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WHY TITLE IX IS AT A CROSSROADS

REXFORD SHEILD*

INTRODUCTION

As we celebrate the fiftieth anniversary since the passage of Title IX, it is imperative that we, as a society, place a greater emphasis on combatting sexual misconduct that occurs on and off the campuses of postsecondary institutions, especially given the recent data. In a 2019 survey conducted by the Association of American Universities (AAU) that interviewed over 180,000 undergraduate and graduate students, the survey found that thirteen percent of the respondents acknowledged that they experienced “nonconsensual sexual contact by physical force or inability to consent.”¹ Even more concerning, the Rape, Abuse & Incest National Network (RAINN) reported that roughly one in four female undergraduate students are victims of “rape or sexual assault through physical force, violence, or incapacitation.”² Sexual assault victims also hesitate to report the incident to law enforcement and, even if they do, justice is rarely served. For every 1,000 sexual assaults committed among the general population according to data spanning from 2012 until 2019, only thirty-one percent were reported to police (only twenty percent of the sexual assaults where a college-aged female was a victim were reported to police), only five percent of the sexual assaults reported to police led to an arrest, and only 2.5% of the perpetrators ended up behind bars.³ Taken together, or dissected separately, these are concerning and alarming statistics.

This Article will exclusively focus on Title IX in connection with sexual harassment/violence at postsecondary institutions (e.g., colleges and

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1. David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Misconduct*, ASS’N AM. UNIV., [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20and%20appendices%201-7_(01-16-2020_FINAL).pdf) (Jan. 17, 2020).

2. *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Dec. 30, 2022).

3. *The Criminal Justice System: Statistics*, RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited Dec. 30, 2022).

universities), but this Article would be remiss in not mentioning additional federal legislation that covers sexual harassment and sexual violence. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)⁴ mandates that postsecondary institutions that receive federal funding must prepare, publish, and distribute campus crime statistics and campus security policies pertaining to their institution on an annual basis to its students and employees.⁵ The statistics, which must cover the three prior calendar years, must consist of the following criminal offenses that are reported to campus police authorities or local law enforcement “on campus, in or on noncampus buildings or property, and on public property” – murder, sex offenses (forcible or nonforcible), robbery, aggravated assault, burglary, motor vehicle theft, manslaughter, arson, and “arrests or persons referred for campus disciplinary action for liquor law violations, drug-related violations, and weapons possession.”⁶ The Violence Against Women Act, which went into effect in 2015, amended the Clery Act by requiring schools to not only report statistics pertaining to forcible and nonforcible sex offenses, but also to report statistics pertaining to sexual assault, dating and domestic violence, and stalking incidents.⁷ It also mandated that institutions provide students with “primary prevention and awareness programs” and “ongoing prevention and awareness campaigns” as detailed in their annual security reports relating to the aforementioned categories.⁸

This Article will provide a timeline of significant events that shaped Title IX in regard to sexual harassment, which includes sexual violence, beginning in 1972 and ending at the present day. Thereafter, it will highlight highly publicized cases of sexual violence involving NCAA student-athletes over the years. This Article will then conclude with a discussion on sexual harassment under Title IX and what steps can be taken, both on the federal level and the campus level, to greatly diminish sexual harassment on college campuses while also ensuring the accused are afforded due process rights.⁹

I. TIMELINE OF SIGNIFICANT EVENTS THAT SHAPED TITLE IX IN REGARD TO SEXUAL HARASSMENT (1972-2010)

In order to provide more opportunities for female athletes and to build upon the Civil Rights Act of 1964, Congress enacted, and President Richard Nixon

4. 20 U.S.C. § 1092(f) (2022).

5. 20 U.S.C. § 1092(f)(1) (2022).

6. 20 U.S.C. § 1092(f)(1)(F) (2022).

7. Violence Against Women Act, 79 Fed. Reg. 62,752, 62,752 (Oct. 20, 2014).

8. *Id.*

9. Note that sexual harassment and sexual violence/assault may be used interchangeably throughout.

signed into law, the Title IX of the Education Amendments of 1972, which read as follows: “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹⁰ Any institution or entity that receives federal funding, which includes over 5,000 postsecondary institutions, is bound by Title IX and, should they be found to not be in compliance, face potential fines and withholding of federal funds by the Office for Civil Rights (OCR) through Department of Education, the governmental entities responsible for enforcing Title IX.¹¹ The threat of withholding of federal funds is a toothless one, however, as those entities have never withheld federal funds from a postsecondary institution since the passage of Title IX.¹²

A. Alexander v. Yale University

When Title IX was originally enacted in 1972, the language was silent as to sexual assault and sexual harassment, which aligns with the legislation’s original intent outlined above. However, a Connecticut federal district court in 1977 brought sexual harassment to the forefront in the realm of Title IX.¹³ Five Yale female students alleged that they were sexually harassed by males employed by the university, which included but were not limited to unwelcomed sexual advances and a request by one professor in particular directed toward a female student whereby the student would receive an “A” grade “in exchange for her compliance with his sexual demands.”¹⁴ The university received complaints in connection with the alleged harassment but did not take any action.¹⁵ The court granted in favor of Yale University and thereby denied the relief requested by the five female Yale students – to implement a program for handling sexual harassment complaints.¹⁶ Despite that, it acknowledged that “it is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education.”¹⁷ Even though the court did not mandate it, Yale did implement

10. 20 U.S.C. § 1681(a) (2022).

11. *Title IX and Sex Discrimination*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (Aug. 20, 2021).

12. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,072 (May 19, 2020).

13. *Alexander v. Yale Univ.*, 459 F. Supp. 1 (D.Conn. 1977).

14. *Id.* at 3-4.

15. *Id.* at 4.

16. *Id.* at 7.

17. *Id.* at 4.

procedures to handle sexual harassment complaints in 1979.¹⁸ This led the Second Circuit, on appeal by the plaintiffs, to affirm the district court's holding because, among other reasons, the original relief that the plaintiffs sought was already granted.¹⁹

B. Cannon v. University of Chicago

While *Cannon v. University of Chicago*²⁰ did not involve sexual harassment, it still holds great significance in the realm of Title IX. The female plaintiff alleged that the University of Chicago denied her admission to the institution's medical school because of her gender, a Title IX violation.²¹ The Northern District Court of Illinois and Seventh Circuit Court of Appeals both concluded that, even if there is a Title IX violation, a private cause of action does not exist under the statute.²² In fact, the Court of Appeals found that the only remedy available under the statute was "termination of federal financial support for institutions violating" Title IX, as Congress had originally intended.²³ The Supreme Court disagreed and reversed the judgment of the Court of Appeals.²⁴ Since the Civil Rights Act of 1964 (Title VI), which served as the backdrop for Title IX, had been found to allow for a private cause of action in a Fifth Circuit Court of Appeals decision and never challenged thereafter and since "[b]oth statutes provide the same administrative mechanism for terminating federal financial support for institutions engaged in prohibited discrimination," among other reasons, the Court held that a private cause of action does, in fact, exist under Title IX.²⁵

C. 1981 OCR Policy Memo and 1988 OCR Pamphlet

The Office for Civil Rights (OCR) produced a pamphlet in September 1988, *Sexual Harassment: It's Not Academic*, which laid out a working definition of sexual harassment, as originally established in a 1981 policy memorandum produced by the OCR, and included a Questions and Answers section in

18. *Alexander v. Yale Univ.*, 631 F.2d 178, 184 (2d Cir. 1980).

19. *Id.* at 184, 186.

20. 441 U.S. 677 (1979).

21. *Id.* at 680.

22. *Id.* at 683.

23. *Id.* at 683-84.

24. *Id.* at 717.

25. *Id.* at 695-96.

connection with sexual harassment of students.²⁶ The OCR defined sexual harassment as follows: “[s]exual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.”²⁷ The pamphlet also re-established that sexual harassment of students constituted a Title IX violation, thereby vesting power with the Department of Education to investigate sexual harassment complaints under Title IX.²⁸ Thus, the 1981 policy memorandum marked the first time that the Department of Education identified sexual harassment as a Title IX violation.²⁹

D. Franklin v. Gwinnett County Public Schools

Up until this point in time, the only significant Supreme Court case specific to Title IX, at least relevant to this Article, was *Cannon v. University of Chicago*, which to reiterate found that there was a private cause of action available under Title IX.³⁰ In *Franklin v. Gwinnett County Public Schools*,³¹ Christine Franklin, a high school student at the time, alleged that Andrew Hill, a Gwinnett County School District coach and teacher, continually sexually harassed her, which began when she was a sophomore in high school.³²

Among other allegations, Franklin avers that Hill engaged her in sexually oriented conversations in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man . . . ; that Hill forcibly kissed her on the mouth in the school parking lot . . . ; that he telephoned her at her home and asked if she would meet him socially . . . ; and that, on three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse

26. Margaret Spellings & Stephanie Monroe, Sec’y of U.S. Dep’t of Educ. & Assistant Sec’y of Off. for Civ. Rts., *Sexual Harassment: It’s Not Academic*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Sept. 1988), <https://files.eric.ed.gov/fulltext/ED504206.pdf>.

27. *Id.*

28. *Id.*

29. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,394 (proposed July 12, 2022).

30. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 683-84 (1979).

31. 503 U.S. 60 (1992).

32. *Id.* at 63.

Franklin, and took her to a private office where he subjected her to coercive intercourse.³³

The district court held that monetary damages are not available under Title IX, so it dismissed Franklin's complaint, and the Eleventh Circuit Court of Appeals affirmed that court's decision.³⁴ The Supreme Court, however, held that monetary damages are available under Title IX because, among other reasons, "federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."³⁵

E. The Sexual Harassment Guidance 1997

The *Sexual Harassment Guidance 1997*, provided by the OCR under then-President Bill Clinton, established two kinds of sexual harassment, quid pro quo harassment and hostile environment sexual harassment.³⁶ Quid pro quo harassment occurs when a school employee offers a student "participation in an education program or activity" or a better grade in an educational course in exchange for a sexual favor by the student.³⁷ Hostile environment sexual harassment occurs when a school employee or a student engages in "[s]exually harassing conduct . . . that is sufficiently severe, persistent, *or* pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."³⁸ The Guidance also established liability standards for situations in which the alleged harassment was committed by a school employee against a student and for situations in which the alleged harassment was committed by a student against another student.³⁹

As to the former, an institution "will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue."⁴⁰ In addition, an institution will be found liable for hostile environment sexual harassment

33. *Id.* (citations omitted).

34. *Id.* at 64.

35. *Id.* at 71.

36. *Sexual Harassment Guidance 1997*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> (Jan. 10, 2020).

37. *Id.*

38. *Id.* (emphasis added).

39. *Id.*

40. *Id.*

if the employee—(1) acted with apparent authority (i.e., because of the school’s conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority); or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.⁴¹

As to the latter, an institution will be held liable “if its students sexually harass other students if (i) a hostile environment exists in the school’s programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.”⁴²

The Guidance also established that schools are required to have procedures in place to receive and resolve students’ complaints of sex discrimination, including sexual harassment, and are required to publish policies against sex discrimination.⁴³ If not, then the school would be in violation of Title IX.⁴⁴ However, the Guidance did not require institutions to implement separate procedures specific to sexual harassment.⁴⁵ Regardless, it did not outline any bright-line procedures that institutions must follow, but rather, outlined several elements that they can utilize when determining whether they have prompt and equitable procedures in place.⁴⁶ Specifically, a school’s procedure should: (1) provide notice to the parties of the procedure, including but not limited to students and school employees; (2) utilize the procedure when a sexual harassment complaint is filed; (3) investigate sexual harassment complaints in an adequate, reliable, and impartial manner; (4) establish timeframes for handling the complaint; (5) provide notice of the complaint’s outcome to the interested parties; and (6) ensure that the school will take the necessary precautions to avoid reoccurring harassment “and to correct its discriminatory effects on the complainant and others, if appropriate.”⁴⁷

Notwithstanding that, the Guidance acknowledged that the school’s procedure can include an informal process to adjudicate sexual harassment complaints if agreed to by the accused and the accuser.⁴⁸ However, the Guidance cautioned that the accuser should not be required to resolve the complaint

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

directly with the accused.⁴⁹ “In some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis.”⁵⁰ Finally, the Guidance required that schools hire at least one individual to oversee all of the school’s Title IX responsibilities, what is now formally known as a Title IX coordinator.⁵¹

F. Gebser v. Lago Vista Independent School District

In *Gebser v. Lago Vista Independent School District*,⁵² Alida Gebser, a student in the Lago Vista Independent School District, and Frank Waldrop, a teacher at Lago Vista’s high school, began having sexual intercourse in the spring of 1992, when Gebser was a high school freshman, which continued throughout the summer of 1992 and carried over to the 1992-1993 school year.⁵³ Gebser did not report her sexual relationship with Waldrop to school officials.⁵⁴ Parents of two other students met with the high school principal and complained that Waldrop made inappropriate comments in class.⁵⁵ While the principal advised a guidance counselor about meeting with the parents in connection with Waldrop’s comments, he did not report it to the district’s Title IX coordinator.⁵⁶ In January 1993, police arrested Waldrop after discovering that he was engaging in sexual intercourse with Gebser.⁵⁷ As a result, the district terminated Waldrop’s employment contract.⁵⁸ Throughout the aforementioned period of events, the district did not have an official procedure for handling sexual harassment complaints or a policy against sexual harassment.⁵⁹

Gebser filed suit against Waldrop and the district under Title IX and state law and requested punitive and compensatory damages.⁶⁰ The Western District of Texas ruled in favor of the district on all claims.⁶¹ Specific to the Title IX claim, the court found that Title IX “‘was enacted to counter *policies* of discrimination . . . in federally funded education programs,’ and that ‘[o]nly if

49. *Id.*

50. *Id.*

51. *Id.*

52. 524 U.S. 274 (1998).

53. *Id.* at 277-78.

54. *Id.* at 278.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998).

59. *Id.*

60. *Id.* at 278-79.

61. *Id.* at 279.

school administrators have some type of notice of the gender discrimination and fail to respond in good faith can the discrimination be interpreted as a *policy* of the school district.”⁶² The parents’ meeting with, and complaint to, the principal in connection with Waldrop did not qualify, the court ruled, as notice.⁶³ Gebser appealed as to the Title IX claim only, and the Fifth Circuit Court of Appeals affirmed the lower court’s decision.⁶⁴

In affirming the Fifth Circuit’s ruling, the court noted that Title IX dictates that the institution should only be liable for its own actions, rather than the actions of its students and/or employees, and also dictates that monetary damages can only be awarded if the institution receives actual notice of sex discrimination and is able to promulgate corrective measures. Thus, it held that a plaintiff that was sexually harassed can recover monetary damages in a private cause of action under Title IX, but only if a school official with the requisite “authority to address the alleged discrimination and to institute corrective measures on the [school’s] behalf ha[d] actual knowledge of the discrimination” and did not provide an adequate response thereto, the latter of which the Court defined as deliberate indifference.⁶⁵ The court found that the only school official with the requisite authority that had knowledge of the discrimination was the high school principal and, even then, the information he received was a complaint of inappropriate comments made by Waldrop, which were not indicative of any potential sexual relationship with a student nor could it have alerted the principal to the possibility of such.⁶⁶

Important to this Article is that *Gebser* acknowledged that the Department of Education holds the requisite authority to investigate sexual harassment complaints.⁶⁷

G. Davis v. Monroe County Board of Education

In *Davis v. Monroe County Board of Education*,⁶⁸ LaShonda Davis, a fifth grade student at Hubbard Elementary in Georgia, was allegedly sexual harassed by one of her classmates several times over a span of five months (December 1992 to mid-April 1993).⁶⁹ Davis reported the first two incidents of alleged

62. *Id.*

63. *Id.*

64. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 279 (1998).

65. *Id.* at 290.

66. *Id.* at 291.

67. *Id.* at 292.

68. 526 U.S. 629 (1999).

69. *Id.* at 633-34.

sexual harassment to her classroom teacher, Diane Fort;⁷⁰ reported the third incident to her gym teacher, Whit Maples;⁷¹ reported the fourth incident to another classroom teacher, Joyce Pippin;⁷² reported the fifth incident to Maples and Pippin;⁷³ and reported the sixth incident to Fort.⁷⁴ While the perpetrator pled guilty to sexual battery in May 1993, the school did not take against disciplinary action against him as alleged in the complaint.⁷⁵ Davis' mother, on behalf of Davis, filed suit in the Middle District of Georgia against the school board, the superintendent, and the school's principal, alleging that the school board violated Title IX, and requested compensatory and punitive damages.⁷⁶

The district court granted the defendants' motion to dismiss because only schools receiving federal funding can be found liable in private causes of action under Title IX and the only way they can be found liable is if there was any involvement in the harassment by the school or a school employee.⁷⁷ The Eleventh Circuit Court of Appeals affirmed the district court's decision, holding that a private cause of action does not exist under Title IX in connection with student-on-student harassment because "Title IX . . . provides recipients with notice that they must stop their employees from engaging in discriminatory conduct, but the statute fails to provide a recipient with sufficient notice of a duty to prevent student-on-student harassment."⁷⁸

The Supreme Court reversed and remanded, concluding that schools are liable under Title IX in a private cause of action pertaining to student-on-student harassment if they have actual knowledge of the harassment and act deliberately indifferent to the harassment, of which 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."⁷⁹

H. 2001 Revised Sexual Harassment Guidance

Given that the Supreme Court decided two highly influential cases specific to Title IX, the OCR published a revised version of the 1997 Guidance in 2001, *Revised Sexual Harassment Guidance: Harassment of Students by School*

70. *Id.*

71. *Id.* at 634.

72. *Id.*

73. *Id.*

74. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 634 (1999).

75. *Id.* at 634-35.

76. *Id.* at 635-36.

77. *Id.* at 636.

78. *Id.* at 637.

79. *Id.* at 650.

*Employees, Other Students, or Third Parties.*⁸⁰ Altogether, the Revised Guidance largely reiterated the information contained in the 1997 Guidance. Further, the Revised Guidance explicitly pointed out that the liability standards established in the aforementioned Supreme Court cases are strictly confined to private causes of action for monetary damages under Title IX and, therefore, are distinct from the standards that the OCR utilizes in its investigations and enforcement of Title IX.⁸¹ Accordingly, they did not revise the definition of hostile environment sexual harassment to match the definition established in *Davis*, but rather kept intact the definition established in the 1997 guidance.⁸² Moreover, the 2001 Revised Guidance identified eight factors in evaluating hostile environment sexual harassment: (1) “[t]he degree to which the conduct affect[] one or more students’ education[;]” (2) “[t]he type, frequency, and duration of the conduct[;]” (3) “[t]he identity of and relationship between the alleged harasser and the subject or subjects of the harassment[;]” (4) “[t]he number of individuals involved[;]” (5) “[t]he age and sex of the alleged harasser and subject or subjects of the harassment[;]” (6) “[t]he size of the school, location of the incidents, and context in which they occurred[;]” (7) “[o]ther incidents at the school[;]” and (8) “[i]ncidents of gender-based, but nonsexual harassment.”⁸³

I. 2003 OCR Letter to Georgetown University

Throughout the pieces of guidance that the OCR disseminated up until this point in time related to Title IX and sexual harassment, the OCR required that schools receiving federal funding must have grievance procedures in place that deal with sex discrimination, including sexual harassment, and policies against sex discrimination. Yet, the OCR never formally established a formal legal standard that schools should utilize when adjudicating Title IX complaints. In October 2003, in connection with an OCR complaint involving Georgetown University, Howard Kallem, the Chief Attorney for the D.C. Enforcement Office of the OCR, sent a letter to the university and indicated that the university must use a preponderance of the evidence standard when resolving allegations

80. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter *Revised Guidance*].

81. *Id.* at ii.

82. *Id.* at v-vi.

83. *Id.* at 5-6.

of sexual harassment under Title IX in order to be compliant with the statute.⁸⁴ (Preponderance of the evidence burden will be met if proven “there is a greater than 50% chance that the claim is true.”)⁸⁵ Georgetown was applying the “clear and convincing” standard, meaning “the evidence is highly and substantially more likely to be true than untrue,” a higher standard relative to the preponderance of the evidence standard.⁸⁶ The Office relied upon a 1995 Resolution Letter and Agreement with Evergreen State College to conclude that the preponderance of the evidence standard must be used as to not run afoul of Title IX.⁸⁷ It is unclear how and why the OCR arrived at the conclusion that institutions must apply the preponderance of evidence, especially given that “other resolution letters from this same period envisioned sexual assault as a crime for which police, rather than universities, would have responsibility to investigate.”⁸⁸

Notwithstanding that, in effect, the OCR lowered the standard for institutions in assessing guilt in a Title IX investigation. Moreover, it is reasonable to infer that schools were not all applying the same standard – some, like Georgetown, may have been applying the “clear and convincing” standard, while others may have been applying the preponderance of the evidence standard – thus leading to inconsistent results across college campuses.

J. Simpson v. University of Colorado-Boulder

In the preceding subsections, the cases dissected did not feature NCAA student-athletes involved in Title IX sexual harassment/sexual assault cases. However, *Simpson v. University of Colorado-Boulder*⁸⁹ (CU) specifically dealt with NCAA student-athletes (and high school recruits) involved in a Title IX sexual assault case. The facts are as follows: Lisa Simpson and Anne Gilmore alleged that they were sexually assaulted by members of the football team and

84. Letter from Howard Kallem, D.C. Enforcement Off., Off. for Civ. Rts., to Jane E. Genster, Vice President and Gen. Counsel, Georgetown Univ., *Re: OCR Complaint No. 11-03-2017*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Oct. 16, 2003), https://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf; see KC Johnson & Stuart Taylor, *The Path to Obama’s ‘Dear Colleague’ Letter*, WASH. POST (Jan. 31, 2017, 8:34 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/>.

85. *Preponderance of the Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence (last visited Dec. 30, 2022).

86. *Clear and Convincing Evidence*, LEGAL INFO INST., https://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Dec. 30, 2022).

87. Letter from Howard Kallem, *supra* note 84.

88. Johnson & Taylor, *supra* note 84.

89. 500 F.3d 1170 (10th Cir. 2007).

high school students that were on a recruiting visit in December 2001.⁹⁰ The incident occurred at Simpson's apartment.⁹¹ As a whole, the members of the football team responsible for hosting recruits, as well as female "Ambassadors," were tasked with showing them "a good time."⁹² That entailed, at least specific to this incident, that "some of the recruits who came to Ms. Simpson's apartment had been promised an opportunity to have sex."⁹³ CU football players discussed with a female athletics tutor about hanging out together with her, Gilmore and Simpson on the night of December seventh.⁹⁴ While the tutor asked Simpson if four players could come over to her apartment, roughly twenty football players and recruits showed up before midnight, though some left shortly after arriving.⁹⁵

Within an hour or so Ms. Simpson, who was intoxicated, went to her bedroom to sleep. She awoke later to find two naked men removing her clothes. The door was locked. She was then sexually assaulted, both orally and vaginally, by recruits and players surrounding her bed. In the same room at the same time, two players and a third man, who was either a player or a recruit, were sexually engaged with Ms. Gilmore, who was too intoxicated to consent.⁹⁶

Simpson filed a lawsuit in Colorado state court in December 2002, which was removed to federal court by the University, whereas Gilmore filed a lawsuit in federal court in December 2003.⁹⁷ Both lawsuits were consolidated in January 2004, alleging that the university violated Title IX because it "knew of the risk of sexual harassment of female CU students in connection with the CU football recruiting program and that it failed to take any action to prevent further harassment before their assaults."⁹⁸

A federal district court granted the university's motion for summary judgment and held that the university did not have actual notice that members of the football team and high school recruits were sexually assaulting female

90. *Id.* at 1172.

91. *Id.* at 1173.

92. *Id.*

93. *Id.*

94. *Id.* at 1180.

95. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1180 (10th Cir. 2007).

96. *Id.*

97. *Id.* at 1174.

98. *Id.*

students before the at-issue assault took place nor did the university act deliberately indifferent to the at-issue assault.⁹⁹ The Tenth Circuit Court of Appeals disagreed, reversing and remanding.¹⁰⁰ The court relied on the framework by *Gebser* and *Davis*, but it noted that those cases could not be the guiding principle(s) because, while the incidents that took place in those cases involved sexual harassment on school grounds, this case was distinct in that “the assaults arose out of an official school program, the recruitment of high-school athletes.”¹⁰¹ Moreover, those cases did not involve the institutions outwardly encouraging the harassment, whereas Simpson and Gilmore alleged that “CU sanctioned, supported, even funded, a program (showing recruits a ‘good time’) that, without proper control, would encourage young men to engage in opprobrious acts.”¹⁰² Thus, the court found that an institution would be found in violation of Title IX “when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient.”¹⁰³

The court pointed to several prior examples of alleged sexual assault incidents involving football players and high school recruits as the accuser, including one in 1997, one in 1999 or 2000, and one in 2001.¹⁰⁴ Moreover, it found that head coach Gary Barnett knew that sexual assaults had occurred during recruiting visits and “had general knowledge of the serious risk of sexual harassment and assault during . . . recruiting efforts,” but did nothing to change the culture or the policy for recruiting visits.¹⁰⁵ Thus, the court held that the university acted deliberately indifferent to the need for an enhanced school policy related to recruiting visits.¹⁰⁶ Simpson and Gilmore settled with the university for \$2.5 million and \$350,000, respectively.¹⁰⁷

99. *Id.*

100. *Id.* at 1185.

101. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1174-75 (10th Cir. 2007).

102. *Id.* at 1177.

103. *Id.* at 1178.

104. *Id.* at 1181-83.

105. *Id.* at 1184.

106. *Id.* at 1184-85.

107. Howard Pankratz, *\$2.8 Million Deal in CU Rape Case*, DENVER POST (Jan. 31, 2017, 10:21 PM), <https://www.denverpost.com/2007/12/05/2-8-million-deal-in-cu-rape-case/>.

II. TIMELINE OF SIGNIFICANT EVENTS THAT SHAPED TITLE IX IN REGARDS TO SEXUAL HARASSMENT (2011 – PRESENT)

A. 2011 Dear Colleague Letter

The 2011 Dear Colleague Letter, published by President Obama’s OCR, represented a monumental shift in how the OCR directed schools to investigate and adjudicate sexual violence complaints, in large part due to the prevalence of sexual violence. The Dear Colleague Letter, citing a National Institute of Justice report, noted that one in every five women in college were victims of completed or attempted sexual assault, and roughly six percent of men in college were victims of completed or attempted sexual assault.¹⁰⁸ Accordingly, the OCR wanted to make sexual violence a national issue.¹⁰⁹ “The Supreme Court had spoken on this issue, saying that students need to be made safe and that Title IX did cover sexual assault. But the message hadn’t sufficiently taken hold,” Catherine E. Lhamon, former OCR Assistant Secretary, told reporters.¹¹⁰

The 2011 Dear Colleague Letter broadly defined sexual harassment, defining it as “unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX.”¹¹¹ It also acknowledged that schools may have an obligation to promptly investigate a sexual assault complaint filed by the accuser, regardless of whether it occurred on campus grounds.¹¹² Further, schools must promptly investigate a potential sexual assault incident if they know of the potential incident or “reasonably should know.”¹¹³ The Dear Colleague Letter believed that an institution’s investigation should be wholly independent of a police investigation.¹¹⁴ Thus, in order to promptly and equitably resolve sex discrimination complaints, the Dear Colleague Letter recommended that schools should not delay their Title IX investigation until a criminal investigation or proceeding has concluded.¹¹⁵ And even if a school’s

108. Russlynn Ali, Assistant Sec’y for Civ. Rts., *Dear Colleague Letter: Sexual Violence (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

109. Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017), <https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/>.

110. *Id.*

111. Ali, *supra* note 108, at 3.

112. *Id.* at 4.

113. *Id.*

114. *Id.*

115. *Id.* at 10.

initial fact-finding in its Title IX investigation is halted due to law enforcement gathering its own evidence, the Dear Colleague Letter required that schools immediately resume its fact-finding once notified by law enforcement that it has concluded gathering evidence.¹¹⁶ The Dear Colleague Letter also cautioned against relying on police investigations or reports because they “are not determinative of whether sexual harassment or violence violates Title IX.”¹¹⁷ Further, the Dear Colleague Letter suggested that grievance procedures specify a time frame for adjudicating sexual harassment complaints.¹¹⁸ Thus, as additional proof that the OCR wanted schools to promptly and equitably resolve sex discrimination complaints, with an emphasis on promptly, the Dear Colleague Letter pointed out that “a typical investigation takes approximately 60 calendar days following receipt of the complaint.”¹¹⁹

The Dear Colleague Letter also established, as it did in the OCR letter given to Georgetown University in 2003,¹²⁰ that schools must use the preponderance of the evidence standard in order for the grievance procedures to align with Title IX.¹²¹ In addition, while the 2001 Revised Guidance simply pointed out that many schools allow for an appeal of the findings tied to a Title IX investigation as part of their grievance procedures, the Dear Colleague Letter took it one step further and suggested that schools adopt an appeals process as part of their grievance procedures. If a school opts to adopt an appeals process, the Dear Colleague Letter required that both parties have the opportunity to appeal.¹²² For example, then, if the accused was found not guilty at the conclusion of a Title IX investigation and hearing, the accuser had the opportunity to appeal that decision, which seems to present double jeopardy concerns.¹²³

On the topic of constitutional rights, the 2001 Revised Guidance featured an entire section dedicated to the First Amendment, requiring that the constitutional rights under the First Amendment be considered in alleged sexual harassment cases that involve speech or expression.¹²⁴ The 2001 Revised Guidance also required that schools “formulate, interpret, and apply its rules so as to protect academic freedom and free speech rights.”¹²⁵ The 2001 Revised

116. *Id.*

117. *Id.*

118. *Id.* at 12.

119. *Id.*

120. Letter from Howard Kallem, *supra* note 84.

121. Ali, *supra* note 108, at 11.

122. *Id.* at 12.

123. Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U J. LEGIS. & PUB. POL’Y 49, 78 (2019).

124. *Revised Guidance*, *supra* note 80, at 22-23.

125. *Id.* at 22.

Guidance also featured an entire section dedicated to the due process rights of the accused.¹²⁶ However, the Dear Colleague Letter was silent as to the First Amendment of the accused.¹²⁷

The Dear Colleague Letter also implicitly called for more of an informal Title IX hearing involving the accused and accuser.¹²⁸ That is, it strongly discouraged cross-examination, which the Supreme Court once described as the “greatest legal engine ever invented for the discovery of truth,”¹²⁹ and live hearings.¹³⁰ The reasoning was that if the accused was able to question the accuser, the accuser may be traumatized or intimidated, which could then potentially lead to a hostile environment.¹³¹ As a matter of public policy, the Dear Colleague Letter identified steps to combat sexual assault, which included education and prevention.¹³² More specifically,

[t]he education programs . . . should include information aimed at encouraging students to report incidents of sexual violence to the appropriate school and law enforcement authorities [S]chools should consider whether their disciplinary policies have a chilling effect on victims’ or other students’ reporting of sexual violence offenses.¹³³

Finally, one of the many calls to action that the Dear Colleague Letter entailed was for schools to avoid, at all costs, creating a hostile environment for the accuser, which is why the OCR advised that schools not, for example, “remove [the accuser] from classes or housing while allowing [the accused] to remain.”¹³⁴

Altogether, the 2011 Dear Colleague Letter and, the overall commitment by the OCR to combat sexual violence, was praised by sexual assault advocates.¹³⁵ More specifically, the National Women’s Law Center argued that the Dear

126. *Id.*

127. *See generally* Ali, *supra* note 108.

128. *Id.* at 8.

129. Harris & Johnson, *supra* note 123, at 59.

130. R. Shep. Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>.

131. Ali, *supra* note 108, at 12.

132. *Id.* at 14-15.

133. *Id.* at 15.

134. *Id.* at 16.

135. *See* Melnick, *supra* note 130.

Colleague Letter “spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.”¹³⁶ Conversely, Nadine Strossen, a former American Civil Liberties Union (ACLU) president, opined in a 2015 interview that the guidelines brought forth by the 2011 Dear Colleague Letter were in violation of several civil liberties and “actually [do] more harm than good to gender justice, not to mention to free speech.”¹³⁷ Several critics also categorized the new legal environment to resolve Title IX complaints that was created by the 2011 Dear Colleague Letter as “kangaroo courts.”¹³⁸ While not necessarily praise or criticism, it is important to point out the frequency of Title IX lawsuits after the establishment of the Dear Colleague Letter. From April 2011 until June 2019, there were nearly 350 federal Title IX lawsuits and at least 150 state Title IX lawsuits.¹³⁹

1. 2014 Guidance

The OCR followed up the 2011 Dear Colleague Letter with further guidance in 2014, which largely reiterated the information contained in the 2011 Dear Colleague Letter.¹⁴⁰ As evidence that the 2011 Dear Colleague Letter served as the Obama’s Administration vehicle to more aggressively hold schools accountable for not equitably handling and resolving sexual harassment complaints, in 2014 they released a list of fifty-five colleges that had active sexual violence investigations with the OCR.¹⁴¹ Days prior to releasing that list, the White House Task Force to Protect Students from Sexual Assault issued a report that outlined ways that colleges can curb sexual violence, which included

136. *Sign-On Letter Supporting Title IX Guidance & Enforcement*, NAT’L WOMEN’S L. CTR. (July 13, 2016), https://nwlc.org/wp-content/uploads/2016/07/2016.7.13-Title-IX-Support-Sign-On-Letter.final_.pdf.

137. *Nadine Strossen: “Free Expression: An Endangered Species on Campus?” Transcript*, HARV. KENNEDY SCH. SHORENSTEIN CTR. ON MEDIA, POL. & PUB. POL’Y (Nov. 5, 2015), <https://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript/>.

138. Caleb Kruckenberg, *Kruckenberg: Accused Means Guilty in College Kangaroo Courts*, BOS. HERALD (Sept. 27, 2021, 12:35 AM), <https://www.bostonherald.com/2021/09/27/kruckenberg-accused-means-guilty-in-college-kangaroo-courts/>; see also Glenn C. Altschuler & David Wippman, *Getting off the Title IX Roller Coaster*, HILL (July 10, 2022, 8:30 AM), <https://thehill.com/opinion/education/3551262-getting-off-the-title-ix-roller-coaster/>.

139. Harris & Johnson, *supra* note 123, at 64.

140. Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., *Questions and Answers on Title IX and Sexual Violence (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

141. Nick Anderson, *55 Colleges Under Title IX Probe for Handling of Sexual Violence and Harassment Claims*, WASH. POST (May 1, 2014), https://www.washingtonpost.com/local/education/federal-government-releases-list-of-55-colleges-universities-under-title-ix-investigations-over-handling-of-sexual-violence/2014/05/01/e0a74810-d13b-11e3-937f-d3026234b51c_story.html.

conducting surveys, promoting “bystander intervention,” and utilizing trained victim advocates to provide the necessary support.¹⁴²

2. 2020 Final Rule

Roughly eight months after taking office, President Trump and his OCR published its own Dear Colleague Letter in September 2017, rescinding the 2011 Dear Colleague Letter and the 2014 Questions and Answer Letter produced by the Obama Administration.¹⁴³ In sum, the 2017 Dear Colleague Letter argued that the mandates promulgated by the Obama Administration deprived the rights of the accused and accuser.¹⁴⁴ Moreover, it pointed out that the 2011 Dear Colleague Letter and the 2014 Questions and Answers came to be “without affording notice and the opportunity for public comment.”¹⁴⁵ The OCR established that the 2001 Revised Guidelines would now serve as a guiding post for schools in handling sexual harassment complaints.

In 2020, the Trump Administration enacted new regulations related to sexual harassment under Title IX that became legally binding on schools that receive federal funding.¹⁴⁶ The prior Title IX documentation produced by the OCR was not legally binding. Similar to the 2011 Dear Colleague Letter, the Final Rule required that the institution offer supportive measures to the accuser and explain to them the process for filing a formal complaint.¹⁴⁷ The institution also must follow a grievance process “that complies with the Final Rule,” detailing a number of requirements that the process must entail.¹⁴⁸ As to that grievance process, an institution is able to offer an informal resolution process, “such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal resolution.”¹⁴⁹ However, as one might imagine, the differences in the Final Rule and the 2011 Dear Colleague

142. Nick Anderson & Katie Zezima, *White House Issues Report on Steps to Prevent Sexual Assaults on College Campuses*, WASH. POST (Apr. 29, 2014), https://www.washingtonpost.com/local/education/white-house-issues-report-on-steps-to-prevent-sexual-assault-at-college-campuses/2014/04/28/0ebf1e22-cf1f-11e3-b812-0c92213941f4_story.html?tid=a_inl_manual.

143. Candice Jackson, Acting Assistant Sec’y for Civ. Rts., *Dear Colleague Letter (Rescinded)*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. 1 (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

144. *Id.* at 1-2.

145. *Id.*

146. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,029 (May 19, 2020).

147. *Summary of Major Provisions of the Department of Education’s Title IX Final Rule*, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. 2-3, <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf> (last visited Dec. 30, 2022).

148. *Id.* at 3.

149. *Id.* at 8.

Letter are stark, a handful of which are worth discussing in further detail. First, the Final Rule relied more heavily on the framework provided by the Supreme Court in *Gerber* and *Davis*, in contrast to the 2011 Dear Colleague Letter, to properly address how schools should handle sexual harassment complaints under Title IX. More specifically, it laid out the three-part framework established in those Supreme Court cases: “a definition of actionable sexual harassment, the school’s actual knowledge, and the school’s deliberate indifference.”¹⁵⁰ The school’s actual knowledge is triggered, thereby forcing them to conduct an investigation, when the Title IX coordinator or a campus official that “has authority to institute corrective measures on behalf of the recipient” receives notice of sexual harassment.¹⁵¹ Conversely, the Dear Colleague Letter required that institutions take immediate action when it “knows or reasonably should know about student-on-student harassment that creates a hostile environment.”¹⁵²

Second, the two documents produced different definitions of sexual harassment. As mentioned previously, the 2011 Dear Colleague defined sexual harassment as “unwelcome conduct of a sexual nature.”¹⁵³ The Final Rule, meanwhile, in alignment with *Davis*, defined sexual harassment if it met one or more of the following three elements:

- (1) an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (2) unwelcome conduct that a reasonable person would determine is “so severe, pervasive, and objectively offensive” that it effectively denies a person equal access to education; or (3) “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), “domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).¹⁵⁴

150. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,032.

151. *Id.* at 30,033 n.59.

152. Ali, *supra* note 108, at 4.

153. *Id.* at 3.

154. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,033 n.57 (May 19, 2020); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,390 (proposed July 12, 2022).

Additionally, whereas the 2011 Dear Colleague Letter mandated that institutions use the preponderance of the evidence standard, the Final Rule allowed institutions to either use that standard or use the clear and convincing standard.¹⁵⁵ The 2011 Dear Colleague Letter also called for a “single investigator” model, meaning that the Title IX coordinator acted as both the investigator and the decider of the ultimate outcome.¹⁵⁶ However, the Final Rule prohibited that model, establishing that the final decision-maker must be someone other than the Title IX coordinator or investigator.¹⁵⁷ As indicated previously, the 2011 Dear Colleague Letter allowed the right for both parties to appeal the final decision. The same was true for the Final Rule, but they specified that each party may only appeal “on the following bases: procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.”¹⁵⁸

And while the 2011 Dear Colleague Letter discouraged live hearings and cross-examination, the 2020 regulations required both.¹⁵⁹ Specifically, the accused and accuser could either hire their own “advisor” or, if they did not, then the institution “must provide, without fee or charge to that party, an advisor of the school’s choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party.”¹⁶⁰ Further, it required for the decision-maker to not rely on statements not subject to cross-examination when making his or her final decision on the merits.¹⁶¹ However, a federal court later ruled that provision was arbitrary and capricious under the Administrative Procedure Act.¹⁶² Notwithstanding that, the live hearing could either be held in person or, “at the school’s discretion,” virtually.¹⁶³ Finally, while the 2011 Dear Colleague Letter did not contain any sections dedicated to First Amendment

155. *Summary of Major Provisions of the Department of Education’s Title IX Final Rule*, *supra* note 147, at 5.

156. Melnick, *supra* note 130.

157. *Summary of Major Provisions of the Department of Education’s Title IX Final Rule*, *supra* note 147, at 8.

158. *Id.*

159. *Id.* at 6.

160. *Id.* at 7.

161. *Id.*

162. Daniel Masakayan & Amy Morrissey Turk, *Title IX Updates: From Court Decisions to Q&As From the Office For Civil Rights*, JDSUPRA (Sept. 1, 2021), <https://www.jdsupra.com/legalnews/title-ix-updates-from-court-decisions-4708128/>.

163. *Summary of Major Provisions of the Department of Education’s Title IX Final Rule*, *supra* note 147, at 7.

rights, the Final Rule specified that students “should enjoy free speech and academic freedom protections, even when speech or expression is offensive.”¹⁶⁴

Similar to the 2011 Dear Colleague Letter, the 2020 regulations received praise and criticism from the masses. The most prominent praise of the 2020 regulation was increased due process rights for the accused, an aspect of the 2011 Dear Colleague Letter that was severely lacking, while demanding impartiality for those involved in handling sexual assault complaints.¹⁶⁵ In contrast, University of Michigan sociology professors Sandra R. Levitsky and Elizabeth A. Armstrong, as well as doctoral student Kamaria Porter, criticized the 2020 regulations by highlighting evidence that showed that cross-examination “can re-traumatize survivors and further deter survivors from reporting sexual misconduct.”¹⁶⁶ Nicole Bedera, a sociologist, argued that the 2020 regulation’s definition of sexual harassment would limit the number of Title IX complaints brought forth by the accuser because “almost no sexual harassment is considered objectively offensive.”¹⁶⁷ Moreover, she argued that the 2020 regulations could have a harmful effect on accusers because they will constantly be worried about avoiding the accused, which could force them to drop classes, move to a different dorm, or avoid certain areas on campus altogether.¹⁶⁸ Finally, Sage Carson, an official with “Know Your IX,” a Title IX advocacy group, explained in 2021 that the move by the Trump Administration to enhance due process rights for the accused drastically tilted the pendulum in favor of the accused, thereby harming the accusers in the process.¹⁶⁹ “Right now, what we’re hearing from survivors is ‘I don’t want to go through that process, the process is very scary to me, and those rules are very intimidating.’”¹⁷⁰

The 2020 regulations also affected college athletics by limiting the extent to which coaches were able to discipline student-athletes accused of sexual

164. *Id.* at 1.

165. Robert Shibley, *A Victory for Campus Justice*, WALL ST. J. (May 6, 2020, 7:12 PM), <https://www.wsj.com/articles/a-victory-for-campus-justice-11588806738>.

166. Sandra R. Levitsky et al., *Opinion: Why the Cross-Examination Requirement in Campus Sexual Assault Cases is Irresponsible*, WASH. POST (May 7, 2020, 2:04 PM), <https://www.washingtonpost.com/opinions/2020/05/07/what-education-department-gets-wrong-its-rules-campus-sexual-assault/>.

167. Nicole Bedera, *Trump’s New Rule Governing College Sex Assault is Nearly Impossible For Survivors to Use. That’s the Point*, TIME (May 14, 2020, 1:32 PM), <https://time.com/5836774/trump-new-title-ix-rules/>.

168. *Id.*

169. Tovia Smith, *Biden Begins Process to Undo Trump Administration’s Title IX Rules*, NPR (Mar. 10, 2021, 5:27 PM), <https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules>.

170. *Id.*

assault.¹⁷¹ In order to improve the due process rights for the accused, the 2020 regulations did not allow institutions to levy “disciplinary, punitive or unreasonably burdensome” penalties against the accused during a Title IX investigation, which included removing them from their sports team.¹⁷² Only if “the athlete poses an immediate threat to a person’s physical health or safety” could the team suspend the accused, a high burden to meet according to W. Scott Lewis, who is part of the Association of Title IX Administrators.¹⁷³ It is a tricky situation to navigate. On one hand, the school must afford the accused student-athlete proper due process in accordance with the 2020 regulations. Moreover, this specific provision does not allow for quick-snap suspensions until an investigation concludes, which is of benefit for the accused student-athlete because, as New York attorney Andrew Miltenberg, who has represented the interests of student-athletes in this space, told ESPN, “[a]thletes, as we know, have a very limited window. And if they lose part of that window in college, it’s, in many cases, devastating [B]eing suspended is usually the death knell.”¹⁷⁴ In contrast, it sends a poor, and frightening message, to the accuser that the accused is not only able to remain on campus, but also able to still compete on an athletics team.

3. President Biden’s Response to 2020 Final Rule

President Biden issued an executive order in March 2021 that called for reviewing the Title IX regulations promulgated by his predecessor within 100 days of the date of the executive order (March 8, 2021).¹⁷⁵ Fifteen months later, the Department of Education announced that comment submissions were open in connection with the Department’s proposed changes to Title IX regulations,¹⁷⁶ while officially releasing the proposed regulations, *Nondiscrimination on the Basis of Sex in Education Programs or Activities*

171. Paula Lavigne, *Why Critics Say a Trump-Era Title IX Rule Hurts Coaches’ Ability to Discipline Athletes Accused of Sexual Misconduct*, ESPN (Mar. 4, 2022), https://www.espn.com/college-sports/story/_/id/33405557/why-critics-say-trump-era-title-ix-rule-hurts-coaches-ability-discipline-athletes-accused-sexual-misconduct.

172. *Id.*

173. *Id.*

174. *Id.*

175. *Executive Order on Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, WHITE HOUSE (Mar. 8, 2021), <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/03/08/executive-order-on-guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including-sexual-orientation-or-gender-identity/>.

176. *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment (Archived)*, U.S. DEP’T OF EDUC. (June 23, 2022), <https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment>.

Receiving Federal Financial Assistance, in July 2022.¹⁷⁷ In short, the proposed regulations would do away with much of what was contained in the 2020 Final Rule.

For instance, the 2020 regulations required that the individual tasked with deciding the final outcome of the Title IX complaint must not be the same individual as the Title IX coordinator.¹⁷⁸ Moreover, the institution has the option of choosing between the clear and convincing evidence standard and the preponderance of evidence standard.¹⁷⁹ However, the proposed regulations would force institutions to revert back to using the single investigator model and also revert back to using the preponderance of evidence standard, unless the institution imposes the clear and convincing standard in similar types of on-campus proceedings.¹⁸⁰

It is . . . the Department's current view that the preponderance of the evidence is the standard of proof for complaints of sex discrimination that would best promote compliance with Title IX because it ensures that when a decisionmaker determines, based on evidence, that it is more likely than not that sex discrimination occurred in its program or activity, the recipient can take sufficient steps to deter the respondent from engaging in similar conduct and prevent future such violations. Use of a preponderance standard also equally balances the interests of the parties in the outcome of the proceedings by giving equal weight to the evidence of each party, and it begins proceedings without favoring the version of facts presented by either side.¹⁸¹

Further, the Final Rule required that institutions hold live hearings and allow for cross-examination in the same location or virtually, but the proposed regulations would not require cross-examination nor live hearings, rather leaving it up to the institution's discretion.¹⁸² While the Final Rule honed in on

177. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,390 (proposed July 12, 2022).

178. *Summary of Major Provisions of the Department of Education's Title IX Final Rule*, *supra* note 147, at 8.

179. *Id.* at 5.

180. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,483.

181. *Id.* at 41,485.

182. *Id.* at 41,461.

institutions responding to sexual harassment complaints in connection with alleged incidents that only occur on campus, the proposed regulations would expand the institution's responsibility by responding to sexual harassment complaints in connection with alleged incidents that not only occur on campus, but off campus and abroad as well.¹⁸³ If an alleged sexual assault did not take place on campus, then, under the Final Rule, the institution must dismiss the complaint.¹⁸⁴ The institution could also dismiss the complaint if the accused is no longer enrolled at, or employed by, the institution.¹⁸⁵ However, the proposed regulations would allow, but not mandate, an institution to dismiss the complaint because an institution "should not be required to determine whether the conduct alleged meets the definition of sex discrimination at the outset of a complaint," given that "in most cases, it will not be clear whether alleged conduct could constitute sex discrimination under Title IX."¹⁸⁶

The proposed regulations also expanded the definition of sexual harassment by covering all forms of sex-based harassment, not just sexual harassment, meaning that it would include harassment in connection with sexual orientation and gender identity.¹⁸⁷ In addition, one of the elements of the definition of sexual harassment in 2020 Final Rule was "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."¹⁸⁸ However, the proposed regulations would tweak that as follows: "unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment)."¹⁸⁹ The proposed regulations would also increase the amount of supportive measures and accommodations for the accuser.¹⁹⁰ Finally, specific to college athletics, the proposed regulations would keep intact the requirement

183. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,562 (proposed July 12, 2022).

184. *Summary of Major Provisions of the Department of Education's Title IX Final Rule*, *supra* note 147, at 3.

185. *Id.* at 6.

186. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,475.

187. *Id.* at 41,517, 41,528.

188. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,326, 30,033 n.57 (May 19, 2020).

189. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,410 (proposed July 12, 2022).

190. *Id.* at 41,421-22.

that coaches must not immediately suspend a student-athlete accused of sexual assault until the institution makes a final determination.¹⁹¹

Similar to the 2020 Final Rule, the proposed regulations received both praise and criticism. Patty Murray, a Democrat senator, exclaimed on Twitter that the proposed regulations “will help make campuses safer.”¹⁹² Cara Newlon, an attorney writing an opinion article for *The Hill*, acknowledged that the proposed regulations would restore due process rights for accusers while also “thread[ing] the needle of respecting all parties’ rights and education.”¹⁹³ Conversely, North Dakota Republican Senator Kevin Cramer and North Carolina Republican Senator Richard Burr issued a letter to the Department of Education, arguing that the proposed regulations minimizes due process rights for the accused and “encourages institutions to adopt processes that have either been struck down or been viewed skeptically by multiple courts.”¹⁹⁴ Sarah Parshall Perry, a senior legal fellow for the Edwin Meese III Center for Legal and Judicial Studies at The Heritage Foundation, separately argued that the proposed regulations would strip due process rights for the accused while also stripping free speech rights by expanding the definition of sex-based harassment.¹⁹⁵

III. INCIDENTS OF SEXUAL ASSAULT INVOLVING NCAA STUDENT ATHLETES AS THE ACCUSED

A 2018 study by ESPN’s *Outside the Lines* found that “[college athletes in] recent years were about three times more likely than other students to be accused of sexual misconduct or domestic violence in complaints made at Power [five]

191. Paula Lavigne, *Biden Administration Proposals Uphold Ban on Disciplining Athletes Accused of Sexual Misconduct, Punt Ruling on Transgender Athletes*, ESPN (June 23, 2022), https://www.espn.com/college-sports/story/_/id/34136092/biden-administration-upholds-ban-disciplining-athletes-accused-sexual-misconduct-punts-ruling-transgender-athletes.

192. Senator Patty Murray (@PattyMurray), TWITTER (June 23, 2022, 3:21 PM), <https://twitter.com/PattyMurray/status/1540067609487589378>.

193. Cara Newlon, *DeVos-Era Regulations Broke Campus Title IX Proceedings – Biden Rules Restore Due Process*, HILL (July 1, 2022), <https://thehill.com/opinion/education/3544158-devos-era-regulations-broke-campus-title-ix-proceedings-biden-rules-restore-due-process/>.

194. *Sen Cramer, Colleagues Oppose Biden Administration Flawed Title IX Proposal, Urge Extension of Public Comment Period*, KEVIN CRAMER: U.S. SEN. FOR N.D. (July 20, 2022), <https://www.cramer.senate.gov/news/press-releases/sen-cramer-colleagues-oppose-biden-admins-flawed-title-ix-proposal-urge-extension-of-public-comment-period>.

195. Sarah Parshall Perry, *Biden’s New Title IX Rule Guts Protections for Women and Girls. Here’s How to Fight It*, HERITAGE (July 18, 2022), <https://www.heritage.org/gender/commentary/bidens-new-title-ix-rule-guts-protections-women-and-girls-heres-how-fight-it>.

conference schools.”¹⁹⁶ More specifically, roughly six percent of the Title IX complaints identified a student-athlete as the accused.¹⁹⁷ To put that into context, student-athletes made up approximately two percent of the general student population, on average, at the universities polled from 2012 until 2018.¹⁹⁸ The Association of Title IX Administrators regularly handles external Title IX investigations and, according to its president in 2018, “of the roughly 400 external investigations his group completes each year, at least half involve allegations against athletes.”¹⁹⁹

Please note that the below examples are simply some of the most high-profile examples of sexual assault incidents, whereby a student-athlete is accused of sexual assault. Therefore, the list as a whole is not meant to be exhaustive.

A. University of Montana

Then-University of Montana quarterback Jordan Johnson met a female at a party on the Missoula, Montana, campus in February 2012.²⁰⁰ The two students watched a movie together the following night and engaged in sexual intercourse at the female’s house.²⁰¹ Johnson alleged that the female asked Johnson “if he had a condom.”²⁰² Johnson responded that he did not, which the female was okay with.²⁰³ Moreover, Johnson testified at the criminal trial that the female never resisted his sexual advances and, if she would have, then he would have stopped.²⁰⁴ The female alleged, in contrast, that it was not consensual as “Johnson flipped her over and raped her as she said again and again, ‘No, not tonight.’”²⁰⁵ Following the encounter, she texted her roommate and another

196. Paula Lavigne, *OTL: College Athletes Three Times More Likely to Be Named in Title IX Sexual Misconduct Complaints*, ESPN (Nov. 1, 2018, 2:47 AM), https://www.espn.com/espn/otl/story/_/id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints.

197. *Id.*

198. *Id.*

199. *Id.*

200. Lester Munson, *QB’s Trial Begins Amid Larger Scandal*, ESPN (Feb. 8, 2013, 4:45 PM), https://www.espn.com/espn/otl/story/_/id/8921202/university-montana-qb-rape-trial-begins-amid-larger-sex-assault-scandal-plaguing-missoula.

201. *Id.*

202. *Jordan Johnson’s Trial Begins*, ESPN (Feb. 8, 2013), https://www.espn.com/college-football/story/_/id/8930437/jordan-johnson-montana-grizzlies-rape-trial-begin.

203. Munson, *supra* note 200.

204. *Ex-Montana Quarterback Jordan Johnson Acquitted of Rape*, USA TODAY (Mar. 1, 2013, 9:29 PM), <https://www.usatoday.com/story/sports/ncaaf/bigsky/2013/03/01/montana-jordan-johnson-grizzlies-rape-trial/1958193/>.

205. Munson, *supra* note 200.

friend that she thought she was raped and went to get a medical evaluation the next morning.²⁰⁶ She also told that friend “that she didn’t want to report the rape because she ‘felt responsible.’”²⁰⁷ Six weeks later, she filed a police report in connection with the incident.²⁰⁸ The university football team dismissed Johnson from the team in July 2012 following one charge of sexual intercourse without consent.²⁰⁹ (It is important to note that the Department of Justice, in addition to investigating this case, was investigating several other sexual violence complaints on campus.)²¹⁰

After a twelve-day trial in early 2013, a Missoula County (MT) jury acquitted Johnson of one count of sexual intercourse without consent.²¹¹ The university initially expelled Johnson in late 2012 following a Title IX hearing, a decision that Johnson appealed and was later overturned by the university’s Dean of Students and the state’s Commissioner of Higher Education after his acquittal.²¹² He was then re-instated to the football team in March 2013.²¹³ Johnson filed suit against the University of Montana in connection with how they handled, or mishandled, the Title IX investigation stemming from the sexual assault complaint.²¹⁴ He alleged that his due process rights were violated and that the university engaged in sex discrimination.²¹⁵ Johnson received \$245,000 as part of the parties’ settlement in February 2016.²¹⁶

206. *Id.*

207. *Id.*

208. *Id.*

209. *QB Jordan Johnson Reinstated at Montana*, SPORTS ILLUSTRATED (Mar. 5, 2013), <https://www.si.com/nfl/2013/03/05/jordan-johnson-montana-reinstated>.

210. Dan Abrams, *Jordan Johnson Trial: Former University of Montana Grizzlies QB Faces Rape Charge*, ABC NEWS (Feb. 7, 2013, 10:32 PM), <https://abcnews.go.com/US/jordan-johnson-trial-university-montana-grizzlies-qb-faces/story?id=18436681>.

211. Gwen Florio, *Verdict Reached in Jordan Johnson Case*, 406 MT SPORTS (Feb. 7, 2017), https://406mtsports.com/college/big-sky-conference/university-of-montana/verdict-reached-in-jordan-johnsoncase/article_ca96da92-39fc-53d6-abc0-5b1cfd35c6eb.html; *Ex-Montana Quarterback Jordan Johnson Acquitted of Rape*, *supra* note 204.

212. *Jordan Johnson Awarded \$245,000 by Montana For Botched Investigation*, JUSTICE DENIED, Spring 2016, at 7, 7, http://justicedenied.org/issue/issue_63/6403_idb_cases_jd63.pdf; Dillion Kato, *Montana to Pay \$245k to Settle With Ex-Quarterback Over Rape Case*, 406 MT SPORTS (July 3, 2019), https://406mtsports.com/article_9cf22f43-4d99-5fcb-a9d1-6f03cdfb97ad.html.

213. *QB Jordan Johnson Reinstated at Montana*, *supra* note 209.

214. Kato, *supra* note 212.

215. *Id.*

216. *Id.*

B. Vanderbilt

On June 23, 2013, Brandon Vandenburg, a then-member of the Vanderbilt football team, met up with his then-girlfriend at a bar.²¹⁷ The female had four drinks, all given to her by Vandenburg, and the two went back to the female's apartment and then to Vandenburg's dorm by way of the female's car that Vandenburg drove.²¹⁸ The female was unconscious at this point due to the alcoholic drinks given to her by Vandenburg, so Vandenburg and Brandon Banks, Vandenburg's then-teammate, carried her out of the car and into Vandenburg's dorm room.²¹⁹ The two men were joined in doing so by two other then-teammates, Cory Batey and Jaborian McKenzie.²²⁰ There, Batey "penetrated her with his fingers. Banks touched her and took photos of her. Vandenburg and Batey both slapped her buttocks a few times to see if she was going to wake up. Batey also urinated on her."²²¹ McKenzie photographed and recorded what transpired, as did Vandenburg and Banks.²²² Banks also admitted to assaulting the female with a water bottle,²²³ which Vandenburg urged him to do,²²⁴ and inappropriately touching her.²²⁵ Vandenburg, in his criminal trial, was later identified by the prosecution as the "ringleader."²²⁶

In reviewing security footage in connection with an unrelated incident, members of the Vanderbilt housing staff witnessed the men dragging the female and entering Vandenburg's dorm room, which led them to give the footage to the police.²²⁷ Following an announcement by police on June 29 that they were investigating the acts that took place at Vandenburg's dorm room, the Vanderbilt football team dismissed all four players from the team and the

217. Bill Chappell, *Former Vanderbilt Football Players Found Guilty in Rape Case*, NPR (Jan. 27, 2015, 8:19 PM), <https://www.npr.org/sections/thetwo-way/2015/01/27/381999482/former-vanderbilt-football-players-found-guilty-in-rape-case>; Jessica Luther, *A Look at Complex Vanderbilt Rape Case That Left a Community Reeling*, SPORTS ILLUSTRATED (Feb. 9, 2015), <https://www.si.com/college/2015/02/09/vanderbilt-rape-case-brandon-vandenburg-cory-batey>.

218. Luther, *supra* note 217.

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Ex-Vandy Player Brandon Banks Sentenced to 15 Years For Rape*, ESPN (Aug. 18, 2017), https://www.espn.com/college-football/story/_/id/20378792/brandon-banks-former-vanderbilt-football-player-sentenced-15-years-rape.

224. Luther, *supra* note 217.

225. *Id.*

226. Alan Blinder & Richard Perez-Pena, *Vanderbilt Rape Convictions Stir Dismay and Denial*, N.Y. TIMES (Jan. 28, 2015), <https://www.nytimes.com/2015/01/29/us/vanderbilt-rape-trial-didnt-stir-students-on-campus.html>.

227. Luther, *supra* note 217.

university temporarily suspended them.²²⁸ On August 9, each individual was charged “with five counts of aggravated rape and two counts of aggravated sexual battery” and later expelled by the university.²²⁹ Vandenburg received a seventeen year sentence in prison, without a possibility of parole;²³⁰ Batey also received a fifteen-year sentence in prison, without the possibility of parole;²³¹ Banks received a minimum sentence of fifteen years in prison;²³² and McKenzie pled guilty and received ten years of supervised probation, while being placed on the sex offender registry.²³³ He was the only defendant to not serve time behind bars.²³⁴ Once released, Vandenburg, Batey, and Banks will all be placed on the sex offender registry.²³⁵

C. Jameis Winston

Then-Florida State quarterback Jameis Winston met Erica Klinsman at a campus bar in December 2012 and the two went back to Winston’s apartment with two of Winston’s then-teammates, Chris Casher and Ronald Darby.²³⁶ Winston and Klinsman engaged in sexual intercourse in Winston’s bedroom.²³⁷ Klinsman alleged that she partially blacked out after a night of drinking and found herself with Winston on top of her.²³⁸ She tried to push him off but was

228. *Four Vanderbilt University Football Players Dismissed From Team, Suspended From the University*, VANDERBILT UNIV. (June 29, 2013, 5:01 AM), <https://news.vanderbilt.edu/2013/06/29/four-vanderbilt-university-football-players-dismissed-from-team-suspended-from-the-university/>.

229. Alexis Shaw, *Former Campus Athletes Indicted on Multiple Counts of Aggravated Rape, Aggravated Sexual Battery*, ABC NEWS (Aug. 11, 2013, 5:11 PM), <https://abcnews.go.com/US/vanderbilt-football-players-indicted-rape-charges-arrested/story?id=19931607>.

230. Stacey Barchenger, *Brandon Vandenburg Sentenced to 17 Years in Vanderbilt Rape Case*, TENNESSEAN (Nov. 4, 2016, 8:01 PM), <https://www.tennessean.com/story/news/2016/11/04/brandon-vandenburg-sentenced-17-years-vanderbilt-rape-case/91113160/>.

231. Stacey Barchenger, *Corey Batey Sentenced to 15 Years in Vanderbilt Rape Case*, TENNESSEAN (May 25, 2017, 4:36 PM), <https://www.tennessean.com/story/news/2016/07/14/cory-batey-faces-least-15-years-friday-sentencing/86953944/>.

232. *Ex-Vandy Player Brandon Banks Sentenced to 15 Years for Rape*, *supra* note 223.

233. Jason Owens, *Vanderbilt Rape Suspect Avoids Prison After Plea Deal, Testifying Against Fellow Defendants*, YAHOO! SPORTS (May 21, 2018), <https://sports.yahoo.com/last-vanderbilt-rape-suspect-escapes-prison-plea-deal-testifying-fellow-defendants-021551279.html>.

234. *Id.*

235. Barchenger, *supra* note 231.

236. Mark Schlabach, *FSU’s Jameis Winston Not Charged*, ESPN (Dec. 5, 2013), https://www.espn.com/college-football/story/_/id/10082441/jameis-winston-not-charged-sexual-assault-investigation.

237. *Id.*

238. Walt Bogdanich, *A Top Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <https://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

instead pinned down by Winston.²³⁹ Casher entered the room at some point while the couple was in there, hoping to also have sexual intercourse with Klinsman as he later told police, but Klinsman “yelled at him to ‘get out,’” according to one account of the events.²⁴⁰ In contrast, Klinsman alleged that a man—presumably Casher—“walked in and told [Winston] to stop. He did not. Instead, she said, he carried her into the bathroom, locked the door and continued his assault.”²⁴¹ Klinsman spoke with a friend on the phone after the alleged sexual assault and the friend called 911.²⁴² A campus police officer responded and drove Klinsman to the hospital for a medical examination.²⁴³ Klinsman identified Winston to police as the perpetrator in January 2013.²⁴⁴

Almost a year after the alleged sexual assault took place, the prosecution announced in 2013 that Winston would not face any criminal charges because of lack of credible evidence.²⁴⁵ Since Winston was not charged with a crime, the Florida State football team opted not to suspend him.²⁴⁶ Winston would go on to win the Heisman Trophy days later²⁴⁷ and lead the Seminoles to a national championship a month later.²⁴⁸ In the fall of 2014, nearly two years after the incident took place, Florida State began a Title IX investigation in connection with the incident, though school officials first reached out to Winston in January 2014.²⁴⁹ (Winston declined to speak with school officials at that time).²⁵⁰ The hearing took place in December 2014.²⁵¹ Major Harding, a former Florida State

239. *Id.*

240. Schlabach, *supra* note 236.

241. Bogdanich, *supra* note 238.

242. *Id.*

243. *Id.*

244. *Id.*

245. Schlabach, *supra* note 236.

246. *Id.*

247. Ralph D. Russo, *Jameis Winston Wins Heisman Trophy*, AP NEWS (Dec. 14, 2013), <https://apnews.com/article/44071fd442324f28b1107b0965aaf21f>.

248. *Florida State Wins National Title With Touchdown in Final Seconds*, ESPN (Jan. 6, 2014), <http://scores.espn.go.com/ncf/recap?gameId=340060002>.

249. Jared Shanker & Mark Schlabach, *FSU Investigating Jameis Winston*, ESPN (Sept. 4, 2014), https://www.espn.com/college-football/story/_/id/11466541/florida-state-university-follows-title-ix-investigation-qb-jameis-winston.

250. Bogdanich, *supra* note 238.

251. Mark Schlabach, *Jameis Winston Doesn't Testify*, ESPN (Dec. 3, 2014), https://www.espn.com/college-football/story/_/id/11972075/jameis-winston-student-conduct-code-hearing-florida-state-day-2.

Supreme Court Chief Justice, presided over the hearing and ruled that Winston did not violate the school's Title IX policy.²⁵²

It is important to point out that Florida State changed its Title IX policy in 2013,²⁵³ the timing of which was suspect. It was suspect because the school was preparing to begin an investigation into the incident involving Winston and Klinsman in October 2013, as well as another incident of alleged sexual assault involving Winston and a separate accuser that took place in January 2013.²⁵⁴ Conversations transpired between Florida State's Chief of Police and its Dean of Students, which led the school to changing its Title IX policy by removing "the mandate to investigate all reported cases," according to a deposition by then-Florida State Victim Advocate Director Melissa Ashton.²⁵⁵ Klinsman filed a complaint with the Office of Civil Rights in early 2014, and the OCR began its investigation in April 2014.²⁵⁶ The investigation is still pending, according to the Department of Education's website.²⁵⁷ Klinsman also filed a Title IX lawsuit in federal court, arguing that the university "was 'deliberately indifferent' to her reported sexual assault and that its response was 'clearly unreasonable.' She asserted that [Florida State] FSU concealed and obstructed the investigation so as to allow Winston to play football."²⁵⁸ The parties reached a settlement in January 2016 as the university agreed to pay Klinsman \$950,000.²⁵⁹

D. Baylor Football

Whereas the three previous high-profile cases dealt with one a singular incident, this section deals with multiple incidents of sexual assault involving the Baylor football team, spanning from 2011 until 2015 while Art Briles was

252. Tyler Conway, *Jameis Winston's Rape Accuser Documents Experience in "The Hunting Ground,"* BLEACHER REP. (Jan. 25, 2015), <https://bleacherreport.com/articles/2341841-jameis-winstons-rape-accuser-documents-experience-in-the-hunting-ground>.

253. *Report: FSU Struggled with Title IX Guidelines in Jameis Winston Case*, SPORTS ILLUSTRATED (Feb. 19, 2016), <https://www.si.com/college/2016/02/19/jameis-winston-florida-state-title-ix-guidelines-rape-case>.

254. Kirby Dick, *How Florida State Covered Up Two Rape Reports Against Jameis Winston*, HUFFPOST (Mar. 12, 2017), https://www.huffpost.com/entry/how-florida-state-covered_b_9421824.

255. *Id.*

256. Rachel Axon, *Florida State Agrees to Pay Winston Accuser \$950,000 to Settle Suit*, USA TODAY (Jan. 25, 2016, 6:29 PM), <https://www.usatoday.com/story/sports/ncaaf/2016/01/25/florida-state-settles-title-ix-lawsuit-erica-kinsman-jameis-winston/79299304/>.

257. *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/tix.html#> (last visited Dec. 30, 2022).

258. Axon, *supra* note 256.

259. *Id.*

at the helm. There were criminal trials involving three Baylor football players—Tevin Elliott, Sam Ukwuachu, and Shawn Oakman—in addition to several Title IX lawsuits filed against the university.

Elliott allegedly sexually assaulted Jasmin Hernandez, not once but twice, at an on-campus party on April 15, 2012.²⁶⁰ She immediately reported it to Waco police.²⁶¹ Elliott also allegedly sexually assaulted four other females beginning in October 2009, but the Waco police department failed to charge Elliott, according to testimony at Elliott’s criminal trial.²⁶² Briles indefinitely suspended Elliott from the football team on April 26, 2012, for “unspecified team violations,” four days before Waco police arrested him and charged him with two counts of sexual assault.²⁶³ The university expelled him on May 21, 2012.²⁶⁴ In January 2014, a Waco jury found Elliott guilty of both counts, resulting in a 20-year prison sentence and a \$20,000 fine.²⁶⁵ Hernandez filed a Title IX lawsuit against the university, Briles, and then-athletic director Ian McCaw in March 2016. She alleged that (a) the university failed to take any substantial steps toward investigating her complaint despite knowledge of it; (b) the university “failed to address and actively concealed sexual violence committed by its football players for several years . . .” and (c) the university, McCaw, and Briles all had knowledge of prior sexual assault complaints involving Elliott.²⁶⁶ Baylor and Hernandez reached an out-of-court settlement in August 2017 for an undisclosed amount.²⁶⁷

Sam Ukwuachu enrolled at Boise State following his high school graduation on a football scholarship but transferred to Baylor in May 2013 after then-Boise State head coach Chris Peterson kicked him off the team for a violent encounter he had with a female.²⁶⁸ Ukwuachu sat out the entire 2013 season due to NCAA

260. Paula Ann Solis, *Elliott Guilty: Ex-Football Player to Serve 20 years For Assault*, BAYLOR LARIAT (Jan. 24, 2014), <https://baylorlariat.com/2014/01/24/elliott-guilty-ex-football-player-to-serve-20-years-for-assault/>.

261. Paula Lavigne, *Baylor Sexual Assault Victim Files Title IX Suit Against School*, ESPN (Mar. 31, 2016, 4:21 PM), https://www.espn.com/espn/otl/story/_/id/15098651/baylor-sexual-assault-victim-files-title-ix-lawsuit-school.

262. Solis, *supra* note 260.

263. *BU Rapist Remained Enrolled After He was Kicked Off Football Team, Arrested*, KWTX (Aug. 13, 2018, 11:32 PM), <https://www.kwtx.com/content/news/Former—490786321.html>.

264. *Id.*

265. Solis, *supra* note 260.

266. *Hernandez v. Baylor Univ.*, 274 F. Supp. 3d 602, 611-12, 614 (W.D. Texas 2017).

267. Sam Cooper, *Sexual Assault Victim Reaches Settlement with Baylor, Art Briles Removed From Suit*, YAHOO! SPORTS (Aug. 16, 2017), <https://sports.yahoo.com/sexual-assault-victim-reaches-settlement-baylor-briles-removed-suit-184837780.html>.

268. Jessica Luther & Dan Solomon, *Silence at Baylor*, TEX. MONTHLY (Aug. 20, 2015), <https://www.texasmonthly.com/article/silence-at-baylor/>.

rules for transfer players.²⁶⁹ Ukwuachu, on the night of October 19, 2013, celebrated the university's homecoming game after Baylor beat Iowa State and met up with a Baylor women's soccer player after midnight at the Waco convention center. He drove her to his apartment, despite the two previously discussing on the phone they would go to a local eatery or go to a party.²⁷⁰ Once they arrived at his apartment, Ukwuachu tried to sexually engage with the female. After she resisted, he grabbed her and began sexually assaulting her, according to her trial testimony, as "he pulled her dress up, pulled her underwear to the side, and forced her legs open with his toes, her head pressed between his bed and his desk, then forced himself inside of her."²⁷¹

One of the female's friends picked her up from Ukwuachu's apartment after the assault and she told her friend that Ukwuachu raped her.²⁷² She went to the hospital for a rape kit, "which found vaginal injuries including redness, bleeding, and friction injuries."²⁷³ A grand jury indicted Ukwuachu on two counts of sexual assault on June 25, 2014.²⁷⁴ A jury convicted Ukwuachu of sexual assault in 2015, which was overturned by the Waco Tenth Court of Appeals in 2019, but later reinstated by the Texas Court of Criminal Appeals in 2020.²⁷⁵ A McLennan County Court judge sentenced Ukwuachu in 2015 to 180 days in jail, 400 hours of community service, and ten years of probation.²⁷⁶ While the female did not file a Title IX lawsuit, she reached a confidential settlement with the university in 2016, presumably due to the fact that the university revoked her scholarship after the assault.²⁷⁷

In 2015, Baylor hired an outside law firm, Pepper Hamilton, to conduct an investigation into the school's Title IX practices, procedures, responses, and the like from 2012 until 2015.²⁷⁸ Pepper Hamilton produced a number of findings, all of which reflected poorly upon the university. First, Pepper Hamilton found

269. *Id.*

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.*

275. Paula Lavigne, *Ex-Baylor Football Player Sam Ukwuachu's Sexual Assault Conviction Reinstated For Second Time*, ESPN (Nov. 18, 2020), https://www.espn.com/college-football/story/_/id/30342570/ex-baylor-player-sam-ukwuachu-sexual-assault-conviction-reinstated-second.

276. *Id.*

277. David Lee, *Baylor Settles Sexual Assault Claim*, COURTHOUSE NEWS SERV. (Jan. 6, 2016), <https://www.courthousenews.com/baylor-settles-sexual-assault-claim/>.

278. *Baylor University Board of Regents Findings of Fact*, BAYLOR UNIV. 1, <https://www.baylor.edu/the-facts/doc.php/266596.pdf> (last visited Dec. 30, 2022).

that the university's Title IX policy, procedures, training, responses, and resources were wholly inadequate prior to the 2014-2015 academic year.

Prior to the 2014-2015 academic year, Baylor failed to provide training and education to students; failed to identify and train responsible employees under Title IX; failed to provide clear information about reporting options and resources on campus; failed to have a centralized process for ensuring that all reports reached the Title IX Coordinator; failed to impose appropriate interim measures in many cases; failed to appropriately evaluate and balance institutional safety and Title IX obligations against a complainant's request for anonymity or that no action/investigation be pursued against; failed to conduct prompt, equitable, adequate, and reliable investigations; failed to give complainants access to full range of procedural options under the policy; and failed to take sufficient action to identify, eliminate, prevent and address a potential hostile environment in individual cases. Institutional failures at every level of Baylor's administration directly impacted the response to individual cases and the Baylor community as a whole.²⁷⁹

Specific to the football team, Pepper Hamilton found that the football program operated in a bubble. In other words, they failed to report alleged incidents of sexual assault involving football players to the requisite Title IX coordinator, instead meeting directly with the accusers as part of their own informal inquiry into the alleged incidents.²⁸⁰ Their findings from said inquiries were not shared with anyone outside of the athletic department, and any discipline levied against a player was dealt with solely by the football program, as opposed to the university in accordance with Title IX.²⁸¹ Beyond conducting their own informal inquiry, they "took affirmative steps" to steer sexual assault complaints away from a formal university Title IX investigation or from a criminal investigation.²⁸² Even then, they "had inappropriate involvement in disciplinary and criminal matters or engaged in improper conduct that reinforced an overall perception that football was above the rules"²⁸³

279. *Id.* at 4-5.

280. *Id.* at 2.

281. *Id.* at 10.

282. *Id.* at 11.

283. *Id.*

There was a mass personnel fallout at Baylor after it released the Pepper Hamilton report in May 2016, as it terminated Briles' employment contract, forced its president, Ken Starr, to step down, and placed its athletic director, Ian McCaw, on probation.²⁸⁴ McCaw resigned days later.²⁸⁵ In addition, the Title IX coordinator resigned from her post in October 2016 after lodging a Title IX complaint with the OCR, prompting a Title IX investigation.²⁸⁶ The investigation is still pending, according to the Department of Education's website.²⁸⁷

Beyond the previous examples outlined, a 2017 Title IX lawsuit by a Baylor University graduate alleged not only that she was gang raped by then-Baylor football players Tre'Von Armstead and Shamycheal Chatman in April 2013, but also that thirty-one Baylor football players committed fifty-two rapes—five of which were gang rapes—from 2011 to 2014.²⁸⁸

E. Quintez Cephus

Then-University of Wisconsin wide receiver Quintez Cephus met up with two women at a campus bar on the night of April 21, 2018, one of which was already intoxicated when she met Cephus at the bar.²⁸⁹ In fact, "one of the women told police the other was so drunk that she looked 'possessed,' that her eyes were rolled back into her head and that when she lifted the woman's arm, it flopped back down when she let it go."²⁹⁰ After leaving the bar, Cephus drove himself, his then-teammate Danny Davis, and the two women, who were

284. Matthew Watkins, *Ken Starr Resigns as Baylor Chancellor*, TEX. TRIB. (June 1, 2016, 11:00 AM), <https://www.texastribune.org/2016/06/01/ken-starr-says-he-will-resign-baylor-chancellor/>.

285. Scott Polacek, *Ian McCaw Resigns as Baylor AD*, BLEACHER REP. (May 30, 2016), <https://bleacherreport.com/articles/2643315-ian-mccaw-resigns-as-baylor-ad-latest-details-comments-and-reaction>.

286. Matthew Watkins, *Feds Investigating Baylor University for Handling of Sexual Assault*, TEX. TRIB. (Oct. 19, 2016, 5:00 PM), <https://www.texastribune.org/2016/10/19/federal-agency-investigating-baylor-university-han/>; *Woman Who Led Baylor Sex Assault Investigation Speaks Out After Resigning*, CBS NEWS (Oct. 5, 2016, 7:14 AM), <https://www.cbsnews.com/news/baylor-university-sexual-assault-scandal-title-ix-coordinator-patty-crawford-resigns/>.

287. *Pending Cases Currently Under Investigation at Elementary-Secondary and Post-Secondary Schools*, *supra* note 257.

288. Sarah Mervosh, *New Baylor Lawsuit Alleges 52 Rapes By Football Players in 4 Years, 'Show 'Em a Good Time' Culture*, DALL. MORNING NEWS (Jan. 27, 2017, 7:28 PM), <https://www.dallasnews.com/news/2017/01/27/new-baylor-lawsuit-alleges-52-rapes-by-football-players-in-4-years-show-em-a-good-time-culture/>.

289. Ed Treleven, *Cephus Charged With Sex Assaults; Junior Receiver Suspended From Team Activities; UW Football*, WIS. STATE J. (Aug. 21, 2018), https://madison.com/wsj/news/local/courts/wisconsin-receiver-quintez-cephus-charged-with-sex-assaults-of-two/article_8503f97a-0250-5586-891b-3392bdaee3ec.html.

290. Ed Treleven, *Badgers Wideout Quintez Cephus Ordered to Trial on Sexual Assault Charges*, WIS. STATE J. (Sept. 12, 2018), https://madison.com/news/local/courts/badgers-wideout-quintez-cephus-ordered-to-trial-on-sexual-assault-charges/article_c254851b-38c6-5ff6-b895-61572740d43d.html.

equally intoxicated at this point according to the complaint, back to Cephus' on-campus apartment.²⁹¹ One of the women told police that she recalled her and the other woman both being naked "and that Cephus was assaulting them."²⁹² She further recalled that Cephus and his then-teammate Danny Davis were taking pictures of her while she was on the floor.²⁹³ While in Cephus' bed, she sent text messages to a friend, two of which included one word, "Raped."²⁹⁴

The other woman did not remember much from that night, according to the complaint.²⁹⁵ Cephus maintained that the sexual intercourse with both women was consensual when speaking with the police.²⁹⁶ The Dane County District Attorney's Office charged Cephus with second-degree sexual assault of an intoxicated person and third-degree sexual assault of an intoxicated person in August 2018.²⁹⁷ Cephus was suspended from all team activities thereafter.²⁹⁸ The university began a Title IX investigation at some point during the 2018 fall semester and later expelled him after it found he violated the school's conduct policy.²⁹⁹

During his criminal trial, Cephus testified that the sexual intercourse was consensual with both women and that one of the women began taking off her clothes in Cephus' bedroom, while "the other woman followed Cephus into the bedroom. Cephus said he had sex with both women, and that both had asked for him to do specific things during sex."³⁰⁰ In contrast, both women testified that they were extremely intoxicated and did not recall exactly what transpired that night. "One described her memories of the night as 'snapshots,' while the other told jurors she had longer periods of memory, which started when she woke to find herself naked in bed with Cephus and her friend."³⁰¹ Surveillance video from outside of the bar and outside of Cephus' apartment that night showed that the women were able to walk on their own power and did not appear to be

291. Treleven, *supra* note 289.

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.*

296. *Id.*

297. Treleven, *supra* note 290.

298. *Id.*

299. Jeff Potrykus, *UW Reinstates Former Wide Receiver Quintez Cephus as a Student*, MILWAUKEE J. SENTINEL (Aug. 19, 2019, 6:34 PM), <https://www.jsonline.com/story/sports/college/uw/2019/08/19/wisconsin-reinstates-former-wide-receiver-quintez-cephus-student/2050667001/>.

300. Ed Treleven, *Former Badger Receiver Quintez Cephus Acquitted of Sex Assault Charges*, WIS. STATE J. (Aug. 3, 2019), https://madison.com/news/local/crime-and-courts/former-badgers-wide-receiver-quintez-cephus-acquitted-of-sex-assault-charges/article_8b459cba-5128-5632-8240-9fd5413a33a0.html.

301. *Id.*

walking in a way that depicted intoxication, though the prosecution argued that surveillance video did not exist from 12:34 am until 2:28 am, a time frame of when the alleged assaults took place.³⁰²

In August 2019, a Dane County jury found Cephus not guilty of both counts after thirty minutes of deliberation.³⁰³ Following the acquittal, the university overturned his expulsion and reinstated him as a student in August 2019 after it acquired information not available to them during the Title IX investigation in connection with the incident.³⁰⁴ Cephus went on to lead the football team in receiving yards (901) and receiving touchdowns (7) during the 2019-2020 season³⁰⁵ and was selected in the fifth round of the 2020 NFL Draft by the Detroit Lions.³⁰⁶ Nearly eighteen months after the incident, in September 2020, one of the accusers filed a Title IX lawsuit in federal court against the university arguing that the university should have consulted with her in accordance with Title IX prior to reinstating Cephus after the university overturned his expulsion.³⁰⁷ The lawsuit was dismissed in July 2022, but U.S. District Judge William Conley noted that the university's "decision to reinstate Cephus may have been driven by the school's desire to avoid a lawsuit or to get Cephus back on the field."³⁰⁸

IV. DISCUSSION

While the United States has undoubtedly made significant progress in terms of combatting sexual assault on college campuses, sexual assault will, sadly, still continue to occur on college campuses. This begs the question: what needs to be done to drastically diminish the chances of sexual assault occurring on campus?

302. *Id.*

303. Lawrence Andrea, *Ex-Badgers Player Quintez Cephus Found Not Guilty of Two Counts of Sexual Assault*, MILWAUKEE J. SENTINEL (Aug. 2, 2019, 6:42 PM), <https://www.jsonline.com/story/news/politics/2019/08/02/quintez-cephus-women-voluntarily-got-into-his-bed-consented-sex/1899290001/>.

304. Potrykus, *supra* note 299.

305. *2019 Wisconsin Badgers Stats*, SPORTS REFERENCE, <https://www.sports-reference.com/cfb/schools/wisconsin/2019.html> (last visited Dec. 30, 2022).

306. Sean Wagner-McGough, *2020 NFL Draft Order*, CBS SPORTS (Apr. 26, 2020, 8:41 AM), <https://www.cbssports.com/nfl/draft/news/2020-nfl-draft-order-updated-list-of-all-255-selections-and-all-seven-rounds-of-virtual-draft/>.

307. *Woman Sues UW-Madison After Quintez Cephus Cleared of Assault*, MILWAUKEE J. SENTINEL (Sept. 16, 2020, 2:43 PM), <https://www.jsonline.com/story/news/local/wisconsin/2020/09/16/quintez-cephus-woman-sues-uw-over-allowing-him-back-campus-team/5821113002/>.

308. *Judge Dismisses Suit vs. Wisconsin Over Former WR Quintez Cephus' 2019 Reinstatement After Alleged Sexual Assault*, ESPN (July 19, 2022), https://www.espn.com/college-football/story/_/id/34268661/judge-dismisses-suit-vs-wisconsin-former-wr-quintez-cephus-2019-reinstatement-alleged-sexual-assault.

A. Increase Title IX Staff Specific to Sexual Assault

First, institutions must take substantial efforts to bolster their staff dedicated to handling Title IX complaints specific to sexual assault by having the number of staff be proportionate to the number of students on campus. In other words, the more students that the institution has on campus, the more staff members that the institution's Title IX office should then employ. As required by the 2011 Dear Colleague and the 2020 Final Rule, as well as the proposed regulations, an institution must employ a Title IX coordinator to oversee everything related to Title IX, which should continue to be the case for decades to come. Interestingly enough, the proposed regulations contemplate "adding that, as appropriate, the Title IX Coordinator may assign one or more designees to carry out some of the recipient's responsibilities"³⁰⁹ The proposed regulations should go one step further and require that institutions add extra staffing to carry out the institution's Title IX responsibilities in connection with sexual harassment. One of the chief reasons why is because a 2018 survey conducted by ESPN found that "of the 99 [Title IX administrators at schools of all sizes and divisions], 75 percent said they did not have enough staff."³¹⁰ This is evident in the below snapshot of select institutions (both public and private), organized from highest student population to lowest student population.

- University of Texas at Austin (public)
 - Student population: Approximately 51,991 (as of Fall 2021)³¹¹
 - Title IX organization structure
 - Associate Vice President, Title IX Coordinator³¹²
 - Deputy Title IX Coordinator and Director of Support and Resources³¹³
 - Director of Education and Prevention³¹⁴

309. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,424 (proposed July 12, 2022).

310. Paula Lavigne, *OTL: College Athletes Three Times More Likely to be Named in Title IX Sexual Misconduct Complaints*, ESPN (Nov. 1, 2018), https://www.espn.com/espn/otl/story/_/id/25149259/college-athletes-three-s-more-likely-named-title-ix-sexual-misconduct-complaints.

311. *Facts & Figures*, UNIV. OF TEX., <https://www.utexas.edu/about/facts-and-figures> (last visited Dec. 30, 2022).

312. *Our Team*, UNIV. OF TEX., <https://titleix.utexas.edu/our-team> (last visited Dec. 30, 2022).

313. *Id.*

314. *Id.*

- Director of Intake and Assessment and Education and Prevention Coordinator³¹⁵
 - Coordinator of Intake and Assessment³¹⁶
 - Case Manager for Support and Resources³¹⁷
 - Senior Administrative Associate³¹⁸
 - **These positions are designated as Title IX Office Staff.³¹⁹ The University of Texas also has five Title IX Deputies, and each academic college has “designated faculty and staff members who have received comprehensive Title IX training”³²⁰*
- Arizona State University (public)
 - Student population: Approximately 54,866 (as of Fall 2021)³²¹
 - Title IX organization structure
 - Title IX Coordinator and Special Counsel³²²
 - Deputy Coordinator (3)³²³
 - For Athletics: Senior Associate Athletics Director³²⁴
 - For Faculty, Staff and Visitors: Director of Office of University Rights and Responsibilities³²⁵
 - For Students: Associate Vice President, Educational Outreach and Student Services³²⁶

315. *Id.*

316. *Id.*

317. *Id.*

318. *Id.*

319. *Id.*

320. *Title IX*, UNIV. OF TEX. SCH. L., <https://law.utexas.edu/student-affairs/student-services/title-ix/> (last visited Dec. 30, 2022) (emphasis added).

321. *Facts and Figures*, ARIZ. STATE UNIV., <https://www.asu.edu/about/facts-and-figures> (last visited Dec. 30, 2022).

322. *Title IX Statement*, ARIZ. STATE UNIV., <https://www.asu.edu/titleIX/> (last visited Dec. 30, 2022).

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

- University of Central Florida (public)
 - Student population: Approximately 70,000 (as of Fall 2021)³²⁷
 - Title IX organization structure
 - Title IX Coordinator³²⁸
 - Deputy Title IX Coordinator³²⁹
 - Title IX Remedial Measures Support³³⁰
 - Ohio State University (public)
 - Student population: 61,677 (as of Fall 2021)³³¹
 - Title IX organization structure
 - Title IX Coordinator³³²
 - Deputy Title IX Coordinator (undisclosed amount)³³³
- Penn State University (public)
 - Student population: 88,914 (as of Fall 2021)³³⁴
 - Title IX organization structure
 - Title IX Coordinator³³⁵
 - Title IX Deputy Coordinator³³⁶
 - Director³³⁷
 - Associate Director³³⁸

327. *UCF Facts 2021-2022*, UNIV. OF CENT. FLA., <https://www.ucf.edu/about-ucf/facts/> (last visited Dec. 30, 2022).

328. *Sexual Misconduct and/or Interpersonal Violence*, UNIV. OF CENT. FLA., <https://osrr.sdes.ucf.edu/titleix/> (last visited Dec. 30, 2022).

329. *Id.*

330. *Id.*

331. *Statistical Summary*, THE OHIO STATE UNIV., <https://facts.osu.edu/statistical-summary> (last visited Dec. 30, 2022).

332. *Sexual Misconduct Response and Prevention*, THE OHIO STATE UNIV., <https://titleix.osu.edu/navigation/report-incident/report-incident.html> (last visited Dec. 30, 2022).

333. *Id.*

334. *Penn State at a Glance*, PENN STATE UNIV., <https://stats.psu.edu/> (last visited Dec. 30, 2022).

335. *Sexual Misconduct Contacts*, PENN STATE UNIV., <https://titleix.psu.edu/title-ix-contacts/> (last visited Dec. 30, 2022).

336. *Id.*

337. *Id.*

338. *Id.*

- Case Manager (2)³³⁹
- Investigator (3)³⁴⁰
- Administrative Support Coordinator³⁴¹
- University of Houston (public)
 - Student population: 47,031 (as of Fall 2021)³⁴²
 - Title IX organization structure
 - Title IX Coordinator³⁴³
- Texas A&M University (public)
 - Student population: 74,829 (as of Fall 2022)³⁴⁴
 - Title IX organization structure
 - Assistant Vice President and Title IX Coordinator³⁴⁵
 - Title IX Deputy Coordinator – Investigations³⁴⁶
 - Title IX Deputy Coordinator³⁴⁷
 - Informal Resolution Facilitator³⁴⁸
 - Hearing Coordinator & Compliance Investigator³⁴⁹
 - Compliance Investigator (4)³⁵⁰
 - Case Manager (3)³⁵¹

339. *Id.*

340. *Id.*

341. *Id.*

342. *Fall 2021 Facts*, UNIV. HOUS. 1, <https://uh.edu/ir/reports/facts-at-a-glance/facts-at-a-glance-fa-2021.pdf> (last visited Dec. 30, 2022).

343. *Sexual Misconduct/Title IX*, UNIV. HOUS., <https://www.uh.edu/equal-opportunity/title-ix-sexual-misconduct/> (last visited Dec. 30, 2022).

344. *At a Glance*, TEX. A&M UNIV., <https://www.tamu.edu/about/at-a-glance.html> (last visited Dec. 30, 2022).

345. *Our CREI/Title IX Team*, TEX. A&M UNIV., <https://titleix.tamu.edu/our-team/> (last visited Dec. 30, 2022).

346. *Id.*

347. *Id.*

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

- Baylor University (private)
 - Student population: 20,626 (as of Fall 2021)³⁵²
 - Title IX organization structure
 - Associate Vice President for Equity & Title IX Coordinator³⁵³
 - Director of Equity, Civil Rights, and Title IX³⁵⁴
 - Equity Services Manager³⁵⁵
 - Equity Process Manager³⁵⁶
 - Investigator (3)³⁵⁷
 - Education and Prevention Specialist³⁵⁸
 - Case Coordinator (2)³⁵⁹
- University of Southern California (USC) (private)
 - Student population: Approximately 49,500 (as of Fall 2021)³⁶⁰
 - Title IX organization structure
 - Vice President for the Office for Equity, Equal Opportunity, and Title IX and Title IX Coordinator³⁶¹
 - Associate Vice President and Deputy Title IX Coordinator³⁶²

352. Lori Fogleman, *Baylor University Announces Fall Enrollment, Including Overall Enrollment Milestone, Rising Diversity, Graduation Rates*, BAYLOR UNIV. (Sept. 13, 2021), <https://www.baylor.edu/mediacommunications/news.php?action=story&story=224539>.

353. *Equity Office Staff*, BAYLOR UNIV., <https://www.baylor.edu/equity/index.php?id=974607> (last visited Dec. 30, 2022).

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Id.*

359. *Id.*

360. *Facts and Figures*, UNIV. S. CAL., <https://about.usc.edu/facts/> (last visited Dec. 8, 2022).

361. *Office for Equity, Equal Opportunity, and Title IX*, UNIV. S. CAL., <https://eeotix.usc.edu/about-us/> (last visited Dec. 30, 2022).

362. *Id.*

- Education, Training, and Prevention Coordinator³⁶³
 - Deputy EEO-TIX Coordinator for Healthcare³⁶⁴
 - Senior Investigator for Healthcare (2)³⁶⁵
 - Intake, Outreach, and Care Manager (4)³⁶⁶
 - Deputy Coordinator—Intake, Outreach, and Support (2)³⁶⁷
 - Deputy Coordinator—Investigation and Resolution (2)³⁶⁸
 - Senior Investigator (7)³⁶⁹
 - Hearing Manager³⁷⁰
- Boston University (private)
 - Student population: Approximately 36,809 (as of Fall 2022)³⁷¹
 - Title IX organization structure
 - University Title IX Coordinator³⁷²
 - Several deputy Title IX coordinators, organized by office or school³⁷³
- Villanova University (private)
 - Student population: 10,200 (as of Fall 2021)³⁷⁴
 - Title IX organization structure

363. *Id.*

364. *Id.*

365. *Id.*

366. *Id.*

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.*

371. *BU Facts and Stats*, BOS. UNIV., <https://www.bu.edu/president/boston-university-facts-stats/> (last visited Dec. 30, 2022).

372. *Title IX Team*, BOS. UNIV., <https://www.bu.edu/eoo/sexual-misconduct-title-ix/title-ix-team/> (last visited Dec. 30, 2022).

373. *Id.*

374. *Fast Facts*, VILL. UNIV., <https://www1.villanova.edu/university/fast-facts.html> (last visited Dec. 30, 2022).

- Title IX Coordinator³⁷⁵
 - Deputy Title IX Coordinator (4, which includes a Title IX Investigator; Vice President for Student Life; Director, Employee Relations and Compliance; and Senior Associate Athletic Director for Administration)³⁷⁶
- Northwestern University (private)
 - Student population: Approximately 21,000 (as of Fall 2021)³⁷⁷
 - Title IX organization structure
 - Title IX Coordinator³⁷⁸
 - Deputy Title IX Coordinator (2)³⁷⁹
 - Deputy Title IX Coordinator: Athletics Compliance Issues³⁸⁰
- Marquette University (private)
 - Student population: 11,320 (as of Fall 2021)³⁸¹
 - Title IX organization structure
 - Title IX Coordinator³⁸²
 - Deputy Title IX Coordinator (3)³⁸³
- Vanderbilt University (private)
 - Student population: 13,537 (as of Fall 2021)³⁸⁴
 - Title IX organization structure

375. *Title IX*, VILL. UNIV., <https://www1.villanova.edu/villanova/generalcounsel/uco/titleix.html> (last visited Dec. 30, 2022).

376. *Id.*

377. *About Our Students*, NW. UNIV., <https://www.northwestern.edu/recruit/our-students/> (last visited Dec. 30, 2022).

378. *Title IX Coordinators*, NW. UNIV., <https://www.northwestern.edu/sexual-misconduct/get-help/title-ix-coordinators/> (last visited Dec. 30, 2022).

379. *Id.*

380. *Id.*

381. *Student Demographics*, MARQ. UNIV., <https://www.marquette.edu/about/student-demographics.php> (last visited Dec. 30, 2022).

382. *Sexual Harassment and Sex Discrimination*, MARQ. UNIV., <https://www.marquette.edu/sexual-misconduct/> (last visited Dec. 30, 2022).

383. *Id.*

384. *Quick Facts*, VANDERBILT UNIV., <https://www.vanderbilt.edu/about/quick-facts/#students-2020-2021> (last visited Dec. 30, 2022).

- Director and Title IX Coordinator³⁸⁵
- Supportive Measures/Informal Resolution Manager³⁸⁶
- Assistant Director³⁸⁷
- Senior Investigator³⁸⁸
- Office Manager³⁸⁹

As ascertained from the above snapshot of select institutions, vast inconsistencies exist from one institution to another. For instance, despite its student populations, it appears that Ohio State University only has a Title IX coordinator and an undisclosed number of investigators, which theoretically could be a few, and the University of Houston only has a Title IX coordinator.³⁹⁰ Universities like the aforementioned ones are doing a grave disservice to the accused and accuser alike. Comparatively, Baylor University, which has a much smaller student population than the aforementioned institutions, has much more Title IX staff, though that should not be a surprise given what previously transpired there.³⁹¹ Strongly recommending for institutions to have Title IX staffers, specific to sexual assault, that are relatively proportionate to the institution's student population forces the institution to take proactive steps toward combatting sexual assault on campus while also providing a prompt and equitable investigation and resolution to any and all sexual assault complaints filed by accusers. A common result, among others, in resolution agreements between an institution and the Department of Education/OCR is that the institution increases more Title IX staffing.³⁹² Under my proposal, institutions can get ahead of this, if nothing else to ultimately promote an environment that takes sexual harassment, including sexual assault, seriously.

385. *Staff*, VANDERBILT UNIV., <https://www.vanderbilt.edu/title-ix/staff.php> (last visited Dec. 30, 2022).

386. *Id.*

387. *Id.*

388. *Id.*

389. *Id.*

390. *Sexual Misconduct Response and Prevention*, *supra* note 332; *Sexual Misconduct/Title IX*, *supra* note 343.

391. *Equity Office Staff*, *supra* note 353.

392. Katherine Mangan, *How a Student Used Title IX to Force Her College to Change its Response to Cases of Sexual Assault*, CHRON. HIGHER EDUC. (June 26, 2018), <https://www.chronicle.com/article/how-a-student-used-title-ix-to-force-her-college-to-change-its-response-to-cases-of-sexual-assault/>; Bill Cummings, *UConn Settles Sex-Assault Suit for \$1.3 Million*, CONN. POST (July 19, 2014, 12:14 AM), <https://www.ctpost.com/local/article/UConn-settles-sex-assault-suit-for-1-3-million-5631806.php>.

Moreover, Title IX staffers responsible for handling, investigating, and adjudicating sexual assault complaints must be properly trained and have the necessary background and credentials in that realm in order to accomplish a prompt and equitable investigation and, ultimately, a final determination. Accordingly, in order to eliminate any potential bias or conflict of interest while also ensuring that the final determinator possesses the requisite knowledge, background, and credentials, institutions should strongly consider employing a neutral party, or parties, to make the final ruling during a live hearing.³⁹³ Per a recent survey by the Association of Title IX Administrators, more than one-third of schools already outsource the role of the final determinator and TNG Consulting expects this trend to continue.³⁹⁴ Still though, it is important that the neutral third-party continues to work hand-in-hand with the institution's Title IX investigators so as to avoid any unruly delay in the process.

B. The Department of Education Should Require Live Hearings, But Leave Cross-Examination Up to School's Discretion

Requiring live hearings will provide the opportunity for the accused and accuser to be heard, promoting due process rights, and present all of the necessary relevant evidence in order to arrive at the most appropriate final outcome. For example, there were 187 reported incidents of sexual harassment and sexual assault throughout the 2019-20 academic year at Stanford University, of which sixteen consisted of nonconsensual intercourse or sexual assault and nineteen consisted of nonconsensual touching.³⁹⁵ However, there was not a single hearing conducted; instead, several of the complaints were handled via an informal process.³⁹⁶ “According to advocates, non-hearing resolutions often result in negotiated outcomes and consequently lighter sentences for perpetrators.”³⁹⁷ While requiring a live hearing may potentially draw out the process due to inconsistent attendance and communication from witnesses, the Association of Title IX Administrators recommended to, among other options, “text and email the witnesses several times during the week before the hearing to keep them engaged, to keep them apprised, and to ensure

393. Rachael A. Goldman, *When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students*, 47 PEPP. L. REV. 185, 215 (2019).

394. Brett Sokolow, *Fifteen Title IX Hearings In, What Have We Learned? (Part 1)*, JDSUPRA (Oct. 15, 2021), <https://www.jdsupra.com/legalnews/fifteen-title-ix-hearings-in-what-have-2900726/>.

395. Kathryn Zheng, *No Expulsions for Perpetrators, No Title IX Hearings, Annual Report Shows*, STAN. DAILY (Nov. 27, 2020), <https://stanforddaily.com/2020/11/27/no-expulsions-for-perpetrators-no-title-ix-hearings-annual-report-shows/>.

396. *Id.*

397. *Id.*

they know when and where to show up.”³⁹⁸ Altogether, with how much is at stake for the accused and accuser, requiring a live hearing is appropriate as it will lead to more of a fair grievance process. If nothing else, the Supreme Court held that in incidents in which a student is facing a suspension, which applies to Title IX incidents, that student “must be . . . afforded some kind of hearing.”³⁹⁹ Similarly, the Supreme Court held that procedural due process requires, at a minimum, an opportunity to be heard.⁴⁰⁰

However, the Department of Education should not require schools to implement cross-examination, but rather leave it up to the school’s discretion. Though there is a split as to whether cross-examination is required in institutional disciplinary proceedings, several courts have still held that cross-examination is not required in institutional disciplinary proceedings.⁴⁰¹ Courts have also held that as long as the hearing entails “basic fairness,” then no cross-examination is required.⁴⁰² This is not to say that no one should be able to question the accused, accuser, and/or witnesses, but rather it can be accomplished through different means than cross-examination.⁴⁰³ Schools need to also keep in mind the emotional toll for victims that can come about from cross-examination, as evidence has shown that it can re-traumatize them and

398. Brett A. Sokolow, *More Lessons Learned From Title IX Live Hearings (Part II)*, ASS’N OF TITLE IX ADM’RS, <https://www.atixa.org/blog/more-lessons-learned-from-title-ix-live-hearings-part-ii/> (last visited Dec. 30, 2022).

399. *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

400. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

401. Suzannah Dowling, *(Un)Due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 ME. L. REV. 123, 157 (2021) (“However, we have not expanded the Goldberg procedural requirements for quasi-judicial termination of welfare benefits in student disciplinary hearings. Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding” *Id.* at 156 n.251 (2021) (quoting *Nash v. Auburn Univ.*, 812 F.2d 655, 663-64 (11th Cir. 1987)); *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701 (5th Cir. 1974); *Doe v. Rensselaer Polytechnic Inst.*, No. 1:18-CV01374, 2019 U.S. Dist. LEXIS 5396, at *18-21 (N.D.N.Y. Jan. 11, 2019); *Doe v. Princeton Univ.*, No. 18-16539, 2019 U.S. Dist. LEXIS 4449, at *10, 19-21 (D.N.J. Jan. 9, 2019); *Sterrett v. Cowan*, 85 F. Supp. 3d 916, 929 (E.D. Mich. 2015).

402. Dowling, *supra* note 401 (citing *Newsome v. Batavia Loc. Sch. Dist.*, 842 F.2d 920, 925 (6th Cir. 1988); *Nash*, 812 F.2d at 664; *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961)).

403. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,506 (proposed July 12, 2022) (citing *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 867-68 (8th Cir. 2020); *Haidak*, 933 F.3d 56, 69 (1st Cir. 2019) (“holding that in the university disciplinary setting, due process may require some opportunity to confront the complaining witness, but that this confrontation need not be done by the accused student or that student’s representative.”); *Gendia v. Drexel Univ.*, No. 20-1104, 2020 WL 5258315, at *5 (E.D. Pa. Sept. 2, 2020) (“finding that the university satisfied the requirements for fundamental fairness when it allowed the parties to submit cross-examination questions to the adjudicator.”)).

further deter them from reporting altogether.⁴⁰⁴ In fact, mental health professionals, in response to the proposed regulations under President Trump prior to the Final Rule, laid out that cross-examination “would exacerbate psychological harms to victims.”⁴⁰⁵ As an alternate to cross-examination, the parties would still be able to retain their due process rights because, as contemplated in the proposed regulations, they would be able to request for the final determinator – ideally a neutral third party, as expressed above – to ask “relevant questions and follow-up questions, including questions challenging credibility, that they want asked of any party or witness and have those questions asked . . . at a live hearing subject to certain requirements.”⁴⁰⁶ The final determinator could also ask relevant questions of the parties and witnesses.⁴⁰⁷

C. Use Preponderance of the Evidence Standard

In evaluating all of the relevant evidence and, therefore, making a final determination, institutions should use the preponderance of the evidence standard, as opposed to the clear and convincing standard. First, the preponderance of evidence standard is widely used in civil litigation proceedings, which are akin to Title IX hearings.⁴⁰⁸ Several courts have also held that the preponderance of evidence standard is appropriate and protects the

404. Sandra R. Levitsky et al., *Why the Cross-Examination Requirement in Campus Sexual Assault Cases is Irresponsible*, WASH. POST (May 7, 2020, 2:04 PM), <https://www.washingtonpost.com/opinions/2020/05/07/what-education-department-gets-wrong-its-rules-campus-sexual-assault/>.

405. Dowling, *supra* note 401, at 160 (citing Letter from Judith L. Herman et al., Prof of Psychiatry, Harv. Med. Sch., to Kenneth L. Marcus, Assistant Sec’y for Civ. Rts., Dep’t of Educ., *Re: ED Docket No. ED-2018-OCR-0063, RIN 1870-AA14, Non-Discrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance* 3 (Jan. 30, 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/01/Title-IXComment-from-Mental-Health-Professionals.pdf> [<https://perma.cc/EN-38-FE7G>] (“This rule requires students who file formal Title IX complaints to submit to cross-examination in a ‘live hearing’ by the accused student’s ‘advisor of choice.’ For survivors of sexual assault and harassment, this means being subjected to hostile attacks on their credibility and public shaming at a time, following a traumatic event, when they may feel most vulnerable. It also means being forced to relive their traumatic experiences in excruciating detail, a situation almost guaranteed to aggravate their symptoms of post-traumatic stress. For these reasons, a requirement for live cross-examination is likely to cause serious harm to victims who complain and to deter even more victims from coming forward.”)). *Id.* at 160 n.270.

406. *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 87 Fed. Reg. at 41,503.

407. *Id.*

408. Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1639 (2012).

due process rights of those involved.⁴⁰⁹ The preponderance of evidence standard is also appropriate because it “more properly allocates the risk of error between the accused student and the school and better accounts for the school’s countervailing interests than the higher standard of clear and convincing evidence.”⁴¹⁰ While the Final Rule contemplated that the institution could choose between the clear and convincing standard or the preponderance of the evidence standard, a recent analysis of the fifty-three top-ranked public and private universities found that they use the preponderance of the evidence standard and, beyond those institutions, a majority of universities apply preponderance of the evidence standard.⁴¹¹ Thus, that is evidence enough that the preponderance of evidence standard is satisfactory in order to arrive at a just outcome and determination.

D. Uphold Definition of Hostile Environment Sexual Harassment Established by Supreme Court

The definition of sexual harassment, specifically that of hostile environment sexual harassment, should align with the definition provided by the Supreme Court, which means that the definition brought forth by the Final Rule should stand. That is, the definition should read as follows: “unwelcome conduct that a reasonable person would determine is ‘so severe, pervasive, and objectively offensive’ that it effectively denies a person equal access to education.”⁴¹² First, even though private litigation involving money damages under Title IX is clearly different from an administrative Title IX hearing, aligning the definitions “provides clear, consistent expectations for [institutions] without letting [them]

409. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,484-85; *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 868 (8th Cir. 2020) (“[W]e do not think a higher standard of proof [than preponderance of the evidence] is compelled by the Constitution A heightened burden of proof may lessen the risk of erroneous deprivations for an accused, but it also could frustrate legitimate governmental interests by increasing the chance that a true victim of sexual assault is unable to secure redress and a sexual predator is permitted to remain on campus.”); *Messeri v. DiStefano*, 480 F. Supp. 3d 1157, 1167-68 (D. Colo. 2020) (“Increasing the evidentiary standard would undoubtedly make it less likely that the University erroneously sanctioned Plaintiff or others similarly situated . . . [but] requiring a higher evidentiary standard would . . . detract from the University’s ‘strong interest in the educational process, including maintaining a safe learning environment for all its students’ Balancing these interests, the Court concludes that it is beyond dispute that due process currently permits state educational institutions to adjudicate disciplinary proceedings relating to sexual misconduct using a preponderance of the evidence standard.” (quoting *Plummer v. Univ. of Hous.*, 860 F.3d 767, 773 (5th Cir. 2017))); *Jordan v. McKenna*, 573 So.2d 1371, 1376 (Miss. 1990) (holding, in civil action for rape, that plaintiff’s burden is “by a preponderance of the evidence.”).

410. Weizel, *supra* note 407, at 1645.

411. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41,485.

412. *Id.* at 41,413.

‘off the hook’” and still allows institutions to “address misconduct that does not mean that standard through codes of conduct outside the Title IX context.”⁴¹³ Second, and perhaps most importantly, implementing the Final Rule’s definition of hostile environment sexual harassment protects constitutional rights under the First Amendment. The Supreme Court in *Tinker v. Des Moines Independent Community School District* found that students are afforded First Amendment rights.⁴¹⁴ And to a greater extent, the Supreme Court recognized that the protecting constitutional freedoms in the classroom is vital and, as a result, our society’s “future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’”⁴¹⁵

As such, we live in a very hypersensitized society, as one Final Rule commenter acknowledged, so expanding the definition of hostile environment sexual harassment would continue to persecute those that express opinions that others simply disagree with and, in effect, would unnecessarily chill and suppress their free speech rights.⁴¹⁶ Similarly, “if a regulation or campus code bans hostile environments created from verbal conduct, without requiring more tangible harm, people can and will file complaints, and bring lawsuits, over constitutionally protected speech that offended them”⁴¹⁷ Finally, just because the definition of hostile environment sexual harassment would be as described previously, does not mean that it would be a free-for-all on campus for students to say whatever they want, as threats of violence, hate speech, and intentional infliction of emotional distress, among other categories of prohibited speech, would still be prohibited.

E. Collaboration with Law Enforcement

The Dear Colleague Letter cautioned against relying on police investigations or reports because they “are not determinative of whether sexual harassment or violence violates Title IX.”⁴¹⁸ It is unclear whether the proposed regulations, once finalized, will also yield such warning (they currently do not),

413. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,149 (May 19, 2020).

414. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969).

415. *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967).

416. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,140 n.619 (citing *Rodriguez v. Maricopa Cmty. Coll. Dist.*, 605 F.3d 703 (9th Cir. 2010) (“dismissing racial harassment lawsuit over instructor’s racially insensitive emails about immigration based on the First Amendment, even though the emails were offensive to Hispanic employees.”)).

417. *Id.* at 30,140.

418. Ali, *supra* note 108, at 10.

but they should nevertheless recommend that institutions collaborate with law enforcement. The most effective method in which Title IX investigators could lean on law enforcement in assisting their Title IX investigation was recommended by Susan Riseling in 2015, the UW-Madison Chief of Police. She recommended that “a Title IX investigator should watch the police’s interview through a television feed and prompt the detective to ask any additional questions.”⁴¹⁹

It is important to note that evidence obtained by law enforcement should not be an overriding factor in the institution’s ultimate determination of guilt, or lack thereof. After all, the standards of proof are different for a criminal investigation/case (e.g., beyond a reasonable doubt) than a Title IX investigation. In addition, a district attorney holds greater power than a Title IX investigator in terms of gathering evidence, as Title IX investigators cannot subpoena text messages, phone records, etc. Still, collaborating with law enforcement may increase the amount of evidence at the institution’s disposal and eliminate wasted time brought by interviewing parties again. In turn, that would expedite the entire Title IX process, which should remain one of the chief goals of a Title IX investigation. It is imperative that the process is not rushed, but at the same time, the process as a whole can be emotionally draining and taxing for both the accused and accuser. For instance, in stories of sexual misconduct shared with the *Seattle Times*, some complained, to no surprise, how grueling the entire process was, including one example where the investigation and discipline process took nine months.⁴²⁰

Law enforcement can also lean on Title IX investigators in order to make campus a safer environment for all. For example, Riseling detailed a Title IX case where the accused admitted regret for what had happened in his disciplinary hearing “in an apparent attempt to receive a lesser punishment,” which contradicted with what he told law enforcement when he denied the charges.⁴²¹ Law enforcement then “subpoenaed the Title IX records of the hearing and were able to use that as evidence against the student.”⁴²²

419. Jake New, *Making Title IX Work*, INSIDE HIGHER ED (July 6, 2015), <https://www.insidehighered.com/news/2015/07/06/college-law-enforcement-administrators-hear-approach-make-title-ix-more-effective>.

420. Asia Fields & Taylor Blatchford, *In Survivors’ Words: How Colleges Should Better Respond to Sexual Misconduct*, SEATTLE TIMES (Mar. 6, 2022), <https://projects.seattletimes.com/2022/sexual-misconduct-title-ix-washington-college-survivors-words/>.

421. New, *supra* note 419.

422. *Id.*

CONCLUSION

In closing, Title IX specific to sexual harassment, sexual assault, and sexual violence is at a crossroads because, largely, it would not be a surprise if future forthcoming regulations continue to fall along political affiliations. We are already seeing that with President Biden's Administration's proposed regulations. It is time, once and for all, that we take a sensible, moderate approach, without political theater, to combat sexual harassment, sexual assault, and sexual violence across college campuses. Both the accused and accusers alike deserve as much.