions allow the accused student to introduce otherwise prohibited evidence of the complainant's sexual behavior or predisposition if he does so either to "prove that someone other than the respondent committed the conduct alleged," or if the evidence is specific to past sexual behavior between the complainant and respondent "and [is] offered to prove consent."<sup>119</sup>

In a small concession, the new regulations allow that on request of either party,

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109. See, e.g., Elizabeth Tang, *Three Reasons Why Betsy DeVos's Proposed Title IX Rules Would Hurt Survivors*, NAT'L WOMEN'S L. CTR. (Nov. 16, 2018), <https://nwlc.org/blog/three-reasons-why-betsy-devos-draft-title-ix-rules-would-hurt-survivors/> [<https://perma.cc/AH3X-WRXJ>]; Victoria Yuen & Osub Ahmed, *4 Ways Secretary DeVos' Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault*, CTR. AM. PROGRESS (Nov. 16, 2018), <https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/> [<https://perma.cc/YN7Q-DPK3>].

110. 34 C.F.R. § 106.45(b)(6)(i) (2020).

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* § 106.45(b)(5)(iv).

115. *Id.*

116. Kristina M. Johnson, Chancellor, SUNY, Comment Letter on Proposed Regulations under Title IX of the Education Amendments of 1972, at 69 (Jan. 29, 2019), <https://www.suny.edu/media/suny/content-assets/documents/chancellor/SUNY-Chancellor-Johnson-Comment-on-ED-Title-IX-Prop-Regs.pdf> [<https://perma.cc/864R-44G6>].

117. FED. R. EVID. 412.

118. 34 C.F.R. § 106.45(b)(6)(i) (2020).

119. *Id.*

the live hearing and adversarial cross-examination may be conducted through the use of technology rather than in person.<sup>120</sup> Ultimately, though, the intent of the new regulations to mandate adversarial cross-examination is clear, as the rule prohibits decision-makers from relying on the testimony of any witness who refuses to submit to cross-examination.<sup>121</sup> As discussed in further detail in Part III, this change is particularly controversial and has substantial potential ramifications for both the accused and accusers, as well as for educational institutions.

### *B. Due Process Rights and School Disciplinary Proceedings*

Both the rhetoric surrounding the new regulations and the regulations themselves heavily reference due process to justify the proposed enhanced procedural protections.<sup>122</sup> Therefore, it is crucial to determine at baseline whether these enhanced protections are constitutionally required. Because public universities are constitutionally considered to be government actors, they are required to provide procedural due process to students in disciplinary processes.<sup>123</sup> Just what that due process entails has been the subject of considerable debate, because procedural due process protections vary depending upon the particular process in question.<sup>124</sup> In the school disciplinary setting, the Supreme Court has distinguished between academic sanctions and disciplinary proceedings, requiring greater procedural protections for the latter.<sup>125</sup> However, the Court has been careful to consider the unique nature of the educational environment and the interplay between that environment and the structure of proceedings, noting that “[t]he educational process is not by nature adversarial”<sup>126</sup> such that importing adversarial judicial processes is inherently in tension with the goals of the educational system.

120. *Id.*

121. *Id.* (“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility . . .”).

122. Press Release Nov. 16, 2018, *supra* note 103 (“The Department’s proposed rule . . . ensures that due process protections are in place for all students.”).

123. U.S. CONST. amends. V & VIII. Although the Supreme Court has not explicitly recognized the constitutionally protected property and/or liberty interests implicated by university disciplinary proceedings, courts and commentators have widely assumed that “[t]here are protected liberty interests and protected property interests in the educational context for accused students,” which include “‘pursuing an education,’ a reputational interest, and an interest in preserving future opportunities” in the property interest category as well as the risk of suspension or expulsion in the liberty interest category. Mann, *supra* note 10, at 647-48; *see also* Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) (“[A] student facing expulsion or suspension from a public [post-secondary] educational institution is entitled to the protections of due process.”); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961) (“Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.”). *But see* Norris v. Montgomery Cnty. Cmty. Coll., No. 15-4741, 2016 U.S. Dist. LEXIS 61506, at \*8-10 (E.D. Pa. May 6, 2016) (“[T]here is no fundamental right to continued college enrollment[.]” and even if a contractual right exists to continued enrollment, that does not make the right constitutional.).

124. Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978) (“[W]e have frequently emphasized that ‘[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.’” (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961))).

125. *Id.* at 87-89.

126. *Id.* at 90.

In *Goss v. Lopez*, a case addressing short-term suspension from secondary school for disciplinary reasons, the Supreme Court held that “[a]t the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.”<sup>127</sup> Potential procedural protections that must be included in this hearing have been debated by both courts and commentators and include: whether students have a right to representation by counsel in school disciplinary proceedings;<sup>128</sup> whether the appropriate standard of review for Title IX grievance procedures should be preponderance of the evidence or clear and convincing evidence;<sup>129</sup> and whether the accused student is entitled, either himself or through his representative, to directly cross-examine witnesses against him.<sup>130</sup> As detailed in the following section, the debate over whether adversarial cross-examination is constitutionally required in Title IX grievance procedures has culminated in a circuit split.

### C. Cross-Examination: An Engine for Truth?

In criminal trials, the right to adversarial cross-examination stems both from the confrontation clause of the Sixth Amendment and procedural due process guarantees of the Fourteenth Amendment.<sup>131</sup> In civil trials and administrative hearings “where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.”<sup>132</sup> In these proceedings, cross-examination serves as a “testing mechanism” in which “the cross-examiner delves into word meaning, truthfulness, memory, and perception” to enable the fact-finder to determine the truth of what happened in a contested matter.<sup>133</sup>

Proponents of adversarial cross-examination argue that it incomparably protects

127. 419 U.S. 565, 579 (1975) (emphasis added).

128. See, e.g., *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (“[W]e do not think [a student] is entitled to be represented in the sense of having a lawyer who is permitted to examine or cross-examine witnesses, to submit and object to documents, to address the tribunal, and otherwise to perform the traditional function of a trial lawyer.”); *Gorman*, 837 F.2d at 16 (“[T]he weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question.”).

129. Compare Jennifer James, Comment, *We Are Not Done: A Federally Codified Evidentiary Standard is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1336 (2016) (“[P]reponderance of the evidence provides a better safeguard for an equitable implementation of rights between the victim and the accused” than other evidentiary standards), with 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, 612 (2013) (arguing that because students accused of sexual violence are facing sanctions which would damage their reputations, the clear and convincing standard must be applied in these cases), and Henrick, *supra* note 82, at 65 (“[T]here is nothing about insisting on more proof that is tantamount to calling complainants liars. Instead, a higher burden reflects the necessity of certainty before convicting an accused student of the highly stigmatizing offense of sexual assault.”).

130. Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 111 (2019) (“[D]ue process suggests that public universities must provide a hearing that allows for cross-examination by the accused or his/her advocate.”).

131. *Pointer v. Texas*, 380 U.S. 400, 405-06 (1965).

132. *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970).

133. Christopher B. Mueller, *Cross-Examination Earlier or Later: When Is It Enough to Satisfy Crawford?*, 19 REGENT U. L. REV. 319, 321-22 (2007).

the rights of the accused by allowing the fact-finder to get to the ultimate truth of the contested matter.<sup>134</sup> These arguments draw on Supreme Court jurisprudence touting cross-examination as “the principal means by which the believability of a witness and the truth of his testimony are tested.”<sup>135</sup> The Court has noted that “cross-examination has always been considered a most effective way to ascertain truth” when there are competing narratives that a court must untangle.<sup>136</sup> This is accomplished not only through the answers provided by an adverse witness, but also by “permit[ting] the [fact-finder] that is to decide the defendant’s fate to observe the demeanor of the witness in making his statement, thus aiding the [fact-finder] in assessing his credibility.”<sup>137</sup> In the criminal context, the Court has noted that cross-examination “ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo-American legal proceedings.”<sup>138</sup>

In the context of school disciplinary proceedings institutions must wrestle with unique factors that complicate the value of cross-examination.<sup>139</sup> Accused students rely on the traditional notion of cross-examination as “the greatest legal engine ever invented for the discovery of truth”<sup>140</sup> to “argue that their ability to adequately present their cases and challenge the charges against them depends on their ability to conduct adversarial cross-examination of their accusers.”<sup>141</sup> Additionally, some proponents of cross-examination in campus sexual assault cases argue that because these adjudications may yield evidence that could be used in future criminal prosecutions, the record will not be reliable or complete if cross-examination is not permitted.<sup>142</sup> On the other side, advocates for sexual assault survivors “argue that this process is unnecessarily adversarial in the education context, other processes are available that do not expose the victim to further trauma, and adversarial cross-examination would discourage them from proceeding with claims within their institution.”<sup>143</sup>

### *1. Rape Myths and the Dark Side of Cross-Examination*

#### *a. Rape Myths and Campus Sexual Assault*

Rape myths comprise widely held societal beliefs that fuel rape culture and

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134. J. Brad Reich, *When Is Due Process Due?: Title IX, “The State,” and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1, 28-29 (2017).

135. *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

136. *Watkins v. Sowders*, 449 U.S. 341, 349 (1981).

137. *California v. Green*, 399 U.S. 149, 158 (1970).

138. *Maryland v. Craig*, 497 U.S. 836, 846 (1990).

139. Mann, *supra* note 10, at 657.

140. 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1367 (James H. Chadbourne ed., 1974).

141. Mann, *supra* note 10, at 657.

142. Reich, *supra* note 134, at 48-49. Given that only a tiny percentage of campus sexual assault cases are ultimately criminally prosecuted, this argument is unconvincing. Only nine cases of sexual assault out of every 1,000 will be referred to a prosecutor for trial. See RAINN, *Campus Sexual Violence*, *supra* note 46 and accompanying text.

143. Mann, *supra* note 10, at 657.

excuse male sexual aggression.<sup>144</sup> These “stereotypes and myths—defined as prejudicial, stereotyped, or false beliefs about rape, rape victims, and rapists”<sup>145</sup> are widely accepted and their internalization and subsequent pushback against them have informed the development of criminal law on sexual assault.<sup>146</sup> Compelling results from multiple “psychology experiments indicates that various rape myths and other sexist stereotypes play a vital role in determining whether and how much the victim is held responsible.”<sup>147</sup> When the victim is held more responsible, the perpetrator is correspondingly often relieved of culpability.<sup>148</sup>

In the criminal context, “victims in sexual assault cases frequently encounter hostile prosecutors and judges who continue to hold ‘deeply held stereotypes and misconceptions [which] can undermine fairness in the court systems, especially in cases where the victim and perpetrator know each other, which are the vast majority of cases.’”<sup>149</sup> These myths also inform university responses to sexual assault and bolster calls for the increasing criminalization of the campus adjudication process.<sup>150</sup>

144. Kimberly Peterson, *Victim or Villain?: The Effects of Rape Culture and Rape Myths on Justice for Rape Victims*, 53 VAL. U. L. REV. 467, 470 (2019). There is perhaps no clearer example of the prevalence and persistence of rape culture than the sexual assault of a sixteen-year-old girl by multiple football players in Steubenville, Ohio in August 2012. Although the victim was so intoxicated that she had little memory of the assault, prosecutors were able to secure convictions against the perpetrators because they and their friends documented much of the assault and its aftermath on social media. See, e.g., Steve Almasy, *Two Teens Found Guilty in Steubenville Rape Case*, CNN (Mar. 17, 2013), <https://www.cnn.com/2013/03/17/justice/ohio-steubenville-case/index.html> [<https://perma.cc/8EN6-AXVB>]; Connor Simpson, *The Steubenville Victim Tells Her Story*, ATLANTIC (Mar. 16, 2013), <https://www.theatlantic.com/national/archive/2013/03/steubenville-victim-testimony/317302/> [<https://perma.cc/F49B-2YEV>]; Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES (Dec. 16, 2012), <https://www.nytimes.com/2012/12/17/sports/high-school-football-rape-case-unfolds-online-and-divides-steubenville-ohio.html> [<https://perma.cc/D95V-3QSC>]; ROLL RED ROLL (Sunset Park Pictures 2018).

145. Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCH. 217, 217 (1980).

146. See, e.g., MARIA BEVACQUA, RAPE ON THE PUBLIC AGENDA: FEMINISM AND THE POLITICS OF SEXUAL ASSAULT (2000); Janet C. Gornick & David S. Meyer, *Changing Political Opportunity: The Anti-Rape Movement and Public Policy*, 10 J. POL’Y HIST. 367, 383-86 (1998).

147. Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L. J. 663, 681 (1998).

148. Katherine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 586-89 (1997).

149. Holly Boux, “*If You Wouldn’t Have Been There That Night, None of This Would Have Happened to You*”: Rape Myth Usage in the American Judiciary, 40 WOMEN’S RTS. L. REP. 237, 242 (2019) (quoting *The National Judicial Education Program*, LEGAL MOMENTUM, <https://www.legalmomentum.org/national-judicial-education-program> [<https://perma.cc/89KE-M85D>] (last visited Nov. 11, 2020)).

150. Ashley Hartmann, *Reworking Sexual Assault Response on University Campuses: Creating a Rights-Based Empowerment Model to Minimize Institutional Liability*, 48 WASH. U. J. L. & POL’Y 287, 294-95 (2015) (“University policy makers have often relied on sexist, heteronormative, and outdated beliefs about sexual assault when developing response policies. For example, the myth that sexual assault is a crime committed by strangers influenced universities to model sexual assault responses after the criminal justice system, which has largely codified this same assumption. In addition, students themselves endorse rape myths that blame victims, especially if alcohol or drugs were involved in the sexual assault. Campus security and local police approach sexual assault prevention and interactions with sexual assault victims from a law enforcement perspective. University officials often balance considerations of university liability with student safety. The multiple perspectives and gaps in the

The potency and prevalence of rape myths and their impact on both the discourse surrounding and actual processes of sexual assault adjudications looms large over debates about adversarial cross-examination. Specifically, one of the most prominent rape myths instructs that “victims often lie about being raped.”<sup>151</sup> This myth is often interwoven with calls for enhanced due process protections for accused parties, including a demand for direct, adversarial cross-examination, because it is the pernicious idea that victims of sexual assault are lying that provides a sense of urgency for cross-examination.<sup>152</sup> This myth was historically rationalized by an underlying belief that women who were “unchaste” were liars, such that evidence of a rape victim’s promiscuity provided the rationalization to determine her complaint was false.<sup>153</sup>

The second myth, that of the lying woman who cries rape, “continues to be a pervasive and insidious part of the sexual assault dialogue on and off campus.”<sup>154</sup> Although statistics on sexual assault are difficult to compile because the majority are never reported,<sup>155</sup> of reported sexual assaults, the false report rate is only 2%-10%.<sup>156</sup> This number includes cases that are determined to be unfounded; an unfounded case is not necessarily one determined to be false but rather signifies that police “conclude that it is unverifiable, not serious, or not prosecutable.”<sup>157</sup> This category groups together several disparate reasons why a case may not proceed, many of which are

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knowledge of each stakeholder group results in university programming and policies that inadvertently reinforce ‘good victim’ and ‘masked stranger’ rape mythology.”).

151. Peterson, *supra* note 144, at 475.

152. See, e.g., George Leef, *The Title IX Rule Change on Cross-Examination is Crucial to Due Process*, UNLOCK HIGHER ED (Dec. 17, 2018), <https://unlockhighered.com/the-title-ix-rule-change-on-cross-examination-is-crucial-to-due-process/> [<https://perma.cc/WU3D-PQSC>] (arguing that cross-examination in Title IX cases is necessary to “deter students from filing false charges that might be exposed under questioning by an attorney,” and justifying it further by noting that “[a]nswering probing questions about her claims might be uncomfortable for the accuser, but we must weigh that against the possibility that the accused student will suffer long-lasting damage if a made-up story is believed”); Wendy McElroy, *The New Title IX Regulation Helps Women*, THE HILL (Jan. 3, 2019), <https://thehill.com/opinion/civil-rights/423710-the-new-title-ix-regulation-helps-women> [<https://perma.cc/HDN2-VKZP>] (“The ‘believe the women’ approach trivialized the role of evidence in justice; banning cross-examination made it extremely difficult to ascertain the truth. Sealed procedures only encouraged false accusations and a Star-Chamber environment, which cast doubt on every verdict rendered, including valid ones.”).

153. Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant’s Past Sexual Behavior*, 44 CATH. U. L. REV. 711, 715 (1995) (“It was considered ‘a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth . . . while it does that of a woman.’ In other words, evidence that a woman was unchaste was thought relevant to prove that she was also a liar.”).

154. Margaret Drew, *It’s Not Complicated: Containing Criminal Law’s Influence on the Title IX Process*, 6 TENN. J. RACE, GENDER & SOC. JUST. 191, 214 (2017).

155. See *supra* notes 35-43 and accompanying text.

156. *False Reporting Overview*, NAT’L SEXUAL VIOLENCE RES. CTR (2012), [https://www.nsvrc.org/sites/default/files/2012-03/Publications\\_NSVRC\\_Overview\\_False-Reporting.pdf](https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf) [<https://perma.cc/8QRH-JV44>]. Further, because of extensive failures of police to respond appropriately to sexual assault, which erroneously result in a reporting victim being labeled as a false reporter, even these percentages may be too high. Lisa Avalos, *Policing Rape Complainants: When Reporting Rape Becomes a Crime*, 20 J. GENDER RACE & JUST. 459, 465-66 (2017).

157. Michelle Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 985 (2004).

unrelated to false reporting.<sup>158</sup> Nonetheless, the myth that women lie about being raped persists.<sup>159</sup> Although “a recent ten-year study of sexual assault reports taken on a college campus [revealed that] only [5.9%] of cases met criteria to be classified as false allegations,” a group of male college athletes “reported that [50%] of rapes were invented by women or that women ‘often’ lied about being sexually victimized.”<sup>160</sup> This myth fuels the urgency of the perceived need for cross-examination; if you believe that women are likely to be lying about sexual assault, the need to challenge their testimonies despite the potential costs seems logical.

Unfortunately, “many people still believe that women who dress and behave in sexual ways deserve to be raped,”<sup>161</sup> and that “victims invite rape by their behaviors and actions.”<sup>162</sup> This myth holds that women who have in some way asked for their assaults—through wearing provocative clothing, being intoxicated, or showing some level of interest in the man who ultimately assaulted them—were in essence contributorily negligent and therefore their perpetrators’ responsibility should be diminished.<sup>163</sup> This myth is frequently invoked in the context of campus sexual assaults.<sup>164</sup> For example, a defense attorney for the alleged perpetrator in a recent Yale campus rape case that was criminally prosecuted explained his aggressive cross-examination of the victim’s behavior as follows:

“If you flirt with somebody, you have a little bit too much to drink, you invite him back to your room, and you’re wearing provocative clothing, don’t be surprised if the individual looking at you is going to be provoked,” he added. “People need to take responsibility for the signals they send. All this outrage about the questions I

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158. Additionally, research suggests that rape complaints are routinely unfounded inappropriately, such that police “categorize as unfounded allegations involving complainants who engaged in risky behavior at the time of the incident, complainants who were unwilling to cooperate in the prosecution of the suspect, complainants who delayed reporting, or complainants whose allegations were inconsistent or contradictory.” Cassia Spohn et al., *Unfounding Sexual Assault: Examining the Decision to Unfound and Identifying False Reports*, 41 LAW & SOC’Y REV. 161, 164 (Mar. 2014); see also Alex Campbell & Katie J.M. Baker, *This Police Department Tosses Aside Rape Reports When a Victim Doesn’t Resist ‘To the Best of Her Ability’*, BUZZFEED NEWS (Sept. 8, 2016, 7:11 AM), <https://www.buzzfeednews.com/article/alexcampbell/unfounded> [<https://perma.cc/56QE-KELX>].

159. See Bret Stephens, Opinion, *For Once, I’m Grateful For Trump*, N.Y. TIMES (Oct. 4, 2018), <https://www.nytimes.com/2018/10/04/opinion/trump-kavanaugh-ford-allegations.html> [<https://perma.cc/T4L4-93AK>].

160. Kaarin Long et al., *A Distinction Without a Difference: Why the Minnesota Supreme Court Should Overrule its Precedent Precluding the Admission of Helpful Expert Testimony in Adult Victim Sexual Assault Cases*, 31 HAMLIN J. PUB. L. & POL’Y 569, 589-90 (2010) (citing R.G. Sawyer et al., *Rape Myth Acceptance Among Intercollegiate Student Athletes: A Preliminary Examination*, 18 AM. J. HEALTH STUD. 19, 19-25 (2002)).

161. Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1057 (2018).

162. Peterson, *supra* note 144, at 475.

163. Courtney Fraser, *From “Ladies First” to “Asking for It”: Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 170 (2015).

164. See, e.g., Katie Reilly, *A Yale Student Accused Her Classmate of Rape. His Lawyers Asked What She Was Wearing and How Much She Drank*, TIME (Mar. 9, 2018, 9:47AM), <https://time.com/5192004/yale-university-sexual-assault-trial/> [<https://perma.cc/FE9A-UXZD>] (“How much did she have to drink? Why didn’t she wear a more modest outfit? Why did she and the man she later accused of raping her look ‘like two lovers’ while walking together on campus? These are some of the questions that defense attorneys asked a Yale University student who brought a rape complaint against her classmate.”).

asked is really ridiculous. You don't get a free pass just because you claim to be a victim."<sup>165</sup>

Aya Gruber argues that this rape myth has worked to effectively import the tort defense of contributory negligence into rape cases, working to undermine the credibility of victim witnesses.<sup>166</sup> This has been documented in campus hearings as well, when narratives are deployed to “diminish the responsibility of the respondent, or even claim the respondent is the real victim, by stating that both parties were drinking alcohol or that both parties are equally responsible for participating in nonconsensual sex.”<sup>167</sup> Couched in terms of furthering gender parity, this narrative “ignor[es] current research on campus serial rapists (or ‘target rapists’) who deliberately use alcohol as a tool to incapacitate victims to sexually assault them as part of a continuum of instrumental violence.”<sup>168</sup>

*b. Weaponization of Rape Myths Through Cross-Examination  
and the Emergence of Rape Shield Laws*

Cross-examination “emerged as a response . . . to perjury”<sup>169</sup> and has been lauded as the best way for fact-finders to assess credibility of witnesses to come to an ultimate conclusion regarding disputed facts.<sup>170</sup> However, in sexual assault cases, cross-examination has a dark history of being weaponized by defense lawyers to discredit sexual assault victims in such a humiliating fashion that the process operates as a “second rape.”<sup>171</sup> Complainants were routinely subjected to highly intrusive questions about their sexual histories aimed to portray them as promiscuous women who could not possibly be victims of sexual assault.<sup>172</sup> This practice was so effective, and so devastating to sexual assault prosecutions, that the Federal Rules of Evidence were updated to include the so-called rape shield rules to mitigate against

165. *Id.*

166. Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. OF WOMEN & L. 203, 217-19 (1997) (detailing (1) how courts have “specifically not[ed] victim precipitation behavior, such as meeting at a bar, entering the defendant’s car, or inviting the defendant for a drink;” (2) that police may choose not to investigate cases if they believe the victim provoked the assault, and (3) that jurors effectively nullify what should be their verdict by determining “whether or not the complainant is ‘responsible’ for or ‘deserves’ the ensuing rape” rather than determining the actual material fact of consent).

167. Behre, *supra* note 2, at 348.

168. *Id.*

169. Jules Epstein, *The Great Engine That Couldn't: Science, Mistaken Identifications, and the Limits of Cross-Examination*, 36 STETSON L. REV. 727, 766 (2007).

170. *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (“Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.”); Harris & Johnson, *supra* note 130, at 110 (“No process can be reliable or fair . . . if a person accused of wrongdoing is unable to effectively challenge the accusations against him by testing his accuser’s credibility. It is a truism in American criminal and civil justice systems that the best tool for achieving these ends is cross-examination.” (quoting Brief for Gregory S. Alexander et al. as Amici Curiae Supporting Petitioner-Appellant John Doe at 9-10, *Doe v. Cornell Univ.*, No. 526013 (N.Y. App. Div. July 12, 2018))).

171. Ruthy Lowenstein Lazar, *Me Too? The Invisible Older Victims of Sexual Violence*, 26 MICH. J. GENDER & L. 209, 224-25 (2019).

172. See, e.g., Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 12-15 (1977).

the weaponization of rape myths in cross-examination.<sup>173</sup> Speaking in support of passage of the federal rape shield rule, then-Senator Joe Biden remarked:

The enactment of this legislation will eliminate the traditional defense strategy . . . of placing the victim and her reputation on trial in lieu of the defendant [and] end the practice . . . wherein rape victims are bullied and cross-examined about their prior sexual experience[, making] the trial almost as degrading as the rape itself.<sup>174</sup>

These rape shield laws, first promulgated in the Federal Rules of Evidence<sup>175</sup> and subsequently modified and adopted by all fifty states,<sup>176</sup> were “designed to protect complainants from broad defense inquiries into the complainant’s sexual history to support a defense of consensual sex.”<sup>177</sup> Reformers hoped that the adoption of these rules would increase reporting of sexual assault and increase the likelihood of convictions in sexual assault cases.<sup>178</sup>

The results were mixed. First, rape shield rules were immediately challenged as violating due process by limiting a defendant’s ability to cross-examine his accuser.<sup>179</sup> The Supreme Court clarified, however, that the right to cross-examination in criminal cases could be reasonably limited based on the concerns that were reflected in rape shield laws.<sup>180</sup> State courts have similarly upheld rape shield laws in the face of due process challenges.<sup>181</sup> However, rape shield laws do contain exceptions to protect defendants’ rights, which has fostered unpredictability about what evidence will be admitted and what will be excluded.<sup>182</sup>

173. See Marah deMuele, *Privacy Protections for the Rape Complainant: Half a Fig Leaf*, 80 N.D. L. Rev. 145, 147 (2004).

174. 124 CONG. REC. 36,256 (1978) (statement of Sen. Biden).

175. See FED. R. EVID. 412.

176. Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 646 (2009).

177. deMuele, *supra* note 173.

178. Gruber, *supra* note 176, at 601 (“Reformers argued that shield laws would not only lessen victim discomfort, but also prevent juror sexism from influencing verdicts. They contended that without shield laws, jurors would acquit because of distaste for the victim’s lifestyle, the belief that her behavior entitled the defendant to sex, or a mistaken perception that past consent implies present consent.”). Determining whether admission of evidence barred by rape shield laws results in wrongful acquittals is nearly impossible:

[B]ecause the state cannot appeal an acquittal, when a judge admits a complainant’s sexual history and the defendant is wrongly acquitted, the case is not reviewed by a higher court. The central problem with admitting a complainant’s unchaste sexual history is the risk it poses of leading the decision maker to acquit a defendant unjustly, and yet these cases in which such unjust acquittals occur are the most difficult to access and critique.

Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 95 (2002).

179. See Fishman, *supra* note 153, at 721.

180. *Michigan v. Lucas*, 500 U.S. 145, 149 (1991) (“[T]rial judges retain wide latitude’ to limit reasonably a criminal defendant’s right to cross-examine a witness ‘based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.” (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986))).

181. Fishman, *supra* note 153, at 722 n.42 (providing example cases from multiple states).

182. Bennett Capers, *Rape, Truth, and Hearsay*, 40 HARV. J.L. & GENDER, 183, 203 (2017) (“Nearly forty years after feminists secured passage of the federal rape shield rule and a host of state cognates, rape shield laws continue to be problematic, flawed, and—most troubling of all—unpredictable, especially when it comes to the exception that allows evidence of a complainant’s sexual history where doing so is necessary to protect the defendant’s constitutional rights.”).

Rape shield rules have also been criticized by feminist law reformers. These critics argue that they contain multiple exceptions that effectively allow for the weaponization of rape myths despite their protections, particularly because there have not been parallel successful efforts to defuse rape myths at other crucial points in the adjudication process.<sup>183</sup> One of these exceptions, mirrored in the new regulations, allows evidence of “specific incidents of the complainant’s sexual behavior with respect to the respondent [that is] offered to prove consent.”<sup>184</sup> Michelle Alexander argues that this exception in the federal rape shield rule should be abolished because it is based on a flawed rape myth that most rapes are committed by strangers, and erroneously suggests both that rape committed by a person with whom the victim previously engaged in sexual conduct is less harmful and that because a woman has consented to sex with a man once, this consent provides a blanket authorization for sex going forward.<sup>185</sup> This is particularly relevant in the context of Title IX grievance procedures, because approximately 80% of college victims know their offenders, and in 24% of cases the victim and offender are intimate partners.<sup>186</sup>

Additionally, even if evidence prohibited by rape shield rules is properly excluded, defense counsel may still accusingly interrogate the complainant about her behavior at the time in question, which can leverage rape myths that victims of sexual assault contribute to their own victimizations.<sup>187</sup> This is, perhaps, less a deficiency in the rule and more of an inevitability; as one commentator noted, “it cannot in one grand gesture change” tendencies of judge and jury to decide rape cases based on myth-based judgments about victims.<sup>188</sup>

Most troublingly, though, is that because of the myriad exceptions to rape shield laws, and the ability of judges to utilize their discretion to admit otherwise impermissible evidence,<sup>189</sup> “[r]ape shield laws have been applied haphazardly and

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183. Gruber, *supra* note 176, at 646. (“Reformers accordingly praise the broad adoption of shield laws, but complain that they contain too many exceptions. They assert eliminating such exceptions will rid rape trials of sexist myths and increase convictions and reporting. However, it seems feminists underestimated the multitude of ways in which rape myths infect the criminal system. First, shield laws only protect against embarrassment and prejudice at the trial level. Other institutional actors, from police to prosecutors, are free to act on the basis of stereotypes. The continued use of rape mythology by these state actors has the effect of discouraging victim reporting and participation. In addition, prosecutors are culturally oriented toward winning trials, which may lead them to dismiss cases involving nonparadigmatic victims because the chances of victory are low. Experts also note that some rape complainants, like Kobe Bryant’s accuser, can be traumatized by actions of purely non-state actors.”).

184. 34 C.F.R. § 106.45(b)(6)(i) (2020).

185. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 119-21 (2002).

186. SINOZICH & LANGTON, *supra* note 47, at 7.

187. Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, LOYOLA OF L.A. L. REV. 757, 766 (1992).

188. *Id.* at 772.

189. Anderson, *supra* note 185, at 130-31 (“Despite the formal strictures of many rape shield laws, particularly those in the legislated exceptions category, judges have nevertheless found numerous instances in which a woman’s prior sexual conduct should be admitted to support a rape defendant’s claim of consent, despite its inadmissibility under the rape shield laws. Judges in these cases often conclude that the defendant’s rights under the Sixth Amendment to the Constitution demand that this evidence be admitted.”).

inconsistently.”<sup>190</sup> Multiple commentators have therefore concluded that “rape shield rules have not protected rape victims as hoped.”<sup>191</sup>

## 2. *Cross-Examination’s Deficiencies as a Vehicle for Truth-Seeking*

Feminist legal scholars have questioned whether cross-examination actually does serve to uncover the truth in sexual assault cases. First, recent scholarship challenges the assumption that fact-finders are accurately able to assess credibility based on their perceptions of witnesses’ demeanors.<sup>192</sup> Lisa Kern Griffin argues that although there is undeniably a valid fairness component to cross-examination, its role in assessing credibility is overblown, because, “[a]s the experimental evidence indicates, ‘ordinary observers do not benefit from the opportunity to observe nonverbal behavior in judging whether someone is lying.’ Moreover, ‘there is little correlation between people’s confidence in their ability to detect deception and their accuracy.’”<sup>193</sup> Griffin argues that, if anything, the belief that a witness’s demeanor can serve “as a lie detection tool” for fact-finders actually impedes truth-seeking by excluding necessary and reliable testimony.<sup>194</sup>

Second, the supposition that cross-examination will yield a truthful account of what “really” happened assumes that a witness is purposefully attempting to put forth a false narrative in her testimony;<sup>195</sup> however, “[t]rauma is known to result in inconsistent narratives.”<sup>196</sup> For cases that rest upon a determination that either the accuser or the accused is telling the truth, but not both, “[r]ecent studies significantly indicate that even when people are trying to recall the same memory the content can change substantially from one occasion to another.”<sup>197</sup> Additionally, “the normal variability of memory can be further exacerbated by the impact of trauma, such as that experienced by victims of sexual assault.”<sup>198</sup> Specifically, “rape memories can be ‘less clear and vivid, less visually detailed, less likely to occur in meaningful order, less well-remembered, less talked about and less recalled either voluntarily or involuntarily.’”<sup>199</sup> As a result, an adjudicatory panel aiming to uncover the “truth” about what happened in a sexual assault case faces a difficult task, and cross-examination is unlikely to be the proper tool.

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190. Capers, *supra* note 182, at 205 n.153.

191. *Id.* at 205.

192. See Lisa Kern Griffin, *Honesty Without Truth: Lies, Accuracy, and the Criminal Justice Process*, 104 CORNELL L. REV. ONLINE 101, 113 (2018); Anne Bowen Poulin, *Credibility: A Fair Subject for Expert Testimony?*, 59 FLA. L. REV. 991, 1004 (2007) (“There is now ample psychological literature demonstrating that humans generally, and jurors specifically, have limited ability to detect lying.”).

193. Griffin, *supra* note 192, at 113 (quoting Adam J. Kolber, *Will There Be a Neurolaw Evolution?*, 89 IND. L.J. 807, 837 (2014)).

194. *Id.* at 115-16.

195. Epstein, *supra* note 169, at 766.

196. Brodsky, *supra* note 55, at 835.

197. Louise Ellison, *Closing the Credibility Gap: The Prosecutorial Use of Expert Witness Testimony in Sexual Assault Cases*, INT’L J. OF EVID. & PROOF 239, 243 (2005).

198. *Id.*

199. *Id.* at 244.

*D. Cross-Examination Circuit Split*

Cross-examination is raised as a potentially required due process protection in the educational context because it is widely considered to be the cornerstone of fairness in the criminal justice context, as codified through the Sixth Amendment's right of the accused to directly, or through counsel, examine witnesses against him.<sup>200</sup> Further, because cross-examination is widely considered "the greatest legal engine ever invented for the discovery of truth," it is required in civil trials and many administrative hearings.<sup>201</sup> Adversarial cross-examination allows the questioner to interrogate an adverse witness "under oath, in front of the decision-maker," and "is highly prized in our legal system as a method to test evidence for bias and to test the credibility of witnesses."<sup>202</sup> The Supreme Court has not yet weighed in on whether due process requires adversarial cross-examination in school disciplinary proceedings, and although the circuits were largely in agreement that it was not required,<sup>203</sup> a recent split has emerged between the First and Sixth Circuits, which, in combination with the new regulations requiring cross-examination, makes the issue ripe for clarification by the Supreme Court.

*1. Doe v. Baum: Adversarial Cross-Examination is Required in School Disciplinary Proceedings*

Jane Roe was part-way through her freshman year at the University of Michigan when she met John Doe at a fraternity party.<sup>204</sup> At the party, the two drank and danced, and after the party ultimately had sex.<sup>205</sup> Jane Roe filed a sexual misconduct complaint two days later with the University, in which she claimed that she was unable to consent because she was too drunk.<sup>206</sup> The University responded quickly by launching an investigation, which lasted for three months.<sup>207</sup> The school utilized an investigator who "collected evidence and interviewed Roe, Doe, and twenty-three other witnesses."<sup>208</sup>

Two divergent narratives emerged from the investigation; Doe's story was that Roe did not appear to be drunk and affirmatively consented, while Roe told the investigator that she told Doe "no sex" before passing out but awoke to find Doe performing oral sex on her.<sup>209</sup> Although twenty-three other witnesses were interviewed, they did not clarify which of the competing stories was accurate, as "[a]lmost all of the male witnesses corroborated Doe's story, and all of the female witnesses corroborated Roe's."<sup>210</sup> Ultimately, the investigator could not find that

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200. U.S. CONST. amend. VI.

201. H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the "Greatest Legal Engine Ever Invented,"* 27 CORNELL J.L. & PUB. POL'Y 145, 146 (2017) (quoting WIGMORE, *supra* note 140, at 32).

202. Mann, *supra* note 10, at 657.

203. *See infra* Part II(D)(2).

204. Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018).

205. *Id.* at 578-79.

206. *Id.* at 579.

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

Roe was so intoxicated that Doe should have been aware that she was unable to consent, and recommended that the University “rule in Doe’s favor and close the case,” a recommendation that the University followed and Roe appealed.<sup>211</sup> The University’s Appeals Board then reversed the determination, because “Roe’s description of events was ‘more credible’ than Doe’s, and Roe’s witnesses were more persuasive.”<sup>212</sup> Doe, who was 13.5 credits away from graduating, withdrew from the school prior to the sanctioning phase to avoid expulsion.<sup>213</sup> Doe brought suit against the University, claiming that because credibility was at the heart of the University’s decision, due process required that he have the “opportunity to cross-examine Roe and adverse witnesses.”<sup>214</sup> The District Court granted the University’s motion to dismiss, and Doe appealed that decision to the Sixth Circuit.<sup>215</sup>

With *Doe v. Baum*, the Sixth Circuit became the first federal appellate court to hold that either the accused or his agent must have the opportunity to directly cross-examine the accuser and adversarial witnesses when a school disciplinary proceeding turns upon the credibility of the two parties.<sup>216</sup> Previously, in *Flaim v. Medical College of Ohio*, the Sixth Circuit held that cross-examination in school disciplinary processes is not always required, particularly if the accused student was “given adequate opportunity to address any discrepancies in [testimony offered against him] during the hearing, [such that] ‘cross-examination would have been a fruitless exercise.’”<sup>217</sup> But, in dicta, the *Flaim* court carved out space for a potential requirement of cross-examination in cases that turned on a credibility determination between accuser and accused.<sup>218</sup>

In 2017, the Sixth Circuit addressed this in a school disciplinary case involving sanctions imposed against two male students charged with separate incidents of sexually assaulting female students, setting the stage for its later holding in *Baum*.<sup>219</sup> In *Doe v. University of Cincinnati*, the court wrote that in cases where a credibility determination is central to the ultimate decision, a university’s procedures must be sufficient “to make ‘issues of credibility and truthfulness . . . clear to the decision makers.’”<sup>220</sup> The court acknowledged that “strengthening those procedures is not without consequences for victims,” as cross-examination conducted by the alleged perpetrator “‘may be traumatic or intimidating, thereby possibly escalating or perpetuating’ the same hostile environment Title IX charges universities with eliminating.”<sup>221</sup> Nonetheless, it ultimately concluded that because the accused student was not asking to directly cross-examine the accusing student, this concern

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211. *Id.* at 580.

212. *Id.*

213. *Id.*

214. *Id.* Additionally, Doe claimed that the university discriminated against him on the basis of gender, in violation of Title IX. *Id.*

215. *Id.*

216. *Id.* at 583.

217. 418 F.3d 629, 641 (6th Cir. 2005).

218. *Id.* (“[I]n *Flaim*’s case, it was not a choice between believing an accuser and an accused, where cross-examination is not only beneficial, but essential to due process.”).

219. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400-07 (6th Cir. 2017).

220. *Id.* at 403.

221. *Id.* at 404.

was sufficiently mitigated.<sup>222</sup>

In *Doe v. Baum*, the Sixth Circuit noted that Doe, and any other student facing school discipline for sexual misconduct, had substantial interests at stake in both his reputation and his future educational and employment opportunities.<sup>223</sup> Additionally, the court highlighted that the University of Michigan “already provides for a hearing with cross-examination in all misconduct cases other than those involving sexual assault,” such that requiring cross-examination in sexual misconduct hearings would in no way add to the administrative burden.<sup>224</sup> The court did not find persuasive the university’s argument that it was sufficient that Doe was given an opportunity to review Roe’s statement in advance and provide a response highlighting her inconsistencies to the investigator, because “[c]ross-examination is essential in cases like Doe’s because it does *more* than uncover inconsistencies—it ‘takes aim at credibility like no other procedural device.’ Without the back-and-forth of adversarial questioning, the accused cannot probe the witness’s story to test her memory, intelligence, or possible ulterior motives.”<sup>225</sup> Rather than relying on empirical studies, the court cited to *A Few Good Men* and *My Cousin Vinny* to show how crucial cross-examination is to the administration of justice.<sup>226</sup>

Although the court briefly acknowledged the university’s concern that adversarial cross-examination in sexual misconduct cases “may subject an alleged victim to further harm or harassment,”<sup>227</sup> it quickly dismissed that concern.<sup>228</sup> According to the Sixth Circuit, an agent of the accused could perform the live adversarial cross-examination of the accuser, which would “accomplish the benefits of cross-examination—its adversarial nature and the opportunity for follow-up—without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker.”<sup>229</sup> This reasoning fundamentally misunderstands the nature of the emotional trauma wrought by cross-examination. As detailed above, it is the questions, not just the questioner, that are problematic.

## 2. Haidak v. University of Massachusetts-Amherst: *Adversarial Cross-Examination is Not Required in School Disciplinary Proceedings*

In 2012, James Haidak and Lauren Gibney were both students at the University of Massachusetts, Amherst, and were involved in a romantic relationship.<sup>230</sup> Gibney’s mother reported to the University that Haidak had assaulted Gibney, and

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222. *Id.*

223. 903 F.3d 575, 582 (6th Cir. 2018).

224. *Id.*

225. *Id.* (citing *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 402).

226. *Id.* at 580 n.1.

227. *Id.* at 583.

228. *Id.*

229. *Id.*

230. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 61 (1st Cir. 2019). This case does not stem from an allegation of sexual misconduct; instead, it is a Title IX case brought by the accused student under the claim that the University’s disciplinary processes discriminated against him because of his gender. The case is further relevant because he alleged that the University denied him due process in its disciplinary proceedings by not allowing him to directly cross-examine his accuser when a credibility determination was central to the outcome.

in response, the University charged Haidak with physical assault and issued a no-contact order, which both Haidak and Gibney ignored.<sup>231</sup> After two additional no-contact orders were issued and ignored, the University suspended Haidak pending a hearing on the assault charge.<sup>232</sup> By the time the hearing was scheduled, Haidak had withdrawn from the University.<sup>233</sup> Prior to the hearing, the University sent Haidak a description of the hearing procedures, which included a newly implemented policy “under which charged students could no longer question other students directly, but instead could submit proposed questions for the Board to consider posing to the witness.”<sup>234</sup>

During the hearing, Haidak participated by phone while his attorney was present in person (although the attorney’s role was limited to observing and consulting with Haidak), and Gibney was present in person.<sup>235</sup> The Board conducted all questioning of witnesses, and “ultimately found Haidak responsible for assault and failure to comply with the no-contact orders, but not for endangerment or harassment.”<sup>236</sup> The Board expelled Haidak based on this finding.<sup>237</sup> Haidak appealed the expulsion to the University Appeals Board, which upheld the sanction.<sup>238</sup> Haidak then filed a complaint against the University in federal court alleging violations of his due process, equal protection, and Title IX rights.<sup>239</sup> The district court granted summary judgment for the University and denied for Haidak; Haidak then appealed this decision to the First Circuit.<sup>240</sup>

In his appeal, Haidak argued that because he was not allowed to cross-examine Gibney, he was denied constitutional due process protection in the hearing.<sup>241</sup> Although Haidak recognized that the First Circuit had previously noted that “the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases,”<sup>242</sup> he argued that due process requires at least some opportunity for the accused to directly question opposing witnesses “whenever a university disciplinary proceeding turns on the witnesses’ credibility.”<sup>243</sup> Additionally, the court inferred that because Haidak did not separately argue that he had a right to legal counsel in the hearing, he must necessarily have been arguing that “the accused student must be allowed to question such opposing witnesses himself.”<sup>244</sup>

The First Circuit ruled against Haidak and held that, in school disciplinary

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231. *Id.* at 61-62.

232. *Id.* at 62.

233. *Id.* at 63.

234. *Id.* at 64.

235. *Id.*

236. *Id.*

237. *Id.* at 65.

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 66-68. Additionally, Haidak argued that his due process rights were violated because he was not allowed to present all of his intended evidence, an issue which is beyond the scope of this comment and on which the First Circuit ruled against him. *Id.*

242. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988).

243. *Haidak*, 933 F.3d at 68.

244. *Id.* at 69.

hearings which rely on credibility determinations, the accused does not have the right to perform direct cross-examination of witnesses.<sup>245</sup> The court came to this conclusion because it “doubt[ed] that student-conducted cross-examination would so increase the probative value of hearings and decrease the ‘risk of erroneous deprivation’” as to make it constitutionally required.<sup>246</sup> The First Circuit declined to adopt the Sixth Circuit’s holding from *Doe v. Baum*.<sup>247</sup> In contrast to the Sixth Circuit, the First Circuit had no qualms about the ability of a neutral party to question witnesses, including the accuser, and was concerned that mandating adversarial cross-examination would transform school disciplinary proceedings in to a “mandated mimicry of a jury-waived trial.”<sup>248</sup> Ultimately, the court held that due process does not require that a school must “provide for cross-examination by the accused or his representative in all cases turning on credibility determinations,” holding instead that a neutral party, such as the hearing panel, can question the witness.

The First Circuit bolstered its holding in *Haidak* by carefully reviewing the manner of questioning conducted by the Board during Haidak’s hearing, finding that although it was troubling that the Board was not able to see Haidak’s full list of questions, “[t]he Board questioned Gibney at length on the matters central to the charges. It probed for detail and required her to clarify ambiguities in her responses.”<sup>249</sup> Crucially, “[b]y alternating between questioning Haidak and Gibney, ultimately examining each student three times, [the Board] engaged in an iterative process in which its questioning of Gibney was informed in real time by Haidak’s testimony as the proceedings unfolded,” which allowed the Board to elicit critical information regarding Gibney’s continued relationship with Haidak after the initial assault.<sup>250</sup>

The First Circuit’s holding in *Haidak* is well-supported by other circuits and federal district courts which have also held that there is no direct right to cross-examination in school disciplinary proceedings.<sup>251</sup> Courts holding that due process does not always require adversarial cross-examination in the school disciplinary context base this determination largely on one or more of three strains of reasoning.

First, and most conservatively, many courts have held that cross-examination is not required in the academic context when the adjudication does not turn on the credibility of witnesses—namely, in cases where the accused student has admitted to the same crucial facts about which the witness he wants to cross-examine would

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245. *Id.*

246. *Id.* (citing *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

247. *Id.*

248. *Id.* at 69-70.

249. *Id.* at 70.

250. *Id.*

251. *See, e.g.*, *Nash v. Auburn Univ.*, 812 F.2d 655, 663-64 (11th Cir. 1987) (“However, we have not expanded the *Goldberg* procedural requirements for quasi-judicial termination of welfare benefits in student disciplinary hearings. Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding.”); *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974); *Doe v. Rensselaer Polytechnic Inst.*, No. 1:18-CV01374, 2019 U.S. Dist. LEXIS 5396, at \*18-21 (N.D.N.Y. Jan. 11, 2019); *Doe v. Princeton Univ.*, No. 18-16539, 2019 U.S. Dist. LEXIS 4449, at \*10, \*19-21 (D.N.J. Jan. 9, 2019); *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 929 (E.D. Mich. 2015).

also testify.<sup>252</sup> Because Title IX cases are often credibility contests, the dicta in these cases indicate that cross-examination in some form may be required.

Second, courts have held that cross-examination is not required in educational disciplinary settings because it is both overly burdensome and potentially harmful to the education process.<sup>253</sup> In *Newsome v. Batavia*, the Sixth Circuit held that in school disciplinary proceedings where “the veracity of a student account of misconduct by another student is initially assessed by a school administrator—who has, or has available to him, a particularized knowledge of the student’s trustworthiness,” the benefit of cross-examination is outweighed by the “necessity of protecting student witnesses from ostracism and reprisal” such that cross-examination of student accusers is not required.<sup>254</sup> Further, the court held that requiring school disciplinary boards to provide for adversarial cross-examination would be too burdensome to be mandated because:

[t]o saddle them with the burden of overseeing the process of cross-examination (and the innumerable objections that are raised to the form and content of cross-examination) is to require of them that which they are ill equipped to perform. The detriment that will accrue to the educational process in general by diverting school board members’ and school administrators’ attention from their primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence simply outweighs the marginal benefit that will accrue to the fact-finding process by allowing cross-examination.<sup>255</sup>

Third, multiple courts have emphasized that because educational disciplinary proceedings are vastly different from criminal proceedings, cross-examination in educational adjudications is not required as long as “basic fairness is preserved”<sup>256</sup> in the proceedings.<sup>257</sup> These courts have held that hearings should have the

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252. See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005) (involving a medical student who was arrested for and convicted of a felony drug crime and was then expelled from the Medical College of Ohio. The school held a hearing in which the arresting officer testified, but where the student was not permitted to question the officer directly or through his attorney. The student made multiple procedural due process challenges to his expulsion, including that he was denied his due process right to cross-examine witnesses. The court held that because this was not a situation in which the adjudicatory board was required to choose between believing either the accuser or the accused (a situation where the court noted in dicta that “cross-examination is not only beneficial, but essential to due process”), the lack of cross-examination was not a denial of due process because the student had ample other opportunities to identify discrepancies in the officer’s testimony to the extent that cross-examination would have added no value.); *Winnick v. Manning*, 460 F.2d 545, 549-50 (2d Cir. 1972) (involving a student who was suspended from the University of Connecticut for participating in a demonstration that disrupted final exams, following a disciplinary hearing. Winnick challenged the suspension on due process grounds, alleging in part that he was denied his right to cross-examine the chief complaining witness. The reviewing court held that “if this case had resolved itself into a problem of credibility, cross examination of witnesses might have been essential to a fair hearing,” however, in this specific instance the credibility of the witness was not in issue and therefore “cross-examination would have been a fruitless exercise.”).

253. See *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 924-26 (6th Cir. 1988).

254. *Id.* at 924-25.

255. *Id.* at 926.

256. *Nash*, 812 F.2d at 664.

257. See, e.g., *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925 (6th Cir. 1988); *Nash*, 812 F.2d at 664; *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961).

“rudiments of an adversary proceeding”—which includes provision of the names of adverse witnesses and an overview of the content of their anticipated testimony to the accused student; an opportunity for the accused student to present a defense to the adjudicatory board (including oral and/or written testimony from witnesses); and, ultimately, provision of a report to the accused student detailing the reasons for the board’s findings—but does not include requiring the cross-examination of adverse witnesses.<sup>258</sup> When determining that expelled students have a due process right to notice and a hearing prior to expulsion, the Fifth Circuit was careful to note that “[t]his is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college’s educational atmosphere and impractical to carry out.”<sup>259</sup>

Over twenty-five years later, the Eleventh Circuit drew upon the Fifth Circuit’s recognition in *Dixon* that the crucial differences between educational and criminal proceedings give rise to different due process rights. In *Nash v. Auburn*, the Eleventh Circuit differentiated educational settings from both criminal proceedings and formalized quasi-judicial administrative proceedings, because although “[d]ue process requires that appellants have the right to respond, . . . their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.”<sup>260</sup> In *Nash*, even though the expelled students were not permitted to cross-examine adverse witnesses when doing so would have been valuable to their defense, their due process rights were not violated because they were afforded other procedural protections.<sup>261</sup>

Additionally, many courts have held, like the *Haidak* court, that even if some form of cross-examination of witnesses in Title IX grievance procedures is required to conform with due process, this cross-examination does not need to be adversarial and can instead be conducted by a neutral party. These courts blend the above three approaches, recognizing that (1) Title IX cases often do rest upon a credibility determination of the accuser and accused which warrants some level of cross-examination; (2) the educational context is ill-served by requiring laypersons to follow technical legal procedures that govern adversarial cross-examination and which undermine the core tenets of education; and (3) traditional adversarial cross-examination is not required by due process in adjudicatory proceedings where basic

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258. *Dixon*, 249 F.2d at 159 (“If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.”).

259. *Id.*

260. *Nash*, 812 F.2d at 664 (“Appellants rely on *Goldberg v. Kelly* to challenge the constitutional adequacy of their hearing on the ground they were not allowed to cross-examine the accusing witnesses. *Goldberg* taught us that ‘in almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.’ However, we have not expanded the *Goldberg* procedural requirements for quasi-judicial termination of welfare benefits in student disciplinary hearings. Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding.” (quoting *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970))).

261. *Id.*

fundamental fairness is preserved.<sup>262</sup> As discussed further in Part III, some of these courts also recognize that adversarial cross-examination “‘may be traumatic or intimidating, thereby possibly escalating or perpetuating’ the same hostile environment Title IX charges universities with eliminating.”<sup>263</sup>

### III: ADVERSARIAL CROSS-EXAMINATION IS NOT REQUIRED BY DUE PROCESS, AND UNDERMINES THE MANDATE OF TITLE IX

#### *A. Adversarial Cross-Examination Will Deter Reporting and Harm Accusers, in Violation of Title IX*

A majority of schools do not publish their specific procedures for handling sexual assault adjudications, but recent research suggests that, in the wake of the 2011 DCL, “most schools err on the side of disallowing [adversarial] cross-examination.”<sup>264</sup> This would drastically change, though, with the new regulations’ requirement of a live hearing with adversarial cross-examination for Title IX grievance procedures.

Adversarial cross-examination can be deeply damaging to victims of sexual assault because it can lead to further trauma and shame.<sup>265</sup> We know from the criminal context that “[w]omen’s descriptions of their injury also make clear that the dignitary harms associated with having sex expropriated against one’s will are inexorably aggravated by traditional criminal law process. Effective adversarial hearings are designed to make witnesses uncomfortable, uncertain, and, often, ashamed.”<sup>266</sup> In her searing victim impact statement, Chanel Miller wrote of her experience in the adversarial legal system:

I was pummeled with narrowed, pointed questions that dissected my personal life, love life, past life, family life, inane questions, accumulating trivial details to try and find an excuse for this guy who didn’t even take the time to ask me for my name,

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262. See, e.g., *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401, 406 (6th Cir. 2017) (holding that cross-examination does not have to be direct, and that due process is satisfied as long as the university provides “means for the [adjudicatory panel] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.” This means that the accuser must appear in front of the panel in some manner, which includes through the use of technology.); *Doe v. Rensselaer Polytechnic Inst.*, No. 1:18-CV01374, 2019 U.S. Dist. LEXIS 5396, at \*21 (N.D.N.Y. Jan. 11, 2019) (holding that circumscribed cross-examination, in which the accused student submits questions prior to and during the hearing to the adjudicatory board, which then poses the questions to witnesses, does not violate the accused student’s due process rights); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (involving a Title IX sexual assault case where consent was at issue and the focus of the disciplinary hearing was to determine whether the accuser or accused was more credible. The court stated that “in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel.”).

263. *Doe v. Univ. of Cincinnati*, 872 F.3d at 403 (quoting *Doe v. Regents of the Univ. of Cal.*, 210 Cal. Rptr. 3d 479, 505 (Cal. Ct. App. 2016)).

264. *Bruton*, *supra* note 201, at 152.

265. See, e.g., Michele Burman, *Evidencing Sexual Assault: Women in the Witness Box*, J. CMTY. & CRIM. JUST. 379, 383 (2009) (“A wealth of research evidence points unerringly to the intimidating and often painful nature of giving evidence for complainants in sexual offence trials, so much so that the trial has been characterized as a form of *secondary victimization*.”).

266. *Baker*, *Essential Sexuality*, *supra* note 32, at 778.

who had me naked a handful of minutes after seeing me. After a physical assault, I was assaulted with questions designed to attack me, to say see, her facts don't line up, she's out of her mind, she's practically an alcoholic, she probably wanted to hook up, he's like an athlete right, they were both drunk, whatever, the hospital stuff she remembers is after the fact, why take it into account, Brock has a lot at stake so he's having a really hard time right now.<sup>267</sup>

Putting students through this process, particularly if it is unlikely to help the adjudicatory panel make its ultimate determination, does not further the due process rights of accused students and puts universities in a position of potentially subjecting complainants to a hostile environment—the very situation Title IX is supposed to address.<sup>268</sup> It is for this reason that the 2011 DCL strongly discouraged schools from utilizing adversarial cross-examination during hearings, because “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”<sup>269</sup> In response to the Department of Education’s proposed regulations, over 900 mental health professionals submitted a comment decrying the new rules and arguing that “the proposed changes would exacerbate psychological harms to victims.”<sup>270</sup>

Critics of the new regulations argue that the cross-examination requirement, in addition to other components of the new regulations that bolster the rights of accused students, will act to deter reporting of campus sexual assault.<sup>271</sup> Eliza Lehner traced

267. Samuel Osborne, *Stanford University Rape Case: Victim’s Letter in Full*, INDEP. (June 6, 2016), <https://www.independent.co.uk/news/world/americas/stanford-university-rape-case-the-victims-letter-in-full-a7067146.html> [<https://perma.cc/E3NJ-YEHG>].

268. Sara O’Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. PITT. L. REV. 511, 538 (2018).

269. 2011 Dear Colleague Letter, *supra* note 3, at 12.

270. Judith L. Herman et al., Prof. of Psychiatry, Harv. Med. Sch., Comment Letter to Proposed Rule to Amend Rules Implementing Title XI of the Education Amendment Act of 1972 (Title IX), at 2 (Jan. 30, 2009), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/01/Title-IX-Comment-from-Mental-Health-Professionals.pdf> [<https://perma.cc/EN38-FE7G>] (“This rule requires students who file formal Title IX complaints to submit to cross-examination in a ‘live hearing’ by the accused student’s ‘advisor of choice.’ For survivors of sexual assault and harassment, this means being subjected to hostile attacks on their credibility and public shaming at a time, following a traumatic event, when they may feel most vulnerable. It also means being forced to relive their traumatic experiences in excruciating detail, a situation almost guaranteed to aggravate their symptoms of post-traumatic stress. For these reasons, a requirement for live cross-examination is likely to cause serious harm [to] victims who complain and to deter even more victims from coming forward.”).

271. See, e.g., Maggie Brown, *Proposed Title IX Changes “Immensely Concerning” for Elon*, ELON NEWS NETWORK (Jan. 15, 2019 3:24 PM), <https://www.elonnewsnetwork.com/article/2019/01/title-ix-proposed-changes> [<https://perma.cc/XW9K-MFMS>] (“Title IX Coordinator Mike Neiduski called the proposed changes ‘immensely concerning.’ He was worried the changes would decrease reporting and induce re-traumatization.”); Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER ED (Nov. 20, 2018), <https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say> [<https://perma.cc/5BA9-3R3H>] (Brett Sokolow, President of Association of Title IX Administrators, “predicted that the requirement for cross-examination in live hearings—even with accommodations like questioning from a separate room—would lead to a 50 percent drop in the reporting of misconduct.”); *Statement: BARCC Responds to Proposed New Title IX Regulations Announced by Trump Administration*, BOS. AREA RAPE CRISIS CTR. (Nov. 20, 2018), <https://barcc.org/blog/details/statement-barcc-responds-to-proposed-new-title-ix-regulations-announced-by> [<https://perma.cc/5773-2SK7>]; Sarah Brown & Katherine Mangan, *What You Need to Know About the*

how retellings of “brutal cross-examination” in “he said, she said” cases beginning at the outset of police investigations of rape complaints serves to “effectively discourage victims from reporting and pursuing their rape allegations in large part because they concern victims who are already particularly susceptible to discouragement.”<sup>272</sup> Campus sexual assault complainants, too, could be dissuaded from reporting if they are repeatedly exposed to (truthful) messages that the cross-examination they will have to undergo during the grievance procedure will be harrowing.

Additionally, if adversarial cross-examination is required then issues of representation by counsel are inevitable. The new regulations note that restrictions on the participation of an advisor to either party be applied equally, but do not require parity in representation by counsel across parties.<sup>273</sup> This is a departure from the 2011 DCL, which explicitly noted that “if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties.”<sup>274</sup>

Critics of the new regulations point out that although “[w]ealthy students will be free to hire high-priced lawyers to represent them,” many students will only be able to rely on an advisor appointed by the college who may not be an attorney.<sup>275</sup> This outcome is particularly troubling given the new requirement of adversarial cross-examination, as the complexities of cross-examination in sexual assault cases are legion, and even highly experienced ethical criminal defense attorneys wrestle with how to effectively cross-examine sexual assault victims.<sup>276</sup> The rules of evidence, and including rape shield laws, are complex and difficult for even experienced legal practitioners to understand—it is inconceivable that laypersons will be able to follow these rules to conduct effective and ethical cross-examinations

*Proposed Title IX Regulations*, CHRON. HIGHER EDUC. (Nov. 16, 2018), <https://www.chronicle.com/article/What-You-Need-to-Know-About/245118> [<https://perma.cc/MN8Z-WPAC>] (“[R]equiring cross-examination ‘could affect the willingness of people to report sexual assault, if they picture themselves in a courtroom being yelled at about their sexual history the way you see on TV shows.’”); *see also supra* notes 35-43 and accompanying text (describing how campus sexual assault is already vastly underreported).

272. Eliza A. Lehner, *Rape Process Templates: A Hidden Cause of the Underreporting of Rape*, 29 YALE J.L. & FEMINISM 207, 227-28 (2018).

273. Kreighbaum, *supra* note 271 (“[M]any lawyers who advise colleges on Title IX issues are warning that the proposal essentially would turn campus hearings into courtroom proceedings, pushing colleges into roles they are ill equipped to take on. And critics said the requirement raises questions about equity for student representation in court-like settings.”).

274. *2011 Dear Colleague Letter*, *supra* note 3, at 12.

275. Glenn C. Altschuler & David Wippman, *Proposed Changes to Title IX Will Not Solve the Problem of Sexual Assaults on College Campuses*, THE HILL (Jan. 5, 2020 12:00PM), <https://thehill.com/opinion/education/476814-proposed-changes-to-title-ix-will-not-solve-the-problem-of-sexual-assaults> [<https://perma.cc/KHE7-ERH8>]; *see, e.g.*, Erin J. Heuring, *Til It Happens to You: Providing Victims of Sexual Assault with Their Own Legal Representation*, 53 IDAHO L. REV. 689, 728-34 (2018) (arguing that a Special Victims’ Counsel program, mirroring the program that exists in the military, should be established for all sexual assault victims in civil cases); Behre, *supra* note 2, at 324 (criticizing the criminalization of Title IX procedures while also arguing that a way to mitigate the harms of this criminalization to victims is to provide attorneys for accusers in campus sexual assault cases).

276. *See, e.g.*, Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255 (2016).

in an educational adjudicatory setting.<sup>277</sup>

*B. Adversarial Cross-Examination Undermines Title IX's Mandate*

Because the Supreme Court has not yet addressed the specific contours of due process requirements for Title IX proceedings, the most instructive case for determining proper procedural safeguards is *Mathews v. Eldridge*. In this case, the Court set out a three-factor test to determine whether due process requires implementation of a specific procedural protection.<sup>278</sup> First, the private interest that will be impacted must be identified; second, the risk that this interest would be erroneously deprived through the existing procedures used must be assessed; and third, “the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail” needs to be considered.<sup>279</sup> Ultimately, due process requires that “a person in jeopardy of a serious loss (be given) notice of the case against him and opportunity to meet it.”<sup>280</sup> The question at issue here is whether procedural due process requires adversarial cross-examination to ensure that an accused student receives “a meaningful opportunity to present their case.”<sup>281</sup>

The first *Mathews* factor requires identification of “the private interest that will be affected by the official action.”<sup>282</sup> Title IX grievance procedures, as school disciplinary proceedings, “have neither the consequences nor weight of a criminal conviction.”<sup>283</sup> Given that context, though, students accused of sexual misconduct face serious disciplinary consequences if they are found to be responsible for the

277. Johnson, *supra* note 116, at 654 (“Cross-examination may or may not be the ‘greatest legal engine,’ but it is doubtful that Dean Wigmore was imagining that such cross-examination would be conducted by an untrained 19-year-old friend of the party. Whatever gain to truth-seeking the Department imagines would occur with genteel attorneys ethically asking probing questions is sure to be outweighed by the grave trauma and harm caused by unskilled advisors ‘playing attorney’ while likely elucidating few, if any, facts that could not have been learned in a less adversarial, more educational manner.”).

278. Although *Mathews* was specifically regarding due process in administrative proceedings, the test emerging from the case is widely used as the standard for assessing whether procedural safeguards in a range of non-criminal proceedings, including school disciplinary proceedings, meet due process requirements. See, e.g., *Palmer v. Merluzzi*, 868 F.2d 90, 95-96 (3d Cir. 1989) (applying the *Mathews* test to determine that although a sixty-day football suspension had a substantial impact on the student, the governmental interests in efficiently maintaining order and discipline in the school and the fact that implementing more formal hearing processes including cross examination and representation by counsel would “not sufficiently increase the reliability and fairness of the process to warrant the additional expense and disruption of the educational process,” the school’s provision of notice and an informal hearing met the *Goss* minimum requirements and satisfied due process); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017) (reasoning that, under the second *Mathews* prong, “[a] finding of responsibility for a sexual offense can have a ‘lasting impact’ on a student’s personal life, in addition to his ‘educational and employment opportunities,’ especially when the disciplinary action involves a long-term suspension. The ‘private interest that will be affected by the official action’ is therefore compelling.”).

279. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).

280. *Id.* at 348-49 (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951)).

281. *Id.* at 349.

282. *Id.* at 335.

283. Margo Kaplan, *Restorative Justice and Campus Sexual Misconduct*, 89 TEMP. L. REV. 701, 727 (2017).

charged conduct, up to and including expulsion.<sup>284</sup> Because suspension and expulsion both interrupt, and potentially cease, a student's ability to attend the university of their choice, these sanctions implicate a significant private interest. To that end, some measure of due process protection is required in these adjudications.<sup>285</sup>

Additionally, commentators argue that accused students also have a serious reputational interest at stake: if they are found to have committed sexual misconduct, they will be effectively labeled as sex offenders, which could jeopardize their abilities to transfer to new institutions and potentially obtain employment in their desired fields.<sup>286</sup> The Sixth Circuit found this argument compelling, determining that “the effect of a finding of responsibility for sexual misconduct on ‘a person’s good name, reputation, honor, or integrity’ is profound.”<sup>287</sup> This factor establishes that some measure of due process protection is required, but does not directly speak to the necessity, or lack thereof, of adversarial cross-examination in grievance procedures.

The second *Mathews* factor examines “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards.”<sup>288</sup> Accused students and their advocates argue that the risk of erroneous deprivation of their interest in continued enrollment and risk of lasting reputational damage is high if adversarial cross-examination is not used.<sup>289</sup> This argument is undermined by the evidence that under

284. Jake New, *Expulsion Presumed*, INSIDE HIGHER ED (June 27, 2014, 3:00 AM), <https://www.insidehighered.com/news/2014/06/27/should-expulsion-be-default-discipline-policy-students-accused-sexual-assault> [<https://perma.cc/5XWH-LYVQ>]. However, “[v]ictims are frequently told that disciplinary sanctions are not intended to be punitive in nature. In place of expulsions and active suspensions, universities impose educational sanctions or probationary measures that are effectively meaningless.” Bethany Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and Twombly/Iqbal in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2679 (2017). Sanctions more commonly include “reflection papers, community service, counseling, short suspensions, and even suspension after graduation.” Behre, *supra* note 2, at 353.

285. *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (“At the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing.”)

286. Harris & Johnson, *supra* note 130, at 53-54 (“[A] guilty finding has life-altering consequences: the lost value of paid tuition and opportunity cost of time in college; suspension or expulsion in an economy in which a college degree confers enormous earning potential; likely loss of any future job or appointment that uses a background check; and status as a social outcast among the student’s former peers—and increasingly, the broader society.”). However, reputational damage alleged by accused students is often not a result of the adjudicatory process itself, but rather stems from instances were alleged victims publicly, on social media and elsewhere, name their perpetrators before the Title IX grievance procedures is complete. *See, e.g.*, Reputation Communications, *Title IX: Legal Insight into Reputation-Damaging College Issues*, YOU(ONLINE) (Feb. 1, 2020), <https://reputation-communications.com/article/title-ix-legal-insight-into-reputation-damaging-college-issues/> [<https://perma.cc/5FTV-QANP>].

287. *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018).

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

289. KC Johnson, *Title IX Has a Cross-Examination Crisis*, MINDING THE CAMPUS (Feb. 27, 2019), <https://www.mindingthecampus.org/2019/02/27/title-ix-has-a-cross-examination-crisis/> [<https://perma.cc/U64N-NQH8>] (characterizing arguments against adversarial cross-examination as “accepting one assumption: that all, or nearly all, campus allegations are true, and so a system primarily designed to test the veracity of each individual claim is not only unnecessary but counterproductive”).

current procedures any serious penalty for campus sexual misconduct is rare—let alone an erroneous imposition of such penalties. Although expulsion is a potential sanction, it is rarely applied.<sup>290</sup> According to Department of Justice data, the most common sanction for campus sexual assault is suspension, not expulsion, and the combined numbers of reprimands and requirements for counseling far exceed the number of expulsions.<sup>291</sup> After a year-long investigation of campus sexual assault, the Center for Public Integrity found that “[i]t was far more common for the alleged victim to drop out or transfer, while the accused student remained on campus.”<sup>292</sup>

Under the second prong of this factor, the probable value of the additional safeguard of adversarial cross-examination is low. If anything, adversarial cross-examination is likely to undermine the legitimacy of Title IX hearings, particularly in the form mandated by the new regulations. If adversarial cross-examination is relied upon, because of the real risk that rape myths will be harmfully leveraged through the questioning to inappropriately cast doubt on the accuser’s credibility, the accuracy of proceedings could be decreased while harm to the accuser is increased. Further, the process “becomes far less sturdy” if non-attorney advocates are the individuals conducting the cross-examination.<sup>293</sup> As the First Circuit noted, “[c]onsiderable anecdotal experience suggests that cross-examination in the hands of an experienced trial lawyer is an effective tool,”<sup>294</sup> but it does not follow that a lay-person would be equally capable of conducting effective cross-examination. The only way to ensure that adversarial cross-examination in this setting functions as it does in the criminal and civil context, where it has established its reputation as an engine for truth-seeking, would be to essentially “turn campus hearings into courtroom proceedings.”<sup>295</sup>

The form of adversarial cross-examination imposed by the new regulations also poses considerable potential harm to accused students. Because an institution is prohibited under these regulations from considering any statements from a party who does not submit to adversarial cross-examination during the live hearing,<sup>296</sup> an accused student who chooses not to testify at the hearing out of concern that his statements could be used against him in either a concurrent or future criminal

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290. Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence – With U-Va. a Prime Example*, WASH. POST (Dec. 15, 2014), [https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e\\_story.html](https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html) [<https://perma.cc/3F4B-DT5V>]; see *Confronting Campus Sexual Assault*, *supra* note 18 (noting that approximately one-third of accused students who brought litigation against their institutions to challenge the sexual misconduct proceedings against them faced minimal or no sanctions).

291. Tyler Kingkade, *Sexual Assault Sanctions from DOJ FY2011-13*, SCRIBD.COM, <https://www.scribd.com/document/241023157/Sexual-Assault-Sanctions-From-DOJ-FY2011-13> [<https://perma.cc/7T53-TWYQ>] (last visited Oct. 16, 2020); see also Corbin, *supra* note 284, at 2679 (“Only [30%] of students found responsible for sexual assault are expelled, and less than 50 percent are suspended.”).

292. CTR. PUB. INTEGRITY, *supra* note 40, at 69.

293. Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. L. & FEMINISM, 123, 166 (2017) (quoting Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 342 (1999)).

294. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019).

295. Kreighbaum, *supra* note 271.

296. 34 C.F.R. § 106.45(b)(6)(i) (2020).

proceeding effectively loses his ability to mount a defense to the charges against him.

Finally, under the third factor, the government's interest as relates to the specific function in question "and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail" must be examined.<sup>297</sup> To this end, the government's interest, as embodied by the public university, is to adhere to the mandate of Title IX by ensuring that students have equal access to education free from sex discrimination while ensuring fair disciplinary proceedings for students accused of misconduct. This is a strong interest, which cannot be ascribed to either side as the university must attend to the needs of both accused and accusing students. Therefore, the crucial portion of the analysis under this factor is the fiscal and administrative burden that requiring an across-the-board requirement of adversarial cross-examination would impose.

The cost to public universities of requiring adversarial cross-examination in Title IX hearings would be substantial. First, this procedure would greatly incentivize accused students to retain counsel if they have the financial means to do so. Because it would be fundamentally unfair for only an accused student to be represented by counsel, this procedure would require universities to either provide counsel for accusing students or prohibit the participation of counsel in the adversarial cross-examination altogether. Adversarial cross-examination is most useful as a truth-seeking endeavor when skilled attorneys are conducting the examinations and experienced judges are ensuring that rape shield limitations are followed. Without bringing attorneys into these proceedings for the benefit of both accused and accusing students, as well as for the adjudicatory board itself, it is likely that adversarial cross-examination would yield only downsides and no benefits. The administrative burdens, too, would be immense. If the fiscal burden of providing attorneys for one or both parties as well as to advise the board is too steep, then universities would face a substantial administrative burden. Campus adjudicatory boards would need to become experts in effective cross-examination techniques and rape shield laws to ensure that the adversarial cross-examination is as accurate and useful as possible without harming accusing students.

Courts have warned against "undue judicialization of an administrative hearing, particularly in an academic environment," because it "may result in an improper allocation of resources, and prove counter-productive."<sup>298</sup> Requiring adversarial cross-examination in Title IX hearings would inherently change the nature of these campus proceedings, turning them into highly judicialized mini-trials. This would place a substantial financial and administrative burden on institutions, and thus this factor too militates against requiring adversarial cross-examination. Therefore, under the *Mathews* factors, adversarial cross-examination in Title IX hearings is not required to satisfy due process.

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

298. *Gorman v. Univ. of R.I.*, 837 F.2d 7, 15 (1st Cir. 1988); *see also Goss v. Lopez*, 419 U.S. 565, 583 (1975) ("[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.").

*C. Indirect Cross-Examination Meets Both Sides' Needs*

Adversarial cross-examination in Title IX hearings presents real harms to victims and undermines the fundamental goals of Title IX by further subjecting sexual assault victims to a hostile environment. Finally, because it is ill-suited to sexual misconduct cases, it is not likely to serve as a vehicle for truth-seeking. Instead, it threatens to taint outcomes of proceedings by allowing for the weaponization of rape myths—obscuring, rather than revealing, any true answers about what happened between the parties.

However, cross-examination is not without its merits. Accused students have the right to defend themselves, and, particularly when an adjudicatory panel is tasked with making a credibility determination, witnesses on both sides of the argument should be questioned to ensure that the fact-finders can make an informed and reasoned decision. This does not require adversarial cross-examination, though. Instead, and as noted by the Haidak court, an adjudicatory panel can serve as an intermediary for cross-examination, vetting questions in advance and posing them to witnesses. Even if a live hearing is required, this can be conducted with the witnesses in different locations, using video technology. Alternatively, more schools could adopt the independent investigator model, wherein a neutral outside expert investigator conducts a thorough investigation of the complaint—including conducting thorough witness interviews—and then prepares a detailed report for the adjudicatory board. Both the accused and accusing parties could submit cross-examination questions to the investigator who could assess and pose the questions most likely to shed light on credibility and any factual disputes.

This indirect, less-adversarial mode of cross-examination continues to protect accused students from being subjected to serious disciplinary sanctions without fundamentally fair procedures. Additionally, it recognizes and respects that adversarial cross-examination has great potential to both directly harm complainants through re-traumatizing them in the process of questioning and deter future students from reporting out of fear of being subjected to this process.

## CONCLUSION

Requiring that universities implement direct adversarial cross-examination will not provide due process protection for accused students, because, in cases turning upon issues of consent and intoxication, it is unlikely that cross-examination could ever uncover a neutral “truth.” Further, because of the troubling ways in which rape narratives can be effectively wielded in cross-examination despite the rape shield rule, and because the adjudicators in the educational context will be laypersons rather than skilled courtroom attorneys and judges, there is an unacceptably high chance that cross-examination in the Title IX context will itself create a hostile environment for students. Although the Department of Education cited confusion among universities about how to comply with Title IX as a motivating factor in promulgating the new regulations, these new rules will only heighten confusion. The circuit split, too, creates uncertainty that must be resolved.

Judicially, the Supreme Court should resolve the circuit split to hold that due process does not require adversarial cross-examination in school disciplinary proceedings, upholding the First Circuit’s determination that indirect cross-

examination in this context is sufficient. Additionally, either legislative or agency action will be needed to revoke the new regulations and promulgate new, more appropriate regulations that are fair to all parties. Updated Title IX regulations that carry the force of law are necessary, but, when promulgated, cannot mandate adversarial cross-examination for Title IX hearings. To do so is neither required by due process nor in keeping with Title IX's mandate to eliminate sex-based discrimination in education.

