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## A Critique on Title IX

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**A Critique on Title IX**

Senior Project Submitted to  
The Division of Social Studies  
of Bard College

by:

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Annandale-on-Hudson, New York

May 2023

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To every victim who has felt ignored and defeated by Title IX, this senior project most importantly goes to you.

This material contains potentially triggering content for survivors of sexual misconduct specifically rape, sexual assault, and sexual harassment. If you or someone you know is a victim of any of the above, please get in contact with any of the organizations mentioned below.

RAINN (Rape Abuse Incest National Network) : 1-800-656-4673

RAINN's Victim Connect Service: 1-855-484-2846

Department of Defense (DOD) Safe Helpline for Sexual Assault: 1-877-995-5247



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## I. Introductory Chapter

Title IX of the Civil Rights Act was signed into law by Richard Nixon in June 23, 1972 and was intended to create equal opportunities for the sexes in any “education program or activity receiving Federal financial assistance. Title IX authorized any federal agency that provides such assistance to create regulations enforcing the prohibition of sexual discrimination. From its induction the law was intended to create equal opportunities in schools regarding sexual discrimination in sports. It was only until a decade later on June 19, 1986 that the Supreme Court addressed sexual assault for the first time in *Meritor Savings Bank v Vinson*. According to a Suzanne Egan article in the “Golden Gate University Law Review”<sup>1</sup>, “The Court held that when sexual harassment creates a hostile or offensive working environment, it is actionable under Title VII of the Civil Rights Act.” (379) This is because “The Court interpreted Title VII as demonstrating a congressional intent to preserve the economic, psychological and emotional benefits of employment.” (379) The interpretation of sexual assault as sexual discrimination is thanks to many feminist legal scholars fighting for these cases to be brought to the Supreme Court. In inscribing this interpretation into the Education Amendments, it had to be established that Vinson was targeted as a *woman* for harassment, as the defendant Taylor “(made) her employment contingent on sex, (solidifying) those social meanings, “perpetuat(ing) the interlocked structure by which women have been sexually in thrall to men and at the bottom of the labor market.”” (Brodsky, *Sexual Justice*, 30)<sup>2</sup>

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<sup>1</sup> *Meritor Savings Bank v. Vinson: Title VII Liability for Sexual Harassment*.  
<https://digitalcommons.law.ggu.edu/cgi/viewcontent.cgi?httpsredir=1&article=1408&context=ggulrev&sei->

<sup>2</sup> Brodsky, Alexandra. *Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash*. Metropolitan Books, Henry Holt and Company, 2022.

Meaning that in order to get a conviction in favor of the victim the prosecution must prove that they are no longer productive in the work environment. When this is applied to the academic space it is based on the productivity of the student, the problematic difference being that these are kids developing into young adults being measured on productivity like an adult would be. One study I will be analyzing further in this piece is called “A Distorting Mirror: Educational Trajectory After College Sexual Assault” and was conducted by professors Claire Raymond and Sarah Corse. It discusses the complexity of on campus sexual assault. Their major claim being that they “suggest that campus sexual assault creates a social space in which survivors experience diminished or fractured citizenship in their university community.” (469) Which inherently undermines the student’s capability to engage not only academically, but with the community as a whole which the researchers suggest is a key part in a student’s collegiate experience. “We analyze the impact of sexual assault as it disengages women from the community of students, undermining their capacity to participate in university life.” (469)<sup>3</sup>

As this new Title IX interpretation was integrated into the Education Amendments, there needed to be a disciplinary system in place to deal with sexual crimes. The issue becomes how to integrate a criminal court system into the academic disciplinary system. Though this interpretation is an incredible moment for feminism and sexual justice activists everywhere, the lack of clarity of how Title IX functions becomes a problem for schools quickly. This is partly because there is minimal jurisprudence regarding the state's involvement in schools regarding the structure of their disciplinary systems. The school being the stage for which these cases are dealt

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<sup>3</sup> Claire Raymond, and Sarah Corse. “A Distorting Mirror: Educational Trajectory After College Sexual Assault.” *Feminist Studies* 44, no. 2 (2018): 464–90. <https://doi.org/10.15767/feministstudies.44.2.0464>.



with has become a dilemma as well for both activists and administrators alike. As most of disciplinary hearings in an academic institution are dealt with in civil cases, while sexual violence cases are not only typically criminal cases but utilize the highest evidentiary standards. How can a school's resources meet those high evidentiary standards? Also what are the consequences for exceptionalizing sexual assault crimes in this regard?

Over the last thirty years we have moved from this vague legal interpretation to the creation of this complex system. There are many different entry points for the story of how Title IX came to be the system it is today. Its' different for a college student analyzing their college's Title IX system versus someone analyzing the meandering jurisprudential story of Title IX or even from a Feminist engagements and debates over harassment and discrimination. Each of these entry points are crucial in understanding this pivotal moment where there are almost thirty thousand response submissions regarding Biden's proposed Title IX comments. For me, I entered researching Title IX as a means to understand why my fellow classmates and the administrators were finding such difficulties dealing with the Title IX system. In doing so, I researched the jurisprudential piece of how Title IX became interpreted and the policies and letters to follow. Then I analyzed the feminist debate surrounding how Title IX should function, because of the crucial role feminists played in the creation of the law. This interlocked relationship between feminist theory and legal history is pivotal in contemplating how Title IX functions today.

Furthermore by analyzing the histories you will be able to understand the contentious debated over points surrounding Title IX regulation and guidance. Since we are at a moment where there has not been legislation on the matter since the 1990s, regulation and guidance are released with the same debate a law would. For example the Obama administration released its

“Dear Colleague Letter” in 2011 and received enormous backlash from the rightwing and support from activists for making a letter guiding schools on enacting more victim protections in their Title IX grievance procedures. Considering the Dear Colleague Letter is only a letter and not a law rendering it to a piece of paper, it is surprising how much attention it got. Another example would be how when Biden released a draft of his proposed regulations, it drew two hundred thousand comments in a two month commentary window. Regulations are also not laws, just rules that are released by the Executive Branch that affect those who deal with the agency enforcing them directly. While they carry more weight than a letter, you can understand the shock at just how polarizing these contentious points are.

Moreover you will wonder, like I did throughout my research, why this highly debated grievance procedure is dealt with within the university and not the courtroom. Especially considering that meaningful change can erupt from establishing change in the courtroom. In my first chapter, I will analyze why this responsibility rests in the hands of the university administrators and accordingly what responsibility it owes its students in response.

### III. Chapter Two

In this chapter, I will investigate how the jurisprudence regarding Title IX has created these highly contested critical points that have caused massive debate amongst legal scholars. These critical points have also led to back and forth regulations and guidance throughout the last decade from the Obama administration to the Biden administration. Each separate piece of guidance and regulation has led to enormous backlash, critique, and support despite not being law. In order to understand how we got to these matters becoming pressing issues in 2022, I will walk through pivotal Supreme court cases that have created these controversial points today. Then, I will analyze guidance and regulation over the past decade and why these points have shifted back and forth throughout each. In order to begin analyzing the jurisprudence of Title IX, I will analyze *Vinson v. Meritor Bank* as it was the case that interpreted sexual assault as sex discrimination under Title IX.

Sexual harassment was inducted into the Education Amendments via *Vinson v. Meritor Savings Bank*. Feminist legal scholars such as Mackinnon were central in making sexual discrimination a political issue and doing the heavy lifting of making a legal argument of sexual assault as discrimination and making it possible to be interpreted into law. Catherine Mackinnon due to her creating what would become the legal interpretation for sexual harassment as sexual discrimination. In Mackinnon's groundbreaking book "Sexual Harassment of Working Women", she established sexual harassment as often coming in two overlapping forms, according to Brodsky, "quid pro quo harassment, where workers were offered professional advancement (or safety from professional retaliation) for sexual favors; and "hostile environment" harassment, where sexual demeaning behavior, comments, and attitudes pervade the workplace." (Brodsky, *Sexual Justice*, 29) Both of which were foundation in her co-litigation in the Supreme Court case

Vinson v. Meritor Savings Bank. In the Vinson case she was able to establish that Vinson was targeted as a *woman* for harassment, as the defendant Taylor “(made) her employment contingent on sex, (solidifying) those social meanings, “perpetuat(ing) the interlocked structure by which women have been sexually in thrall to men and at the bottom of the labor market.”” (Brotsky, *Sexual Justice*, 30) This was a groundbreaking moment for feminist legal scholars as feminist theorists are never truly taken seriously in feminist spaces as feminist theorist Alice Miller explains it. “Women, already “sexed” speakers in local and international contexts and not quite fully public citizens, often have to strive doubly hard for their credibility as activists in human rights.” (Miller 38) Therefore feminism gaining this win through Mackinnon’s win was seen as a great accomplishment at feminism receiving respect from the state. Though that has its own consequences according to other feminist legal scholars.

It was only until the early 1990’s when the federal government applied this understanding of sexual discrimination to the universities, on the basis that it would affect the student’s academic success.<sup>1</sup> It was inducted through *Franklin v Gwinnett County Public School*, as this interpretation was vital in the Supreme Courts’ unanimous decision holding that Christine Franklin was, a sophomore in highschool at the time, owed monetary damages in order to remedy the violation of her federal right. Franklin was harassed by her teacher at North Gwinnett County Public School throughout her sophomore year. After Franklin reported her harassment to her school’s administrators and teachers, the university took no action and encouraged Franklin to do the same and refrain from pressing charges. Andrew Hill, her professor, resigned in 1988

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<sup>1</sup> Powell, Alvin. "How Title IX transformed colleges, universities over past 50 years." *The Harvard Gazette*. <https://news.harvard.edu/gazette/story/2022/06/how-title-ix-transformed-colleges-universities-over-past-50-years/>.

on the condition that the school would drop all matters pending against him. Post Hill's resignation, the school dropped its investigation and Franklin took the case to Supreme Court after her districts' court dismissed the case holding that Title IX didn't authorize an award for damages.<sup>2</sup> The Supreme Court evidently felt different, issuing its unanimous decision on February 26, 1992. This interpretation of sexual harassment as sexual discrimination was crucial as the basis for the decision was made under "implied right of action."

The jurisprudence utilized for sexual harassment in the workplace becomes developed for school sexual assault with cases "Gebser v. Lago Vista Independent School District" (1998) and "Davis V. Monroe County Board of Education" (1999). Gebser v. Lago Vista Independent School District is a case where Petitioner Gebser was a high school student within the respective school district who had a sexual relationship with a teacher yet informed no school official. Since no school official who had supervisory powers over the teacher was informed of the sexual harassment, and they weren't *deliberately* indifferent to the matter - it was held that damages could not be recovered for Gebser in an implied private action. Davis v. Monroe County Board of Education is a case where the petitioner filed a suit against the Monroe County Board of Education on behalf of her child who was allegedly repeatedly sexually assaulted by a classmate at a public elementary school. The basis on which they were suing was that the respondents' *deliberate* indifference to the classmates' repeated advances towards her child created an intimidating and abusive educational environment, which would violate Title IX of the Education Amendments of 1972. This "hostile environment" understood through the Education Amendments would have to be one that prevented the student from "participation in, be[ing]

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<sup>2</sup>"Franklin v. Gwinnett County Public Schools." Oyez. <https://www.oyez.org/cases/1991/90-918>.

denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U. S. C. § 1681(a) The court held that a private Title IX damages action *could* lie against a school but only when the funding recipient is *deliberately* indifferent to the sexual harassment and that the harassment is "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school." (Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999) Pp. 638-653)<sup>34</sup>

What does this establish for what the Title IX system looks like now? Well two very important notions. One being that the institution in order to be held liable must be deliberately indifferent to the sexual harassment. The other being that the sexual assault must be "so severe, persistent, and objectively offensive that it effectively bars the victim's access to educational opportunity." (Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999) Pp. 638-653) The Supreme Court's interpretation of Title IX was narrower than earlier administrative interpretations of Title IX and judicial interpretations of Title VII of the Civil Rights Act. According to an article by R. Shep Melnick's, an American Politics professor at Boston College, another frustration amongst legal scholars was that "the court's interpretation, it maintained, applied only to lawsuits for money damages, not to the conditions attached to federal funding." This makes the enforcement of the condition on the funding to be either nearly impossible or

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<sup>3</sup> "Davis v. Monroe County Board of Education." Oyez. Accessed April 27, 2023. <https://www.oyez.org/cases/1998/97-843>.

<sup>4</sup> "Gebser v. Lago Vista Independent School District." Oyez. Accessed May 3, 2023. <https://www.oyez.org/cases/1997/96-1866>.

rarely enforced. Since this point no formal law exists, only guidelines and letters designated to shape the interpretation of Title IX, but no bill has been successful in terms of permanently fixing the fall out of Title IX's vagueness.<sup>5</sup>

This represents a larger difficulty for sexual assault victims receiving equal treatment by the judicial system. In having to prove such extreme evidentiary standards and fulfilling such a high threshold for what the school should investigate, the state reinforces the subjugation of these victims. Alice Miller discusses this in her article "Sexuality, Violence Against Women, and Human Rights: Women, and Ladies Get Protection." Miller questions that the source for this difficulty is due to a narrative perpetuated by Human Rights activists in regards to sexual assault. "Can it be that the focus on sexual harm sprang from and reaffirmed both progressive and regressive ideas about women and sexuality, and that some part of that engagement with human rights amplified the regressive aspects?" (Miller 22) Miller suggests that it is the very framework in which sexual violence is presented that reinforces sexism within human rights law. "The Frame of sexual harm, a frame that tends to reduce women to suffering bodies in need of protection by the law and the state, rather than as bodies and minds in need not only of protection, but participation and equality." (Miller 27) Therefore the issue becomes how do we bring equality for victims inside of a system that can reinforce sexist ideals?

### **A. Clery Act**

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<sup>5</sup> Analyzing the Department of Education's final Title IX rules on sexual misconduct.  
<https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

The only law that has been created in regards to Title IX is the Clery Act and it was fundamental in creating the groundwork for the Title IX crime reporting system today. This reporting system is now used to hold schools accountable regarding on-campus and off-campus safety. The Clery Act was signed into law by President George H.W Bush, the federal legislation that would become the Jeanne Clery Disclosure of Campus Security Policy and Crime Statistics Act, requiring schools to record campus crime statistics and implement safety policies. The Clery Act was initially titled the Title II of the Student-Right-to-Know and Campus Security Act of 1990. The intention of the act was to create transparency between Institutions of Higher Education and students regarding campus security and to mandate institutions to meet certain responsibilities. In 1998 the law was renamed after Jeanne Clery, a Lehigh University freshman who was raped and murdered in her dorm room. These amendments increased the amount of crimes schools could be held liable for as well as the locations they must crime report. These IHEs also must maintain a public crime log and report their crime data to the U.S Department of Education annually. The nature of the crime committed to Jeanne Clery shaped this act into one that focused on campus safety in regards to sexual misconduct. Therefore it was no surprise that “in 2000, the Victims of Trafficking and Violence Prevention Act (P.L. 106-386) amended the Clery Act again by requiring IHEs to provide information on the location of the state’s public sex offender registry.”(1) With legislation shifting to incorporate changes to make campuses safer for student victims, and with the Supreme Court affirming responsibilities universities have towards student-on-student harassment, it was only a matter of time before the Department of Education's Office for Civil Rights to release guidance on the matter.<sup>6</sup>

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<sup>6</sup> Clery Center. <https://www.clerycenter.org/the-clery-act>.



## **B. The OCR 2001 Revised Sexual Harassment Guidance**

When the OCR's California regional office in 1994 issued a resolution letter stating that Title IX gave it jurisdiction to investigate a university's response to student-on-student sexual assault allegations, Bill Clinton's OCR was encouraged to apply this principle in their 1997 "Sexual Harassment Guidance" after notice and comment rulemaking. Post the decisions in both *Davis v. Monroe County Board of Education* (1999) and "*Gebser v. Lago Vista Independent School District*" (1998), the OCR decided to revise their original guidance in order to incorporate the new jurisprudence. In 2001, the Office for Civil Rights released their "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties." This guidance contains a lot of tongue-in-cheek remarks of what sexual assault could be understood as, "It is also important that schools not overreact to behavior that does not rise to the level of sexual harassment. As the Department stated in the 1997 guidance, a kiss on the cheek by a first grader does not constitute sexual harassment." (iii) Which the office follows with the comment "School personnel should consider the age and maturity of students in responding to allegations of sexual harassment." (iv) This comment signifies the mindset during the early 2000s towards sexual assault that it can be overdramatized and should not be taken as seriously as a crime despite it warranting the highest evidentiary standard. The main claim from this guidance was that according to the *Gebser v. Lago Vista Independent School District* was that "the Supreme Court...specifically affirmed the Department's authority to enforce this requirement administratively in order to carry out Title IX's nondiscrimination mandate." (iii) Stating that it was well within the right of the state to enforce administrations to create a system that would conduct grievance procedures. "Strong policies and effective grievance procedures

are essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it.” (iii) Though it was important for the OCR to cement that the state could enforce these grievance procedures, it was vague in illustrating what these procedures should look like while reinforcing stigmas about the severity of these crimes.<sup>7</sup>

Alexandra Brodsky explains how this vagueness provides tangible complications for both the student complainant and the accused. “Reviewing lawsuits and stories from both student complainant and accused students, I’ve been struck by how often they ask for many of the same things. A clear explanation of the process and their rights. An advocate to help them navigate the system. The opportunity to present evidence and witnesses, to review what the other side submitted, and to respond. An unbiased decision-maker.” (Brodsky 116) Brodsky explains that though administrations may want the same, it can be difficult for schools to afford carrying out “truncated trial-type procedures.” Brodsky refers to a decision made in the 1975 Supreme Court case “Goss v Lopez,” which “addressed the rights of students facing school discipline” (Brodsky 98) in order to contextualize how the Supreme Court analyzes school’s disciplinary procedures. “As the justices saw it, “even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.” (Brodsky 98) Following Brodsky’s analysis of the jurisprudence surrounding these procedures she finds that “for the last half-century, lower courts have been slowly filling the gap, but their rulings sometimes conflict. So there is currently no legal answer for what school disciplinary procedures should look like when they may lead to the most serious sanction.” (Brodsky 98) Thereby due to the lack of clarity from the Supreme Court rulings the

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<sup>7</sup>U.S Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

OCR's assertion that the Department of Education would enforce this requirement holds little to no weight.<sup>8</sup>

### **C. Obama Administration Advisements**

Almost ten years later and seemingly out of nowhere, the Obama Administration released the famed "Dear Colleague Letter," a mere recommendation by a single administrator that would shake Title IX regulations for the decade to come. In 2011, few people anticipated such a commanding set of recommendations coming from the government. Since the 2001 guidance, nothing significant had changed. There were no new laws and no dramatic court cases. There were two main factors that contributed to the making of this letter. For one the Obama Administration's OCR Assistant Secretary, Russlynn Ali was very intent on encouraging sexual assault victims to file Title IX complaints against their colleges. In a 2010 interview, Ali promised that "we will use all of the tools at our disposal including referring to Justice or withholding federal funds or going to adjudication to ensure that women are free from sexual violence." Secondly, after the Democratic loss in the 2010 midterm elections, many thought that homing in on college sexual assault was a political maneuver to rally the base. In fact, the Administration released the letter on the same day that Obama announced his reelection bid, April 4 2011.

This letter was transformative in legal theory because prior to this letter it was unheard of in congressional debate to extend federal authority to direct procedures that colleges must use to adjudicate sexual assault allegations. Also for 20 years post Title IX's creation the OCR did not take any steps to direct procedures either. The letter also takes a step in explicitly defining

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<sup>8</sup> Brodsky, Alexandra. *Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash*. Metropolitan Books, Henry Holt and Company, 2022.

sexual violence under Title IX, “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.” The letter goes on to address the necessary threshold for schools to investigate, the evidentiary standard, and the obligations that schools have to respond to student-on-student sexual violence on campus.<sup>9</sup>

The “Dear Colleague Letter”, written by Russalyn Ali, reinforces the OCR’s 2001 guidance in that any harassment that can create a hostile academic environment should be punished but expands the threshold for what that includes. “As explained in OCR’s *2001 Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program. The more severe the conduct, the less need there is to show a repetitive series of incidents to prove a hostile environment, particularly if the harassment is physical. Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe. For instance, a single instance of rape is sufficiently severe to create a hostile environment.” (3) This is pivotal because up until now courts have been utilizing the “sufficiently severe and pervasive” threshold for investigating sexual harassment on college campuses because of the precedent set

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<sup>9</sup> Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

in “*Meritor v. Savings Bank*.” Lowering the threshold would allow for more victims to have their cases investigated in order to free them of these hostile environments.<sup>10</sup>

Freeing victims from these hostile environments is part of the school administration’s responsibilities up until this point, according to precedent, but when it becomes the school’s responsibility has always been left vague. This is due to the precedent set by the *Davis v Monroe County Board of Education* that held that a private Title IX damages action *could* lie against a school but only when the funding recipient is *deliberately* indifferent to the sexual harassment. Proving this deliberate indifference has been the ambiguous standard that prosecutors have had to prove in these cases. The letter addresses these concerns and explains the OCR’s perspective of what schools should do once aware of assault that emulates its new understanding of the “severe and pervasive” threshold. For one the OCR discusses training that administrators and employees should participate in in order to better identify sexual harassment and violence. “Schools need to ensure that their employees are trained so that they know how to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly. Training for employees should include practical information about how to identify and report sexual harassment and violence. OCR recommends that this training be provided to any employees likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors.” (4)

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<sup>10</sup> Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

As for what these employees should do once the school receives notice of student-on-student harassment, the OCR outlines meticulously and comprehensively the appropriate procedures.<sup>11</sup>

First the OCR advocates for receiving consent from the victim before pursuing action and explains tangibly what this would look like regarding confidentiality and whether the alleged victim would want to pursue action. “Schools also should inform and obtain consent from the complainant (or the complainant’s parents if the complainant is under 18 and does not attend a postsecondary institution) before beginning an investigation. If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation. If a complainant insists that his or her name or other identifiable information not be disclosed to the alleged perpetrator, the school should inform the complainant that its ability to respond may be limited. The school also should tell the complainant that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs.” (5) Now in regards to confidentiality, the letter has four stipulations required for permitting confidentiality. “ the school may weigh the request for confidentiality against the following factors: the seriousness of the alleged harassment; the complainant’s age; whether there have been other harassment complaints about the same individual; and the alleged harasser’s rights to receive information about the allegations if the information is maintained by the school as an “education record” under the

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<sup>11</sup> Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g; 34 C.F.R. Part 99.”  
(5)<sup>12</sup>

According to Alexandra Brodsky’s analysis of the jurisprudence surrounding school disciplinary proceedings, the question of what is an appropriate procedure for cases that can result in expulsion or suspension are left up to the discretion of the respective school. The OCR addresses this ambiguity and details its understanding of what constitutes an appropriate procedure once obtaining consent from the alleged victim to proceed with the investigation. It specifies three points Title IX systems must meet procedurally that would constitute institutions being in accordance with Title IX. Schools that are Recipients of Federal financial assistance must disseminate a notice of nondiscrimination, designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX, and adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.<sup>13</sup>

What would these notices of nondiscrimination look like? Well “each recipient publish a notice of nondiscrimination stating that the recipient does not discriminate on the basis of sex in its education programs and activities, and that Title IX requires it not to discriminate in such a manner. The notice must state that inquiries concerning the application of Title IX may be referred to the recipient’s Title IX coordinator or to OCR.” (6) The most debate out of these three

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<sup>12</sup>Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

<sup>13</sup> Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

requirements is surrounding the specific role of the Title IX coordinator, and the OCR cogently responds to these concerns. “The coordinator’s responsibilities include overseeing all Title IX complaints and identifying and addressing any patterns or systemic problems that arise during the review of such complaints. The Title IX coordinator or designee should be available to meet with students as needed.” (7) Alongside other requirements, the two that could be considered the most controversial are that “The Title IX coordinators should not have other job responsibilities that may create a conflict of interest.” (7) and that “The school’s Title IX coordinator or designee should be available to provide assistance to school law enforcement unit employees regarding how to respond appropriately to reports of sexual violence. The Title IX coordinator also should be given access to school law enforcement unit investigation notes and findings as necessary for the Title IX investigation, so long as it does not compromise the criminal investigation.” (7) What the OCR considered the appropriate grievance measures is a controversial anti-live hearing stance, “Grievance procedures generally may include voluntary informal mechanisms (*e.g.*, mediation) for resolving some types of sexual harassment complaints. OCR has frequently advised recipients, however, that it is improper for a student who complains of harassment to be required to work out the problem directly with the alleged perpetrator, and certainly not without appropriate involvement by the school (*e.g.*, participation by a trained counselor, a trained mediator, or, if appropriate, a teacher or administrator).<sup>14</sup> (8)

The OCR also advocated for these Title IX coordinators to transparently discuss the structure of the grievance procedure with both the alleged victim and the accused, and even

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<sup>14</sup>Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.



outlined what would constitute transparent communication between the students and coordinator in four stipulations. Both parties must have notice of the grievance procedure, adequate, reliable, and impartial investigation of complaints, a designated and reasonably prompt time frame, and notice of outcome. As for what constitutes an adequate, reliable, and impartial investigation of complaints, Ali breaks this requirement down into essentially two categories: informing the complainant of their right to file a criminal complaint and establishing what evidentiary standard would be appropriate. This section is particularly interesting because Ali cogently explains in what ways these grievance procedures should hold civil suit standards, with the lower evidentiary standard, and criminal case standards, allowing for the use of “fact gathering police investigations.” (10) In terms of the lower evidentiary standard, Ali states that schools must “use a preponderance of the evidence standard when it resolves complaints against recipients.” (11) and that “the “clear and convincing” standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX.” (11) This is a major shift as the high threshold of “severe and pervasive” assault would typically have been proven through this higher evidentiary standard of “clear and convincing.”<sup>15</sup> In terms of what would constitute appropriate police involvement, the letter explains “A school should notify a complainant of the right to file a criminal complaint, and should not dissuade a victim from doing so either during or after the school’s internal Title IX investigation. For instance, if a complainant wants to file a police report, the school should not tell the complainant that it is working toward a solution and instruct, or ask, the complainant to wait to file the

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<sup>15</sup> For more on evidentiary standards and the difference between the “preponderance of the evidence” and the “clear and convincing” standards of evidence look to Chapter III

report.” (10) Though also the OCR acknowledges that high police involvement within the university administration’s Title IX system would not necessarily be helpful in finding out whether a student would be in violation with Title IX. “ Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.” (10)<sup>16</sup>

Finally the letter explained “steps to prevent sexual harassment and sexual violence and correct its discriminatory effects on the complainant and others (14) and breaks these steps into two categories: “Education and Prevention” and “Remedies and Enforcement.” In the Education and Prevention section Ali outlines examples reminiscent of the stipulations in the Clery Act for example two of the examples she provides are “orientation programs for new students, faculty, staff, and employees” (14) and “training for students who serve as advisors in residence halls.”(14) Regarding the “Remedies and Enforcement” section, Ali explains that “if a school determines that sexual harassment that creates a hostile environment has occurred, it must take immediate action to eliminate the hostile environment, prevent its recurrence, and address its effects. In addition to counseling or taking disciplinary action against the harasser, effective corrective action may require remedies for the complainant, as well as changes to the school’s overall services or policies.” (15) Some examples of remedies that would pertain specifically to the victim would be “providing an escort to ensure that the complainant can move safely between classes and activities”(16) or “ensuring that the complainant and alleged perpetrator do not attend the same classes.” (16) In terms of wider school remedies, Ali explains other possible

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<sup>16</sup> Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

examples such as “offering counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services.” (17) Under the letter’s advisement, the Title IX coordinator can be involved in educating and enforcing these stipulations as well in preventative manners as well. This would happen through reports to the OCR from the respective coordinator. The letter explains that the coordinator is responsible for “conducting periodic assessments of student activities to ensure that the practices and behavior of students do not violate the school’s policies against sexual harassment and violence;” (18) and “conducting, in conjunction with student leaders, a school or campus “climate check” to assess the effectiveness of efforts to ensure that the school is free from sexual harassment and violence, and using the resulting information to inform future proactive steps that will be taken by the school.” (18)<sup>17</sup>

This was such a shift from the extreme vagueness portrayed in the 2001 OCR guidance in that it explicitly outlined what would be considered an appropriate procedure. Which as we know according to Brodsky through her research is primarily what alleged victims and the accused both want to see changed. Alexandra Brodsky explains how this vagueness provides tangible complications for both the student complainant and the accused. “Reviewing lawsuits and stories from both student complainant and accused students, I’ve been struck by how often they ask for many of the same things. A clear explanation of the process and their rights. An advocate to help them navigate the system. The opportunity to present evidence and witnesses, to review what the

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<sup>17</sup> Ali, Russalyn. "Dear Colleague Letter." In the Department of Education. <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html#ftn3>.

other side submitted, and to respond. An unbiased decision-maker.” (Brodsky 116) However many thought that this guidance utilized the language of regulations and made an overstep in federal control of school administrations. Alongside the concern for federal control over education systems, many thought that this stripped back rights of the accused in favor of the rights of the alleged victim. These concerns were addressed controversially by the following Trump administration, specifically by the new secretary of the Department of Education Betsy Davos.

#### **D. Trump Administration Regulations**

On September 7, 2017, Betsy DeVos announced that the Trump Administration would eliminate the Obama Administration letter and put guidance in place to reinstate the rights of the accused . In DeVos’ speech she addressed the concerns about the rights of the accused in the Title IX process, specifically in providing the accused due process. “One assault is one too many, one aggressive act of harassment is one too many, one person denied due process is one too many. There is no way to avoid the devastating reality of campus sexual misconduct; lives have been lost, lives of victims and lives of the accused.” Davos even goes as far to refer to the accused as “victims of a lack of due process” in order to convey the new administration's frustrations with the Obama administration’s previous Title IX guidance. In DeVos’ speech she pledged that there would be action to replace the guidance, promising to reinstall the ‘clear and convincing evidentiary’ standard in replace of ‘preponderance of the evidence’ standard. This would raise the evidentiary standard necessary to find the accused guilty of sexual harassment under Title IX.

The Trump Administration's Department of Education released a "Dear Colleague" Letter rescinding the Obama Administration's guidance on September 22, 2017. This is coming at a time where many were praising Obama's Dear Colleague Letter for its protections for sexual assault victims while critics "accused the Obama administration of federal micromanaging and pushing colleges to find students guilty, with the number of sexual violence cases under investigation by the department's Office for Civil Rights going from 55 in May 2014 to 344 as of July 12, 2017." Betsy DeVos went as far as to claim that "some innocent men were falsely accused under the standard." In regards to the specific overstep of the Obama administration, DeVos explained that "the Obama administration .... advised schools to ramp up investigations of misconduct and warned that their failure to do so could bring serious consequences." Therefore it was no surprise that on May 6, 2020 Betsy DeVos, Secretary for the Trump Administration's Department of Education, issued final regulations on sexual misconduct. According to a New York Times article on these final regulations by Erica L. Green, a reporter who focuses on education equity and civil rights issues, "The rules fulfill one of the Trump administration's major policy goals for Title IX, bolstering due-process protections for accused students while relieving schools of some legal liabilities." Moreover these changes would reduce schools' responsibility towards reporting responsibilities and strengthened the rights of the accused students.

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<sup>18</sup> Anderson, Nick. "Trump administration rescinds Obama-era guidance on campus sexual assault." *The Washington Post*. [https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e\\_story.html](https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e_story.html).

Nicole Bedera is a sociologist who specifically focuses on how social structures retraumatize survivors and cause violence to perpetuate. Bedera analyzes how the 2020 regulations of the Department of Education under the Trump administration will make it harder for victims to understand their legal rights. Bedera explains that this is because the regulations are incredibly difficult to navigate and comprehend. This becomes an issue as student-survivors who have not been trained legally, have found it difficult to learn their rights and take action regarding their own Title IX system. According to Bedera even experts on campus sexual assault find the rule unnecessarily convoluted and struggle to understand its nuances, Beyond that Bedera finds that once victims navigate these regulations they will find that “many of the harms they hoped to report are no longer reportable” this is because “the new rule has drastically limited the types of sexual misconduct universities are required to navigate.” This is because under the Trump administration the appropriate evidentiary threshold for school investigation was the “severe, pervasive, and objectively offensive” standard, which Bedera finds issue with. “The problem is that almost *no* sexual harassment is considered objectively offensive.” Which is evident considering what is offensive regarding sexual harassment has changed drastically over the past few decades. Bedera postures this claim by referring to defensive measures utilized by defense attorneys for multiple sexual assault cases regarding certain political and cultural figures. “For evidence of that, we need not look any farther than the comment section of any major newspaper’s coverage of men whose maltreatment of women was exposed by #MeToo. Aziz Ansari, Louis CK, Joe Biden, Donald Trump, and even Bill Cosby and Harvey Weinstein all have their defenders who insist that whatever they have done isn’t “that bad.” By taking the narrowest definition of sexual harassment, the Trump administration has reduced the number of cases universities can consider.”<sup>19</sup>

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<sup>19</sup> Bedera, Nicole. "Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors

During the 2018-2019 school year, Bedera conducted ethnographic research on a university regarding how they dealt with Title IX complaints in which she observed and interviewed “students and staff as they attempted to address sexual harassment and gender-based violence that occurred.” Bedera found upon her observations that what is considered objectively offensive by the student body and by staff is extremely varied and that the ramifications for the Trump administration’s change in threshold requirement had severe and pervasive results. “In that time, Title IX administrators labeled most types of sexual misconduct or discrimination as “not that bad,” including everything from unwanted hugs to removing clothing in the workplace to death threats from physically violent abusers. There were few—if any—violations that they unanimously agreed were “offensive.””

Though the “severe, pervasive, and objectively offensive” standard is not the only requirement for victims to meet in order to get their cases investigated by the school, the harassment must also occur on school grounds or be “in conjunction with an education program or activity.” This becomes incredibly difficult for the majority of student-survivors to find justice as Bedera points to research conducted by RAINN, which is the largest anti-sexual violence organization, that explains that “only 8% of sexual assaults take place on school property, which means these regulations give universities permission to ignore the vast majority of sexual assault claims.” Even in the unlikely chance that a student-survivor meets the “severe, pervasive, and objectively offensive” criteria and that said student was one of

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to Use. That's the Point." *Time Magazine*. <https://time.com/5836774/trump-new-title-ix-rules/>.

only 8% of student-survivors who are assaulted on campus, even the procedure could be dangerous according to Bedera. This is because the student-survivor is given two choices, one being “cross-examination” and the other being an incredibly vague “informal resolution” process. Bedera finds the cross examination method potentially dangerous for these student survivors “the Trump administration has made formal investigations more difficult and potentially dangerous for survivors, requiring that survivors undergo cross-examination in a live hearing that would bring them face to face with their assailants.” Though the “informal resolution” process isn’t much better for survivors, “Informal resolution is notoriously vague. It has only two requirements. First, it must be voluntary, not only for survivors, but for accused students. That means that if an assailant does not want to participate in disciplinary proceedings, they have the right to refuse. To put it another way, perpetrators of sexual assault have the right to end an informal resolution before it begins. Second, any outcomes including punishment for the accused are banned. That means no expulsions or suspensions, but it potentially also rules out things like required trainings on sexual violence or asking the assailant to change a class schedule or a housing assignment.” Since the concept of the informal resolution is primarily defined by its stipulations, the reality of what it actually means is still left vague. Bedera explains that without a meaningful consequence and with the possibility that the alleged perpetrator could drop the case, the “informal resolution” “will be little more than some shuffling of paperwork between administrators and survivors before it becomes clear that no one else is interested in participating and that there are no meaningful outcomes available anyway.”<sup>20</sup>

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<sup>20</sup> Bedera, Nicole. "Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point." *Time Magazine*. <https://time.com/5836774/trump-new-title-ix-rules/>.



As for what are the tangible ramifications of the Trump Administration's Title IX regulations, Bedera explains that these regulations are just guidelines not requirements meaning that universities are able to decide what best fits their student body. Though what these regulations do is inform universities of what the minimum is, and for schools that do not have the adequate funding to fulfill beyond the federally funded minimum these regulations become the rule. "For the most part, these rules are guidelines, not requirements. Universities have the right to take a more proactive approach to address sexual violence, but there will be no federal oversight. What we are most likely to see in the years to come is that some schools—likely the wealthiest and best resourced schools—will continue to support survivors beyond the letter of law, while others will do the bare minimum." Moreover Bedera points to a more concerning consequence of Trumps' regulations, "The new Title IX rule has given universities the power to choose when survivors are heard and when they are not by making it impossible for them to speak up for themselves." For Bedera the specific reason why these rules fail student-survivors is because of what she defines as the inherent reason why schools were chosen as judge and jury regarding sexual assault on college campus. "Furthermore, the reason universities were tasked with adjudicating sexual assault complaints was not to punish perpetrators or end sexual violence, but to ensure that campuses are safe. When universities turn a blind eye to the most common ways sexual violence is perpetrated, they open the door to serial assailants using college campuses as a hunting ground for new victims. This makes campuses less safe for all women."<sup>21</sup>

#### **E. Biden Administration Regulations**

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<sup>21</sup> Bedera, Nicole. "Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point." *Time Magazine*. <https://time.com/5836774/trump-new-title-ix-rules/>.

Post the Trump administration, there was much questioning if the Biden administration would propose new Title IX regulations as Joe Biden was a part of the Obama Administration when the “Dear Colleague Letter” came out. Therefore when the Department of Education under the Biden Administration announced on April 27th of 2022, that it would release proposed changes, everyone was listening. The Biden Administration claimed that these regulations would encompass new victim protections and modify language to include sexual orientation and to protect LGBTQ+ students. On the 50th anniversary of the Title IX Education Amendments, Biden released a statement commemorating the occasion by announcing that the administration would reinstate the victim protections that the Trump administration withdrew in its 2020 proposed regulations.<sup>22</sup> In Biden’s White House statement, he asserted that “over the last fifty years, our nation has made monumental progress in advancing equity and equality for all students, including by narrowing gender gaps in sports, expanding opportunities in science and technology fields, and protecting students from sex discrimination, including sex-based harassment and sexual violence.” Biden acknowledged in his statement that the promise of Title IX has yet to be fulfilled, “Yet there is more work to do. As we look to the next fifty years, I am committed to protecting this progress and working to achieve full equality, inclusion, and dignity for women and girls, LGBTQI+ Americans, all students, and all Americans. My Administration will continue to fight tirelessly to realize the promise of Title IX—that every person deserves an opportunity to pursue their education free from discrimination and realize their full potential.”<sup>23</sup>

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<sup>22</sup> Jones, Dustin. "Biden's Title IX reforms would roll back Trump-era rules, expand victim protections." NPR. <https://www.npr.org/2022/06/23/1107045291/title-ix-9-biden-expand-victim-protections-discrimination>.

<sup>23</sup> "Statement by President Joe Biden on the 50th Anniversary of Title IX." News release. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/23/statement-by-president-joe-biden-on-the-50th-anniversary-of-title-ix/>.

Though what does this promise mean tangibly, well Biden released an Executive Order on March 8 of 2021 before this announcement which stated that within “100 days of the date of this order, the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that are or may be inconsistent with the policy set forth ... of this order.” (13803) A mandatory part of this reviewing process was to reconsider the Trump Administration’s 2020 Regulations, ‘Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance.’” During this reconsideration of previous proposed regulations, the Executive order explains that “The Secretary of Education shall consider suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding—those agency actions that are inconsistent with the policy set forth.” As for when that policy would take place the order mandated that “as soon as practicable, and as appropriate and consistent with applicable law, the Secretary of Education shall review existing guidance and issue new guidance as needed.”<sup>24</sup>

Then on the 50th anniversary of the Title IX Amendments, June 23 2021, the Department of Education under the Biden administration released alongside his White House statement, a fact sheet regarding Title IX proposed regulations. This fact sheet breaks down eight specific measures that the department plans to implement in its’ new regulations that will specifically affect sexual harassment on college campuses in regards to Title IX. “Clearly protect students

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<sup>24</sup>“Executive Order 14021 of March 8, 2021.” In *Federal Register Vol. 86, No. 46*. <https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>.

and employees from all forms of sex discrimination; Provide full protection from sex-based harassment; Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities – and to prevent its recurrence and remedy its effects; Require schools to respond promptly to all complaints of sex discrimination with a fair and reliable process that includes trained, unbiased decisionmakers to evaluate all permissible evidence; Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment; Clarify and confirm protection from retaliation for students, employees, and others who exercise their Title IX rights; Improve the adaptability of the regulations’ grievance procedure requirements so that all recipients can implement Title IX’s promise of nondiscrimination fully and fairly in their educational environments; Ensure that schools share their nondiscrimination policies with all students, employees, and other participants in their education programs or activities.”<sup>25</sup>

A lot of these proposed changes reflect similar jurisprudence utilized in the Obama Administration’s “Dear Colleague” letter, though the described new threshold for what is considered sexual harassment lies somewhere in the middle ground between the Obama’s “Dear Colleague Letter” and Trump’s 2020 Proposed Regulations. “The proposed regulations would also cover harassment that creates a hostile environment—unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity. (Proposed § 106.2)” (1) The change noted by the Department of Education being that Trump’s Proposed Changes stated that it is “only”

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<sup>25</sup> <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf>

inacceptable once that “severe and pervasive” standard is met while Biden’s Proposed Changes stated that the evidence only has to “sufficiently” fulfill the “severe and pervasive” standard. Biden’s Proposed Changes state that it would fulfill the “*sufficiently* severe and pervasive standard” when the conclusion of said procedure is “based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity. (Proposed § 106.2)” (1) Though the Biden regulations utilize the “severe and pervasive” standard, the regulations *expand* the jurisdiction of where schools must investigate. The regulations state that university administrations are responsible for “address(ing) all sex discrimination in their education programs or activities. Under the proposed regulations, conduct that occurs in a recipient’s education program or activity includes: Conduct that occurs in any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. Conduct that occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient’s disciplinary authority.” (1-2)<sup>26</sup> Hopefully this will allow for more sexual assaults to get reported as according to RAINN, “only 8% of sexual assaults take place on school property.”

Furthermore, Biden’s comments require a more prompt approach by the respective university than Trump’s, “Title IX requires all recipients to operate their education programs or activities free from prohibited sex discrimination at all times. To fulfill this requirement, the proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its

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<sup>26</sup> “Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking” In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

recurrence, and remedy its effects. (Proposed § 106.44(a))”(2) While the current regulations (Trump’s Proposed Changes), state that not only must the assault occur on school grounds and that the respective school only has to “respond to possible sexual harassment when it has “actual knowledge” of the harassment” (2) Moreover Trump’s regulations also state that “at postsecondary institutions, only employees with authority to institute corrective measures can have actual knowledge” (2), while Biden’s proposed comments would expand who student-survivors can turn to within the school’s administration. As higher level authority figures may intimidate a student-survivor who wants to reach out for help. Currently “at postsecondary institutions, only employees with authority to institute corrective measures can have actual knowledge.” (2) Whereas under the Biden Administration’s changes, “The proposed regulations require that recipients require certain employees to notify the recipient’s Title IX Coordinator of conduct that may constitute sex discrimination under Title IX. This would ensure that recipients learn of possible sex discrimination so they can operate their education programs or activities free from prohibited sex discrimination as Title IX requires. (Proposed § 106.44(c))” (2) Regarding postsecondary education, “An employee at a postsecondary institution or other recipient who has authority to take corrective action or, for incidents involving students, has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity, would be obligated to notify the Title IX Coordinator. (Proposed § 106.44(c)(2)(i)-(ii))”(3) and “All other employees at a postsecondary institution or other recipient would be obligated to notify the Title IX Coordinator or provide an individual with the Title IX Coordinator’s contact information and information about reporting, except that confidential employees would not be obligated to notify the Title IX Coordinator about possible sex discrimination. Confidential employees would be obligated only to provide an individual

with the Title IX Coordinator’s contact information and information about reporting. (Proposed § 106.44(c)(2)(i)-(ii); § 106.44(d)(2))” (3)<sup>27</sup>

Another point that Biden’s Proposed Changes stress is the importance for the university to respect the autonomy of the complainant throughout the Title IX proceedings while maintaining a “free from sex discrimination” learning environment. “To ensure that a recipient’s education program or activity is free from sex discrimination while also respecting complainant autonomy, the proposed regulations would require recipients to provide clear information and training (proposed § 106.8(d)) on (1) when their employees must notify the Title IX Coordinator about possible sex discrimination (proposed § 106.44(c)) and (2) how students can report sex discrimination for the purpose of seeking confidential assistance only (proposed § 106.44(d)) or for the purpose of asking a recipient to initiate its grievance procedures. (Proposed § 106.45(a)(2))” (3) Another way in which Biden advocates for the protection of student-survivors’ agency is that it allows for victims who may choose to leave the university to still pursue justice regarding assault that occurred within the school, “A complainant would also be protected in their right to file a complaint about sex discrimination they experienced even if they have chosen to leave the recipient’s education program or activity as a result of that discrimination or for other reasons. (Proposed §§ 106.2 and 106.45(a)(2))” (3)<sup>28</sup>

Alongside these other provisions, the Biden Administration would also require the Title IX coordinator to ensure the clarity of discourse between members of the university

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<sup>27</sup> ‘Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking’ In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

<sup>28</sup> ‘Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking’ In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

administration “regarding reporting information about conduct.” (3) “Under the proposed regulations, a recipient also would require its Title IX Coordinator to monitor for barriers to reporting information about conduct that may constitute sex discrimination under Title IX. The recipient would then need to take steps reasonably calculated to address barriers the Title IX Coordinator identifies. (Proposed § 106.44(b))” (3) These “reasonably calculated” requirements would ensure that “employees and students have information about the identity and role of a recipient’s confidential employees,”(3) “employees and students at elementary schools and secondary schools know that all employees must notify,” (3) “employees and students at postsecondary institutions know that certain employees have a duty to notify the Title IX Coordinator of possible sex discrimination and other employees must instead provide them information about how to contact the recipient’s Title IX Coordinator and report sex discrimination,” (4) “students (and parents, guardians and other authorized legal representatives of elementary and secondary school students) know how to make a complaint to initiate a recipient’s grievance procedures and also how to seek information about supportive measures and other resources without making a complaint,” (4) and that “recipients know to honor a complainant’s request not to proceed with a complaint investigation whenever possible, as long as doing so does not prevent the recipient from ensuring equal access to its education program or activity.” (4)<sup>29</sup>

This level of clarity within the administration would create an environment where prompt and efficient action is mandatory. “Under the proposed regulations, a recipient would be required to take prompt and effective action to end any sex discrimination in its education program or

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<sup>29</sup> ‘Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking’ In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>



activity.” (4) In order to ensure that effective action is taken “the proposed regulations would require a recipient to ensure that its Title IX Coordinator takes the following steps upon being notified about possible sex discrimination.” (4) These steps would include that the coordinator, “Treat the complainant and respondent equitably at every stage of the recipient’s response. (Proposed § 106.44(f)(1)) (4)”, “Notify the complainant of the recipient’s grievance procedures and, if a complaint is made, notify the respondent of the grievance procedures and notify the parties of the informal resolution process, if any. (Proposed § 106.44(f)(2))” (4), “Offer and coordinate supportive measures, as appropriate, to the complainant and respondent. (Proposed § 106.44(f)(3))” (4), “In response to a complaint, initiate the recipient’s grievance procedures or informal resolution process. (Proposed § 106.44(f)(4))” (4), “In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination if necessary to address conduct that may constitute sex discrimination under Title IX in the recipient’s education program or activity. (Proposed § 106.44(f)(6))” (4), “Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur in the recipient’s education program or activity, in addition to providing remedies to an individual complainant. (Proposed § 106.44(f)(7))” (4)<sup>30</sup>

This is similar to the Obama Administration’s “Dear Colleague Letter” in its desire to give the student-survivor agency of their trial, except in the aspect of the pace of the trial. Though in creating other palliative measures for the complainant Biden’s “ proposed regulations require recipients to offer supportive measures as appropriate to the complainant and/or respondent to the extent necessary to restore or preserve that person’s access to the recipient’s

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<sup>30</sup> “Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking” In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

education program or activity. Supportive measures may include, for example, counseling, extension of deadlines, restrictions on contact between the parties, and voluntary or involuntary changes in class, work, or housing. (Proposed § 106.44(g)) (5) This is different from the current regulations, Trump’s regulations, which require “only that a recipient treat a complainant and respondent equitably by providing remedies to a complainant when it has determined that sexual harassment has occurred and by following a grievance process before imposing disciplinary sanctions or other actions on a respondent. (Current § 106.45(b)(1))” (5) This means that only once the complainant’s assault is already deemed objectively offensive, severe, and pervasive is it required to not only provide the complainant with mere equitable treatment but to keep them safe during the procedure. Moreover the current regulations, “do not permit a recipient to offer an informal resolution process unless a formal complaint has been filed. (Current § 106.45(b)(9))” (5) Which means that even if the complainant doesn’t want to endure criminal case level proceedings, they must in order to have any sort of complaint processed.

“Since 1975, the Title IX regulations have required a recipient to adopt and publish grievance procedures that provide for the prompt and equitable resolution of sex discrimination complaints. The current regulations include detailed requirements for grievance procedures only for complaints of sexual harassment. The proposed regulations adapt the current regulations to apply to all complaints of sex discrimination with specific changes that would take into account the age, maturity, and level of independence of students in various educational settings, the particular contexts of employees and third parties, and the need to ensure that recipients adopt grievance procedures that include basic and essential requirements for fairness and reliability for all parties that are well suited to implementing Title IX’s nondiscrimination guarantee in their

respective settings.” (5) What do these requirements entail? Well one specific requirement that differs from that of the Trump administration regulations is that these new proposed regulations would require the Title IX office to take “reasonable steps to protect privacy of parties and witnesses.” (Proposed § 106.45(b)(5)) (5) A key part in ensuring this is establishing that the “Title IX Coordinator, investigators, and decision makers must not have conflicts of interest or bias.(Proposed § 106.45(b)(2))” (5) The regulations go on to outline reasonable steps in ensuring that the Title IX office is objective and unbiased.<sup>31</sup>

The regulations go on to elaborate on “additional requirements for grievance procedures,” focusing on written documentation and elaborating on live hearings. In order to keep both parties informed the new regulations mandate that Title IX offices must provide both “written notice to the parties of allegations, dismissal, delays, meetings, interviews, and hearings.” (6) and “written notice of the determination that includes a description of the allegations, information about the policies and procedures used to evaluate the allegations, the decision maker's evaluation of the relevant evidence and determination of whether sex-based harassment occurred, disciplinary sanctions and remedies if relevant, and information about appeal procedures. (Proposed § 106.46(h))” (7) This would allow both parties to fully comprehend what has happened and the bases of whichever decision was made, this clear communication from the Title IX office to the alleged victim and accused would create clarity. Also controversially the Biden administration will permit live hearings, but with some caveats. “Permitting, but not requiring, a live hearing. When a live hearing is permitted, a recipient must allow the parties, on request, to participate

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<sup>31</sup> ‘Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking’ In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

from separate locations using technology. (Proposed § 106.46(g))” (7) Hopefully by allowing for these live hearings to take place from separate locations the live hearing model will not induce trauma from the alleged victim.<sup>32</sup>

In terms of other victim protections the Biden administration mandates, the respective Title IX office must ensure the safety of the alleged victim throughout the proceedings against retaliation from the accused. “The proposed regulations would clarify that Title IX protects a person from retaliation, including peer retaliation, and that protection against retaliation is necessary to fulfill Title IX’s requirement that recipients operate their education programs or activities free from sex discrimination. (Proposed § 106.71)” (8) In doing so the regulations also outline what it would consider as retaliation, “Retaliation would be defined as intimidation, threats, coercion, or discrimination against anyone because the person has reported possible sex discrimination, made a sex-discrimination complaint, or participated in any way in a recipient’s Title IX process.” (Proposed § 106.2) (8) This is a clear difference between Trump’s regulations and Biden’s regulations, as Trump stated that the alleged victim is not entitled to this form of protection from the institution until the accused is indicted.<sup>3334</sup> The official regulations are to be released in May of 2023, and will possibly amend the Trump era regulations stripping back victim protections and provide a more effective manner for executing grievance procedures.

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<sup>32</sup> ‘Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking’ In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

<sup>33</sup> ‘Summary of Major Provisions of the Department of Education’s Title IX Notice of Proposed Rulemaking’ In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf>

<sup>34</sup> For more information on Biden’s Proposed Regulations here is the unofficial version: "Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972 Notice of Language Assistance." In the Department of Education. <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf>.





## **IV. Chapter Three**

### **A. Evidentiary Standard**

One of the most contested issues Title IX cases over the past decade has been the evidentiary standard appropriate for holding an alleged abuser responsible.. Between the ‘preponderance of the evidence’ standard and the ‘clear and convincing’ standard, there is a lack of consensus regarding what is appropriate. The clear and convincing standard of evidence has been utilized the longest regarding these accusations; it is the intermediate level of burden of proof and according to the Supreme Court decision in *Colorado v. New Mexico* U.S. 310 (1984), and requires that the evidence is highly and substantially more likely to be true than untrue.. It is a higher evidentiary standard than the preponderance of the evidence standard, which provides that the burden must convince the fact finder that there is a greater than 50% chance that the accused is responsible, but lower than ‘beyond a reasonable doubt,’ the standard for criminal guilt . Both preponderance of the evidence d and clear and convincing standards are used in civil court. Below, I will expand on the reasoning why one standard might be used over the other.

According to an article by the Ohio Alliance to End Sexual Violence, “in civil cases, preponderance of the evidence is generally used – courts heighten to clear and convincing evidence in cases where fundamental rights are involved and the legal and social ramifications of the civil proceeding are serious, clear and convincing evidence may be used.” The article goes on to expand that “in general, (the clear and convincing) standard requires more than mere substantial evidence; suspicion and speculation do not meet the clear and convincing standard. Evidence is “clear” if it is certain, unambiguous, and plain to the understanding, and it is

“convincing” if it is reasonable and persuasive enough to cause a trier of fact to believe it.” This applies to the recounting of witnesses to the specific crimes, “witness memories while in a drugged state would not meet the clear and convincing evidence standard.” In contrast, the preponderance of the evidence standard relies more heavily on witness testimony, “Evidence such as witness testimony may carry more weight under the preponderance of the evidence standard. The number of witnesses may be a factor and may be weighed in light of the nature of the issue of fact.” These standards also result in different consequences. The clear and convincing standard, if fulfilled, could result in the accused potentially facing sanctions, injunctions, financial penalties, and loss of property. Whereas in the preponderance of the evidence standard, if fulfilled, could result in the accused potentially facing financial penalties and court orders.<sup>1</sup>

Therefore the discrepancies between the preponderance of the evidence standard and the clear and convincing standard can be boiled down to the decision makers' trust in the witnesses' retelling, the differing consequences of fulfilling either standard, and whether or not the chosen standard fulfills the due process clause. Though there are these distinctions, there are no clear instructions for juries – the ‘finders of fact’ in a court case – on what is necessary to actually fulfill the clear and convincing standard. There is just an understanding that it exists between preponderance ‘beyond a reasonable doubt’. According to an article by Robin Meadows<sup>2</sup>, “Clear

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<sup>1</sup> Ohio Alliance to End Sexual Violence. "Title IX and Evidentiary Standards." *OAESV*. [https://oaesv.org/wp-content/uploads/2021/08/title\\_ix\\_evidence\\_packet.pdf](https://oaesv.org/wp-content/uploads/2021/08/title_ix_evidence_packet.pdf).

<sup>2</sup> “a member of the California Academy of Appellate Lawyers who was co counsel for the plaintiff in *Mattco Forge, Inc. u Arthur Young & Co*, (1997) 52 Cal.App.4th 820, 60 Cal.Rptr.2d 780, which unequivocally approved BAJI No. 2.62 s definition of clear and convincing evidence.”



and Convincing Evidence: How Much is Enough?”, “there is no historical basis for using that language in a jury instruction.” (116) Meaning “there was no decision that specifically discussed how the concept of clear and convincing evidence should be explained to a lay jury.” (117) Moreover there is no clear distinction on whether the “clear and convincing” standard leans more towards the “proof beyond a reasonable doubt” standard or the “preponderance of the evidence” standard. Furthermore this lack of clarity can confuse untrained juries into requiring the “proof beyond a reasonable doubt” standard, because of the vague descriptors in its description. “Phrases like "the unhesitating assent of every reasonable mind" and "no substantial doubt" pose a substantial risk of confusing the jury into demanding proof "beyond a reasonable doubt.”” (119) Especially because the Supreme Court has previously rejected that wording when applied to the “preponderance of the evidence” standard because that same “language was too similar to "beyond a reasonable doubt.”” (119) It is no surprise that the “clear and convincing” standard and the “beyond a reasonable doubt” standard get conflated as the clear and convincing standard is the highest standard utilized in civil court proceedings.<sup>3</sup>

Therefore when the “clear and convincing” standard is utilized over the “preponderance of the evidence” standard, one must ask why. Especially considering that the “preponderance of the evidence” standard is what is typically utilized in most civil court proceedings. When one chooses to elevate the evidentiary standard to the “clear and convincing” standard, it sets an ambiguous higher threshold of evidence that prosecution must fulfill. Moreover this higher standard is rarely used for civil court proceedings therefore when it is utilized it implies

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<sup>3</sup> Meadow, Robin. "Clear and Convincing Evidence: How Much Is Enough?" *California Institute Law & Regulation*. <https://www.gmsr.com/wp-content/uploads/2016/06/Clear-and-Convincing-Evidence-How-Much-is-Enough.pdf>.

something exceptional in comparison to the other civil court proceedings. This, in turn, highlights the question of the consequences for making Title IX sexual misconduct proceedings exceptional to other civil court proceedings.

## **B. Due Process**

As I mentioned in my last section, one of the main questions regarding which of the evidentiary standards are appropriate to use is: which evidentiary standard fulfills the “due process” necessary to secure a finding of responsibility in Title IX proceedings. First off I will provide the “due process” clause, “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” In other words due process mandates that “the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power.” Therefore when the stakes of the respective procedure chosen by Title IX can result in the loss of any privileges and immunities as a citizen, that citizen is entitled to a fair and balanced procedure. Though this clause is commonplace for both civil and criminal court proceedings the emphasis can become problematic for Title IX proceedings.<sup>4</sup>

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<sup>4</sup> "Evidentiary Standards and Burdens of Proof in Legal Proceedings." In *Justia*. <https://www.justia.com/trials-litigation/lawsuits-and-the-court-process/evidentiary-standards-and-burdens-of-proof/>

The concern with emphasis on due process in Title IX proceedings is that it has been historically utilized by the right wing primarily in favor of the rights of the accused over that of victim protections. One thinker that expands on this is Alexandra Brodsky, founder of non-profit Know Your IX, who wrestles with the history of the due process argument while acknowledging the clause's importance. "Fair process is crucially important in responding to sexual harassment allegations, and yet concerns about fair process are often co-opted and weaponized to thwart progress." (9) Progress is thwarted because "many people seemed to believe that accountability for sexual abuse is per se unfair. And again, the more sophisticated right-wing voices knowingly wielded the language of due process to pursue in impunity." (9) Legal analysts critique the Trump Administration's Regulations for these same reasons.

However Brodsky works to reconceptualize due process within Title IX proceedings, in her book, "*Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash*." For Brodsky due process can create a "fair process" that is beneficial for both the victim and the accused. She illustrates the importance of the clause while contemplating the importance of the critique by stating that we "need to recognize both these truths to respond to sexual harms in an effective way - to make a lasting contribution to equality, to safety, and, fundamentally, to the way we treat one another." (Brodsky, *Sexual Justice* 9) Moreover due process provides a *concrete* framework that is simply lacking in many Title IX systems. As Brodsky puts it "there is no single blueprint for how every institution - businesses and nonprofits, social clubs and political organizations, places of learning and places of worship - should handle allegations of wrongdoing." (Brodsky, *Sexual Justice* 9) For instance due process can help the respective decision makers "come to more accurate conclusions, untainted by bias

or other forms of irrationality.” (Brodsky, *Sexual Justice* 108) One influential legal analyst that Brodsky references in her chapter on due process, Jerry Marshaw, discusses the consequences of “an unfair process.” Marshaw writes, “an unfair process defines the participants as objects, subject to infinite manipulation by ‘the system’ (109) A fair due process could be the means, “to avoid contributing to this sense of alienation, terror, and ultimately self-hatred, a decisional process must give participants adequate notice of these issues to be decided, of the evidence that is relevant to those issues, and of how the decisional process itself works.” (109)<sup>5</sup>

Leaving the question, how do both ensure due process without reinforcing the victim protections strip back? In Brodsky’s chapter on due process, what is due, she illustrates four important principles to consider when thinking about due process in Title IX sexual misconduct cases. “Due process takes many forms, due process depends on the stakes, due process involves a balancing test, due process does not change based on the specific allegations.” (86) Maintaining these four principles, Brodsky argues that a fair process for both parties is entirely possible to implement. Finishing the chapter, Brodsky poses a question to legal scholars who hold hesitations towards implementing due process into Title IX procedures, “Does it really make sense to tilt the scales against the alleged victim precisely in proportion to how bad we think the underlying allegation is? That would mean, in essence, choosing to deny help exactly when it might be most needed.” (95) While this is a fair question, one must analyze why right wingers have been able to masquerade their “thwarts to progress” by emphasizing due process. Part of the reason why it has been utilized as such is because one of the stipulations for ensuring due process is cross examination. The manner in which cross examinations and live hearings are

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<sup>5</sup> Brodsky, Alexandra. *Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash*. Metropolitan Books, Henry Holt and Company, 2022.

conducted can retraumatize victims. Creating the question of whether validating all the stipulations of due process would ensure a fair process?

### **C. Live Hearings and Cross Examination**

The concern with live hearings and cross examination is that it is typically conducted in a room where both the accused and victim are present in the same room. It can be conducted over video conference, but it must be a live hearing where both parties are present and are represented by advisors. These advisors can be faculty members, a counselor, or a trained Title IX coordinator. During the process, advisors take turns asking prescreened questions to the respective parties. The questions are prescreened by the decision maker, who cannot be the same person who investigated the complainant or the Title IX coordinator, in order to ensure that only relevant questions are asked. During the cross examination section of the live hearing, advisors are permitted to interrogate the other party in order to challenge the credibility of said party. If the respective party chooses not to respond to a question from the advisor, the decision-maker must discount all other statements made by that party or witness according to the 2020 Regulations. Post the live hearing is when the decision maker must conclude whether the evidence presented fulfilled the evidentiary standard adjudicated for the hearing.

What is considered a relevant question? The Department of Education vaguely describes relevant questions as questions that would make a point at issue more likely than not to be true. The Department of Education has typically allowed for the institution itself to determine what is a relevant question to include, viewing that each respective institution is better suited to craft rules of decorum best suited to their educational environment. One stipulation is that each

advisor is prohibited from asking any questions in an abusive, intimidating, or disrespectful *manner*. As the regulations keep swinging to either side on either focusing on victim-centered or accused-centered protections, the question of what is considered a relevant question is often up for debate. Relevance determination differs university to university. On one hand, some universities require submission of proposed cross-examination questions before the hearing during a pre-hearing process, while other universities allow for the decision maker to decide the relevance of the questions during the live proceedings. If a university were to choose the prior method, the decision maker must still allow for the given parties to ask further questions during the procedure in which the relevance of those further questions will be decided on the spot.

The rejection of any question as irrelevant however may be closely scrutinized either by an internal appeals process in response to a complaint to OCR, or in subsequent civil rights litigation, or in an internal appeals process. Therefore if a decision maker were to find a question to be irrelevant it is typically recommended that they provide detailed explanation for reason a question was found irrelevant. This is where, as Brodsky explains, many might argue for impunity, by going through an extensive appeals process against a question that was potentially triggering for a victim. Moreover the stipulation for a question being irrelevant centering on whether or not the manner in which the question was posed, leaves room for inappropriate questions that are temperately expressed. Some who are in favor of the cross examination model “argue that cross-examination is necessary because schools have gone too far in seeking to protect survivors and are expelling accused students on the flimsiest of grounds. But evidence shows that even schools using the most victim-centric procedures rarely find those accused of sexual misconduct responsible.”

Without explicit guidance on what constitutes relevant and irrelevant questions, advisors have the freedom to ask the alleged victim questions that could retraumatize them. Considering the fact that all of their answers could be redacted if they refuse to answer a question, alleged victims are compelled to respond to violating questions. Even “in 2011, the Education Department’s Office for Civil Rights advised schools against allowing students to personally cross-examine each other during a hearing, citing concerns about potential trauma to survivors.” According to an article by Sandra R. Levitsky, Elizabeth A. Armstrong and Kamaria Porter, gender studies professors at the University of Michigan, “experts in sexual violence have amassed considerable evidence that cross-examination in a live hearing can re-traumatize survivors and further deter survivors from reporting sexual misconduct. Research has also shown that aggressive, adversarial questioning is a poor tool for assessing the truth in cases of sexual violence.” If cross examination is an improper tool to question survivors and ensure safe campuses, then what should take its place, since due process “requires that universities provide accused students with an opportunity to challenge evidence and witness testimony.” According to research conducted by the professors on sexual misconduct policies across 400 U.S universities, “Sixty percent of schools have moved toward models of fact-finding and resolution that avoid cross-examination but still afford opportunities for the accused to review and contest evidence.” This fact-finding process would maintain that “questions are funneled through an impartial intermediary who has the capacity to omit impermissible questions or revise a question’s format.”<sup>6</sup>

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<sup>6</sup> *The Washington Post*. "Why the cross-examination requirement in campus sexual assault cases is irresponsible." <https://www.washingtonpost.com/opinions/2020/05/07/>

[what-education-department-gets-wrong-its-rules-campus-sexual-assault/](https://www.washingtonpost.com/opinions/2020/05/07/what-education-department-gets-wrong-its-rules-campus-sexual-assault/).

Hopefully this fact-finding process could create an in-between cross examination and the highly criticized single investigator model that is only employed by “20 percent of schools.” The single investigator procedure is a model “where one person or office investigates the claim and makes the determination of responsibility — an approach that some argue can compromise the due process rights of the accused.” Rather than sticking with either extremes, the fact-finding process could fulfill the requirements for due process and would prevent victims from enduring a retraumatizing process.

#### **D. Victim Protections**

Another controversial point in Title IX is how many protections to provide alleged victims during the Title IX proceedings. Some believe that providing protections before the accused is found guilty is like predetermining the guilt of the accused. Others believe that without victim protections, the victim would be endangered going through the Title IX grievance procedure and therefore it would be less likely to have victims come forward. Though the new regulations advocate for certain measures to be taken once a student files a complaint such as dorm assignments and class adjustments, there is no official law mandating the matter. Some of the debated over protections are whether or not to protect the alleged victim from retaliation during the procedure, the school respecting the alleged victim’s choice to file or not to file a formal complaint, and finally whether the student should have to come face to face with the accused.<sup>7</sup>

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<sup>7</sup> "Fact Sheet: Final Title IX Regulation." In *U.S. Department of Education*. <https://sites.ed.gov/titleix/policy/>.





## V. Concluding Chapter

Through this research process, I have been asked where I stand and what I think is the appropriate Title IX procedure. Whether I would choose the single investigator model or the cross examination model. Honestly even though I have dedicated my entire academic year to analyzing the jurisprudence and regulations that led up till now, the feminist theory that installed the interpretation of sexual assault as sex discrimination, and analyzing the highly debated critical points on the matter, I am still not clear on the perfect procedure. What it boils down to is the reason why the school was chosen in the first place, as Nicole Bedera described in her critique on Trump's Regulations, "Furthermore, the reason universities were tasked with adjudicating sexual assault complaints was not to punish perpetrators or end sexual violence, but to ensure that campuses are safe."<sup>1</sup>

Therefore when universities are given the opportunity to create their Title IX grievance procedures, they should keep that intent in mind. The only actual law that has been made on the matter since the inception of Title IX, the Clery Act, is entirely dedicated to schools fulfilling this responsibility. Rather than functioning as a state criminal court where the intention is to punish the accused or more so vindicate state interests, universities should aim for more protective measures. Alexandra Brodsky expanded on this notion further in her book "Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting Conservative Backlash", "the (civil) court can also order the institution to make bigger, systemic improvements that will help others avoid harassment." (Brodsky, *Sexual Justice* 35) Meaning that infrastructural change within the institution is possible, but going through civil measures could also provide for

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<sup>1</sup> Bedera, Nicole. "Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors

remedies that would better the victim. damages can go toward therapy or other medical expenses, allow her to pay off debts incurred after leaving work or school, and help her get on with her life.” (35)<sup>2</sup>

Moreover, understanding that the university’s role is to protect its students, I would also advocate for more victim protections as victims won’t feel safe enough to come forward unless they are protected at least from retaliation. According to the article by Sandra R. Levitsky, Elizabeth A. Armstrong and Kamaria Porter, gender studies professors at the University of Michigan, “experts in sexual violence have amassed considerable evidence that cross-examination in a live hearing can re-traumatize survivors and further deter survivors from reporting sexual misconduct. Research has also shown that aggressive, adversarial questioning is a poor tool for assessing the truth in cases of sexual violence.” Alongside the fact that the Department of Education in 2011, based their guidance off of research illustrating that this process could retraumatize the victim, it would be best to stray away from utilizing this model. “In 2011, the Education Department’s Office for Civil Rights advised schools against allowing students to personally cross-examine each other during a hearing, citing concerns about potential trauma to survivors.”

Focusing on methods that give the victim enough space from traumatizing subject matter, invasive and inappropriate questions, face to face interaction with the accused, is the most appropriate method to go about these grievance procedures. Not only will it be a more effective manner in retrieving accurate information on the alleged sexual misconduct, but it will fulfill the

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<sup>2</sup> Brodsky, Alexandra. *Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash*. Metropolitan Books, Henry Holt and Company, 2022.

university's responsibility towards ensuring that the university is not a hostile learning environment. This way both parties will be able to engage in educational programs provided by the school as well as continue on their academic journeys. Preventing what could be the victim's academic career being set off-track completely, rendering her voiceless by her university for sexual misconduct that was entirely out of their control.

In order to prevent that from happening, it is entirely up to institutions to make sure the manner in which they conduct these grievance procedures does not reinforce the invisibility these students feel. Since what is considered an appropriate Title IX procedure is constantly debated up until now, it is imperative that school administrators focus on what they can control which is preventing hostile learning environments. Creating environments where students feel safe enough to come forward and tell their story is indicative of the faith that student bodies have in their institution. Students only ask that this same open ear that institutions claim provide for students is matched with safety measures to prevent the student from enduring lashback from the accused, or the student body, or from falling off track academically. When a student comes forward and asks for help from a professor or advisor, they are not asking to endure year long grievance procedures where this traumatizing event becomes the main subject of their day-to-day life. When students come forward to these individuals, they are looking for the ability to remain safe on campus and to continue their academic careers. It is not too much for student survivors to ask this of their institution as it is what was promised to them by the intention of the Clery Act. It is the university's every responsibility to ensure that students can continue with their education and their lives after these traumatic events.

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