RE-TOOLING TITLE IX: HOW ADOPTING INTERMEDIARY CROSS-EXAMINATION IN TITLE IX SEXUAL MISCONDUCT ADJUDICATION CAN PROVIDE FAIRNESS AND DUE PROCESS FOR ALL

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I. INTRODUCTION

"If you are a young woman who goes to college, you are more likely to be sexually assaulted than if you didn't. . . ."[1] "There have been decades of institutional betrayal at many of these schools."[2] "Time to Reform the Kangaroo Courts on Campus."[3] A quick google search of Title IX sexual misconduct[4] adjudication on college campuses yields thousands of articles containing quotes and headlines similar to those above.[5] These quotes serve as a chilling reminder to college students and their parents alike: sexual assault is an ongoing epidemic across college campuses.[6] A recent survey of 180,000 students conducted by the Association of American Universities

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[1] Michael Stratford, *U.S. Senators Announce Campus Sexual Assault Legislation*, INSIDE HIGHER EDUC. (July 31, 2014), https://www.insidehighered.com/news/2014/07/31/us-senators-announce-campus-sexual-assault-legislation [https://perma.cc/ZW2V-VN53].

[2] Nell Gluckman, *Students Say They Don't Trust Campus Title IX Processes. And They Doubt Their Own Reports Would Be Taken Seriously*. CHRON. HIGHER EDUC. (Oct. 23, 2019), https://www.chronicle.com/article/Students-Say-They-Don-t/247399 [https://perma.cc/YF9E-JGT4].

[3] Robert Shibley, *Time to Reform the Kangaroo Courts on Campus*, WALL ST. J. (Dec. 29, 2016), https://www.wsj.com/articles/time-to-reform-the-kangaroo-courts-on-campus-1482882574 [https://perma.cc/JEA2-BHGL].

[4] The term "sexual misconduct" encompasses a wide range of behaviors. This Note uses the terms "sexual misconduct," "sexual violence," "sexual assault," and "sexual harassment" interchangeably.

[5] *See, e.g.*, Jamie R. Abrams, *The #MeToo Movement: An Invitation for Feminist Critique of Rape Crisis Framing*, 52 U. RICH. L. REV. 749, 762 (2018).

[6] Jennifer James, Comment, *We Are Not Done: A Federally Codified Evidentiary Standard is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1321 (2016).

(AAU) found that one in four women in undergraduate programs experience some form of nonconsensual contact while they are in college.[7]

Beyond the potential physical and emotional trauma, experiencing sexual harassment has been anecdotally proven to prevent students from receiving the full social and academic benefits of higher education.[8] Both women and men say that sexual harassment adversely affects their education, including causing them to avoid places on campus, finding it hard to study or pay attention in class, halting participation in a sport or activity, and skipping or dropping classes altogether.[9] With a college student population that has topped ten million and continues to grow, creating a climate that is free from bias and harassment is a paramount concern for the country as a whole.[10] A campus culture that tolerates inappropriate verbal and physical contact and intentionally or unintentionally discourages reporting those behaviors undermines the emotional, intellectual, and professional growth of millions of young adults.[11]

Unfortunately, fears that the current enforcement environment on college campuses has discouraged the reporting of sexual assault have largely been confirmed.[12] The results of the AAU survey show few students believe campus officials would conduct fair investigations into their reports of sexual misconduct.[13] Many students also indicated that they believed their report of sexual misconduct would not be taken seriously by officials on their campus.[14] For example, at the University of Southern California, only 38.6% of female undergraduates were sure that a report of sexual misconduct would be taken seriously by officials, and only 27.7% of female undergraduates believed an investigation would be fair.[15] Moreover, only 15% of victims said they had taken advantage of programs or resources such as counseling or the Title IX office after an incident.[16]

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[7] Gluckman, *supra* note 2.

[8] NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, ENDING SEXUAL HARASSMENT AND ASSAULT: EFFECTIVE MEASURES PROTECT ALL STUDENTS 6 (2017), https://www.ncwge.org/TitleIX45/Ending%20Sexual%20Harassment%20and%20Assault.pdf [https://perma.cc/NTN7-E824] [hereinafter ENDING SEXUAL HARASSMENT AND ASSAULT].

[9] *Id.*

[10] NATIONAL COALITION FOR WOMEN AND GIRLS IN EDUCATION, TITLE IX AT 35: BEYOND THE HEADLINES 35 (2008), https://www.ncwge.org/PDF/TitleIXat35.pdf [https://perma.cc/DMF3-2X63] [hereinafter BEYOND THE HEADLINES].

[11] ENDING SEXUAL HARASSMENT AND ASSAULT, *supra* note 8.

[12] Gluckman, *supra* note 2.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

This lack of trust in schools' capabilities to effectively and fairly adjudicate Title IX sexual misconduct is not limited to complainants,[17] but is shared by respondents[18] as well.[19] This distrust from respondents is evidenced by the hundreds of accused students that have filed suit against their universities[20] in the past decade, mostly based on claims that the Title IX sexual misconduct adjudication system at their school violates their procedural due process rights.[21]

The federal government has taken many steps within the past decade to respond to and prevent sexual assault on college campuses.[22] In response to growing public concern, President Obama's administration released administrative guidance in the form of a Dear Colleague Letter in 2011[23] and a Questions & Answers on Title IX and Sexual Violence in 2014.[24] President Trump's administration also released a Dear Colleague Letter in 2017[25] and has promulgated new Title IX regulations, which are the first legally binding regulations since Title IX was first enacted.[26] Despite these efforts, there is an abundance of evidence that the manner in which many universities are

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[17] This Note uses the terms "victim," "survivor," "complainant," and "accuser" to indicate a student who has made an official sexual assault complaint with the university against another student.

[18] The terms "accused," "respondent," and "perpetrator" are used in this Note to indicate a student who has been accused of assaulting another student and is, or could be, subject to a disciplinary hearing by the institution.

[19] Alexandra Yetter, *Title IX Policies Have 'Anti-Male Bias' and Treat Students Accused of Sexual Assault Unfairly, Lawsuit Alleges*, COLUM. CHRON. (July 23, 2019), https://columbiachronicle.com/title-ix-policies-have-anti-male-bias-and-treat-students-accused-of-sexual-assault-unfairly-lawsuit-alleges [https://perma.cc/DUW3-KVUU].

[20] When referring to postsecondary education institutions, this Note uses the terms "universities," "colleges," "higher education institutions," "higher educational institutions," and "schools" interchangeably. Unless otherwise indicated, all of these terms refer to both public and private institutions that receive federal funding of any kind and are subject to Title IX.

[21] Yetter, *supra* note 19.

[22] *See* Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 1 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/9VWK-BNAH] [hereinafter Ali DCL]; Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence 9 (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/TL8P-DKCP] [hereinafter 2014 Q & A]; Candice Jackson, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter 1 (Sept. 22, 2017), https://www.cmu.edu/title-ix/colleague-title-ix-201709.pdf [https://perma.cc/7GMY-W4NX] [hereinafter Jackson DCL]; Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault [https://perma.cc/KSR6-HS2S].

[23] *See* Ali DCL, *supra* note 22.

[24] 2014 Q & A, *supra* note 22, at 9.

[25] Jackson DCL, *supra* note 22, at 1.

[26] Gersen, *supra* note 22.

enforcing Title IX is deeply broken and fails to balance the competing interests of complainants, respondents, and universities alike.[27]

While attempts by the federal government have failed to fix the problems of Title IX enforcement on college campuses, increased public interest including student activism on campuses,[28] outspoken school faculty members,[29] advocacy groups for both complainants and respondents,[30] as well as heightened media coverage have kept pressure on the federal government to continue pursuing solutions.[31] These groups and organizations have raised awareness of the issue of sexual assault on college campuses and spurred government action. Unfortunately, while united in their concerns regarding sexual assault on college campuses, these conversations on how Title IX is enforced on college campuses quickly devolves into standard political muck-throwing.[32]

"Every survivor of sexual misconduct must be taken seriously. . . and every student accused of sexual misconduct must know that guilt is not predetermined."[33] Despite how politicized the topic of sexual misconduct on college campuses has become, these should be non-negotiable principles for any potential solution to the Title IX sexual misconduct adjudication system.[34] Based on those two fundamental principles, this Note argues for the adoption and implementation of an intermediary cross-examination hearing within the Title IX sexual misconduct adjudication system. This Note will explain how this form of cross-examination can balance the competing

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[27] Jesse Singal, *A Bizarre Case at USC Shows How Broken Title IX Enforcement Is Right Now*, N. Y. MAGAZINE (Aug. 4, 2017), http://nymag.com/intelligencer/2017/08/a-bizarre-usc-case-shows-how-broken-title-ix-enforcement-is.html [https://perma.cc/N86Q-DZ7L].

[28] *See* Shibley, *supra* note 3. Members of the University of Minnesota football team staged a walkout as a sign of protest and solidarity in response to what they believed was unfair treatment of ten players who were subject to a campus sexual assault investigation conducted by the university. *Id.*

[29] *See* Open Letter from Members of the University of Penn Law School Faculty on Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities, to WALL ST. J. (Feb. 18, 2015), https://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf [https://perma.cc/L635-XGHY] [hereinafter Penn Open Letter]; *see also* Jamie D. Halper, *Law School Faculty Call for Title IX Sexual Assault Policy Changes*, HARV. CRIMSON (Sept. 1, 2017), https://www.thecrimson.com/article/2017/9/1/law-faculty-title-ix [https://perma.cc/L6JB-QD7F].

[30] Andrew Kreighbaum, *College Groups Blast DeVos Title IX Proposal*, INSIDE HIGHER EDUC. (Jan. 31, 2019), https://www.insidehighered.com/news/2019/01/31/higher-ed-groups-call-major-changes-devos-title-ix-rule [https://perma.cc/NK3Q-5U46].

[31] *See* Abrams, *supra* note 5.

[32] Singal, *supra* note 27.

[33] Susan Svrluga & Nick Anderson, *DeVos Decries 'Failed System' on Campus Sexual Assault, Vows to Replace It*, WASH. POST (Sept. 7, 2017, 9:40 PM), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/protesters-gather-anticipating-devos-speech-on-campus-sexual-assault [https://perma.cc/4K2W-VMD9].

[34] *See id.*

interests among complainants, respondents, and educational institutions and how it comports with procedural due process rights for both complainants and respondents.

Part II of this Note provides an in-depth overview of Title IX enforcement on college campuses, which includes an overview of the current Title IX sexual misconduct adjudication system, Title IX and its interpretive case law, the administrative guidance released by President Obama and President Trump, and the new Title IX regulations. Next, Part III analyzes college students' procedural due process rights in disciplinary hearings, how the current enforcement environment surrounding Title IX is both unpredictable and unfair for all parties, what forms of cross-examination are currently used in the Title IX sexual misconduct adjudication system, as well as an overview of the role intermediary cross-examination plays in foreign judicial proceedings. Part IV addresses how an intermediary cross-examination hearing could successfully balance the competing interests of complainants, respondents, and universities in the Title IX sexual misconduct adjudication system. Part V provides a conclusion to this Note.

II. PAST TO PRESENT: THE EVOLUTION OF TITLE IX ENFORCEMENT

Before considering why it is essential to implement an intermediary cross-examination hearing in Title IX sexual misconduct adjudication, it is necessary to have a detailed discussion of how Title IX, case law, and administrative guidance have impacted the Title IX sexual misconduct adjudication system. When a student notifies university officials of an alleged sexual assault, it triggers a plethora of legal obligations by which universities must abide.[35] The following section provides an overview of the typical adjudication system on college campuses, as well as an overview of those legal obligations by which universities are bound.

A. The Title IX Sexual Misconduct Adjudication System: A Quasi-Judicial Adjudication System

The Title IX sexual misconduct adjudication system is unique because it differs from both the criminal and civil adjudication systems used in the United States.[36] Some differences include allowing the use of hearsay evidence, the format of the proceedings, how complaints are investigated and

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[35] Ali DCL, *supra* note 22, at 4.

[36] Brett A. Sokolow, *Comprehensive Sexual Misconduct Judicial Procedures*, NAT'L CTR. HIGHER EDUC. RISK MGMT. 11 (2001), https://tngconsulting.com/pdfs/comprehensive_campus_sexual_misconduct_judicial_procedures.pdf [https://perma.cc/5F5V-BNWG].

who adjudicates them, the role of attorneys (or sometimes the lack thereof), and the appeal process.[37] There is also a distinct difference in the use of unique legal jargon.[38] For example, "complaints" are made against respondents instead of "charges" being filed, there are no "verdicts" but rather "findings," respondents are not found "guilty" but instead are found "responsible."[39]

Currently, the policies and procedures used in Title IX adjudication systems vary significantly across higher education institutions.[40] A sexual misconduct investigation begins with filing a Title IX complaint with the school, and the school's Title IX investigator meeting with the complainant to conduct an investigatory interview.[41] Next, after the accused student receives notice of the complaint, they may respond in writing or in-person to the charges against them, and the Title IX investigator conducts an investigatory interview with the accused.[42] In addition to interviewing the complainant and respondent, the Title IX investigator interviews any witnesses suggested by the parties, reviews and gathers relevant evidence, and prepares a written report.[43] The written report typically details the allegations, summarizes the interviews with the parties and witnesses, and assesses the evidence gathered.[44]

The next step in the adjudication process is where much of the variance between schools exists. Schools use one of two options. The first option is the use of a hearing panel that operates similar to a civil proceeding.[45] These hearings consist of the formal presentation of evidence as well as the taking of testimony from the parties and any witnesses, with students sometimes being represented by an advisor or representative such as an attorney or another student.[46] Finally, after the hearing, the hearing panel makes its decision as to whether there is a determination of responsibility for any alleged sexual misconduct.[47]

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[37] *Id.*

[38] *Id.* at 12.

[39] *Id.*

[40] Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 644 (2018).

[41] Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 300 (2017).

[42] Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 493 (2012).

[43] Mann, *supra* note 40, at 645.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

The second option—often referred to as the single investigator model—is when schools allow the Title IX investigator to ultimately determine whether any sexual misconduct policies were violated, in what essentially amounts to the Title IX investigator acting as investigator, prosecutor, judge, and jury.[48] Finally, following a determination of responsibility, most schools also offer an appeal process where either the complainant or respondent can file a written appeal of the decided outcome.[49]

B. Enactment and Interpretation of Title IX

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[50] Title IX applies to a broad range of institutions, including any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education.[51]

Congress enacted Title IX with two principal objectives in mind: "to avoid the use of federal resources to support discriminatory practices . . . and to provide individual citizens effective protection against those practices."[52] Despite its origin in the women's civil rights movement, Title IX applies to and protects both male and female students from sexual assault or harassment, whether it be from their peers or employees of the school.[53] In order to accomplish its principal objectives, Title IX is primarily enforced through private rights of action brought directly against schools by or on behalf of students subjected to sexual misconduct, and by the federal agencies that provide funding to educational programs.[54]

Although a private right of action is one way Title IX is enforced, the Title IX statute does not expressly authorize a private right of action for a student through its statutory text.[55] Given this absence of statutory text, federal courts have played a primary, if not exclusive, role in establishing the remedial scheme by which victims of sexual harassment and assault may seek

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[48] *Id.*

[49] Triplett, *supra* note 42.

[50] 20 U.S.C. § 1681 (1972).

[51] *Id.*

[52] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

[53] BEYOND THE HEADLINES, *supra* note 10, at 33.

[54] JARED P. COLE & CHRISTINE J. BACK, CONG. RES. SERV., R45685, TITLE IX AND SEXUAL HARASSMENT: PRIVATE RIGHTS OF ACTION, ADMINISTRATIVE ENFORCEMENT, AND PROPOSED REGULATIONS 1 (2019).

[55] Cannon v. Univ. of Chi., 441 U.S. 677, 683, 688–89 (1979).

relief under Title IX.[56] For example, the Supreme Court has held that when an educational institution violates Title IX, a student can bring a private action against their school for compensatory damages.[57] Similarly, although Title IX makes no explicit reference to sexual harassment or assault, the Supreme Court and federal agencies have determined that such conduct can sometimes constitute discrimination in violation of the statute.[58]

According to the Court, in order for a plaintiff to successfully prevail in a private right of action against a school for alleged sexual harassment or assault, they must prove that: (1) the school received federal funding, (2) the school or its officials had "actual knowledge"[59] of the harassment,[60] (3) the school responded to the known conduct with "deliberate indifference,"[61] and (4) the harassment was so severe, pervasive, and offensive that it deprived the harassed or assaulted student of the educational opportunities or benefits provided by the school.[62]

Title IX is also enforced by federal agencies that provide funding to educational programs.[63] Title IX conditions an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the government and the recipient of funds.[64] Title IX applies to federally-funded schools at all levels of education.[65] When any part of a

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[56] COLE & BACK, *supra* note 54, at 3.

[57] *See* Cannon, 441 U.S. at 688–89.

[58] COLE & BACK, *supra* note 54, at 1.

[59] Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). The Court ruled that an educational institution may be held liable for damages when a schoolteacher sexually harasses or assaults a student. *Id.* at 286. Under *Gebster*, in order to recover damages for sexual harassment, a student must show the educational institution had actual knowledge of the harassment and responded to it with deliberate indifference. BEYOND THE HEADLINES, *supra* note 10, at 33. An educational institution has actual knowledge when an official who—at a minimum—has authority to address the alleged discrimination and to institute corrective measures on the institution's behalf but fails to adequately respond. *See id.* at 290.

[60] Davis v. Monroe City. Bd. of Educ., 526 U.S. 629, 650 (1999).

[61] Federal court decisions have defined an institution's actions as constituting deliberate indifference when the response to known discrimination is "clearly unreasonable in light of the known circumstances, . . . and when remedial action only follows after a lengthy and unjustified delay . . ." Doe ex rel Doe v. Coventry Bd. of Educ., 630 F. Supp. 2d 226, 235 (D. Conn. 2009) (quoting Hayut v. State Univ. of N.Y., 352 F.3d 733, 751 (2d Cir. 2003)).

[62] *Davis*, 526 U.S. at 650. In *Davis v. Monroe County Board of Education*, the Supreme Court held that schools may also be liable under Title IX if one student sexually harasses or assaults another student. BEYOND THE HEADLINES, *supra* note 10, at 33. The *Davis* Court held that, in order to prevail in a private right of action, a student must show in addition to the school's actual knowledge and deliberate indifference, that the harassment was so severe, pervasive, and offensive that it deprived the harassed or assaulted student of the educational opportunities or benefits provided by the school. *Id.*

[63] COLE & BACK, *supra* note 54, at 1.

[64] *Gebser*, 524 U.S. at 286.

[65] COLE & BACK, *supra* note 54, at 1–2.

school district or institution of higher education receives even minimal federal funds, all of the recipient's operations are covered by Title IX.[66]

Although significant, Title IX and its interpretive case law is only one piece of the puzzle. Administrative guidance is also a crucial part of Title IX enforcement on college campuses and has been the primary enforcement tool used by the federal government in the past decade.

C. A New Era of Guidance: The 2011 Dear Colleague Letter and 2014 Questions & Answers on Title IX and Sexual Violence

Title IX is enforced and administered by the Office for Civil Rights (OCR).[67] The OCR is authorized and directed to enforce Title IX provisions by issuing rules, regulations, or orders of general applicability that are consistent with carrying out and achieving the principal goals of Title IX,[68] including guidance documents in the form of "Dear Colleague Letters" and "Questions & Answers."[69] The OCR uses these guidance documents to emphasize and convey the OCR's expectations on how higher education institutions should follow rules and regulations that have been promulgated by the agency.[70]

The 2011 Dear Colleague Letter (2011 DCL) and the 2014 Questions & Answers on Title IX and Sexual Violence (2014 Q & A) were issued by the Obama administration in an attempt to provide clarity to schools about their obligations under Title IX and as a response to heightened awareness of sexual assaults occurring on university campuses across the country.[71] Since these guidance documents are not formal regulations, they did not create any binding legal obligations on universities.[72] Although not legally binding, as a means of enforcing the guidance, the OCR threatened to pull federal funding from any university who violated the policy guidelines.[73]

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[66] *Id.* at 2.

[67] *See* 34 C.F.R. § 106.3(a) (2012).

[68] *See* 20 U.S.C. § 1682 (1972).

[69] *See* Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Investigations*, CHRON. HIGHER EDUC. (Apr. 4, 2011), https://www.chronicle.com/article/Education-Dept-Issues-New/127004 [https://perma.cc/6F8K-MHD4].

[70] Triplett, *supra* note 42, at 507.

[71] *See* Ali DCL, *supra* note 22.

[72] Jeannie Suk Gersen, *Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault*, NEW YORKER (Sept. 8, 2017), https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault [https://perma.cc/HD4P-XHPY].

[73] Yetter, *supra* note 19.

1. The 2011 Dear Colleague Letter

On April 4, 2011, the OCR issued the 2011 DCL addressing Title IX and its enforcement at higher education institutions as it relates to the adjudication of sexual misconduct.[74] The goal of the letter was to tie together previous guidance into a single, comprehensive document.[75] The letter discussed Title IX's requirements relating to student-on-student sexual harassment as well as schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence on college campuses.[76] Additionally, the 2011 DCL provided examples of remedies that schools may use to end sexual harassment, prevent its recurrence, and address its effects.[77] The 2011 DCL also defined sexual harassment as "unwelcome conduct of a sexual nature."[78] This broad definition also included "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[79]

One of the new obligations established by the 2011 DCL was the mandate that universities hire a Title IX coordinator, whose primary responsibility would be to oversee and coordinate the school's sexual misconduct policies and procedures.[80] Title IX coordinators were expected to be available to meet with students and not to be assigned other job responsibilities that could create a potential conflict of interest.[81]

Another mandate of the 2011 DCL was the requirement for schools to use the preponderance of the evidence standard of proof when making a determination of responsibility as to whether sexual misconduct had occurred.[82] This was significant considering some prior guidance issued by the OCR had not established a designated evidentiary standard and because some schools had previously used a different evidentiary standard, the so-called "clear and convincing" standard.[83] The preponderance of the evidence standard requires a showing that a fact or event is more likely to have occurred than not and is a lower standard of proof than the clear and

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[74] Ali DCL, *supra* note 23.

[75] Sieben, *supra* note 69.

[76] Ali DCL, *supra* note 22, at 2.

[77] *Id.*

[78] COLE & BACK, *supra* note 54, at 27.

[79] *Id.*

[80] Ali DCL, *supra* note 22, at 7.

[81] *Id.*

[82] GINA LAUTERIO, LAWSUITS AGAINST UNIVERSITIES FOR ALLEGED MISHANDLING OF SEXUAL MISCONDUCT CASES 1 (SAVE 2016), http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf [https://perma.cc/3MQD-5DQV] [hereinafter LAWSUITS].

[83] *See* COLE & BACK, *supra* note 54, at 28.

convincing standard.[84]

The 2011 DCL also strongly discouraged universities from using cross-examination conducted by the individual parties as a part of their sexual misconduct adjudication hearings.[85] The OCR's main reasoning for discouraging this particular procedure is centered around the potential re-traumatizing effect it may have on the complainant.[86] The 2011 DCL stated that "[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."[87]

2. The 2014 Questions & Answers on Title IX and Sexual Violence

In the years following the release of the 2011 DCL, schools' Title IX policies and procedures rapidly changed. Responding to the need for additional guidance, on April 29, 2014, the OCR issued the 2014 Q & A, which provided more specific instructions to educational institutions regarding their obligations under Title IX.[88] The 2014 Q & A clarified that, in cases of student-on-student sexual violence, a school violates Title IX when "the alleged conduct is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program," and when "the school, upon notice, fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects."[89]

The guidance also outlined three key procedural requirements higher education institutions must follow, including: (1) requiring every school to disseminate a notice of nondiscrimination; (2) establishing the essential duties for a Title IX coordinator; and (3) mandating that every school adopt and publish grievance procedures providing for the prompt and equitable resolution of student sexual misconduct complaints.[90]

First, every school must disseminate a notice of nondiscrimination.[91] A school's notice of nondiscrimination must state that the school does not discriminate on the basis of sex in its educational programs and activities,

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[84] *Id.*
[85] Ali DCL, *supra* note 22, at 12.
[86] *See id.*
[87] *Id.*
[88] Ali DCL, *supra* note 22.
[89] COLE & BACK, *supra* note 54, at 28–29 (internal quotation marks omitted).
[90] *See* 2014 Q & A, *supra* note 22, at 9–10.
[91] *Id.* at 10.

and it is required by Title IX not to discriminate in such a manner.[92]

Second, the 2014 Q & A reinforced the requirement for a Title IX coordinator and established the essential duties for the position.[93] For example, Title IX coordinators must have knowledge of the requirements of Title IX and of all complaints raising Title IX issues throughout the school.[94] To carry out these duties, Title IX coordinators must be informed of all reports and complaints raising Title IX issues, even if the report or complaint was initially filed with another individual or office, or if the investigation will be conducted by another individual or office.[95]

Third, every school was required to adopt and publish grievance procedures providing for the prompt and equitable resolution of student sexual misconduct complaints.[96] The OCR identified crucial provisions that all universities should adopt as part of their grievance procedures, including: (1) providing an adequate, reliable, and impartial investigation of complaints, including the opportunity for both the complainant and respondent to present witnesses and evidence; (2) designated and reasonably prompt time frames for the major stages of the complaint process; (3) written notice to the complainant and respondent of the outcome of the complaint; and (4) assurance that the school would take steps to prevent recurrence of any sexual misconduct and remedy discriminatory effects on the complainant and others, if appropriate.[97]

Additionally, while the 2011 DCL strongly discouraged the use of adversarial cross-examination, the 2014 Q & A stated educational institutions could allow the parties to submit written questions to a hearing panel to ask on their behalf.[98] However, the hearing panel was advised to screen those questions "and only ask those it deem[ed] appropriate and relevant to the case," effectively limiting the questioning party to the discretion of the hearing panel.[99] The 2014 Q & A also noted that because Title IX investigations will not result in the incarceration of individuals, "the same procedural protections and legal standards are not required" in Title IX investigations as are compelled in criminal proceedings.[100]

Some critics of the OCR guidance—such as Janet Halley, a law professor

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[92] *Id.*

[93] Ali DCL, *supra* note 23, at 7. A Title IX coordinator's core responsibilities include overseeing the school's response to Title IX reports and complaints and identifying and addressing any patterns or systemic problems revealed by such reports and complaints. *See id.*

[94] 2014 Q & A, *supra* note 22, at 10.

[95] *Id.* at 10–11.

[96] *Id.* at 12.

[97] *Id.*

[98] COLE & BACK, *supra* note 54, at 29.

[99] *Id.*

[100] *Id.* (internal quotation marks omitted).

at Harvard University—have gone so far as to say that the procedures of the 2011 DCL and 2014 Q & A are so irregular that if any university had asked a court to declare whether the guidance was legally binding, "[e]very single court would have said, 'You don't have to do this.'"[101] Nevertheless schools frantically over-complied with the guidance documents because they were afraid of the bad press that would follow if they had challenged the legality of the documents.[102] The 2017 Dear Colleague Letter represents the response by the Department of Education (DOE) to concerns over the alleged unfairness to respondents in the Title IX sexual misconduct adjudication system.

D. A Change in Direction: The 2017 Dear Colleague Letter and the 2017 Questions & Answers on Campus Sexual Misconduct

On September 22, 2017, the OCR issued the 2017 Dear Colleague Letter ("2017 DCL") and the 2017 Questions & Answers on Campus Sexual Misconduct ("2017 Q & A"), to provide universities with interim guidance and to explicitly rescind the 2011 DCL and the 2014 Q & A guidance documents.[103] Citing criticism that the Obama era guidance lacked key elements of due process, the OCR stated its earlier interpretation "has not succeeded in providing clarity for educational institutions or in leading institutions to guarantee educational opportunities on the equal basis that Title IX requires."[104] The OCR specified that as a result of the previous guidance, many schools had established procedures for resolving allegations that "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."[105]

In order to help educational institutions comply with Title IX, the DOE released the 2017 Q & A to provide interim guidance to schools while the DOE began promulgating regulations that would align with the purpose of Title IX and achieve fair access for both complainants and respondents to educational benefits.[106] This interim guidance required schools to make many

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[101] Wesley Yang, *The Revolt of the Feminist Law Profs*, CHRON. HIGHER EDUC. (Aug. 7, 2019), https://www.chronicle.com/interactives/20190807-feminist-law-profs [https://perma.cc/PVS3-LP9H].

[102] *Id.*

[103] John R. Przypyszny & Jonathan D. Tarnow, *U.S. Department of Education Withdraws Select Obama-era Title IX Policy and Guidance Statements*, NAT'L L. REV. (Oct. 17, 2007), https://www.natlawreview.com/article/us-department-education-withdraws-select-obama-era-title-ix-policy-and-guidance [https://perma.cc/E46R-M3F4].

[104] *Id.*

[105] Jackson DCL, *supra* note 22.

[106] *Id.* at 2.

significant changes.[107] First, it required universities to base the findings of fact and conclusions to be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.[108] Second, schools must make any rights or opportunities available to one party during an investigation available to the other party on equal terms.[109] Third, the guidance required schools to provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview.[110]

While these guidance documents provided interim guidance for schools, universities were essentially in a holding pattern on how to formulate their Title IX policies and procedures.[111] This was due in part to the rescission of the Obama era guidance documents, but also because of the new proposed regulations by the DOE that were on the horizon. These proposed regulations—building on the 2017 Q & A—represent a shift in Title IX enforcement and regulation, one that is focused on equal procedural due process for both complainants and respondents.

E. Title IX Regulations by the Department of Education

On November 16, 2018, the DOE issued proposed regulations to Title IX that would require significant changes to the Title IX policies and procedures of educational institutions.[112] Unlike the Obama era guidance, these proposed Title IX regulations underwent an open comment period as part of the legal process to make them binding law.[113] During the sixty-day open comment period, over 100,000 comments were made on the proposed regulations.[114] According to the draft of the proposed Title IX regulations, they are "intended

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[107] *See* Questions and Answers from Candice Jackson, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Campus Sexual Misconduct at 1, 4–5 (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/8Q7J-RJY2].

[108] *Id.* at 5.

[109] *Id.* at 4.

[110] *Id.*

[111] Jeremy Bauer-Wolf, *A Direct Contradiction*, INSIDE HIGHER EDUC. (Dec. 13, 2018), https://www.insidehighered.com/news/2018/12/13/state-law-likely-conflicts-devoss-title-ix-proposal [https://perma.cc/S5HQ-XKUB].

[112] Michael W. Hawkins & Elizabeth A. Stegeman, *Department of Education Proposes New Title IX Regulations*, NAT'L L. REV. (Nov. 28, 2018), https://www.natlawreview.com/article/department-education-proposes-new-title-ix-regulations [https://perma.cc/JR3U-VQMP].

[113] Jeannie Suk Gersen, *supra* note 22.

[114] Simone C. Chu & Iris M. Lewis, *What Happens Next with Title IX: DeVos's Proposed Rule, Explained*, HARV. CRIMSON (Feb. 27, 2019), https://www.thecrimson.com/article/2019/2/27/title-ix-explainer [https://perma.cc/AG7C-RHXF].

to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and ensuring that due process protections are in place for individuals accused of sexual harassment."[115] On May 6, 2020—nearly one and a half years after they were first published—the DOE released the final Title Regulations.[116] Universities will be required to comply with the newly released regulations by August 14, 2020.117

One of the significant proposed changes is the definition of what sexual harassment means.[118] Under the new regulations, sexual harassment would be strictly defined as occurring in three ways.[119] First, when an employee of the school conditions the provision of an aid, benefit, or service of the school on an individual's participation in unwelcomed sexual conduct, commonly referred to as quid pro quo.[120] Second, it can occur when unwelcomed conduct on the basis of sex is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.[121] The third way is when a sexual assault, as defined in 34 C.F.R. § 668.46(a), occurs.[122]

In addition, schools will be required by the Title IX regulations to operate under a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.[123] Schools must also provide the parties with the same opportunities to have others present during any other grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.[124] Furthermore, higher education institutions would be required to hold a live hearing as part of their grievance procedures.[125] At this hearing, schools must permit each party's

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[115] Susan D. Friedfel & Crystal L. Tyler, *Department of Education has Drafted Long-Awaited Title IX Regulations on Sexual Misconduct*, NAT'L L. REV. (Sept. 19, 2018), https://www.natlawreview.com/article/department-education-has-drafted-long-awaited-title-ix-regulations-sexual-misconduct [https://perma.cc/YZY6-VMXF] (internal quotation marks omitted).

[116] Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER EDUC. (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/2S7T-J6L6].

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.*

[122] *See* 34 C.F.R. § 668.46(a) (defining sexual assault generally as an offense that meets the definition of rape, fondling, incest, or statutory rape).

[123] Anderson, *supra* note 116.

[124] *Id.*

[125] *Id.*

advisor to cross-examine the other party and all witnesses and to allow the parties to ask all relevant questions, including those challenging credibility.[126]

The release of the Title IX regulations has caused controversy and a sharp divide in the reaction between advocacy groups for complainants and respondents alike.[127] Advocates for complainants argue the regulations weaken protections for victims of sexual assault or harassment.[128] In contrast, advocates for respondents say the final regulations ensure long-awaited due process protections that have been denied to students accused of sexual misconduct for more than a decade.[129]

Despite the efforts by the OCR over the past decade, sexual assault on college campuses is still an ongoing issue.[130] While the guidance documents issued by the OCR were made in good faith and had laudable goals, they created complicated and confusing guidelines that often lacked any semblance of procedural due process and failed to balance the competing interests of complainants, respondents, and the universities.[131]

III. PROCEDURAL DUE PROCESS IN THE TITLE IX SEXUAL MISCONDUCT ADJUDICATION SYSTEM

In the Title IX sexual misconduct adjudication system, procedural due process interacts with Title IX in order to ensure fairness for both complainants and respondents. Although these sources interact with each other, public debates over Title IX have mostly examined Title IX and procedural due process as distinct categories—focusing proposed solutions exclusively on the legal requirements of one category or the other—instead of proposing a solution that bridges these two categories.[132] This insistence on proposing solutions that only fit within the framework of constitutional procedural due process rights or Title IX—coupled with confusing administrative guidance from the OCR—has created an adjudication system that is neither uniform nor consistent in its results.

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126 *Id.*
127 Kreighbaum, *supra* note 30.
128 *Id.*
129 Anderson, *supra* note 116.
130 Gluckman, *supra* note 2.
131 *See* Yang, *supra* note 101.
132 Mann, *supra* note 40, at 636.

A. Students' Rights to Procedural Due Process in School Disciplinary Hearings

The Fourteenth Amendment to the U.S. Constitution forbids any state to "deprive any person of life, liberty, or property without due process of law."[133] Procedural due process refers to the procedures the government must follow before it deprives a person of a life, liberty, or property interest.[134]

The fundamental requirement of procedural due process is "the opportunity to be heard at a meaningful time and in a meaningful manner."[135] However, procedural due process rights differ considerably compared to many other constitutional rights because of their "fact-dependent and context-specific" nature.[136] Thus, procedural due process is measured by a flexible standard that depends on the practical requirements of the circumstances.[137] When evaluating procedural due process, courts must focus on whether the process used provided an "effective means for the individual to communicate [their] case to the decisionmaker."[138]

The Supreme Court has developed a two-part approach to determine whether a state or institution has violated procedural due process.[139] First, the Court must determine whether the "asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty or property.'"[140] Second, if protected rights are implicated, the Court must decide what procedures constitute due process of the law.[141] Procedural due process is required when a decision of the State implicates an interest within the protection of the Fourteenth Amendment.[142] Courts are required to look to the *nature* of the interest at stake, rather than the *weight* of the interest when determining if due process is required.[143]

For students at universities, procedural due process rights are implicated when a government entity—the university—acts in a way that deprives a student of a protected life, liberty, or property interest.[144] While there are currently no protected life interests for accused students, courts have

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133 Goss v. Lopez, 419 U.S. 565, 572 (1975).
134 ERWIN CHEMERINSKY, CONSTITUTIONAL LAW 615 (Aspen Casebook Series ed., 5th ed. 2017).
135 Mathews v. Eldridge, 424 U.S. 319, 333 (1976).
136 Mann, *supra* note 40, at 646.
137 Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987).
138 *Mathews*, 424 U.S. at 345.
139 Ingraham v. Wright, 430 U.S. 651, 672 (1977).
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.* (emphasis added).
144 Mann, *supra* note 42, at 647.

emphatically held that accused students who attend a state college have a protected liberty interest in continuing their college education.[145]

Procedural due process forbids the deprivation of liberty.[146] It is well established that a liberty interest is implicated "where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to [them]."[147] This liberty interest is often referred to as a reputational liberty interest, and it has been successfully invoked in school disciplinary cases.[148] While significant harm to one's reputation is regarded as a liberty interest, "injury to reputation alone does not deprive an individual of a constitutionally protected liberty interest."[149]

Thus, in order for harm to one's reputation to be a protected liberty interest, one must show they can make out a case under what is known as the "stigma plus" test.[150] The stigma plus test requires one who is asserting a reputational liberty interest protected by the Fourteenth Amendment to show: (1) the infliction by state officials of a "stigma" to the plaintiff's reputation and (2) the deprivation of a legal right or status.[151]

Two cases—*Dixon v. Alabama State Board of Education*[152] and *Goss v. Lopez*[153]—have been influential in defining students' procedural due process rights in educational disciplinary proceedings. In *Dixon*,[154] six African-American students were expelled from their college.[155] Each of the students received a notice of expulsion, but the notice failed to assign specific grounds for expulsion.[156] In response, three of the students filed suit against the school alleging their procedural due process rights were violated.[157] The Court ruled in favor of the students, holding that they were entitled to notice and a hearing before being expelled for misconduct.[158]

In *Goss*,[159] high school students were suspended for alleged misconduct.[160] The students filed suit against the school district, alleging

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[145] *See* Goss v. Lopez, 419 U.S. 565, 574 (1975).
[146] *See id.*
[147] Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).
[148] Doe v. Rector & Visitors of George Mason Univ., 132 F. Supp. 3d 712, 721 (E.D. Va. 2015).
[149] Tigrett v. Rector & Visitors of Univ. of Va., 290 F.3d 620, 628 (4th Cir. 2002).
[150] Paul v. Davis, 424 U.S. 693, 710–11 (1976).
[151] *Id.*
[152] Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 154 (5th Cir. 1961).
[153] Goss v. Lopez, 419 U.S. 565, 574 (1975).
[154] *Dixon*, 294 F.2d at 150.
[155] *Id.* at 151–52.
[156] *Id.* at 152.
[157] *Id.* at 151.
[158] *Id.* at 158.
[159] Goss v. Lopez, 419 U.S. 565 (1975).
[160] *Id.* at 568–69.

their due process rights were violated because the school district suspended them without a hearing.[161] The Court ruled in favor of the students, holding that students facing a suspension "must be given some kind of notice and afforded some kind of hearing."[162]

In the higher education adjudication context, an accused student must at least receive the following: (1) notice of the charges; (2) an explanation of the evidence against him; and (3) an opportunity to present their side of the story before an unbiased decisionmaker.[163] It is a fundamental requirement of due process that "notice [be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[164] Notice must also be given *before* any kind of hearing is held.[165] As for hearings, they must provide the opportunity for both sides to present their case in considerable detail[166] and the hearing must be held before an impartial decision-maker.[167]

Despite these procedural protections, courts have held that "disciplinary hearings against students are not criminal trials, and therefore need not take on many of those formalities."[168] Although a university student must be afforded a meaningful opportunity to present his side, a full-scale adversarial proceeding is not required.[169] Thus, when courts must evaluate the adequacy of campus adjudication proceedings, procedural due process is measured by rudimentary fairness and not by strict formality.[170]

B. Current Environment Surrounding Title IX Enforcement on College Campuses

Following the release of the 2011 DCL and the 2014 Q & A by the Obama administration, universities across the country adopted new policies and procedures governing how they addressed sexual misconduct on their campuses.[171] Many problems, such as unfair grievance procedures, lack of

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[161] *Id.* at 568.

[162] *Id.* at 579.

[163] Doe v. Cummins, 662 F. App'x 437, 446 (6th Cir. 2016).

[164] Nash v. Auburn Univ., 812 F.2d 655, 661 (11th Cir. 1987).

[165] *See* Goss v. Lopez, 419 U.S. 419, 579 (holding parties whose rights are to be affected are entitled to be heard and in order that they may enjoy that right they must first be notified) (emphasis added).

[166] *See Nash*, 812 F.2d at 660.

[167] Winnick v. Manning, 460 F.2d 545, 548 (2d Cir. 1972).

[168] *Cummins*, 662 F. App'x at 446.

[169] *Id.*

[170] Danso v. Univ. of Conn., 919 A.2d 1100, 1106 (2007).

[171] Elizabeth Bartholet et al., *Fairness For All Students Under Title IX*, HARV. LIBRARY (Aug. 21, 2017), https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1&isAllowed=y [https://perma.cc/H766-KR75] [hereinafter *Fairness for All Students*].

uniformity and predictability, and an increase in litigation between schools and students have arose due to the rapid changes in schools' Title IX policies and procedures.[172]

A driving force behind the problems schools face with Title IX enforcement is the clash of three distinct competing interests that are found in any sexual misconduct investigation: (1) the universities' interests; (2) the respondents' interests; and (3) the complainants' interests.[173] In developing and enforcing Title IX policies and procedures, schools face what appears to be an impossible task of balancing complainants' rights under Title IX and respondents' rights to procedural due process, all while making sure the university itself will not be liable for a potential lawsuit from one of the parties.[174]

1. Universities' Interests in Title IX Sexual Misconduct Adjudication

Due to unfair grievance procedures as well as a lack of uniformity and predictability in the Title IX sexual misconduct adjudication system, universities have been experiencing increased litigation from respondents and complainants alike.[175]

It is estimated that over 400 students who were accused of sexual misconduct have sued their respective schools since 2011.[176] Not all of these suits have concluded, but of those that have, over half of them have either reached a settlement with the school or received a favorable ruling in court.[177] A survey conducted by United Educators reports that claims settled with a student accused of sexual misconduct cost universities on average between $20,000 and $30,000.[178] Settlements with accused students generally cover the students' losses in tuition and housing from periods when they were suspended or expelled from the university.[179]

For cases involving complainants, the price tag can be even higher.[180] The same survey by United Educators found that settling complaints from

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[172] *Id.* at 2.

[173] Behre, *supra* note 43, at 332.

[174] Shannon Harper et al., *Enhancing Title IX Due Process Standards in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice*, 16 J. SCH. VIOLENCE 302, 305 (2017) [hereinafter *Title IX Due Process Standards*].

[175] Yetter, *supra* note 19.

[176] *Id.*

[177] *Id.*

[178] Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER EDUC. (Oct. 3, 2019), https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings [https://perma.cc/6VT7-ASXK].

[179] *Id.*

[180] *Id.*

alleged victims in court costs colleges an average of $350,000, with some settlements reaching $1 million.[181] Furthermore, these figures omit the cost of attorneys' fees that universities incur while defending themselves in litigation.[182] These fees often total in the millions of dollars and are a significant financial burden for any school to bear.[183] With the stakes so high for universities, Jake Sapp—a Title IX coordinator at Austin College—stated, "[i]t would be negligent not to be thinking, 'Am I following the law?' Especially in such a gray area. . . . If they're not thinking about lawsuits, they ought to be."[184]

2. Respondents' Interests in Title IX Sexual Misconduct Adjudication

From the respondents' perspective, the current Title IX sexual misconduct adjudication environment focuses mostly on protecting complainants, while at the expense of respondents' rights to procedural due process.[185] Indeed, being accused of sexual assault is a serious accusation, one that comes with potentially severe consequences for respondents.[186] For example, respondents accused of alleged sexual misconduct face potential suspension or expulsion, lack of confidentiality, and a severe impact on social standing with school instructors and his or her peers.[187]

Additionally, even if found not guilty in a criminal court, respondents can still be found responsible by school hearing panels, which in turn affects future education and employment opportunities for respondents.[188] For example, some schools reserve the right to disclose disciplinary actions to other educational institutions without the consent of the student.[189] Additionally, some employers require disclosure of disciplinary action taken by a student's former school.[190] Moreover, some states such as New York and Virginia have passed laws requiring schools to note on students' transcripts if they were suspended or dismissed for sexual assault, effectively turning transcripts into a form of a sex offender registry.[191]

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[181] *Id.*
[182] *Id.*
[183] *Id.*
[184] *Id.*
[185] *Title IX Due Process Standards*, *supra* note 174, at 307.
[186] *Id.*
[187] *Id.*
[188] *Id.*
[189] Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 601 (D. Mass. 2016).
[190] *Id.* at 602.
[191] Jake New, *Requiring a Red Flag*, INSIDE HIGHER EDUC. (July 10, 2015), https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts [https://perma.cc/7T5S-C5QC].

Doe v. Brandeis University highlights an example of the unfairness some respondents face in Title IX sexual misconduct adjudication.[192] In Doe, the plaintiff, "John Doe," was an undergraduate student at Brandeis University.[193] For nearly two years, he and another male Brandeis student—"J.C."—were engaged in a romantic and sexual relationship.[194] After they broke up, J.C. alleged that John had engaged in sexual misconduct during the relationship.[195]

The university conducted an investigation and found that John was responsible for sexual misconduct.[196] Despite such a serious accusation, Brandeis University never provided John with full notice of the charges against him.[197] The university prohibited him from retaining counsel throughout the investigation.[198] John was not provided a way—either directly or indirectly—to confront J.C. or his witnesses.[199] The university also delayed John's access to the school's investigative report until the investigation was over.[200] Furthermore, they offered no right to an effective appeal and John's fate was decided by a Special Investigator, who acted as an investigator, prosecutor, judge, and jury.[201]

The university also made a notation on his permanent transcript that he was found responsible and disciplined for sexual misconduct.[202] Although he vehemently denied all of the alleged conduct, John was the subject of a public campaign by J.C.[203] As a result, John was "publicly taunted and accused of rape" by other Brandeis students. Consequently—despite graduating *magna cum laude*—John was turned down by numerous potential employers for post-graduation employment.[204]

3. Complainants' Interests in Title IX Sexual Misconduct Adjudication

From the complainants' point of view, schools are not adequately protecting them from victim shaming. Complainants contend the Title IX sexual misconduct adjudication system lacks fairness and fails to protect their

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192 *Brandeis Univ.*, 177 F. Supp.3d at 561.
193 *Id.*
194 *Id.*
195 *Id.*
196 *Id.*
197 *Id.* at 603.
198 *Id.* at 604.
199 *Id.* at 604–05.
200 *Id.* at 606.
201 *Id.* at 607.
202 *Id.* at 561.
203 *Id.* at 592.
204 *Id.*

Title IX rights.[205] Whether or not each complainant's allegations of sexual misconduct are valid, there is no denying that what happens in sexual misconduct adjudication is a life-altering event in itself for many complainants.[206] These experiences have significant consequences for complainants, including physical and emotional trauma, strained relationships between friends, as well as derailed educational and employment plans.[207] The adjudication process also leaves many complainants feeling shamed and as if their experiences were not taken seriously by their schools.[208]

Many complainants choose to report to their school instead of the criminal justice system because of an expectation of confidentiality and because they feel they will receive support from school administrators in a way the criminal justice system would not provide.[209] However, many of them come to regret the decision due to the adjudication process.[210]

In a story published in the *New York Times*, a woman accused members of Hobart College's football team of sexually assaulting her.[211] In just twelve days, the school investigated the report, held a hearing on the complaint, and cleared the accused members of the team.[212] In response to reporting her alleged assault, the woman faced threats and harassment from other students and a traumatizing experience at her hearing, where a member of the school's hearing panel asked the complainant whether a football player's "penis had been 'inside of you' or had he been 'having sex with you.'"[213] Advocacy groups for complainants claim this kind of harsh questioning can lead to the re-victimization of the complainant.[214]

Re-victimization is one of the top-cited reasons from students on why they choose not to report alleged sexual misconduct to their schools.[215] One reason a complainant may feel re-traumatized or re-victimized is the lack of practical implementation of a trauma-informed approach to Title IX sexual misconduct adjudication. A trauma-informed approach or system (1) realizes

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[205] *Title IX Due Process Standards*, *supra* note 174, at 306.

[206] Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't*, N. Y. TIMES (July 12, 2014), https://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=0 [https://perma.cc/RAS5-YPRM].

[207] *Id.*

[208] *Title IX Due Process Standards*, *supra* note 174, at 306.

[209] Bogdanich, *supra* note 206.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] *Id.*

[214] *Title IX Due Process Standards*, *supra* note 174, at 306.

[215] Sokolow, *supra* note 36, at 5.

the widespread effect of trauma and understands potential paths for recovery; (2) recognizes the signs and symptoms of trauma in victims; (3) responds by fully integrating knowledge about trauma into policies, procedures, and practices; and (4) actively seeks to resist re-traumatization.[216]

Currently, trauma is defined as singular or cumulative experiences that result in adverse effects on functioning and mental, physical, emotional, or spiritual well-being.[217] Examples of trauma include exposure to violence, bullying, abuse, neglect, sexual assault, motor vehicle accidents, and life-threatening military incidences.[218] Various law enforcement departments have adopted this approach to questioning, and it has proven to be successful in yielding more effective interviews of victims and witnesses, maximizing the cooperation between law enforcement and victims, and helping to better structure the search for evidence for presentation to a judge or jury during pre-litigation or at trial.[219]

When complainants do choose to report alleged sexual misconduct to their school, they expect a neutral, fair, and impartial system that treats their claims seriously.[220] As illustrated above, many complainants walk away from their experience in the adjudication system feeling a sense of betrayal and lack of trust in the Title IX adjudication process.[221] In one survey—when asked for their opinion on the sexual misconduct adjudication system at their school—seven out of ten students reported that they did not trust the system in place.[222] This sense of betrayal and lack of trust is a significant problem in Title IX enforcement because it causes other victims of sexual misconduct not to report their experience with the school.[223]

Complainants also feel a sense of betrayal because they claim schools are not held accountable for the punishments given to accused students.[224] While the exact percentage is unknown, a recent survey has estimated that only about one third of universities have ever expelled an accused student for

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[216] Claudette Fette et. al., *Understanding and Applying Trauma-Informed Approaches Across Occupational Therapy Settings*, OT PRACTICE MAG. (May 2019), https://www.aota.org/~/media/Corporate/Files/Publications/CE-Articles/CE-article-May-2019-Trauma.pdf [https://perma.cc/CF8T-BYBH].

[217] *Id.*

[218] *Id.*

[219] *See* Amanda M. Dettmer, *New Haven Police Implements Force-wide, Yale-Advised Trauma Training*, YALE NEWS (Apr. 15, 2019), https://news.yale.edu/2019/04/15/new-haven-police-implements-force-wide-yale-advised-trauma-training [https://perma.cc/6AG2-TM5G].

[220] Behre, *supra* note 41, at 320.

[221] *Id.*

[222] Sokolow, *supra* note 36, at 5.

[223] Emma Ellman-Golan, Note, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 174 (2017).

[224] Behre, *supra* note 43, at 320.

sexual misconduct.[225] The consequences of underreporting are illustrated by a study that suggests serial predators commit approximately 90% of rapes on campuses.[226] Even if the actual number is not close to 90%, each rape that goes unreported by complainants on college campuses is a missed opportunity and an example of the failures of the Title IX sexual misconduct adjudication system.[227]

4. The Politicization of the Title IX Sexual Misconduct Adjudication System

Since the issuance of the Obama era OCR guidance, sexual assault on college campuses has become increasingly politicized and a hyper-partisan issue.[228] This political divide is apparent in state legislation,[229] with red states passing legislation favoring accused students and blue states passing "yes means yes" legislation, which is more favorable for students alleging sexual misconduct.[230]

The politicization of campus sexual assault has also attracted unprecedented media attention in recent years, often focusing on the inadequacies of the Title IX sexual misconduct adjudication system.[231] For example, the *New York Times* alone published over three hundred articles on campus sexual assault between 2014 and 2016.[232]

One highly publicized incident that highlights the politicization and ineptness of universities surrounding campus sexual assault involves two students at Columbia University.[233] In 2013, Paul Nungesser was accused of rape by Emma Sulkowicz, a fellow student at Columbia. After an investigation by the school, a hearing panel found Nungesser not responsible for the accused rape.[234] Notwithstanding Nungesser being found not

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[225] *Id.*

[226] Robert Shibley, *Time to Call the Cops: Title IX Has Failed Campus Sexual Assault*, TIME MAG. (Dec. 1, 2014), https://time.com/3612667/campus-sexual-assault-uva-rape-title-ix [https://perma.cc/3CYW-RYGH].

[227] *Id.*

[228] Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, THE ATLANTIC (Sept. 22, 2017), https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846 [https://perma.cc/85Z7-E2VG].

[229] *Id.*

[230] *Id.*

[231] *See* Abrams, *supra* note 5.

[232] *Id.*

[233] Kate Taylor, *Columbia Settles With Student Cast as a Rapist in Mattress Art Project*, N. Y. TIMES (July 14, 2017), https://www.nytimes.com/2017/07/14/nyregion/columbia-settles-with-student-cast-as-a-rapist-in-mattress-art-project.html [https://perma.cc/4W2T-WFF9].

[234] Nungesser v. Columbia Univ., 244 F. Supp. 3d 345, 351 (S.D.N.Y. 2017).

responsible, Sulkowicz maintained Nungesser had raped her.[235] Sulkowicz later became well known as an activist campaigning to raise awareness of sexual assault on college campuses.[236] Her senior thesis project—known as The Mattress Project: Carry That Weight—received widespread, national media attention and involved Sulkowicz carrying a fifty-pound mattress with her on campus.[237] The national media praised Sulkowicz for this act, and many of her fellow students embraced her cause.[238]

Alternatively—throughout the media onslaught—Nungesser felt hounded and ostracized, feelings that were exacerbated by the media attention and because he was condemned as a rapist at a campus rally and on fliers posted around campus.[239] Nungesser became fearful for his safety on campus, felt discouraged from attending on-campus career events for future employment, and suffered from sleep deprivation, depression, and feelings of isolation due to the severe distress he endured as a consequence of Sulkowicz's media campaign and the Columbia-fostered hostile environment.[240]

Despite the narrative of competing interests, providing a fair adjudication system that upholds procedural due process while simultaneously condemning and punishing sexual misconduct are not mutually exclusive ideas.[241] The heated debate surrounding sexual misconduct adjudication on college campuses reflects this idea.[242] While the two sides are divided, they are motivated by the same unifying principle: the importance of education and combating unjust deprivations of the right to learn.[243]

Many different groups—ranging from law school faculties to feminist groups—have embraced this narrative. In an open letter by the University of Penn Law School faculty, they stated, "[w]e do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses."[244] The open letter went on to say that schools can and

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[235] *Id.*

[236] *Id.*

[237] *Id.*

[238] Taylor, *supra* note 233.

[239] *Id.*

[240] Nungesser v. Columbia Univ., 244 F. Supp. 3d 345, 359–60 (S.D.N.Y. 2017).

[241] Press Release, U.S. Department of Education, *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/BH3W-9DHF].

[242] Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 825 (2017).

[243] *Id.*

[244] Penn Open Letter, *supra* note 29.

should provide support and protection for complainants while also implementing a fair adjudication system.[245] The faculty also noted that they believed "there is nothing inconsistent with a policy that both strongly condemns and punishes sexual misconduct and ensures a fair adjudication process."[246]

Additionally, Nancy Gertner—a lawyer, former judge, Harvard law professor, and a self-identified feminist—argues that feminists should be concerned about creating fair Title IX enforcement policies not just for complainants but for respondents as well.[247] According to Gertner, feminists should be concerned about public perception that the Title IX adjudication system has shifted from no protections for complainants to substantially violating respondents' procedural due process rights.[248] Referring to feminists, she states, "[w]e put our decades-long efforts to stop sexual violence at risk when men come forward and credibly claim they were wrongly accused."[249]

While some schools are better equipped than others to investigate Title IX complaints, many schools need to do more.[250] Universities need to focus on solutions that are fair and attentive to the rights of both parties, removing bias from the adjudication process, and providing more funding for Title IX enforcement.[251] Only when educational institutions invest in fair adjudication procedures will they be able to send the message to both complainants and respondents that sexual misconduct is taken seriously.[252] One recommendation that many have zeroed in on as a solution to improve fairness in Title IX sexual misconduct adjudication is cross-examination.

C. Jurisdictional Split: Adversarial v. "Circumscribed" Cross-Examination in the Title IX Sexual Misconduct Adjudication System

The idea of implementing cross-examination into schools' Title IX sexual misconduct adjudication systems in order to assess the credibility and bias of parties and witnesses has been a highly discussed and debated topic in recent years, one that has caused educational institutions to feel immense

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[245] *Id.*

[246] *Id.*

[247] Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), https://prospect.org/justice/sex-lies-justice/ [https://perma.cc/5FH4-DM2Y].

[248] *See id.*

[249] *Id.*

[250] Yetter, *supra* note 19.

[251] *Id.*

[252] *Fairness For All Students*, *supra* note 171.

pressure from advocacy groups for both complainants and respondents.[253] On one hand, universities are afraid that allowing adversarial cross-examination will continue to open them up to Title IX liability from complainants by discouraging reporting and potentially perpetuating the hostile environment surrounding sexual assault.[254] On the other hand, universities understand that providing fair procedures that produce results based on accurate evidence is imperative, and the use of cross-examination may provide additional fairness in adjudication proceedings.[255] Equally divided is the federal court system.[256]

1. Adversarial Cross-Examination in the Title IX Sexual Misconduct Adjudication System

Generally, "the Constitution does not confer on an accused student the right to cross-examine his accuser in a school disciplinary proceeding."[257] The Second Circuit Court of Appeals has recognized this holding, but in *Winnick v. Manning*, that court noted that "if this case had resolved itself into a problem of credibility, cross-examination of witnesses might have been essential to a fair hearing."[258]

In *Flaim v. Medical College of Ohio*, the Sixth Circuit Court of Appeals considered whether cross-examination was required in the disciplinary hearing for a medical student facing expulsion.[259] In that case, the court determined "cross-examination would have been a fruitless exercise," but only because, similar to the case in *Winnick*, Flaim had previously admitted to the conduct.[260] Thus, there was no issue of credibility.[261] However, this did crack open the door for the court to expand upon its holding in subsequent cases.

The Sixth Circuit has held that in certain circumstances, accused students may be entitled to the right to cross-examine witnesses, noting though, that this right only exists in "the most serious of circumstances."[262] In *Flaim*, the court alluded to what "the most serious of cases" might entail, stating that if a case resolves itself into a problem of credibility, cross-examination of

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253 Mann, *supra* note 40, at 657.
254 *Id.* at 658.
255 *Id.*
256 *Id.*
257 Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 641 (6th Cir. 2005).
258 *Id.* (quoting Winnick v. Manning, 460 F.2d 545, 550 (2d Cir. 1972)).
259 *Flaim*, 418 F.3d at 641.
260 *Id.*
261 *Id.*
262 *Id.* at 636.

witnesses might be essential to a fair hearing.[263] The Sixth Circuit has also made a distinction between the seriousness of adjudication proceedings for academic misconduct compared to disciplinary conduct that presents more severe consequences, such as suspension or expulsion.[264]

In *Doe v. Baum*, John Doe and Jane Roe were students at the University of Michigan when their paths crossed during their junior year at a fraternity party.[265] While at the party, the two drank, danced, and eventually had sex.[266] Two days later, Roe filed a sexual misconduct complaint with the university, claiming that she was too drunk to consent.[267] The school opened an investigation into the incident and, over the subsequent three months, gathered evidence and interviewed Doe, Roe, and twenty-three other witnesses.[268]

Two contradictory stories emerged. Doe claimed that he and Roe had consensual sex, while Roe argued that she was taken advantage of by Doe because she was drunk and that Doe had sex with her while she "laid there in a hazy state of blackout."[269] Unsurprisingly, the witnesses were just as divided, with most of Doe's male witnesses confirming his version of the story and the same for Roe's female witnesses.[270] At the conclusion of the investigation—without holding a hearing—the Title IX investigator determined the "evidence supporting a finding of sexual misconduct was not more convincing than the evidence offered in opposition to it."[271] Roe appealed the decision.[272] The appeals board overturned the decision, in part because they deemed Roe's female witnesses to be more credible than Doe's male witnesses.[273]

In its holding in *Doe v. Baum*, the Sixth Circuit held that since credibility was at issue in the case and that it was among the "most serious of cases" described in *Flaim*, John Doe should have been afforded some form of cross-examination.[274] In its ruling, the Sixth Circuit made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of

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[263] *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017).

[264] *Id.* at 400 (quoting *Flaim*, 418 F.3d at 634) ("The more serious the deprivation, the more demanding the process. And where the deprivation is based on disciplinary misconduct, rather than academic performance, 'we conduct a more searching inquiry.'").

[265] Doe v. Baum, 903 F.3d 575, 579 (6th Cir. 2018).

[266] *Id.*

[267] *Id.*

[268] *Id.*

[269] *Id.*

[270] *Id.*

[271] *Id.* at 580.

[272] *Id.*

[273] *Id.*

[274] *Id.* at 582.

hearing before imposing a sanction as severe as expulsion or suspension, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination.[275]

2. "Circumscribed" Cross-Examination in the Title IX Sexual Misconduct Adjudication System

Not everyone agrees with the Sixth Circuit's interpretation of due process and cross-examination in Title IX sexual misconduct.[276] Complainant advocacy groups say that adversarial cross-examination has no place in college adjudication systems because it is not calibrated to the educational nature of the Title IX environment.[277] They also claim that adversarial cross-examination in these proceedings would be too traumatic and cause complainants to be re-victimized, not to mention the discouraging effect it would have on other victims reporting sexual misconduct.[278] Outspoken victim advocacy groups are not the only ones opposed to the Sixth Circuit's stance on cross-examination; as it turns out, so is the First Circuit Court of Appeals.[279]

In *Haidak v. University of Massachusetts-Amherst*, the First Circuit declined to follow the rule adopted by the Sixth Circuit and held that adversarial cross-examination is not required in Title IX sexual misconduct adjudication.[280] In that case, Haidak and Gibney—both university students—were in a tumultuous romantic relationship beginning in 2012.[281] Haidak and Gibney agree that they got into an argument that eventually turned physical.[282] Three days later, Gibney filed a Title IX report with the school.[283]

At the end of the investigation, on November 22, 2013, the university held a hearing.[284] During the hearing, the panel posed their own questions to the parties, but each party was also allowed to submit pre-written questions

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[275] *Id.*

[276] Jeremy Bauer-Wolf, *An 'Unprecedented' Direction for Title IX*, INSIDE HIGHER EDUC. (Sept. 10, 2018), https://www.insidehighered.com/news/2018/09/10/appeals-court-ruling-opens-door-boosted-due-process-rights [https://perma.cc/F9F6-CN6P].

[277] Mann, *supra* note 40, at 661.

[278] *Title IX Due Process Standards*, *supra* note 174, at 309.

[279] Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1st Cir. 2019).

[280] *Id.* at 69.

[281] *Id.* at 61.

[282] *Id.*

[283] *Id.*

[284] *Id.* at 63.

for the panel to ask the other.[285] The school's hearing panel found Haidak responsible for the assault and eventually expelled him from the school.[286]

Haidak brought a suit against the university, asserting that his due process rights had been violated because he was not afforded the right to confront Gibney himself.[287] The court ruled against Haidak on this point, holding that they disagreed with the Sixth Circuit's holding that when credibility is at issue, cross-examination is essential in adjudication proceedings.[288] The court stated: "we have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation."[289]

Courts have referred to this form of indirect questioning used in *Haidak* as a form of "circumscribed" cross-examination.[290] It also refers to the form of third party panel questioning schools were permitted to use by the 2014 Q & A guidance issued by the OCR.[291] Unlike adversarial cross-examination, the use of "circumscribed" cross-examination in the Title IX sexual misconduct adjudication system has been generally accepted as comporting with procedural due process and has widely been accepted by various federal district courts.[292] Generally, the process is conducted as follows: students formulate and submit pre-written questions to the hearing panel, the hearing panel then determines which of those questions are relevant and appropriate, at which point the approved questions will then be posed to the opposing party by the hearing panel.[293]

Many courts have highlighted the potential value of "circumscribed" cross-examination. In *Nash v. Auburn University*, the Eleventh Circuit Court of Appeals stated the opportunity for students to pose questions to opposing parties would have been valuable in that particular case.[294] In *Doe v. University of Cincinnati*, the university allowed for panel-submitted questions at their hearings but did not require mandatory attendance to the

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[285] *Id.* at 68.

[286] *Id.* at 64–65.

[287] *Id.*

[288] *Id.* at 69.

[289] *Id.*

[290] Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961, 978 (S.D. Ohio 2018).

[291] COLE & BACK, *supra* note 54, at 29.

[292] *See generally* Gischel, 302 F. Supp. 3d at 961; Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56 (1st Cir. 2019); Nash v. Auburn Univ., 812 F.2d 655 (11th Cir. 1987); Doe v. Columbia Univ., 831 F.3d 46, 48 (2d Cir. 2016).

[293] Doe v. Cummins, 662 F. App'x 437, 439 (6th Cir. 2016).

[294] *Nash*, 812 F.2d at 664.

hearing by both parties.[295] Subsequently, the complainant did not show up to the hearing, and the respondent was unable to pose questions to the complainant.[296] In that case, the Sixth Circuit wrote, "[a]llowing John Doe to confront and question Jane Roe through the panel would have undoubtedly aided the truth-seeking process and reduced the likelihood of erroneous deprivation."[297] Although the courts have generally accepted "circumscribed" cross-examination, it presents its own set of drawbacks.

Even though it was permitted under the Obama era OCR guidance, many schools did not utilize this form of third-party questioning, as they had shifted away from the use of hearing panels altogether in their adjudication system.[298] This shift benefits schools because the institutions usually lose more control of the outcome when hearings are offered.[299] For those schools that did offer third-party questioning by panels, many of them failed to implement this type of indirect questioning consistently and adequately enough into their adjudication systems in order to maximize its effectiveness.[300]

Another oft-cited drawback to the panel-submitted questions is that the decision to ask any of the submitted questions is entirely within the discretion of the hearing panel.[301] Although they generally approve of panel-submitted questions, courts have often been wary of the use of discretion by hearing panels.[302] Their wariness is often justified, as there are countless examples of hearing panels refusing to ask whole categories of questions or striking anywhere from half to all of the questions submitted by the parties.[303] Sparing hearing panels from having to navigate adversarial cross-examination is a strong reason to justify panel submitted questions; however, it does not justify denying the opportunity to question an adverse witness altogether.[304]

Advocacy groups argue another reason to question the discretion of hearing panels is that as schools face more and more litigation brought by

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[295] Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017).

[296] *Id.*

[297] *Id.*

[298] *See Title IX Due Process Standards*, *supra* note 174, at 309.

[299] Bauer-Wolf, *supra* note 276.

[300] *See Title IX Due Process Standards*, *supra* note 174, at 309.

[301] Penn Open Letter, *supra* note 29, at 4.

[302] Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 70 (1st Cir. 2019).

[303] *See id.* (finding that the hearing panel struck twenty of the thirty-six proposed questions and asked the remaining questions at their own discretion as the testimony played out). *See also* Gischel v. Univ. of Cincinnati, 302 F. Supp. 3d 961, 978 (S.D. Ohio 2018) (finding that the school's hearing panel declined an entire category of questions that respondent submitted); Doe v. Columbia Univ., 831 F.3d 46, 52 (2d Cir. 2016) (finding that the hearing panel did not allow the respondent to exhaust his list of questions because it deemed them irrelevant).

[304] Doe v. Univ. of Cincinnati, 872 F.3d 393, 405 (6th Cir. 2017).

students, the hearing panels have a stronger incentive to do what is in the best interest of the institution and not for the parties.[305] Finally, although hearing panels must direct pre-submitted questions from the party, many hearing panels use the school's Title IX investigation report to help them come to a determination of responsibility. This report is generated by the school's Title IX investigator after a full investigation, and hearing panels rely heavily on these reports in making a determination of responsibility, oftentimes at the expense of parties.[306]

Furthermore, submitting pre-written questions is not a particularly effective way to confront an accuser.[307] Students are often not equipped to write incisive questions, and while the opportunity to submit pre-written questions is better than nothing, it does not allow for the opportunity to ask follow up questions.[308] Additionally, panelists are sometimes not trained in Title IX procedures, ensuring an unfair process for both parties and running the risk of asking potentially re-traumatizing questions to complainants.[309] Many complainants want the opportunity to challenge respondents at hearings, but not if it risks them feeling shamed and re-victimized.[310] These adjudicative hearings also often take place months after a complaint has been filed,[311] which presents its own set of problems, including prolonging the potential trauma to complainants and reducing the accuracy of potential testimony from complainants, respondents, and witnesses.[312]

Title IX, administrative guidance, and procedural due process requirements have created an adjudication system that is complex and complicated, as well as one that is incredibly unpredictable and highly politicized. Cross-examination and its role within this system has been at the heart of this debate. While some argue adversarial cross-examination

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[305] Jeremy Bauer-Wolf, *The Chance to Question Your Accuser*, INSIDE HIGHER EDUC. (Aug. 6, 2018), https://www.insidehighered.com/news/2018/08/06/court-ruling-suggests-cross-examination-will-be-hot-topic-colleges [https://perma.cc/HMZ8-H3LE].

[306] Penn Open Letter, *supra* note 29, at 4.

[307] KC Johnson, *How American College Campuses Have Become Anti-Due Process*, HERITAGE FOUND. (Aug. 2, 2016), https://www.heritage.org/education/report/how-american-college-campuses-have-become-anti-due-process [https://perma.cc/QER5-95NU].

[308] *Id.*

[309] Bauer-Wolf, *supra* note 305.

[310] *See id.*

[311] *See* Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 64 (1st Cir. 2019) (finding the hearing took place over seven months after investigation was opened); Doe v. Columbia Univ., 831 F.3d 46, 52 (2d Cir. 2016) (finding the hearing took place almost five months after complaint was filed); Gischel v. Univ. of Cincinnati, 302 F. Supp.3d 961, 966 (S.D. Ohio 2018) (finding the hearing took place over seven months after complaint was filed); Nungesser v. Columbia Univ., 244 F. Supp.3d 345, 352 (S.D.N.Y. 2017) (finding the hearing took place almost eight months after complaint was filed).

[312] *See* Bauer-Wolf, *supra* note 305.

provides benefits that "circumscribed" cross-examination does not, critics argue it does not fit within the structure of the Title IX sexual misconduct system.[313] Only a solution that bridges the gap between procedural due process and Title IX will be embraced by all parties involved.

D. Protecting Vulnerable Witnesses: The Use of Intermediaries in Cross-Examination in Foreign Judicial Systems

Forms of intermediary systems are used in England and Wales,[314] South Africa, and Israel, with Australia currently testing out a pilot program.[315] While the role differs from country to country, broadly speaking, an intermediary facilitates effective communication between vulnerable witnesses and the people they encounter in the criminal justice system without infringing upon a defendant's right to a fair trial.[316] Intermediary systems have been designed and implemented to protect "vulnerable witnesses," a term that refers to children or those that have a severe intellectual disability that have been victims of—or witnesses to—sexual assault.[317] Although currently not used for adults, some have suggested that the same or similar systems could be used for adult victims of sexual assault.[318]

Intermediaries facilitate communication between vulnerable witnesses and the actors of the criminal justice system in various ways.[319] For example, they may communicate questions to the vulnerable witness that have been posed to them either in an investigative interview or in cross-examination in

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[313] *See* Bauer-Wolf, *supra* note 276.

[314] In England and Wales, the use of intermediaries is now a common occurrence. Kimberly Collins et al., *The Impact of the Registered Intermediary on Adults' Perceptions of Child Witnesses: Evidence from a Mock Cross Examination*, 23 EUR. J. CRIM. POL'Y RES. 211, 212 (2017) [hereinafter *Impact of Registered Intermediary*]. There, the intermediary scheme was implemented nationally in 2008 and in 2014 there were over 3,000 requests from law enforcement or courts for the use of an intermediary, an 81% increase from 2013 alone. *Id.* The success of that scheme is shown not only by the increase in requests for intermediaries but in the positive feedback received from judges, advocates and law enforcement alike. *Id.* Judges and advocates have both praised intermediaries for providing detailed witness assessments and recommendations to adapt witness questioning in investigative interviews and cross-examination as well as increasing vulnerable witnesses' access to the criminal justice system. *Id.* at 214.

[315] Martine B. Powell et al., *Stakeholders' Perceptions of the Benefit of Introducing an Australian Intermediary System for Vulnerable Witnesses*, 48 AUSTL. & N.Z. J. OF CRIMINOLOGY 498, 500 (2015) [hereinafter *Intermediary System for Vulnerable Witnesses*].

[316] *Id.*

[317] Phoebe Bowden et al., *Balancing Fairness to Victims, Society and Defendants in the Cross-Examination of Vulnerable Witnesses: An Impossible Triangulation?*, 37 MELB. U. L. REV. 539, 541 (2014) [hereinafter *Cross-Examination of Vulnerable Witnesses*].

[318] *Id.* at 542.

[319] *Intermediary System for Vulnerable Witnesses*, *supra* note 315, at 500.

a courtroom.[320] Alternatively, they may request that the question be rephrased or reposed in a fashion that the vulnerable witness may better comprehend.[321] In some systems, intermediaries may brief interviewing officers or the court on the specific needs and limitations of a witness before an interview or trial, suggesting ways to maximize their ability to provide accurate testimony and minimize his or her anxiety and trauma.[322] Although they interact closely with witnesses, police, and judges, intermediaries are a sworn member of the court and are bound by neutrality.[323]

This difference in roles and responsibilities of intermediaries is best illustrated by a quick overview of some of the judicial systems that employ them. In South Africa, the intermediary acts like an interpreter.[324] They listen to and translate the questions posed by counsel in a way that the vulnerable witness can understand.[325] In Norway, intermediaries interview the witnesses themselves on behalf of both the prosecution and defense.[326] The prosecution, defense counsel, and judge all observe the ongoing interview, which is also videotaped and played at trial.[327] Similar to Norway, Israel uses intermediaries to interview vulnerable witnesses, but if the matter continues to trial, then the intermediary is used to translate questions similar to the South African system.[328]

Although they fulfill various roles, arguably the most critical role of intermediaries—regardless of the system—is their role in improving the ability of a witness to provide accurate testimony while reducing the trauma and anxiety suffered by the witness.[329] Common sources of stress experienced by vulnerable witnesses include being in the presence of the defendant, having to speak publicly about their experience—particularly about sexual matters—and the formality of the courtroom environment.[330] These not only cause stress for the witness but can damage the amount and quality of testimony attained.[331] These stressors have been shown to impair

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[320] *Id.*

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Impact of Registered Intermediary*, *supra* note 314, at 3.

[325] *Id.*

[326] *Id.*

[327] *Id.*

[328] *Id.*

[329] *See Intermediary System for Vulnerable Witnesses*, *supra* note 315, at 500.

[330] Katie Quinn, Book Note, *Justice for Vulnerable and Intimidated Witnesses in Adversarial Proceedings?*, 66 THE MOD. L. REV. 139, 141 (2003) (reviewing LOUISE ELLISON, THE ADVERSARIAL PROCESS AND THE VULNERABLE WITNESS (2001)).

[331] *Id.*

memory function and appear to make the testimony of vulnerable witnesses less credible and more suggestive.

By adapting and combining various elements of systems already in use, a unique form of an intermediary system could be implemented into the Title IX sexual misconduct adjudication system that comports with procedural due process, while simultaneously balancing the competing interests of complainants, respondents, and universities.

IV. RESOLUTION: INTERMEDIARY CROSS-EXAMINATION IN THE TITLE IX SEXUAL MISCONDUCT ADJUDICATION SYSTEM

In order to restore fairness and trust in the Title IX sexual misconduct adjudication system, a solution is needed that provides complainants and respondents with the capabilities to challenge the Title IX investigator's version of events and ensures both parties have the opportunity to confront the other party in a way that prevents re-victimization, comports with procedural due process, and elicits accurate testimony.[332] A possible solution to the Title IX cross-examination debate would be to adopt an intermediary system similar to ones used in judicial systems around the world.[333]

A. Framework for Proposed Intermediary Cross-Examination Hearing in the Title IX Sexual Misconduct Adjudication System

An intermediary cross-examination hearing—the general contours of which are set forth below—should be adopted as part of the Title IX sexual misconduct adjudication system because it appropriately balances the competing interests of all the parties involved, is calibrated to provide fair results, and is best suited to bridge the gap between Title IX regulations and procedural due process. While this proposed resolution relies on elements from various intermediary models,[334] it is not a carbon copy of one singular model currently being used, but rather an example of how the OCR could build their own intermediary model to fit within the Title IX sexual misconduct adjudication.

In this model, the intermediary would be a neutral, impartial party who is trained and employed by the federal government under the supervision of the OCR. An intermediary's primary responsibility would be to act as a facilitator of cross-examination between the parties. All intermediaries would

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[332] Penn Open Letter, *supra* note 29, at 4.

[333] *See generally Cross-Examination of Vulnerable Witnesses*, *supra* note 317.

[334] *See Impact of Registered Intermediary*, *supra* note 314.

be trained in the trauma-informed approach to questioning, which will help prevent re-traumatizing the complainant and will help solicit more accurate testimony from both parties. To ensure fairness under Title IX, both complainants and respondents will participate in this hearing in the same fashion.

In order to minimize the need for more administrative guidance and schools to change their grievance procedures drastically, this intermediary hearing is designed to be implemented into the current Title IX sexual misconduct adjudication system. This intermediary cross-examination hearing would be mandatory for every case of alleged sexual misconduct. It would be required to take place after the Title IX investigator has completed interviews of both parties and any available witnesses but within three months of the Title IX complaint being filed with the school. This time requirement is to ensure that schools do not drag their feet with Title IX investigations but also because studies have shown that the likelihood of eliciting accurate testimony decreases as more time passes from a traumatic event.[335]

In this model, the parties, the university, and the intermediary would set a date for the hearing to take place. In one room would be the intermediary, the school's Title IX investigator, an advisor or representative of the student, as well as the party who will be subject to the cross-examination. In another room will be the other party and their advisor or representative. The testimony of each party will be video-recorded, and a live feed will connect the room with the intermediary to the room with the party conducting cross-examination.

Each party will have the opportunity to cross-examine one another but will have their questions directed to the parties through the intermediary, who will ask as many questions word-for-word as possible, but will use their discretion if they believe a question may be leading, one that falls under rape shield protections, or one that could be particularly traumatizing. If the opposing party does not like how the intermediary reworded the question, they may have an opportunity to re-pose the question to the intermediary again, but in a different fashion. Each party will also have the opportunity to ask as many follow up questions as possible until that party is satisfied and the cross-examination concludes.

Following the completion of the intermediary cross-examination of both parties, the Title IX investigator will write a report on the findings and conclusions stemming from the hearing. This report—along with the video-recordings of the cross-examination of both parties—will be given to a

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[335] *See* Bauer-Wolf, *supra* note 305.

hearing panel to be used as evidence to determine if any sexual misconduct occurred. Before submission to the hearing panel, each party will be allowed to review and dispute any of the Title IX investigator's report on the intermediary hearing.

As is used in many other countries that utilize an intermediary model, a Code of Ethics could be adopted for intermediaries in the Title IX sexual misconduct adjudication system.[336] This Code of Ethics would cover issues such as professionalism, impropriety, impartiality, and confidentiality.[337] Intermediaries would also be subject to continued education and training, similar to the continuing legal education (CLE) requirements of an attorney. Other countries have developed "continued professional development" requirements for intermediaries that require them to attend conferences, provide presentations, and shadow other more experienced intermediaries.[338] A similar set of mandatory professional development could be adopted for Title IX intermediaries.

In order to test out this intermediary model in Title IX sexual misconduct adjudication, the OCR could establish a pilot program in an area that has a high concentration of universities such as a metropolitan or tri-state area. While the OCR and the federal government would ultimately pay intermediaries in the long run, a potential pilot program could be funded through a grant program by the Office for Violence Against Women (OVW), which currently administers nineteen grant programs authorized by the Violence Against Women Act (VAWA) of 1994 and subsequent legislation.[339] These grant programs support activities that develop and strengthen trauma-informed victim services and strategies to prevent, investigate, and respond to sexual assault, domestic violence, dating violence, and stalking.[340]

In current intermediary models, intermediaries typically have backgrounds in speech pathology, psychology, social work, or occupational

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[336] *See* MINISTRY OF JUSTICE, REGISTERED INTERMEDIARY PROCEDURAL GUIDANCE 6 (Aug. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/831537/moj-registered-intermediary-procedural-guidance.pdf [https://perma.cc/U33Z-WLMJ]; VICTIMS SERVICES, NSW DEPARTMENT OF JUSTICE, WITNESS INTERMEDIARY PROCEDURAL GUIDANCE MANUAL 7 (Apr. 2019), https://www.victimsservices.justice.nsw.gov.au/Documents/wi_manual-april-2019.pdf [https://perma.cc/DCS3-LMHQ].

[337] REGISTERED INTERMEDIARY PROCEDURAL GUIDANCE, supra note 336, at 6.

[338] WITNESS INTERMEDIARY PROCEDURAL GUIDANCE MANUAL, supra note 336, at 43.

[339] Office for Violence Against Women, U.S. Dep't of Just., *OVW Grants and Programs*, JUSTICE.GOV (Updated Feb. 5, 2019), https://www.justice.gov/ovw/grant-programs [https://perma.cc/BRX5-PTFM].

[340] Office for Violence Against Women, U.S. Dep't of Just., *Campus Program*, JUSTICE.GOV, https://www.justice.gov/ovw/page/file/1117446/download [https://perma.cc/J5YE-ZU77].

therapy.[341] For Title IX intermediaries, the OCR could focus on recruiting law students or attorneys who have similar backgrounds from either prior experience, undergraduate degrees, or dual degree programs. Dual degree programs would be ideal considering many schools provide students with many different opportunities to earn a law degree as well as an undergraduate degree in psychology, a master's degree in psychology, or even a dual degree program where a student concurrently earns their J.D. and a Ph.D. in psychology.[342]

Implementing an intermediary cross-examination hearing into the Title IX sexual misconduct adjudication system would create a "fairer" adjudication system. Every fair system of adjudication is based on three main pillars: an impartial decisionmaker, a rational basis for the rendered decision, and the parties to the dispute having a voice in the proceedings.[343]

Decisionmakers in adjudication proceedings must be impartial.[344] Impartiality is generally associated with the objectivity of the rendered decision.[345] There are two distinct types of impartiality in systems of adjudication: personal impartiality and institutional impartiality.[346] Personal impartiality refers to individual decisionmakers.[347] Institutional impartiality refers to the formal aspect of impartiality, i.e., the rules set in place that restrict the actions of the parties and the decisionmaker.[348] Although a system may be free of bias, even the appearance of impartiality has been proven to erode public trust in systems of adjudication.[349] Thus, to be characterized as "fair," an adjudication system must include both personal and institutional impartiality.

Adopting an intermediary cross-examination hearing would improve personal and institutional impartiality in the Title IX sexual misconduct adjudication system. Personal impartiality is improved because Title IX investigators and hearing panels would have a reduced role in the adjudication system. For example, hearing panels can rely on the testimony

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[341] Kirsten Hanna et al., *Questioning Child Witnesses: Exploring the Benefits and Risks of Intermediary Models in New Zealand*, 20 J. PSYCHIATRY, PSYCHOL. & L. 527 (2013).

[342] GARRET BERMAN ET AL., AM. PSYCHOL. L. SOC'Y, GUIDE TO GRADUATE PROGRAMS IN FORENSIC AND LEGAL PSYCHOLOGY 3 (Matthew Huss et al. eds. 4th ed. 2016–2018), https://ap-ls.wildapricot.org/resources/Documents/GuidetoGraduateProgramsinForensicPsych.pdf [https://perma.cc/6EE9-PM5P].

[343] Ellen E. Sward, *Values, Ideology, and the Evolution of the Adversary System*, 64 IND. L.J. 301, 308–10 (1989).

[344] *Id.* at 308.

[345] Diego M. Papayannis, *Independence, Impartiality and Neutrality in Legal Adjudication*, 28 REVUS: J. CONST. THEORY & PHIL. LAW 33, 35 (2016).

[346] *Id.*

[347] *Id.*

[348] *Id.* at 38.

[349] *See* Lawsuits, *supra* note 82, at 17.

of the parties themselves, instead of relying on circumscribed cross-examination, which has caused issues of alleged impartiality in the past. Institutional impartiality is improved as well because intermediary cross-examination is available to both parties. This provides clarity to a school's grievance procedures, and the use of a government trained and employed intermediary shifts some potential impartiality concerns away from the universities themselves.

For systems of adjudication to be "fair," rendered decisions must also be based on a rational basis.[350] Essential to rational decision-making is predictability.[351] The result of predictability is that parties in similar situations, but at different times, will be treated similarly.[352]

Implementing an intermediary cross-examination hearing would provide much-needed predictability in the Title IX sexual misconduct adjudication system. It would ensure complainants and respondents alike are aware of the procedures of the adjudication system itself, and the general population as a whole would be aware of the potential ramifications of committing sexual assault at each university.

The last feature of a "fair" system of adjudication requires both parties involved in the dispute to have a voice in the adjudication process.[353] Each party is knowledgeable about his or her case and can be reasonably expected to present evidence that impartial investigators or decisionmakers might overlook.[354] Furthermore, each party has a keen interest in the outcome of the dispute and is highly motivated to put forth any favorable information that may be beneficial to them.[355]

Implementing an intermediary cross-examination hearing would allow each party to have a voice in the adjudication process. This proposed resolution would allow complainants and respondents to argue their side of the investigation, as well as present and dispute evidence they think is vital to the decision. Additionally, alleged sexual misconduct can often be a witness-less crime. Providing the opportunity to both parties to have a voice is imperative when it may be likely that they are the only people who can shed light on the alleged actions.

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350 Sward, *supra* note 343, at 309.
351 *Id.*
352 *Id.*
353 *Id.* at 310.
354 *Id.*
355 *Id.*

B. Proposed Intermediary Cross-Examination Hearing under The Matthews Test

When a court is considering whether or not to expand procedural due process, it must use the *Matthews* Test, which was established by the Supreme Court in *Matthews v. Eldridge*.[356] The analytic framework of this test is composed of three factors. When assessing potential expansions of procedural due process, courts must consider the following: (1) the private interest that will be affected by the action taken; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government's interest in imposing the additional safeguards weighed against the burdens of imposing those safeguards.[357]

The *Matthews* Test is important because it is the test used to determine the extent to which judicial-type proceedings should be imposed on administrative actions to assure procedural fairness for all parties.[358] The *Matthews* Test has been almost universally used by both state and federal courts when deciding whether to expand procedural due process.[359] This three-factor test will serve as the basis for analyzing whether implementing an intermediary cross-examination hearing into the Title IX sexual misconduct adjudication system meets the constitutional requirements of procedural due process.

1. The Private Interest That Will Be Affected by the Official Action

Both complainants and respondents have a clear private interest in completing a college education, and the results of school disciplinary findings can affect a student's future for years.[360] Schools often retain disciplinary records and make them available to other institutions upon request, such as when a student attempts to transfer from one school to another.[361] It may be near impossible for a student to escape the stigma of expulsion or a mark on one's transcript for punishment for sexual

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[356] Mathews v. Eldridge, 424 U.S. 319 (1976).

[357] *Id.* at 335.

[358] Michael Heavilon, Note, *Peer Review: Top of Form Expanding Procedural Due Process to Require Students as Members of University Sexual Misconduct Hearing Boards*, 51 IND. L. REV. 773, 788 (2018).

[359] William J. Migler, Comment, *An Accused Student's Right to Cross-Examination in University Sexual Assault Adjudicatory Proceedings*, 20 CHAP. L. REV. 357, 380–81 (2017).

[360] Heavilon, *supra* note 358, at 780.

[361] *Id.*

misconduct, making it incredibly challenging to enroll in another school or to get a job with future employers.[362]

Even those students who are found not responsible by university hearing panels—such as Paul Nungesser—may be unable to escape the media attention and notoriety on campus that accompanies being accused of sexual misconduct.[363] In many instances, this may significantly affect a student's ability to continue their education at that school.[364]

Complainants also have a private interest in completing a college education. Similar to respondents, complainants' education may be negatively affected by the backlash of reporting alleged sexual misconduct to the school[365] or by feeling like the school has allowed their rapist to remain on campus.[366]

2. The Risk of an Erroneous Deprivation of Such Interest Through the Procedures Used and the Probable Value of Additional Procedural Safeguards

The rise in Title IX lawsuits by complainants and respondents against universities in the past decade following the release of the 2011 DCL indicates the increased risk of an erroneous outcome for students.[367] Actual or perceived bias is a crucial part of procedural fairness.[368] Various groups have criticized the enforcement environment surrounding Title IX sexual misconduct adjudication as being unfair to respondents,[369] while others have claimed that universities still do not do enough to protect complainants or to encourage others to report sexual misconduct.[370] Regardless of whether there is ultimately a finding of responsibility, the lives of both complainants and respondents may be significantly altered by the determination of the university.[371] If both complainants and respondents are claiming the adjudication process is not fair to either of them, then the risk of erroneous deprivation is high, and the process itself needs to be re-evaluated.

Adopting a form of intermediary cross-examination could have an impact on the risk of erroneous outcomes and quell fears amongst complainants and

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362 Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 592 (D. Mass. 2016).
363 Taylor, *supra* note 234.
364 *Id.*
365 Bogdanich, *supra* note 206.
366 Nungesser v. Columbia Univ., 244 F. Supp. 3d 345, 351 (S.D.N.Y. 2017).
367 Yetter, *supra* note 19.
368 Heavilon, *supra* note 358, at 792.
369 Yang, *supra* note 101.
370 *Title IX Due Process Standards*, *supra* note 174, at 306.
371 *Id.* at 307; Bogdanich, *supra* note 206.

respondents that universities are biased against them. If students are allowed to challenge the credibility of the opposing party, while simultaneously having the opportunity to prove their own credibility, the school becomes less of a suspect for perceived biases in the adjudication process.

3. The Government's Interest in Imposing the Additional Safeguards Weighed Against the Burdens of Imposing Those Safeguards

As represented by the release of several administrative guidance documents by the OCR over the past decade—as well as the Title IX regulations by the DOE—it is clear the federal government has an interest in adopting the best possible procedures to effectuate the reporting of—and adjudication of—sexual misconduct on college campuses.[372] Universities also have a clear interest in adopting the best possible adjudication procedures for sexual misconduct on their campuses, as well as an interest in applying their own set of procedures and limiting administrative costs.[373]

Adopting an intermediary cross-examination hearing poses a limited burden on the government, and the potential benefits that could be realized by all parties significantly outweigh those potential burdens. Implementing an intermediary cross-examination hearing would allow schools and the government to keep administrative and regulatory costs lower in the long run.[374] By allowing complainants and respondents to have a voice in the adjudication proceedings, the risk of an erroneous outcome decreases, thus decreasing the potential Title IX liability for schools.

If schools face less Title IX liability, naturally less financial resources will go toward defending against litigation.[375] Moreover, the government will save money by not having to investigate as many Title IX complaints lodged by students with the OCR.[376] Furthermore, some of the elements of the proposed Title IX intermediary cross-examination hearing—such as video-recording, separating complainants and respondents into independent rooms,

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[372] *See* Ali DCL, *supra* note 22, at 1; 2014 Q & A, *supra* note 22, at 9; Jackson DCL, *supra* note 22, at 1; Gersen, *supra* note 22.

[373] Migler, *supra* note 359, at 382.

[374] *See* Sarah Brown, *Would the Education Dept.'s New Title IX Rules Really Save Colleges Money?*, CHRON. HIGHER EDUC. (Sept. 11, 2018), https://www.chronicle.com/article/Would-the-Education-Dept-s/244491 [https://perma.cc/F27K-7A72].

[375] Anderson, *supra* note 178.

[376] Jake New, *Justice Delayed*, INSIDE HIGHER EDUC. (May 6, 2015), https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years [https://perma.cc/5T5R-49EV]. The OCR received nearly 1,000 civil rights complaints in 2014 alone. *Id.*

and rape shield questioning—have already been approved or at least proposed by the OCR.[377]

Implementing an intermediary cross-examination hearing into the Title IX sexual misconduct adjudication system would also provide much needed uniformity and predictability to the system. This uniformity and predictability would help make the adjudication process more transparent, restore confidence and trust in the adjudication process from both complainants and respondents, and encourage potential complainants to report sexual misconduct to their schools.

V. CONCLUSION

Title IX was adopted to protect both men and women from sex discrimination in educational environments.[378] Despite this goal, both complainants and respondents agree the current Title IX sexual misconduct adjudication system is broken.[379] In the beginning of the past decade, the pendulum of Title IX protection swung firmly in favor of complainants and away from procedural due process.[380] However, due to the 2017 DCL and the recently released Title IX Regulations, the Title IX pendulum is set to swing the other way, firmly in favor of respondents and procedural due process.[381] A solution is needed to bridge the gap between Title IX and procedural due process. The implementation of an intermediary cross-examination hearing would provide complainants and respondents a voice in the adjudication process, improve the impartiality of the Title IX adjudication system, and ensure that rational decisions are made. Through an intermediary cross-examination hearing, trust and predictability can be restored to a broken Title IX adjudication system, all while balancing the competing interests of complainants, respondents, and universities.

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[377] *See* Anderson, *supra* note 118.
[378] BEYOND THE HEADLINES, *supra* note 10, at 33.
[379] *See* Singal, *supra* note 27.
[380] *See* Yang, *supra* note 101.
[381] *See* Hawkins & Stegeman, *supra* note 112.