

## TAMING TITLE IX TENSIONS

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### ABSTRACT

*The appropriate parameters for sexual assault disciplinary proceedings in public colleges and universities have historically been hotly contested. In recent years, the debate has focused on two competing sets of rights—the more established Title IX rights of the victim and the evolving constitutionally-based procedural due process rights of the accused. This debate over whose rights should be prioritized—those of the victim or those of the accused—is a classic civil rights enforcement dynamic. How can educational institutions effectuate the equality mandate of Title IX while not infringing on the constitutionally-based procedural due process rights of the accused? The Executive Branch, through the federal Department of Education (“DOE”), has historically been a critical player in defining Title IX obligations. However, Title IX has become increasingly politicized, with its enforcement largely dependent on who is in power in the Executive Branch. In this changing environment, where litigation from both victims and accused students is increasing, educational institutions must look beyond politics to determine how to develop disciplinary systems that fairly balance these two sets of competing rights. First, this Article distills the procedural due process case law and the actual protections it provides to accused students. It then argues that educational institutions should prioritize four key principles in order to create fair disciplinary systems: 1) The educational context must determine the scope of the procedural due process rights; 2) Sexual assault is not a sui generis disciplinary problem; 3) Educational institutions must calibrate the system to its remedies; and 4) Title IX must be factored in as a governmental interest. This Article proposes an Investigator/Board model that would satisfy these four principles and provide educational institutions with the tools to design and implement fair systems that are compliant with both Title IX and procedural due process.*

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## INTRODUCTION

The Executive Branch of the United States government, through the Department of Education’s Office for Civil Rights (“OCR”),<sup>1</sup> has historically played a critical role in defining and enforcing Title IX, the civil rights statute that protects an equal access to education based on sex.<sup>2</sup> In recent years, Title IX has become increasingly politicized, with enforcement largely dependent upon who is in power in the Executive Branch.<sup>3</sup> Schools are caught

<sup>1</sup> The Title IX regulations provide the Department of Education, specifically the Assistant Secretary for Civil Rights (who is in charge of OCR), with the authority to implement the requirements of Title IX. 34 C.F.R. § 106 (2017).

<sup>2</sup> 20 U.S.C. § 1681 (2016); *see also* Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1997–98 (2016) (“Title IX is about institutional accountability, a civil rights mechanism to hold institutions accountable for providing equal education.”); Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. Rev. 1049, 1054 (2015) (“Title IX, at the time it passed, contemplated more direct issues of access to programs and equality of resources for male and female students [than Title VII].”).

<sup>3</sup> Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, ATLANTIC (Sept. 22, 2017), <https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846/>; Jake New, *Trump, Clinton and Sex Assault*, INSIDE HIGHER ED (Oct. 11, 2016), <https://www.insidehighered.com/news/2016/10/11/approaches-campus-sexual-assault-would-differ-under-trump-clinton>.

in the middle of this politicization, as the requirements on them shift from administration to administration.<sup>4</sup>

This uncertainty comes at a critical moment.<sup>5</sup> It is clear that the rate of sexual assault in post-secondary schools is troubling and poses a risk to equal access to education based on sex.<sup>6</sup> It is also clear that Title IX *requires* post-secondary schools to address sexual assault (as a form of sex discrimination) in order to comply with Title IX's equality mandate. That obligation includes the subject of this Article, the adjudication of sexual assault claims in schools' disciplinary systems.<sup>7</sup> But what specifically does that require of post-secondary schools to meet their Title IX obligations? Whose rights should they prioritize? How can they address the growing number of sexual assault complaints?

The starting place is Title IX. As is typical for a civil rights statute, Title IX codifies the societal interest in protecting victims<sup>8</sup> against certain types of discrimination and requires schools to provide an equal access to education.

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<sup>4</sup> Compare OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 3-12 (2001) [hereinafter 2001 SEXUAL HARASSMENT GUIDANCE], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (stating that the school was entitled to weigh the request for confidentiality of the victim; that mediation is not appropriate in sexual assault cases even if voluntary; that preponderance is the acceptable and appropriate standard for sexual assault cases; that promptness is based off the general OCR standard for such cases at sixty days; and that schools should minimize the burden on the complainant during the investigation period), with OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 3-5 (2017) [hereinafter 2017 Q&A], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> (stating that once an investigation is opened that may lead to disciplinary action, schools should provide written notice including identities of the parties involved; that mediation can be appropriate in sexual assault cases; that preponderance of clear and convincing evidence are standards that can be used in sexual assault cases; that promptness will be assessed holistically; that equitable interim measures will be used; and that schools cannot rely on fixed rules or operating assumptions that favor one party over another).

<sup>5</sup> Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 131 (2016) ("Title IX Coordinators currently address campus sexual misconduct in an uncertain, legalized environment characterized by growing complaints, liability pressure, and legalized directives from the Department of Education's OCR.").

<sup>6</sup> See *infra* Part I.A.

<sup>7</sup> This Article focuses on the educational institutions' response obligations as they relate to the institutions' disciplinary systems. Educational institutions' response obligations are not limited to the adjudication of allegations. See 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 15-18 ("Once a school has notice of possible sexual harassment of students . . . it should take immediate and appropriate steps to investigate . . . and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.").

<sup>8</sup> Some advocates have argued that "survivor" is a preferable term as it is more empowering. While this is certainly an important point, this Article uses the term "victim" because it is consistent with the language used in both OCR guidance and in court decisions. See, e.g., *Roskin-Frazee v. Columbia Univ.*, 17 Civ. 2032 (GBD), 2018 WL 1166634, at \*1 (S.D.N.Y. Feb. 21, 2018) (referring to the plaintiff as "a victim of sexual assault"); *Karasek v. Regents of the Univ. of Cal.*, No. 15-cv-03717-WHO, 2016 WL 4036104, at \*1 (N.D. Cal. July 28, 2016) (referring to the plaintiffs as "victims of sexual assault").

This mandate aims to redress the educational harms caused by sex discrimination, which has historically impeded women's equal access to education.

But it is not as simple as protecting the sexual assault complainant's<sup>9</sup> rights. As with most rights, the complainant's rights don't exist in a vacuum, but rather in relation to other rights, including those of the respondent (the student accused of sexual assault).<sup>10</sup> In public colleges and universities ("educational institutions"),<sup>11</sup> this tension has extra mileage because the respondents have constitutionally-based procedural due process ("procedural due process") protections, which may require additional process.

Critics argue that, given the serious (and potentially criminal) nature of sexual assault allegations, the procedural due process protections of a criminal trial, with its full panoply of rights and protections, including adversarial cross-examination and representation by counsel, should be utilized in the educational setting.<sup>12</sup> These assertions have grown in recent years, notably in a reaction to the sweeping changes that resulted from OCR guidance between 2011–2016.<sup>13</sup> One paramount concern has been that in the resultant rush to protect victims and comply with OCR's new policies, schools did not adequately protect the accused students' procedural due process rights.<sup>14</sup>

<sup>9</sup> In this Article, the student who brings a sexual assault complaint will be referred to as a complainant. This language is consistent with that used by OCR in its Title IX investigations. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL (CPM) 26 (2015) [hereinafter CASE PROCESSING MANUAL], <https://www2.ed.gov/about/offices/list/ocr/docs/ocrpm.pdf>.

<sup>10</sup> In this Article, the student who is accused of sexual assault will be referred to as a respondent. This language is consistent with that used by OCR in its Title IX investigations. See *id.*

<sup>11</sup> Constitutional procedural due process rights are only applicable to public colleges and universities, not private ones. See *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 156–57 (5th Cir. 1961).

<sup>12</sup> For scholarly articles on this issue, see *infra* note 16; see also Nancy Chi Cantalupo, "Decriminalizing" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 483 (2012) (arguing against using a criminal model).

<sup>13</sup> See *infra* Part II.

<sup>14</sup> This criticism has been articulated in numerous media pieces and in multiple faculty letters and advocacy group publications. See, e.g., Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J., Aug. 20, 2011, at A13; Ariel Kaminer, *A New Factor in Campus Assault Cases*, N.Y. TIMES, Nov. 19, 2014, at A22 (detailing the rise of attorneys assisting respondents in sexual assault disciplinary proceedings, due to the perception that a "rush to judgment" is leading to unfair processes for respondents); Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (arguing that Harvard's new sexual harassment policies "lack the most basic elements of fairness and due process"); Letter from Ass'n of Am. Univ. Professors (AAUP) to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Aug. 18, 2011), <https://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf> (arguing that OCR's decision to mandate use of the preponderance of the evidence standard will not adequately protect respondents); Open Letter from Found. for Individual Rights in Educ. (FIRE) to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (May 7, 2012), <https://www.thefire.org/open-letter-to-ocr-from-fire-coalition/> (arguing that OCR's changes have "failed to protect fundamental constitutional principles" and protect respondents); Emily Yoffe, *The College Rape Overcorrection*, SLATE: DOUBLE X (Dec. 7, 2014, 11:53 PM),

In the midst of these shifting debates, educational institutions are facing legal challenges from complainants and respondents in courts and through OCR complaints.<sup>15</sup> Title IX rights are well-established in case law and in established OCR guidance.<sup>16</sup> By contrast, education-related procedural due process rights are neither as strong, nor as well-established for this specific context. Courts are actively grappling with the contours of this balance.

Educational institutions should not play politics with either Title IX or procedural due process rights. They must create and maintain disciplinary systems that provide for both Title IX protections for complainants and appropriate procedural due process protections for respondents. They must also act to protect their central educational mission within their unique environment. In this uncertain climate, the proliferation of litigation from both sides is likely to continue to increase. It is best for all interested parties—educational institutions, courts, students and interest groups—to understand how Title IX and procedural due process rights interact and to enable educational institutions to develop fair<sup>17</sup> systems that balance both sources of rights.

There is fierce scholarly and public debate about the appropriate balance between Title IX rights and procedural due process rights in sexual assault disciplinary systems, notably about which set of rights should be prioritized when they are in tension.<sup>18</sup> Two issues lie at the heart of these disputes. The first is whether educational institutions and OCR have accurately balanced the rights of sexual assault complainants and respondents. This debate is centered mainly on what protections Title IX mandates for complainants, but recently has also included the assertion that some changes intended to protect complainants have trampled on respondent's rights.<sup>19</sup> The second is

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[http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html) (arguing that the rush to protect complainants has led to a process in which respondents are denied due process).

<sup>15</sup> See, e.g., EDURISK, UNITED EDUCATORS, STUDENT SEXUAL ASSAULT: WEATHERING THE PERFECT STORM 1, <https://www.edurisksolutions.org/templates/template-article.aspx?id=379&pageid=136> (“From 2006–2010, United Educators (UE) received 262 claims of student-perpetrated sexual assault, which generated more than \$36 million in losses for UE and our members.”); Pappas, *supra* note 5, at 129–31 (describing how “[i]ncreased attention to sexual misconduct has also led to a proliferation of complaints and lawsuits”).

<sup>16</sup> See Dear Colleague Letter from Candice Jackson, Acting Asst. Sec’y, Office for Civil Rights, U.S. Dep’t of Educ. (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> (stating that the 2001 Sexual Harassment Guidance is still in effect).

<sup>17</sup> The concept of “fairness” frequently appears in the case law interpreting Title IX and is a fundamental procedural due process concept as well. See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (“The time-honored phrase ‘due process of law’ expresses the essential requirement of fundamental fairness.”); *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) (proclaiming that school hearings must be “conducted with basic fairness” (citing *Coveney v. Presidents & Trs. of Holy Cross Coll.*, 445 N.E.2d 136, 139 (Mass. 1983))); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 380 (Mass. 2000).

<sup>18</sup> See *infra* notes 19 and 20.

<sup>19</sup> Compare ROBERT L. SHIBLEY, *TWISTING TITLE IX* 34–37 (2016) (arguing the preponderance of the evidence standard results in conclusions most likely to be more “convenient for the college”),

whether the potentially criminal nature of sexual assault mandates higher procedural protections for respondents, specifically in the form of quasi-criminal procedural due process rights.<sup>20</sup>

These two scholarly conversations and public debates have largely examined Title IX and procedural due process in silos, with the proposed solutions focused more on the requirements of one of these legal regimes than on how to mediate between the two sets of rights and obligations.<sup>21</sup> This Article bridges the two by providing a normative framework for mediating between Title IX and procedural due process rights. The framework embodies four principles that educational institutions should use when crafting their sexual assault disciplinary proceedings. These principles, and the proposed model, correctly balance Title IX and procedural due process rights, and provide for fair results for both parties.

Additionally, this Article assumes that the burden for investigating and proving allegations of sexual assault should rest with the educational institution and not be delegated to students. The risk of some aspects of the adversarial model, such as using cross-examination and permitting adverse attorneys, is that some of the investigatory and proof functions get shifted to the students, rather than remaining with the educational institution per Title IX.

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and Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 907–08 (2016) (arguing that the protections that Title IX mandates for complainants have been overblown and thus threaten the protections for respondents), and Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 53 (2013) (arguing that OCR provides insufficient due process protections for the respondent in Title IX adjudications), with Nancy Gertner, *Complicated Process*, 125 YALE L.J. FORUM 442, 444 (2016) (defending the preponderance of evidence standard as mandated by OCR while criticizing its application in Harvard's pre-2014 sexual assault policies), and 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, 1642 (2012) (arguing "preponderance of the evidence is the most appropriate standard of proof for university adjudications of sexual assault complaints"), and Katharine K. Baker et al., *White Paper: Title IX & the Preponderance of the Evidence*, FEMINIST LAW PROFESSORS (July 18, 2017), <http://www.feministlawprofessors.com/wp-content/uploads/2017/07/Title-IX-Preponderance-White-Paper-signed-7.18.17-2.pdf> (defending the preponderance of evidence standard as necessary to realize the civil rights protections of Title IX).

<sup>20</sup> Compare SHIBLEY, *supra* note 19, at 30–44 (arguing the 2011 Dear Colleague Letter violates constitutional procedural due process rights), and Henrick, *supra* note 19, at 59–60 (arguing that the preponderance of the evidence standard will increase convictions with regard to guilt or innocence of a student accused of sexual assault), and Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 491 (2012) (arguing for a unified due process framework for all universities, which would provide increased due process rights to respondents, in order to better effectuate victim protections), with Anderson, *supra* note 2, at 1988–89 (arguing that due process protections must be balanced with the civil rights mandate of Title IX), and Gertner, *supra* note 19, at 447 (reframing the campus sexual assault debate as about providing appropriate manners of ending sex discrimination, not rebalancing or rewriting due process standards). See also Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243 (2001) (cataloguing the due process jurisprudence in campus disciplinary adjudications prior to 2001).

<sup>21</sup> See *supra* notes 19–20.

Part I of this Article briefly discusses the scope of the problem of sexual assault in educational institutions and their Title IX obligations to adjudicate sexual assault allegations. Part II details the changing sexual assault disciplinary models since 2011, as prompted by OCR's guidance between 2011 and 2016. Part III outlines the procedural due process framework and the rights it provides to respondents. Part IV critically examines the rationales animating respondents' call for additional procedural due process rights in the education context, as illustrated by case law on two central rights in our legal system—the right to representation by counsel and the right to cross-examination. Part V proposes a set of principles that educational institutions should use when developing fair disciplinary systems in sexual assault cases that provides both Title IX and procedural due process rights.

## I. SEXUAL ASSAULT AND TITLE IX

### A. *The Scope of the Problem*

Studies on the rate of sexual assault vary,<sup>22</sup> but there is agreement that the rate of sexual assault is troublingly high<sup>23</sup> and that the majority of victims are female.<sup>24</sup> The prevalence of sexual assault, combined with the long-lasting negative impact that a sexual assault has on the victim's educational and economic opportunities,<sup>25</sup> make sexual assault a serious barrier to women's equal access to education.<sup>26</sup>

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<sup>22</sup> Compare BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf> (finding a sexual assault rate of 27.7 per 1,000 students), with DAVID CANTOR ET AL., ASS'N OF AM. UNIVS., AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 13 (2015), <http://www.aau.edu/Climate-Survey.aspx?id=16525> (finding that 23.1% of female undergraduate respondents reported unwanted sexual contact and 11.7% of total respondents reported nonconsensual sexual contact), and Bonnie S. Fisher et al., *Crime in the Ivory Tower: The Level and Sources of Student Victimization*, 36 CRIMINOLOGY 671, 691 (1998) (finding a sexual assault rate of 30.0 per 1,000 students), and Christopher P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. COLL. HEALTH 639, 639–47 (2009) (finding that 20% of college women had experienced “some type of completed assault” before graduation).

<sup>23</sup> See, e.g., *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 183 (D.R.I. 2016) (“[E]nsuring allegations of sexual assault on college campuses are taken seriously is of critical importance . . . .”); Henrick, *supra* note 19, at 49 (“Empowering victims of sexual violence to seek justice is critically important . . . .”); Triplett, *supra* note 20, at 487 (recognizing “[s]tudent-on-student” sexual assault as a “significant problem”).

<sup>24</sup> One in five college women are victims of completed or attempted sexual assault in college, compared with 6.1% of males. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. 2 (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter] (citing CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT xiii, 5-5 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>).

<sup>25</sup> See Baker et al., *supra* note 19, at 1–3.

<sup>26</sup> 2011 Dear Colleague Letter, *supra* note 24, at 2 (“The statistics on sexual violence are both deeply

Sexual assault has dramatic negative effects on a victim's access to education.<sup>27</sup> These effects include, but are not limited to, an impact on grades,<sup>28</sup> ability to stay at the institution of one's choice,<sup>29</sup> ability to graduate on time,<sup>30</sup> ability to maintain scholarships,<sup>31</sup> and even the ability to continue education itself.<sup>32</sup> In addition, sexual assault, as with all forms of sexual harassment, negatively impacts a victim's health and economic prospects.<sup>33</sup> Victims are at increased risk for depression, post-traumatic stress disorder, and suicidality.<sup>34</sup> They are also at greater risk for homelessness, lower earnings, and poverty.<sup>35</sup>

### B. *The Impact of Under-Reporting*

Sexual assault is underreported on college campuses. According to a 2007 survey, only 16% of forced rape victims and 8% of incapacitated sexual assault victims reported to a crisis center or health center.<sup>36</sup> The numbers of victims who report to law enforcement are even lower: 13% of forced sexual assault victims and just 2% of incapacitated victims.<sup>37</sup>

Thus the conundrum: Per Title IX, educational institutions must respond to sexual assaults that they know about *or should know about*,<sup>38</sup> but the vast majority of sexual assaults are not being reported.<sup>39</sup> In order to meet their

troubling and a call to action for the nation.”).

<sup>27</sup> It is a well-documented phenomenon that many sexual assault victims experience adverse educational outcomes, such as decline in grades, loss of scholarship funds, withdrawal from school, academic probation, and expulsion. For a full discussion, see Baker et al., *supra* note 19, at 1–2.

<sup>28</sup> *Id.* at 1 & n.5 (citing Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106 (2016); Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA VIOLENCE & ABUSE 191, 196 (2014); Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors' Grades*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think>; Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* (June 2012) (unpublished Ph.D. dissertation, Brandeis University), <https://pqdtopen.proquest.com/doc/1102751005.html?FMT=AI>).

<sup>29</sup> Baker et al., *supra* note 19, at 2 & n.11 (citing Bolger, *supra* note 28, at 2108–09; Loya, *supra* note 28, at 96–100).

<sup>30</sup> *Id.* at 2 & n.10 (citing Bolger, *supra* note 28, at 2116; Loya, *supra* note 28, at 94).

<sup>31</sup> *Id.* at 2 & n.6 (citing Bolger, *supra* note 28, at 2117; Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 479 (2005); Loya, *supra* note 28, at 95–96).

<sup>32</sup> *Id.* at 2 & nn.7 & 12–14 (citing Bolger, *supra* note 28, at 2108, 2118–19; Loya, *supra* note 28, at 99, 103).

<sup>33</sup> *Id.* at 2.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 3.

<sup>36</sup> KREBS ET AL., *supra* note 24, at xvii. See generally David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002) (demonstrating how common repeat rapists are, even if they self-report their violent acts but have never been prosecuted).

<sup>37</sup> KREBS ET AL., *supra* note 24, at xvii.

<sup>38</sup> See 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 12–14 (referring to the obligation when a “school knows or reasonably should know about [a] harassment”).

<sup>39</sup> See FISHER ET AL., *supra* note 22, at 21–26.

Title IX legal obligations, they must therefore create systems that increase reporting so that the scope of the problem can be understood and addressed under Title IX's requirements.

*C. The Role of Educational Institutions in Sexual Assault Cases*

When a sexual assault occurs at an educational institution, there are several avenues a sexual assault student victim can pursue. These include contacting the police to see if a criminal case could be pursued, filing a civil tort case, filing a civil restraining order, and/or pursuing actions at the student's educational institution. Each avenue provides different remedies and has different requirements.

No crime victim is legally required to pursue a criminal case, or even a civil case. Our legal system instead allows crime victims to choose between filing a criminal complaint (which may or may not be prosecuted) and a civil complaint, or both. In part, this is because the systems address different harms: the criminal system redresses the societal or public harm caused by a crime, while civil cases address the harm to individuals. Given the differences in the systems, including the standards of proof, victims may prevail in one arena while not receiving a remedy in another.<sup>40</sup>

Students rarely seek the protections of criminal courts.<sup>41</sup> Even when they do, criminal prosecutions of reported sexual assaults are rare.<sup>42</sup> Any victim in a criminal case is not in charge of the case; rather it is the officers of the criminal justice system (the police and the prosecutors) who determine whether the case moves forward and what charges are brought, if any. The remedies in criminal cases are not tailored to individual harm but rather societal harm. Even if the accused student received the criminal punishment of incarceration, this punishment would not necessarily assist the student victim with remaining at school pending the outcome of the criminal case. Given that the sanction in a criminal case is the potential loss of liberty, the burden of proof is the highest in our legal system and the accused is afforded

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<sup>40</sup> See, e.g., Jennifer Auther et al., *Jury Unanimous: Simpson is Liable*, CNN (Feb. 4, 1997), <http://www.cnn.com/US/9702/04/simpson.verdict1/index.html> (reporting that O.J. Simpson was found civilly liable for the death of Ronald Goodman and for committing battery against Nicole Brown Simpson, despite being acquitted for criminal charges based on the same conduct).

<sup>41</sup> BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995–2013, at 1 (“Among student victims, 20% of rape and sexual assault victimizations were reported to police, compared to 32% reported among nonstudent victims ages 18 to 24. . .”).

<sup>42</sup> Anderson, *supra* note 2, at 1961–62 (“Sexual offenses rank among the least reported of serious crimes, and, once reported, they experience a high attrition rate.”); David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329 (reporting that in 136 examined sexual assault cases “61 (44.9%) did not proceed to any prosecution or disciplinary action”).

the full scope of protections, such as the right to an attorney, the right to cross-examination of the victim, and the right to discovery.

The civil system provides a wide range of remedies, with examples including tort actions for monetary compensation for the harm suffered and civil restraining orders barring the accused from contact with the victim. Just as with potential incarceration in criminal cases, tort actions would not necessarily assist the student victim with remaining at school pending the (often lengthy) outcome of the civil case. Also, while civil restraining orders could in theory keep the accused student away from the student victim, courts are often reluctant to issue stay-away orders that affect the accused student's ability to attend class, as they view this as interfering with the educational institution's sphere of authority. In civil cases, the default standard of evidence is "preponderance of the evidence," which has been described as "50% plus a feather," a standard which reflects the lower level of sanctions that defendants face than in a criminal case.<sup>43</sup>

Educational institutions provide a unique third avenue for student victims seeking actions to enable them to continue their education and/or to redress the harm from the sexual assault.<sup>44</sup> In fact, student victims are often seeking remedies that *only* the educational institution can provide. These remedies can be accessed through the educational institution's internal systems, including the student conduct code and disciplinary systems. The required process to access these remedies varies from the more informal (requesting extensions from individual professors), to the more formal (meeting with the Title IX Coordinator and requesting actions, filing a complaint in the disciplinary system).

These education-specific remedies include waiving requirements to allow the student victim to change classes without penalty, allowing her to move her residence off-schedule for such moves, providing education-related accommodations such as extensions on course assignments, and/or requiring that the accused student stay away from the student victim, change class, and/or move his residence.<sup>45</sup>

Student victims often turn first to their educational institution for remedies because this is the most effective and direct way that they can get what they need to continue their education. Student victims often prefer to seek remedies from their community directly, rather than proceeding through the civil or criminal process, which requires them to navigate foreign outside systems.<sup>46</sup>

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<sup>43</sup> Tamara Rice Lave, *Ready, Aim, Fire: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 681 ("All of the flagship state universities are known to have adopted 'preponderance of the evidence' as their standard of proof. As one university administrator explained, 'preponderance of the evidence is 50% plus a feather.'").

<sup>44</sup> CANTOR ET AL., *supra* note 22, at 1, 35–37.

<sup>45</sup> 2011 Dear Colleague Letter, *supra* note 24, at 16.

<sup>46</sup> *Id.*

Sexual assault victims are not atypical among students in seeking education-based remedies when they are harmed by other students. In other types of cases where actions are potentially criminally prosecutable, such as a simple assault at a school, students often prefer the remedy to be centered on making the school community safe again for them, rather than seeing the perpetrator go to jail.<sup>47</sup>

While a number of commentators have asserted that schools are not the optimal forum in which to address sexual assault,<sup>48</sup> they are currently the primary forum in which such issues are brought forward. Sexual assault victims have a right to bring their requests to their educational institution, just as they do to file a criminal complaint and/or a civil complaint. Educational institutions have the resultant Title IX legal obligation to address such claims, and they must do so.

#### D. Title IX Applicability and General Requirements

Title IX applies to most educational institutions in the United States,<sup>49</sup> and prohibits discrimination on the basis of sex in education.<sup>50</sup> Over time, Title IX jurisprudence has evolved to include sexual harassment, including sexual assault, as prohibited sex discrimination.<sup>51</sup>

Once a school is covered by Title IX, sex discrimination must be addressed in “any education program or activity” affiliated with that institution.<sup>52</sup> Per Title IX, actionable sexual harassment requires a *nexus* between the alleged sex discrimination and the complainant’s ability to access her education. One instance of sexual assault may be sufficient to constitute sexual harassment, if it is “sufficiently severe.”<sup>53</sup> The complainant must allege (and demonstrate, in order to prevail) that the sexual assault negatively affected

<sup>47</sup> Cf. ALL. FOR SAFETY & JUSTICE, CRIME SURVIVORS SPEAK: THE FIRST-EVER NATIONAL SURVEY OF VICTIMS’ VIEWS ON SAFETY AND JUSTICE 13–23 (2016) (displaying data that serious crime victims would prefer prosecutors to focus on solving community problems rather than focusing on convictions).

<sup>48</sup> See Katharine Silbaugh, *Reactive to Proactive: Title IX’s Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. Rev. 1049, 1050–52 (2015) (arguing that Title IX improperly incentivizes schools to focus on “post-assault infrastructure” rather than dedicating resources to preventing sexual assault).

<sup>49</sup> This is because Title IX obligations attach to schools “receiving Federal financial assistance,” and that term has been broadly interpreted. See *Haffer v. Temple Univ.*, 688 F.2d 14, 17 (3d Cir. 1982) (finding that because the University “as a whole” received federal money, “its intercollegiate athletic department” was governed by Title IX). It includes even the receipt of federal financial aid by students attending that educational institution. *Grove City Coll. v. Bell*, 465 U.S. 555, 564 (1984) (“[Title IX] ‘encompass[es] all forms of federal aid to education, direct or indirect.’” (quoting *Grove City Coll. v. Bell*, 687 F.2d 684, 691 (3d Cir. 1982))).

<sup>50</sup> “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .” 20 U.S.C. § 1681(a) (2016).

<sup>51</sup> For an analysis of this development, see generally Silbaugh, *supra* note 48.

<sup>52</sup> 20 U.S.C. § 1681(a) (2016).

<sup>53</sup> 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 6.

her education.<sup>54</sup> There are many ways in which the two can be tied; examples include claims of being unable to attend class or engage in shared activities (such as the dining hall) for fear of encountering the accused student.<sup>55</sup>

The educational institution's obligation to act is triggered when it has actual or constructive notice (that is, whether it knew or should have known) of potential sex discrimination.<sup>56</sup> Once it is on notice the educational institution has a duty to respond, which includes, but is not limited to, investigation and adjudication of the sex discrimination.<sup>57</sup>

With regards to complaint adjudication, the disciplinary system, or grievance procedure, must be "prompt and equitable."<sup>58</sup> This includes "the opportunity [for both parties] to present witnesses and other evidence"<sup>59</sup> and the obligation to provide "[n]otice to the parties of the outcome of the complaint."<sup>60</sup> An adversarial system is not required; the focus is on the educational institution using a process that reflects the allegation, and school population, at hand.<sup>61</sup>

Educational institutions covered by Title IX must meet these fundamental Title IX requirements, as interpreted both by the case law and by OCR. Failure to abide by Title IX's requirements is actionable both in court (through injunctive relief and/or monetary damages<sup>62</sup>) and through an OCR investigation, which could result in a number of sanctions, including a monitoring period by OCR,<sup>63</sup> issuing (typically) onerous and multi-level

<sup>54</sup> *Id.* at iv, 22 (describing how the discrimination must "deny or limit" the complainant's access to their education: "[T]he school is responsible for discrimination in these cases, whether or not it knew or should have known about it, because the discrimination occurred as part of the school's undertaking to provide nondiscriminatory aid, benefits, and services to students.").

<sup>55</sup> *Id.* at 15–16.

<sup>56</sup> *Id.* at 12–14 (referring to the obligation when a "school knows or reasonably should know").

<sup>57</sup> *See id.* at 15–18 ("Once a school has notice of possible sexual harassment of students . . . it should take immediate and appropriate steps to investigate . . . and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again.").

<sup>58</sup> *Id.* at 19 ("Schools are required by the Title IX regulations to adopt and publish . . . grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex."); *see also* 34 C.F.R. § 106.8(b) (2017) ("Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

<sup>59</sup> *See* 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 20.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 15 ("[S]pecific steps in an investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors.").

<sup>62</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 287–88 (1998). For a discussion of how Title VII jurisprudence informed Title IX remedies in *Gebser* and in subsequent OCR guidance, *see* Silbaugh, *supra* note 48, at 1058.

<sup>63</sup> CASE PROCESSING MANUAL, *supra* note 9, at 16; *see also* VOLUNTARY RESOLUTION AGREEMENT: YALE UNIVERSITY (UNIVERSITY) COMPLAINT NO. 01-11-2027, OFFICE FOR CIVIL RIGHTS, U.S. DEPT OF EDUC. 6 (Jun. 11, 2012) [hereinafter YALE UNIVERSITY VOLUNTARY RESOLUTION AGREEMENT], <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf>.

requirements to come into compliance,<sup>64</sup> and/or acting to revoke federal funding.<sup>65</sup>

## II. CHANGING DISCIPLINARY MODELS

While the prevalence of sexual assault is well-established, educational institutions have historically been reluctant to overtly focus on the problem for fear that it will generate negative publicity and a decline in student enrollment.<sup>66</sup> This cautious approach receded between 2011 and 2016, with OCR's vigorous enforcement of Title IX.

Specifically, between 2011 and 2016, OCR actively—and publicly—took measures to increase the pressure on schools to comply with their Title IX obligations, as interpreted by OCR.<sup>67</sup> OCR increased its oversight of schools,<sup>68</sup> and issued more detailed and stringent policy documents<sup>69</sup> on how

<sup>64</sup> See, e.g., YALE UNIVERSITY VOLUNTARY RESOLUTION AGREEMENT, *supra* note 63 (requiring campus-wide “climate” assessments, yearly reporting to OCR, comprehensive trainings, and twelve guidelines for the development of new grievance procedures, among other requirements); VOLUNTARY RESOLUTION AGREEMENT: THE GEORGE WASHINGTON UNIVERSITY COMPLAINT NO. 11-11-2079, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC. (Aug. 31, 2011), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/11112079-b.pdf> (requiring the revision of the University's notice of nondiscrimination, revised procedures, annual reporting of complaints of sexual violence to OCR, and student-focused remedies, among other requirements).

<sup>65</sup> The U.S. Department of Education Office for Civil Rights has noted:

When OCR is unable to negotiate a resolution agreement with the recipient, OCR will initiate enforcement action. OCR will either: (1) initiate administrative proceedings to suspend, terminate, or refuse to grant or continue and defer financial assistance from or, with respect to the Boy Scouts Act, funds made available through the Department to the recipient . . . .

CASE PROCESSING MANUAL, *supra* note 9, at 28; see also *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 181 (D.R.I. 2016) (stating that OCR “holds the specter of loss of federal funds as a sword over the universities' heads in the event it were to find that the university failed to comply with Title IX”); Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT, Jan. 12, 2015, at 32 (quoting Assistant Secretary Catherine Lhamon as saying that the threat of losing federal funding is not “an empty threat”).

<sup>66</sup> Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 220 (2011) (“[S]chools have incentives not only to remain unaware of the general problem and specific instances of campus peer sexual violence, but also to actively avoid knowledge about both.”).

<sup>67</sup> See, e.g., 2011 Dear Colleague Letter, *supra* note 24, at 2 (“The statistics on sexual violence are both deeply troubling and a call to action for the nation.”); Gertner, *supra* note 65, at 32 (quoting Assistant Secretary Catherine Lhamon as saying that the threat of losing federal funding is not “an empty threat”).

<sup>68</sup> In May 2014, OCR first released a list of the universities under investigation. At that time, the list included fifty-five schools. Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>. Since then, the number of schools under investigation and the number of open cases have both grown. *Title IX: Tracking Sexual Assault Investigations*, CHRON. OF HIGHER EDUC., <http://projects.chronicle.com/titleix> (last visited Aug. 29, 2016).

<sup>69</sup> See, e.g., 2011 Dear Colleague Letter, *supra* note 24; CATHERINE E. LHAMON, ASSISTANT SEC'Y, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter 2014 QUESTIONS AND ANSWERS], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

to handle sexual assault allegations.<sup>70</sup> Between 2011 and 2016, OCR dramatically increased the number of schools that it proactively investigated for Title IX compliance, and broke with prior practice by publicly listing the names of schools under investigation.<sup>71</sup> OCR also started publishing the previously confidential settlement agreements it reached with schools,<sup>72</sup> to serve as examples for other schools to follow.

In response to OCR's pressure between 2011 and 2016 to come into Title IX compliance per its definitions, many educational institutions changed both their sexual assault policies and their disciplinary systems. Often, the changes came quickly, which increased tension between the various camps.<sup>73</sup> Even with OCR changes on the horizon,<sup>74</sup> it is unlikely that the pressure on educational institutions from both complainants and respondents will ease.

One major change has been the move towards creating separate policies for adjudicating sexual assault allegations.<sup>75</sup> While it is difficult to capture the full range of existing policies, there are some procedural commonalities among them. The policies define sexual assault (including the pivotal issue of consent) in their student handbooks and/or codes of conduct, and detail the process that will be used when determining allegations of sexual assault. Per Title IX requirements, these policies must be well-published and disseminated to students.<sup>76</sup> When a student makes a sexual assault allegation, the educational institution determines if it merits proceeding to the disciplinary system.<sup>77</sup>

While current disciplinary systems vary widely, there has been a shift away from use of a formal hearing process that operates akin to a civil court hearing, with formal presentation of evidence, and taking of testimony before

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<sup>70</sup> See, e.g., 2011 Dear Colleague Letter, *supra* note 24, at 2 (“This letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence.”).

<sup>71</sup> See *supra* note 68.

<sup>72</sup> See *Sex Discrimination: Case Resolutions*, OFFICE FOR C.R., U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/frontpage/caseresolutions/sex-cr.html> (last updated Apr. 4, 2017).

<sup>73</sup> See *supra* notes 14 and 19; see also Pappas, *supra* note 5, at 129–31 (describing the increased litigation from both sides).

<sup>74</sup> 2017 Q&A, *supra* note 4, at 7 (announcing that much of the prior guidance on Title IX between 2011 and 2016 has been rescinded and that OCR will use the rulemaking process to promulgate new guidance).

<sup>75</sup> For example, in 2011, Yale University formed the University-Wide Committee on Sexual Misconduct (“UWC”), which was created “to help ensure that reports of sexual misconduct are resolved swiftly and justly.” *University Wide Committee (UWC) on Sexual Misconduct*, YALE UNIV.: SEXUAL HARASSMENT & ASSAULT RESPONSE & EDUC. (SHARE), <http://sharecenter.yale.edu/filing-complaint/university-wide-committee-uwc-sexual-misconduct> (last visited Aug. 27, 2016).

<sup>76</sup> See 2001 SEXUAL HARASSMENT GUIDANCE, *supra* note 4, at 14, 19–20.

<sup>77</sup> The role of the complainant in determining whether the educational institution proceeds may be in flux. The 2011 Dear Colleague Letter prioritized confidentiality. See *supra* note 24, at 5 (“If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation.”). This document was later rescinded, though, by the 2017 Q&A. See *supra* note 4.

a hearing board (“Board”), sometimes with the parties represented by a representative (who is sometimes allowed to be a lawyer).<sup>78</sup> While a number of educational institutions have maintained this formal process, some schools have moved towards the non-adversarial route of having the allegations investigated by a trained<sup>79</sup> Title IX investigator (“Investigator”).<sup>80</sup> In many cases, this Investigator interviews the parties and any witnesses suggested by the parties, reviews relevant evidence, and prepares a written report.<sup>81</sup> Often, the Investigator is the conduit through which the parties “cross-examine” each other (through questioning each other’s version of events with the Investigator).<sup>82</sup> The Investigator may produce a written report that typically details the allegations, summarizes the interviews with the parties and witnesses, and assesses the evidence.<sup>83</sup> The Investigator may make credibility

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<sup>78</sup> This process is exemplified in Yale University’s formal sexual assault allegation proceedings and the University of California at Berkeley’s appeal procedures for sexual assault claims. *See* OFFICE OF THE PROVOST, YALE UNIV., UWC PROCEDURES (2016), <https://provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf> (outlining the hearing process as “intended primarily to allow the panel to interview the complainant and the respondent with respect to the [impartial] fact-finder’s [previously conducted] report”); UNIV. OF CAL., SEXUAL VIOLENCE AND SEXUAL HARASSMENT 9–16 (2017), <https://policy.ucop.edu/doc/4000385/SVSH> (outlining the University of California’s procedures for responding to sexual assault allegations whereby an investigation is conducted and a report is made under the supervision of the Title IX Officer); UNIV. OF CAL., U.C. SYSTEMWIDE FRAMEWORK ON INVESTIGATIONS, ADJUDICATIONS AND SANCTIONS (FOR STUDENT CASES) (Oct. 19, 2015), [http://survivorsupport.berkeley.edu/sites/default/files/UCSystemwideFrameworkSVSA\\_0.pdf](http://survivorsupport.berkeley.edu/sites/default/files/UCSystemwideFrameworkSVSA_0.pdf); *see also* Pappas, *supra* note 5, at 132–34 (discussing the variety of hearing models).

<sup>79</sup> Title IX requires that educational institutions “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities . . . including any investigation of any complaint.” 34 C.F.R. § 106.8(a) (2017). OCR requires that this individual be properly trained. *See* Dear Colleague Letter from Catherine E. Lhamon, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ. (Apr. 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> [hereinafter 2015 Dear Colleague Letter] (explaining in detail the Title IX coordinators role, responsibilities, and training). This document was not rescinded by the 2017 Q&A, *supra* note 4.

<sup>80</sup> For summaries of commonly utilized sexual assault disciplinary procedures and models, including the use and role(s) of investigators, hearings, and boards, and recommendations on their effectiveness and use, *see*, for example, ABA TASK FORCE ON COLL. DUE PROCESS RIGHTS & VICTIM PROTECTIONS, RECOMMENDATIONS FOR COLLEGES AND UNIVERSITIES IN RESOLVING ALLEGATIONS OF CAMPUS SEXUAL MISCONDUCT (2017), <https://www.americanbar.org/content/dam/aba/publications/criminaljustice/2017/ABA-Due-Process-Task-Force-Recommendations-and-Report.authcheckdam.pdf> [hereinafter ABA TASK FORCE RECOMMENDATIONS]; ASS’N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES (2014), <http://www.theasca.org/Files/Publications/ASCA%202014%20White%20Paper.pdf>; Pappas, *supra* note 5, at 132–34 (describing the uses of the Hearing Model, Investigation Model, and Hybrid Model, as well as a number of model policies and practices).

<sup>81</sup> *See* sources cited *supra* note 80.

<sup>82</sup> In some educational institutions, this is accomplished more formally wherein the accused student can submit a list of potential questions that the Investigator must ask the victim. *See* *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997). In other institutions, this is at the discretion of the Investigator. *See supra* note 80; *see also infra* Part V.

<sup>83</sup> *See* sources cited *supra* note 80.

determinations, and/or may decide whether any school conduct policies were violated.<sup>84</sup>

Some form of Board is commonly used in these different models.<sup>85</sup> The Board may be composed of staff, faculty, and/or students.<sup>86</sup> The authority of the Boards varies widely.<sup>87</sup> On one end of the spectrum are Boards whose authority is more limited to implementing the sanction(s) recommended by the Investigator absent a serious concern with the report (usually limited to rare occurrences like an abuse of discretion).<sup>88</sup> This means that the disciplinary decision is made basically “on the papers”; the Board does not personally interview the students and/or hear them testify about the alleged sexual assault.<sup>89</sup> On the other end of the spectrum are Boards that make full determinations, deciding what occurred—which may involve a second full investigation of the facts—and whether it was a violation of the student code and imposing any sanctions.<sup>90</sup>

### III. PROCEDURAL DUE PROCESS IN THE EDUCATIONAL CONTEXT

Procedural due process rights differ in kind from many other constitutional rights.<sup>91</sup> They are fact-dependent and context-specific.<sup>92</sup> As such, they do not mandate a specific procedure in every instance, but rather are flexible by nature.<sup>93</sup>

Procedure is not considered a panacea in every situation. Perfect procedures are not required<sup>94</sup> (if indeed any such procedures exist); rather, the is-

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*; see also N.Y.U., NON-DISCRIMINATION AND ANTI-HARASSMENT POLICY AND COMPLAINT PROCEDURES FOR STUDENTS, (2013) <http://www.nyu.edu/about/policies-guidelines-compliance/policies-and-guidelines/non-discrimination-and-anti-harassment-policy-and-complaint-proc.html>; UNIV. OF MICH.: OFFICE OF THE PROVOST, THE UNIVERSITY OF MICHIGAN FACULTY HANDBOOK: 11.C PROCEDURES FOR ADDRESSING SEXUAL HARASSMENT CLAIMS/RESOURCES, <http://provost.umich.edu/faculty/handbook/11/11.C.html> (last visited Jan. 13, 2018).

<sup>89</sup> See sources cited *supra* note 80.

<sup>90</sup> See sources cited *supra* note 80.

<sup>91</sup> Contrast their fluidity with the rigid nature of the Sixth Amendment right to cross-examination, which does not allow for “comparable” procedures to replace the right to cross-examination at a hearing. See *Crawford v. Washington*, 541 U.S. 36 (2004).

<sup>92</sup> *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (“[D]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.” (quoting *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961))).

<sup>93</sup> See *id.* (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972))).

<sup>94</sup> *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (“At the very minimum . . . students facing suspension and the consequent interference with a protected property interest must be given *some* kind of notice and afforded *some* kind of hearing.”); see also *Grannis v. Ordean*, 234 U.S. 385, 395 (1914) (stating that due

sue is whether the process used provided an “effective means for the [individual] to communicate his case to the decisionmaker.”<sup>95</sup> The touchstone is whether the procedures provide for “fundamental fairness.”<sup>96</sup>

Procedural due process rights are implicated when the government entity (here, the educational institution) acts to deprive an individual of a protected life, liberty, or property interest.<sup>97</sup> There are protected liberty interests<sup>98</sup> and protected property interests<sup>99</sup> in the educational context for accused students.<sup>100</sup> Although the liberty interest is more commonly recognized, the process due to the accused student does not differ depending on whether the

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process “does not impose an unattainable standard of accuracy”); *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 637 (6th Cir. 2005) (rejecting a student’s procedural due process challenge to an educational institution’s disciplinary procedure even where “the procedures used here were far from ideal and certainly could have been better”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (“The question presented is not whether the hearing was *ideal*, or whether its procedure could have been better. In all cases the inquiry is whether, under the particular circumstances presented, the hearing was fair, and accorded the individual the essential elements of due process.” (emphasis added)).

<sup>95</sup> *Mathews*, 424 U.S. at 345.

<sup>96</sup> *See Gorman*, 837 F.2d at 12 (“The time-honored phrase ‘due process of law’ expresses the essential requirement of fundamental fairness.”).

<sup>97</sup> U.S. CONST. amends. IV, XIV (providing that neither the state nor the federal government shall “deprive any person of life, liberty, or property, without due process of law . . .”). Courts have interpreted the Fourteenth Amendment to implicate the dictates of the Fifth Amendment (including its jurisprudence) to states.

<sup>98</sup> *Donohue v. Baker*, 976 F. Supp. 136, 145 (N.D.N.Y. 1997) (“It is well settled that an expulsion from college is a stigmatizing event which implicates a student’s protected liberty interest.” (citing *Albert v. Carovano*, 824 F.2d 1333, 1339 n.6 (2d Cir. 1987)); *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 622 (D.P.R. 1974) (stating “the right to attend a public educational institution to which one is admitted or attending as a student in good standing” is a liberty interest with due process protections).

<sup>99</sup> Protected property interests are generally linked to an entitlement, and outside the K-12 context there is rarely an entitlement to attend an educational institution, let alone a specific one. *See Goss*, 419 U.S. at 574 (describing how a state statute provides K-12 students a right to education and thus procedural due process applies when students are being suspended); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (stating that the dimensions of property interests that implicate procedural due process “are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits”). Nonetheless, some courts have found a quasi-contractual property interest through locating the source of the entitlement in the educational institution’s student policies. *See Lankheim v. Fla. Atl. Univ., Bd. of Trs.*, 992 So. 2d 828, 834 (Fla. 4th Dist. Ct. App. 2008) (identifying an extension of “the Fourteenth Amendment’s procedural protection . . . to interests that a person has already acquired in specific benefits created by sources such as . . . university rules and policies.”).

<sup>100</sup> *See Gorman*, 837 F.2d at 12 (“It is also not questioned that a student’s interest in pursuing an education is included within the fourteenth amendment’s protection of liberty and property.” (citing *Goss*, 419 U.S. at 574–75)). Often, the property right has been assumed (without making a decision on whether it exists) for purposes of conducting a due process analysis. *See Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 222–23 (1985) (assuming for analysis, without deciding, that “continued enrollment” in the educational institution was a property right); *Marshall v. Ohio Univ.*, No. 2:15-cv-775, 2015 WL 7254213, at \*11 (S.D. Ohio Nov. 17, 2015) (“It is not entirely settled in the Sixth Circuit as to whether a student’s continued enrollment at a state university is an interest protected by procedural due process.”).

interest is categorized as a property or liberty interest.<sup>101</sup> The liberty interest is about the impact that an educational institution's disciplinary actions may have on the accused student's reputation and educational opportunities. Enumerated interests include "pursuing an education,"<sup>102</sup> a reputational interest,<sup>103</sup> and an interest in preserving future opportunities.<sup>104</sup> Discipline for a sexual assault and/or related offenses has a potentially significant impact on the accused's liberty interests, as the conduct code generally contemplates suspension or expulsion.<sup>105</sup>

While there is no entitlement<sup>106</sup> in the post-secondary context to attend (and remain at) the educational institution of one's choice, this Article does not contest that procedural due process protections may apply. However, such application is rightly subject to the clear limits of procedural due process, including that it provides minimal protections<sup>107</sup> and that those protections can be affected by the level of implicated sanctions.<sup>108</sup>

<sup>101</sup> To date, procedural due process case law has not recognized victims as having property and liberty rights in this context. Rather, procedural due process is viewed as covering action that deprives a student of rights, not the failure to take action to protect those rights.

<sup>102</sup> *Gorman*, 837 F.2d at 12; *see also* *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (noting that education is the "very foundation of good citizenship" and "a right which must be made available to all on equal terms").

<sup>103</sup> *See, e.g., Goss*, 419 U.S. at 574 ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the [Due Process] Clause must be satisfied." (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971))). *But see* *Paul v. Davis*, 424 U.S. 693, 701 (1976) (rejecting the argument that "reputation alone, apart from some more tangible interests such as employment, is either 'liberty' or 'property' by itself sufficient to invoke the procedural protection of the Due Process Clause").

<sup>104</sup> *See, e.g., Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2004) ("The Plaintiffs argue, and this Court accepts, that these charges could 'have a major immediate and life-long impact on [their] personal life, education, employment, and public engagement.'" (citation omitted)).

<sup>105</sup> With the risk of expulsion and suspension, accused students can face reputational damage. *See Goss*, 419 U.S. at 575 ("If sustained and recorded, [misconduct] charges could seriously damage the students' standing . . . as well as interfere with later opportunities for higher education and employment."). Many universities, private and public, may place a permanent notation of the charge on a student's transcript, which could affect the student's job prospects or admission to other institutions of higher learning. *See, e.g., Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 571 (D. Mass. 2016) (considering a private university case in which the accused received a notation on his transcript, without further explanation, that he had committed "serious sexual transgressions").

<sup>106</sup> *See, e.g., Goss*, 419 U.S. at 573–74 (declaring that students facing suspension were guaranteed procedural due process because they had "legitimate claims of entitlement to a public education" where state statutes provided free K-12 education and required attendance); *see also* *Bd. of Regents v. Roth*, 408 U.S. 564, 569–71 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property. . . . [T]he range of interests protected by procedural due process is not infinite.").

<sup>107</sup> *See Goss*, 419 U.S. at 574 ("Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the *minimal requirements* of the Clause must be satisfied." (emphasis added) (quoting *Constantineau*, 400 U.S. at 437)).

<sup>108</sup> Once due process is implicated, then the weight of the deprivation can affect what process is due. *See id.* at 576 (setting level of process for short term suspensions and stating that more process can be due for greater deprivations: "the length and consequent severity of a deprivation" is "another factor to weigh in determining the appropriate form of hearing"); *see also* *Mathews v. Eldridge*, 424

Once procedural due process is triggered, the *Mathews v. Eldridge* three-prong balancing test determines what process is due:

[T]he specific dictates of due process generally require[] consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>109</sup>

Context is a critical component of any procedural due process analysis.<sup>110</sup> Thus, *Goss v. Lopez*<sup>111</sup>—the only Supreme Court case to address (non-academic<sup>112</sup>) discipline in the educational context—is centrally important. While *Goss* left some key questions open, it does provide helpful guidance regarding how to determine what process is due in educational institution disciplinary proceedings.

In *Goss*, suspended high school students brought a class action suit against the school district alleging that their procedural due process rights were violated when they were suspended (for periods up to ten days) without a hearing. The *Goss* court held that where students face a suspension of up to ten days they must be provided “some kind of notice and afforded some kind of hearing.”<sup>113</sup> While at the time this holding was a great advance for students’ rights, in actuality the *Goss* case provides for fairly minimal protections.

Specifically, the notice and hearing protections are intended to be “rudimentary,”<sup>114</sup> in this context. In essence, *Goss* merely requires that the student should have “an explanation of the evidence the authorities have and an opportunity to present [the student’s] side of the story.”<sup>115</sup> These protections may be provided quickly and need not be formal in nature.<sup>116</sup> In fact, they

U.S. 319, 341 (1976) (“As *Goldberg* illustrates, the degree of potential deprivation that may be created by a particular decision is a factor to be considered in assessing the validity of any administrative decisionmaking process.”); cf. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (“Whether any procedural protections are due depends on the extent to which an individual will be ‘condemned to suffer grievous loss.’” (quoting *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring))).

<sup>109</sup> *Mathews*, 424 U.S. at 335 (citation omitted).

<sup>110</sup> See *id.* at 334 (“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” (quoting *Morrissey*, 408 U.S. at 481)).

<sup>111</sup> 419 U.S. 565, 574 (1975).

<sup>112</sup> When it comes to academic matters, such as whether the student has met the course requirements for a degree, the Court provides a different (and heightened) level of deference. See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (declaring that no hearing is required for dismissal of a student for academic reasons).

<sup>113</sup> *Goss*, 419 U.S. at 579.

<sup>114</sup> *Id.* at 581.

<sup>115</sup> *Id.*

<sup>116</sup> See *Horowitz*, 435 U.S. at 86 (rejecting the proposition that *Goss* requires formal hearings, stating “[a]ll that *Goss* required was an ‘informal give-and-take’ between the student and the administrative

are, “if anything, *less* than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions.”<sup>117</sup>

In reaching the conclusion that procedural due process protections are rudimentary in nature, the Court focused on two important factors: deference to educational institutions, and protecting their central educational function.

Educational institutions are entitled to deference when they are exercising their authority to make operational decisions, including maintaining discipline.<sup>118</sup> Discipline and adherence to community standards are part of the educational process, and therefore educational institutions are well-suited to implement these goals.<sup>119</sup> As such, educational institutions have broad authority to make and implement their rules, provided that they don’t conflict with other laws, including constitutional law.<sup>120</sup> This deference is appropriate given that education has historically been the province of the state government and courts are therefore reluctant to intervene.<sup>121</sup>

The *Goss* Court recognized the importance of protecting educational institutions’ central educational function from the effect that mandated adversarial process has on educational institutions, particularly if these processes are formal in nature. This includes factors such as cost<sup>122</sup> and interference with both the effective operation of the educational institution and the educational nature of discipline in this particular setting. As the Court stated:

Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the

body dismissing him that would, at least, give the student ‘the opportunity to characterize his conduct and put it in what he deems the proper context’” (quoting *Goss*, 419 U.S. at 584); *see also Goss*, 419 U.S. at 581 (referring to the protections of notice, explanation of evidence and “opportunity to present his side of the story” as “rudimentary”).

<sup>117</sup> *Goss*, 419 U.S. at 583 (emphasis added).

<sup>118</sup> *Id.* at 578 (“We are also mindful of our own admonition: ‘Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.’” (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

<sup>119</sup> *Id.* at 583 (“Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.”).

<sup>120</sup> *Id.* at 571–72.

<sup>121</sup> *Id.* at 578 (“We are also mindful of our own admonition: ‘Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.’” (quoting *Epperson*, 393 U.S. at 104); *see also Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (“[E]ducation is perhaps the most important function of state and local governments.”).

<sup>122</sup> Cost is a factor in this analysis, though not controlling. *Compare Mathews v. Eldridge*, 424 U.S. 319, 347 (1976) (the need to assess the “administrative burden and other societal costs that would be associated with requiring [a certain process]”), *with id.* at 348 (stating that in the administrative decision context, “[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard”).

suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.<sup>123</sup>

The *Goss* Court left open what process protections are mandatory when the punishment exceeds a suspension of up to ten days, and/or when the “unusual” nature of the situation demands it.<sup>124</sup> While “unusual” was not defined, the *Goss* Court identified that where credibility and veracity are key factual components of the case at issue, greater procedures may be required.<sup>125</sup> Credibility and veracity are generally central to sexual assault disciplinary proceedings, which most often reduce to “he said/she said” analyses on the issue of consent between the implicated parties. “Unbiased third-party evidence” on this issue is rare.<sup>126</sup>

After *Goss*, two central questions remain for sexual assault disciplinary proceedings in educational institutions. First, given that the punishment for sexual assault cases generally exceeds a ten-day suspension, what procedural protections must be provided? Second, assuming, without conceding, that sexual assault cases are the “unusual” cases contemplated by *Goss*, what procedural protections must be provided?

#### IV. THE LIMITS OF PROCEDURAL DUE PROCESS IN THE EDUCATIONAL CONTEXT

##### A. *The Context: Educational Institutions are Different*

Since *Goss*, a number of courts have addressed these open questions. These cases have outlined principles consistent with both the context-specific/fact-specific nature of procedural due process rights and with the *Goss* Court’s emphasis on protecting the educational environment. They establish a baseline conceptual understanding through which to appropriately assess the rights due in educational disciplinary systems.

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<sup>123</sup> *Goss*, 419 U.S. at 583.

<sup>124</sup> *Id.* at 584.

<sup>125</sup> *Id.* (noting that more process may be required where the facts are contested or nuanced); *see also Mathews*, 424 U.S. at 325 (remarking that due process did not require a hearing before a complainant’s disability benefits were terminated because “issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence”).

<sup>126</sup> Courts prize unbiased third-party opinions. *See, e.g., Mathews*, 424 U.S. at 344 (“In *Richardson* the Court recognized the ‘reliability and probative worth of written medical reports,’ emphasizing that while there may be ‘professional disagreement with the medical conclusions’ the ‘spectrum of questionable credibility and veracity is not present.’” (quoting *Richardson v. Perales*, 402 U.S., 389, 405, 407 (1971))). However, even where such neutral third-party evidence exists in sexual assault cases, such as medical reports, it is often attacked as being unreliable as to the issue of consent. *See Ashley Fantz, Outrage Over 6-Month Sentence for Brock Turner in Stanford Rape Case*, CNN (June 7, 2016, 8:45 AM), <http://www.cnn.com/2016/06/06/us/sexual-assault-brock-turner-stanford/index.html> (describing a lenient six-month sentence even when two bystanders intervened in a sexual assault of an incapacitated woman and gave testimony to the police).

Educational institution disciplinary systems are not criminal courts and thus the procedures due are different. The criminal analogy is not appropriate because the deprivations under educational institutions' disciplinary processes are completely different in kind than the criminal law's sanction of loss of liberty through incarceration.<sup>127</sup> At most, the educational institution's sanction is to deny the student the ability to continue his education at that particular educational institution. Often, this sanction is temporary and the student is permitted to return to the educational institution after the victim graduates.<sup>128</sup> Criminal protections are not triggered simply because there is a possibility that the underlying facts in dispute could be the subject of a potential criminal case. Simply put, a disciplinary hearing at an educational institution is *not* a criminal trial and thus criminal protections are *not* mandated. To find otherwise would be to paralyze this informal disciplinary system.

Likewise, educational institutions are *not* civil courts and thus do not require the same level of procedures used in the civil system.<sup>129</sup> Disciplinary systems are not primarily adversarial processes and they are not required to

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<sup>127</sup> See *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005) (noting that due process in the educational context is not co-extensive with rights in a criminal trial); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988) (noting that the question is whether due process was provided, and not “whether the hearing mirrored a common law criminal trial”); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (“[Defendants’] rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.”); *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (“[W]e reject any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases.”); *Jenkins v. La. State Bd. of Educ.*, 506 F.2d 992, 1004 (5th Cir. 1975) (“[I]t is clear that school disciplinary regulations need not be drawn with the same precision as are criminal codes.”); *Linwood v. Bd. of Educ.*, 463 F.2d 763, 770 (7th Cir. 1972) (stating that an expulsion hearing “need not take the form of a judicial or quasi-judicial trial. . . . [I]t is not to be equated . . . with that essential to a criminal trial”); *Farrell v. Joel*, 437 F.2d 160, 162 (2d Cir. 1971) (“Due process does not invariably require the procedural safeguards accorded in a criminal proceeding.”).

<sup>128</sup> Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—with U-Va. a Prime Example*, WASH. POST (Dec. 15, 2014), [https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e\\_story.html?utm\\_term=.253f1e6eeb05](https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence—with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html?utm_term=.253f1e6eeb05).

<sup>129</sup> See *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88 (1978) (“A school is an academic institution, not a courtroom . . . .”); *Goss*, 419 U.S. at 583 (imposing “truncated trial-type procedures” and noting that “further formalizing the . . . adversary nature” of the suspension process in all disciplinary cases might “destroy its effectiveness as part of the teaching process”); *Gorman*, 837 F.2d at 14 (“[T]he courts have not and should not require that a fair hearing is one that necessarily must follow the traditional common law adversarial method.”); *Nash*, 812 F.2d at 664 (“[Defendants’] rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.”); *Linwood*, 463 F.2d at 770 (stating that an expulsion hearing “need not take the form of a judicial or quasi-judicial trial. . . . [I]t is not to be equated . . . with that essential to a criminal trial”); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) (“[A] major purpose of the administrative process and hearing is to avoid formalistic and adversarial procedures.”); *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) (“While a University cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms.”), *aff’d*, 787 F.2d 590 (6th Cir. 1986).

replicate court hearings.<sup>130</sup> Rather, the system is geared to reflection and learning<sup>131</sup> (including the accused recognizing any transgressions) and focused on protection of the learning environment. Utilizing an adversarial model negatively affects the fabric of the educational community, and detracts from the educational institution's ability to carry out its core functions.<sup>132</sup>

Finally, procedural due process in this context is intended to be a rudimentary level of protection. The procedures used are not required to be the best ones available. Rather, the inquiry is whether the procedures provide an "effective means for the [individual] to communicate his case to the decisionmaker."<sup>133</sup>

Careful consideration is given, and should be given, when determining whether a process is mandated by procedural due process. In this adjustable metric, the required procedures are more minimal in the educational context. These reduced requirements reflect the more limited nature of the remedy (as compared to criminal or civil cases) and the educational institution's strong interests in protecting its educational setting.

### B. *The Right to Counsel*

The right to counsel is often conceptualized as a fairness yardstick: the assumption is that where counsel is present, the system will be fair to both sides. While this is a powerful belief, there is no procedural due process right to be provided or allowed counsel in the educational disciplinary proceedings even where the student faces expulsion<sup>134</sup>—the most serious sanction that an educational institution can impose.

Those who advocate for counsel to be provided are seeking to import the criminal law model into the very different context of educational disciplinary systems,<sup>135</sup> through us of procedural due process. The courts' denial of a right to be provided counsel in this instance, is consistent with our legal system generally, in which the right to be provided counsel is limited to criminal cases,<sup>136</sup> where the individual's liberty is literally at stake.

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<sup>130</sup> See cases cited *supra* note 129.

<sup>131</sup> See *Goss*, 419 U.S. at 583 ("[F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.").

<sup>132</sup> *Id.*

<sup>133</sup> *Mathews v. Eldridge*, 424 U.S. 319, 345 (1976).

<sup>134</sup> See *Osteen v. Henley*, 13 F.3d 221, 226 (7th Cir. 1993) ("[R]ight to counsel' is rather a misnomer for the far more limited . . . right of consultation . . . . But *Osteen* was not denied the right to *consult* counsel; and he had no greater right." (emphasis added)); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at \*4 (W.D.N.C. July 22, 2015) (nothing that while "Tanyi faced expulsion, so his interest was substantial," there was no expertise required when the counsel's role would have been to "call and examine witnesses").

<sup>135</sup> See *Cantalupo*, *supra* note 12, at 483.

<sup>136</sup> See generally *Gideon v. Wainwright*, 372 U.S. 335 (1963).

Accused students have also argued that when they have hired counsel they are entitled to have said counsel represent them in the disciplinary hearing.<sup>137</sup> This argument has gained some traction as the increased use of lawyers has made the system more adversarial in nature.

Nonetheless, case law is clear that it is only when the accused student is simultaneously facing a current (not merely prospective or potential) open criminal case based on the alleged sexual assault that courts have carved out a limited exception to the general rule that representation by counsel is not constitutionally required.<sup>138</sup> This narrow exception doesn't provide an additional procedural due process right. Rather, it *only* allows the attorney to act to protect the accused student's Fifth Amendment rights in relation to the criminal case,<sup>139</sup> *not* to defend against the charges in the educational institution's disciplinary proceedings.<sup>140</sup> The narrow scope of the simultaneous criminal case exception reflects how highly the courts prioritize this governmental interest in avoiding undue judicialization<sup>141</sup> of educational institution's disciplinary proceedings under a procedural due process analysis.

This case law on the right to counsel, with its limited exception, is consistent with both the *Mathews v. Eldridge* factors and *Goss*. First, the accused student's private interest in educational disciplinary decisions is certainly strong, given the importance of education and the serious negative impact of a suspension

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<sup>137</sup> This is different than consulting counsel separate from any proceedings. See *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 16 (1st Cir. 1988) ("This, however, does not preclude a student threatened with sanctions for misconduct from seeking legal advice before or after the hearings."); see also Violence Against Women Reauthorization Act of 2013, 79 Fed. Reg. 62752, 62752 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668) (stating that "the accuser and the accused have equal opportunities to have others present, including an advisor of their choice," and the advisor can be an attorney but they are not required to be permitted to participate and are just allowed to be present).

<sup>138</sup> It does not protect students where there is a *potential* interest because he/she may *potentially* later be criminally charged. See *Gorman*, 837 F.2d at 16 ("[T]he weight of authority is against representation by counsel at disciplinary hearings, unless the student is also facing criminal charges stemming from the incident in question."); see also *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 640–41 (6th Cir. 2005) (illustrating there was no right to counsel at a disciplinary hearing when that hearing took place after the criminal proceeding had ended); *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978) ("We hold that, because of the pending criminal case, the denial to appellee of the right to have a lawyer of his own choice consult with and advise him during the disciplinary hearing without participating further in such proceeding would deprive appellee of due process of law."); *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (noting there is a right to counsel to protect the Fifth Amendment right when the criminal case is pending, but not for a substantive defense of the case).

<sup>139</sup> See *Flaim*, 418 F.3d at 640–41; *Donohue*, 976 F. Supp. at 147.

<sup>140</sup> *Donohue*, 976 F. Supp. at 146 (rejecting the accused's procedural due process challenge on the right to counsel because "Plaintiff desired counsel not to protect him from any Fifth Amendment jeopardy, but to enable him to prevail at the disciplinary hearing").

<sup>141</sup> *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (cautioning that to "recognize [] a right [to representation] would force student disciplinary proceedings into the mold of adversary litigation" and citing a "reluctan[ce] to encourage further bureaucratization by judicializing university disciplinary proceedings").

and/or expulsion on the student.<sup>142</sup> However, it is vastly different in degree and severity than the sanction of imprisonment, and therefore, under procedural due process, requires a very different level of constitutional protection.

Second, the process is explicitly intended to be accessible to students and to exclude rules and procedures that would require an attorney to understand and/or utilize them.<sup>143</sup> As such, the rationales of the Sixth Amendment right to representation by counsel are not applicable here. That right recognizes that the complexity of the criminal system and its procedural rules, including those of evidence and hearsay, coupled with the high potential sanction of a total loss of liberty, mean that counsel is required to ensure fairness.<sup>144</sup> By contrast, fundamental fairness here does not require a general right to representation by counsel<sup>145</sup> because the procedures used are designed for this specific context and the age and needs of the students utilizing them. The system contemplates that students will represent themselves about matters which they have directly observed and/or about which they have personal knowledge.<sup>146</sup> The students are mature enough to effectively communicate

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<sup>142</sup> See, e.g., *Gorman*, 837 F.2d at 14 (“The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount.”).

<sup>143</sup> Even *assuming arguendo* that the educational disciplinary system is as complex as the civil system (which it certainly is not) does not support a right to be provided counsel here, as there is no right to be provided counsel in the civil context even where the conduct complained of could also be criminally prosecuted. This issue often comes up in contempt proceedings, wherein a violation of a civil order can be punished with criminal penalties. See, e.g., *Turner v. Rogers*, 564 U.S. 431 (2011) (declining to find that an indigent defendant must be provided counsel in a child support contempt proceeding which resulted in the defendant being jailed).

<sup>144</sup> *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.”).

<sup>145</sup> See *Osteen*, 13 F.3d at 225 (noting that due process does not provide a right to counsel at a school disciplinary hearing and “at most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding”); *Gorman*, 837 F.2d at 16–17 (holding no due process right to counsel); *Nash v. Auburn Univ.*, 812 F.2d 655 (11th Cir. 1987) (deciding in part that a student facing expulsion had no right to counsel); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (asserting that right to counsel “is not a right generally available to students facing disciplinary charges”); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967) (“Where the proceeding is non-criminal in nature . . . due process does not require representation by counsel.”); *Donohue*, 976 F. Supp. at 146 (“The Second Circuit has never recognized any absolute right to counsel in school disciplinary proceedings.”); *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984), *aff’d*, 787 F.2d 590 (6th Cir. 1986). *But see* *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972) (“[W]here exclusion or suspension for any considerable period of time is a possible consequence of proceedings, modern courts have held that due process requires a number of procedural safeguards such as . . . the right to be represented by counsel (though not at public expense) . . .”); *Esteban v. Cent. Mo. State Coll.*, 277 F. Supp. 649, 651 (W.D. Mo. 1967) (ordering university to conduct new hearing for expelled students at which “plaintiffs shall be permitted to have counsel present with them at the hearing to advise them”).

<sup>146</sup> See *Wasson*, 382 F.2d at 812 (“[W]here the [individual’s] knowledge of the events [in question] should enable him to develop the facts adequately *through available sources*, and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.” (emphasis added)).

and understand what is being asked of them in the process.<sup>147</sup> As such, the courts consider the risk of error and the value of the added procedure of representation by counsel to be fairly low.<sup>148</sup>

Third, the educational institution's interests are not in punishment,<sup>149</sup> but rather in preserving its community, maintaining the integrity of its system and meeting its Title IX obligations in a manner compliant with procedural due process.<sup>150</sup> The educational institution therefore has a strong governmental interest in not adding counsel; counsel would change the educational nature of the disciplinary proceeding into an adversarial one<sup>151</sup> and educational institutions would be required to adopt and adhere to an adversarial litigation model that would impose significant costs<sup>152</sup> and detract from its effective functioning as an educational institution.<sup>153</sup>

<sup>147</sup> See *id.* (“[W]here the individual concerned is *mature and educated* . . . and where the other aspects of the hearing taken as a whole are fair, due process does not require representation by counsel.” (emphasis added)).

<sup>148</sup> See *Osteen*, 13 F.3d at 226 (“The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight.”); *Gorman*, 837 F.2d at 15 (recognizing the presumption of integrity and objectivity given board’s “quasi-judicial” role); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 601 (S.D. Ohio 2016) (“School disciplinary boards . . . are entitled to a presumption of honesty and impartiality absent a showing of actual bias.” (citing *Atria v. Vanderbilt Univ.*, 142 Fed. App’x 246, 256 (6th Cir. 2005))).

<sup>149</sup> The Seventh Circuit has noted:

The danger that without the procedural safeguards deemed appropriate in civil and criminal litigation public universities will engage in an orgy of expulsions is slight. The relation of students to universities is, after all, essentially that of customer to seller. That is true even in the case of public universities, though they are much less dependent upon the academic marketplace than private universities are.

*Osteen*, 13 F.3d at 226. See also *Anderson supra* note 20, at 1998 (“Colleges do not have the penological interests of the state. Their interest is educational opportunity and Title IX requires them to provide it to students equally.”); *Cantalupo supra* note 12, at 517 (“[A]s ‘best practices’ literature in the student discipline area already acknowledges, the goals of a school in conducting student disciplinary proceedings are quite different [than for criminal law]” (footnote omitted) (citing *Stoner, infra* note 185)).

<sup>150</sup> See *Osteen*, 13 F.3d at 226; *Gorman*, 837 F.2d at 15 (considering presumption of integrity and objectivity given board’s “quasi-judicial” role); *Duke v. N. Tex. State Univ.*, 469 F.2d 829, 834 (5th Cir. 1972) (“Alleged prejudice of university hearing bodies must be based on more than mere speculation and tenuous inferences.”); *Univ. of Cincinnati*, 173 F. Supp. 3d at 601 (“School disciplinary boards . . . are entitled to a presumption of honesty and impartiality absent a showing of actual bias.” (citing *Atria*, 142 Fed. App’x at 256)); see also *Murray v. N.Y.U. Coll. of Dentistry*, 57 F.3d 243, 251 (2d Cir. 1995); *Nash*, 812 F.2d at 665; *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 31–32 (D. Me. 2004) (declaring that the mere fact that the hearing board chair was active in sexual assault prevention at the educational institution was not sufficient to show bias).

<sup>151</sup> See *Osteen*, 13 F.3d at 225 (“To recognize such a right would force student disciplinary proceedings into the mold of adversary litigation.”).

<sup>152</sup> *Gorman*, 837 F.2d at 15 (“[A]t some point the benefit to individuals from an additional safeguard is substantially outweighed by the cost of providing such protection . . . .” (alteration in original) (internal quotation marks omitted) (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1276 (1975))).

<sup>153</sup> The Seventh Circuit addressed this issue:

The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in—from the law faculty or elsewhere—to serve as judges.

The cases have correctly balanced the factors here. Were counsel to be permitted to act *qua* counsel, or to be required at such hearings, it would fundamentally change the system and render it less accessible to students. Adding counsel would complicate the proceedings by importing outside legal rules based on adversarial systems. Students and educational institutions would need to learn to navigate and utilize these foreign systems. Critically for students, the use of counsel would shift the burden of investigating and proving allegations from the educational institution to the students. This is a high burden that would disproportionately fall on them.

### C. *The Right to Cross-Examination*

Adversarial cross-examination is the ability to question an adverse witness, under oath, in front of the decision-maker. It is highly prized in our legal system as a method to test evidence for bias and to test the credibility of witnesses.<sup>154</sup>

Some form of adversarial cross-examination is considered a basic right in both the criminal and civil contexts. In the criminal context, the Sixth Amendment guarantees the accused a robust right to confront adverse witnesses, including cross-examination.<sup>155</sup> In the civil context, the right to cross-examination is a basic right that is permitted in some circumstances to be more circumscribed; courts may limit the form and/or content of questions in order to protect the interests of justice<sup>156</sup> and/or for judicial economy.<sup>157</sup>

Educational institutions face pressure from both sides on the use of cross-examination to assess issues of credibility and bias. Accused students argue that their ability to adequately present their cases and challenge the charges against them depends on their ability to conduct adversarial cross-examination of their accusers. Complainants argue that this process is unnecessarily adversarial in the education context, other processes are available that do not expose the victim to further trauma, and adversarial cross-examination would discourage them from proceeding with claims within their institution.

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The cost and complexity of such proceedings would be increased, to the detriment of discipline as well as of the university's fisc. . . . We are reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings . . . .

*Osteen*, 13 F.3d at 225.

<sup>154</sup> See *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) (referring to cross-examination as the “greatest legal engine ever invented for the discovery of truth” (internal quotation marks omitted) (quoting *California v. Green*, 399 U.S. 149, 158 (1970))); *Maryland v. Craig*, 497 U.S. 836, 845 (1990) (asserting that cross examination “ensure[s] the reliability of the evidence against a defendant by subjecting it to rigorous testing in the context of an adversary proceeding”).

<sup>155</sup> See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .”); see also *Craig*, 497 U.S. at 842 (“[T]he essence of the right of confrontation, include[s] the right to . . . cross-examine . . . .” (internal quotation marks omitted)).

<sup>156</sup> See FED. R. EVID. 609 (limiting evidence of prior bad acts as they are too prejudicial).

<sup>157</sup> See, e.g., FED. R. EVID. 611 (allowing the judge to limit the scope of cross-examination).

Educational institutions are again caught in the middle. On the one hand, they face the possibility that adversarial cross-examination will expose them to further Title IX liability by discouraging reporting and potentially perpetuating and/or exacerbating the hostile environment created by the sexual assault. On the other hand, they must conduct fair determinations, which includes critical assessment of the evidence presented to them. How then should they proceed?

While the education-based case law on cross-examination is more nuanced and complex than that for the right to counsel, by and large the courts have held that adversarial cross-examination is not required, as a matter of constitutional law, even where credibility is implicated, *if* fundamental fairness is otherwise provided.

Federal appellate courts have declined to rule broadly on this issue, preferring instead to rule narrowly on the facts of the cases before them.<sup>158</sup> Nonetheless, no federal appellate court has held that there is an affirmative right to adversarial cross-examination in the educational context.<sup>159</sup> Many question, in their holding or in dicta, whether a procedural due process right to *any* cross-examination in educational institutions exists *at all* in disciplinary proceedings. Where these courts contemplate the *potential* existence of such a right they largely indicate that, at most, it would be a narrow one.<sup>160</sup> They largely assume *arguendo* that some cross-examination right might exist, and

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<sup>158</sup> See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) (holding that although cross-examination might be a procedural due process right in school disciplinary cases, it was not required under the facts of that case).

<sup>159</sup> See, e.g., *Flaim*, 418 F.3d at 636; *Gorman v. Univ. of R.I.*, 837 F.2d 7 (1st Cir. 1988); *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924–26 (6th Cir. 1988); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (8th Cir. 1985); *Boykins v. Fairfield Bd. of Educ.*, 492 F.2d 697, 701–02 (5th Cir. 1974); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961).

<sup>160</sup> See *Newsome*, 842 F.2d at 925–26 (deciding that there is no right to cross-examine adverse witnesses in expulsion proceedings due to the burden it would place on school employees); *Nash*, 812 F.2d at 664 (“Where basic fairness is preserved, we have not required the cross-examination of witnesses . . . .”); *Brewer*, 779 F.2d at 263 (rejecting argument that accused had a procedural due process right to cross-examination in a suspension case and stating, “[W]e reject any suggestion that the technicalities of criminal procedure ought to be transported into school suspension cases.”); *Boykins*, 492 F.2d at 701 (holding that the right to cross-examination is not required in expulsion proceedings); see also *Flaim*, 418 F.3d at 636 (“Some circumstances may require the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases.”); *Gorman*, 837 F.2d at 16 (“[T]he right to *unlimited* cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.” (emphasis added)); *Winnick*, 460 F.2d at 549 (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”); *Dixon*, 294 F.2d at 159.

then hold that it was not violated under the specific facts of the case before them.<sup>161</sup> The federal district courts have followed a similar path.<sup>162</sup>

A minority of federal district court cases indicate (often in dicta) that some form of *non-adversarial* cross-examination could be required where witness credibility is central to the case.<sup>163</sup> These cases echo *Goss*' concern that "unusual" situations may require greater procedure, and that many sexual assault cases turn on witness credibility.<sup>164</sup> Even in this subset of cases, the required cross-examination is not adversarial in that direct cross-examination at a hearing is not mandatory, and/or it may be conducted through a third-party or outside of the hearing.<sup>165</sup>

These cases are consistent with procedural due process requirements in the educational context. Fundamental fairness without adversarial cross-examination is satisfied where the accused is provided with the opportunity to know the substance of the evidence against him and has the opportunity to provide evidence and testimony on his behalf.<sup>166</sup> These goals can be

<sup>161</sup> These cases assume, without deciding, that such a right exists for purposes of holding that even if such a right existed it was not violated. See, e.g., *Winnick*, 460 F.2d at 549 ("[E]ven assuming that the right to confront witnesses may be essential in some disciplinary hearings, there are cogent reasons why due process did not require cross-examination in this case.").

<sup>162</sup> Compare *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 602 (S.D. Ohio 2016) ("[T]here is no general due process right to cross-examine witnesses in school disciplinary hearings . . ."), and *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984) ("The Constitution does not confer on plaintiff the right to cross-examine his accuser in a school disciplinary proceeding."), with *Dillon v. Pulaski Cty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978) (deciding whether, in an expulsion proceeding of a student who had been disrespectful to a teacher, the student's procedural due process rights were violated when the accusing teacher offered no testimony as to why or how he was disrespectful, and the accused student was not able to introduce and question this evidence through cross-examination).

<sup>163</sup> Courts decline to spell out what "some form" might entail, outside of evaluating the adequacy of the procedures within the case at hand. See *Flaim*, 418 F.3d at 636 ("Some circumstances may require the opportunity to cross-examine witnesses, though this right might exist only in the most serious of cases."); *Winnick*, 460 F.2d at 549 ("Moreover, even assuming that the right to confront witnesses may be essential in some disciplinary hearings, there are cogent reasons why due process did not require cross-examination in this case.").

<sup>164</sup> See, e.g., *Winnick*, 460 F.2d at 550 ("[I]f this case [was] a problem of [witness] credibility, cross-examination of witnesses might have been essential to a fair hearing."); see also *Flaim*, 418 F.3d at 641 ("[I]n *Flaim*'s case, it was not a choice between believing an accuser and an accused, where cross-examination is not only beneficial, but essential to due process."). But see *Univ. of Cincinnati*, 173 F. Supp. 3d at 605 n.7 (declining to find that *Flaim* established that credibility is central and cross-examination is required, thus limiting it to the proposition that cross-examination might be required).

<sup>165</sup> See *Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) ("At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to . . . direct questions to his accuser through the panel.").

<sup>166</sup> See, e.g., *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) ("Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding."); see also *Goss v. Lopez*, 419 U.S. 565, 581 (1975); *Flaim*, 418 F.3d at 636, 641 (deciding whether the "accused individual has the right to respond and defend, which will generally include the opportunity to make a statement and present evidence" when the accused had the "opportunity to present his version of events . . . [and] point out inconsistencies or contradictions in the officer's testimony"); *Winnick*, 460 F.2d at 549 ("The right to cross-examine witnesses generally has not been

achieved with a process that informs the accused student of the charges and allows the student to question the evidence, including bias and credibility issues, and submit evidence on his/her behalf. In “one of the most widely quoted passages in college student education law,”<sup>167</sup> the Fifth Circuit explained how, even in an expulsion case, procedures short of adversarial cross-examination can be sufficient:

[T]he student should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies. He should also be given the opportunity to present to the Board, or at least to an administrative official of the college, his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf. If the hearing is not before the Board directly, the results and findings of the hearing should be presented in a report open to the student’s inspection. If these rudimentary elements of fair play are followed in a case of misconduct of this particular type, we feel that the requirements of due process of law will have been fulfilled.<sup>168</sup>

As such, the case law permits a wide range of permissible constitutional limits on adversarial cross-examination once fundamental fairness has been provided: the evidence does not need to be questioned in the traditional adversarial context,<sup>169</sup> the content of cross-examination may be limited,<sup>170</sup> the individuals that may be cross-examined may be limited, cross-examination may be denied where not material to the result,<sup>171</sup> cross-examination does

considered an essential requirement of due process in school disciplinary proceedings.”); *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961). *But see Dillon*, 468 F. Supp. at 58 (deciding that it was not permissible to deny cross-examination of a teacher where the student was not told why or how he was “defiant” towards teacher).

<sup>167</sup> Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 142 EDUC. L. REP. 11, 14 n.12 (2000); *see also Goss*, 419 U.S. at 590 n.8 (Powell, J., dissenting) (referring to *Dixon* as a “landmark decision”); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1382 (W.D. Mich. 1983) (referring to *Dixon* as “[t]he seminal opinion discussing the dictates of due process in [the educational] context”).

<sup>168</sup> *Dixon*, 294 F.2d at 159. Despite the fact that *Dixon* predates *Goss*, it is commonly used as a touchstone for courts when deciding procedural due process cases.

<sup>169</sup> *See, e.g., Nash*, 812 F.2d at 664 (“Although an important notion in our concept of justice is the cross-examination of witnesses, there was no denial of appellants’ constitutional rights to due process by their inability to question the adverse witnesses in the usual, adversarial manner.”).

<sup>170</sup> *See, e.g., Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (permitting the prohibition of the accused from cross-examination on bias where the accused was otherwise allowed to cross-examine the witnesses against him).

<sup>171</sup> *See Flaim*, 418 F.3d at 640 (finding that because the student had pled guilty to the criminal charge, there was no right to cross-examine the arresting officer at the school disciplinary hearing as even if officer’s story was inconsistent the student could address this in his affirmative case); *Brewer v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (8th Cir. 1985) (deciding that there was no right to cross-examine at a hearing where the student had admitted to the conduct and thus procedural due process was not implicated); *Winnick*, 460 F.2d at 550 (assuming, without deciding, that cross-examination was constitutionally required and finding procedural due process was satisfied where the student had admitted to many of the facts at issue because “cross-examination would have been a fruitless exercise”).

not have to be face-to-face,<sup>172</sup> and cross-examination may be performed through a third party.<sup>173</sup> Permissible cross-examination may be oral or written,<sup>174</sup> with some courts holding that there is no right to change the submitted written questions in response to the victim's testimony at a hearing.<sup>175</sup> The cross-examination may be in front of a hearing board or an investigator.

The conclusion that adversarial cross-examination in this context is not required by procedural due process is consistent with both the *Mathews v. Eldridge* factors and *Goss*. Even assuming *arguendo* that adversarial cross-examination is the best process to determine bias and credibility, procedural due process does not require that the best process is used. Rather, the procedures must balance the different interests, with no perfect procedure contemplated; “[t]he Due Process Clause . . . sets only the floor or lowest level of procedures acceptable.”<sup>176</sup>

While the accused student's private interest in educational disciplinary decisions is certainly strong, given the importance of education and the serious negative impact of a suspension and/or expulsion on the student,<sup>177</sup> the governmental interest is again decisive. Adversarial cross-examination is not calibrated to the educational nature of the environment.<sup>178</sup> It is the most adversarial manner in which to ascertain the reliability and credibility of evidence. In this context, which prioritizes the community and the educational process, the adversarial nature of cross-examination is detrimental. It re-

<sup>172</sup> See, e.g., *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 26–29 (D. Me. 2005) (finding that it was permissible for the victim to be placed such that the accused could only view her back and profile but the accused's attorney could move around the room).

<sup>173</sup> See, e.g., *Nash*, 812 F.2d at 663–64 (holding that if procedural due process required cross-examination there would not be a procedural due process violation by requiring cross-examination to occur through a third party—here, the Board).

<sup>174</sup> See, e.g., *id.* at 664 (finding that there was no due process violation where the accused was only allowed to submit written cross-examination questions to the decision-maker and could not ask them directly); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016) (deciding that allowing for written questions does not violate due process given that there is no general right to cross-examine).

<sup>175</sup> See *Nash*, 812 F.2d at 664 (deciding that due process was not violated where process involved submitting written questions to the board); *Univ. of Cincinnati*, 173 F. Supp. 3d at 603 (deeming it a permissible process to submit written questions even though there was “no opportunity to ask follow-up questions”).

<sup>176</sup> *Flaim*, 418 F.3d at 636.

<sup>177</sup> See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988) (“The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount.”).

<sup>178</sup> For a discussion about the nature of the educational institutions' disciplinary proceedings, including how they are geared for students to be able to represent themselves without the need for resorting to complex evidentiary rules and/or processes, see *supra* Part IV.B.; see also *Goss v. Lopez*, 419 U.S. 565, 594 n.13 (1975) (Powell, J., dissenting) (defining the teacher-student relationship as “rarely adversary in nature” and distinguishing it from other, more adversarial and “faceless” relationships that invoke due process rights).

quires enormous and unnecessary resources, transforms the educational nature of the proceedings into adversarial ones, requires that educational institutions become familiar with the rules of evidence, and further judicializes hearings.<sup>179</sup> Therefore, while the private right at stake is strong and adversarial cross-examination is certainly a valuable process,<sup>180</sup> the balance here cuts against a right to adversarial cross-examination, and against transforming the unique relationship of educational institutions to their students.<sup>181</sup>

This doesn't mean, however, that the evidence should not be critically assessed. The evidence must be assessed in a manner that reflects the serious consequences to the respondent, the complainant, and the community. These consequences are too important not to be at the forefront in creating fair disciplinary systems. Educational institutions must create and utilize methods to assess credibility and bias that are consistent with their demographic and core functions. Developing such a system requires a careful balancing of the interests involved, as detailed in Part V.

## V. PRINCIPLES, CONCLUSIONS AND RECOMMENDATIONS

In recent years, the proliferation of litigation from both complainants and respondents has led to sexual assault disciplinary processes becoming more contentious and resource-intensive. The amount of litigation will likely continue to increase, as Title IX continues to be highly politicized.

Procedural due process has been a central rallying cry for those dissatisfied with the protections offered to respondents in current sexual assault disciplinary processes. A close examination of the procedural due process case law, however, demonstrates that courts are largely—and appropriately—affirming the rudimentary nature of the protections in this environment. This

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<sup>179</sup> See *Goss*, 419 U.S. at 581; see also *Gorman*, 837 F.2d at 15 (“[U]ndue judicialization of an administrative hearing, particularly in an academic environment, may result in an improper allocation of resources, and prove counter-productive.”). Additionally, the Sixth Circuit provided:

The detriment that will accrue to the educational process in general by diverting school board members' and school administrators' attention from their primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence simply outweighs the marginal benefit that will accrue to the fact-finding process by allowing cross-examination.

*Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 926 (6th Cir. 1988).

<sup>180</sup> See *Newsome*, 842 F.2d at 924 (“The value of cross-examination to the discovery of truth cannot be overemphasized.”); cf. *Mathews v. Eldridge*, 424 U.S. 319, 325 (1976) (finding that due process did not require a hearing before a complainant's disability benefits were terminated because “issues of credibility and veracity do not play a significant role in the disability entitlement decision, which turns primarily on medical evidence”).

<sup>181</sup> See *Goss*, 419 U.S. at 594 n.13 (Powell, J., dissenting) (defining the teacher-student relationship as “rarely adversary in nature” and distinguishing it from other, more adversarial and “faceless” relationships that invoke due process rights); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (“Where basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding.”).

rudimentary level of protection means that educational institutions have to meet minimal requirements in order to comply with procedural due process.

However, the inquiry should not end there. Procedural due process has become a rallying cry precisely because it serves as a proxy for voicing important concerns about fairness in the process that should be listened to. It is not enough for educational institutions to meet the requirements of Title IX and procedural due process. They must also create and utilize fair systems.

In order to create fair systems for sexual assault disciplinary proceedings, educational institutions should prioritize four key principles: 1) the educational context determines the scope of the procedural due process rights; 2) sexual assault is not a *sui generis* disciplinary problem; 3) educational institutions must calibrate the system to its remedies; and 4) Title IX must be factored in as a governmental interest. These principles are utilized in the Board/Investigator model that follows.

#### A. *The Four Principles*

##### 1. *The Educational Context Determines the Scope of the Procedural Due Process Rights*

Educational institutions are neither courtrooms nor judicial bodies,<sup>182</sup> and their core educational function must be protected.<sup>183</sup> We do not want to change classrooms into courtrooms<sup>184</sup> for good reasons.

Educational institutions are communities that provide privileges and responsibilities, both of which are subject to qualifications and ongoing rules, including student conduct codes. When these conduct codes are violated, both the individual and the community are harmed.

An educational institution must be able to respond in a manner that protects its students, and the community from any hostile environment that has been created, and further, is not alien to how it normally functions. Given

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<sup>182</sup> See *supra* notes 129–132 and accompanying text; see also *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 90 (1978) (“The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students . . . .”); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005) (“[A] major purpose of the administrative process and hearing is to avoid formalistic and adversarial procedures.”).

<sup>183</sup> See *supra* note 182; see also *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988) (referring to protecting the “primary function of institutions that exist to provide education”).

<sup>184</sup> *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) (“While a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms.”).

that educational disciplinary processes are intended to provide learning environments,<sup>185</sup> in which positive and respectful relationships are a key component,<sup>186</sup> the process that is used should reflect those goals.

Educational institutions design their own conduct codes. They define for themselves the prohibited conduct and determine why it is important. As such, the educational institutions, rather than the courts, are best positioned to determine whether their conduct code is violated. In doing so, they regularly assess the bias and credibility of those whom they interview.<sup>187</sup> Often, these assessments are for other conduct code violations that are also high stakes and also potentially criminal, with drug use, drug dealing, assault, plagiarism, and stealing being a few examples.<sup>188</sup>

Student conduct codes are not replicas of criminal statutes.<sup>189</sup> The definition of punishable conduct is often very different than that punishable in the criminal system. Sexual assault-related conduct code violations typically focus on issues of consent<sup>190</sup> and the promotion of respectful relationships between students. This prohibited conduct is not necessarily defined by criminally prosecutable conduct.<sup>191</sup> Rather, the definitions are created by educational institutions for their community and for use in their specific disciplinary systems.

<sup>185</sup> See Edward N. Stoner II et al., *Reviewing Your Student Discipline Policy: A Project Worth the Investment*, UNITED EDUCATORS 1, 7 (2000), <http://www.edstoner.com/uploads/UE.pdf> (“[T]he real purpose of campus standards . . . is to create the best environment in which students can live and learn.”).

<sup>186</sup> See *Bd. of Curators of Univ. of Mo.*, 435 U.S. at 90 (“The educational process is not by nature adversary; instead it centers around a continuing relationship between faculty and students, ‘one in which the teacher must occupy any roles—educator, advisor, friend, and, at times, parent-substitute.’” (quoting *Goss*, 419 U.S. at 594 (Powell, J., dissenting))).

<sup>187</sup> This is not a new requirement for school disciplinary procedures. See *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 924 (6th Cir. 1988) (acknowledging that schools regularly assess credibility and bias, and “the process of cross-examining the student witness may often be merely duplicative of the evaluation process undertaken by the investigating school administrator”).

<sup>188</sup> Cf. Katherine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 U. KAN. L. REV. 861, 862–63 (2016) (noting that “universities routinely regulate and adjudicate non-criminal student conduct” including cheating and offensive speech).

<sup>189</sup> Stoner, *supra* note 185, at 8.

<sup>190</sup> Consent is defined very differently across schools, although the trend is towards an increase in affirmative consent policies. See Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS 257 (2016). The definitions range from an “affirmative consent” policy to an “unwelcome conduct policy.” See HARVARD UNIV., SEXUAL AND GENDER-BASED HARASSMENT POLICY (2017), [http://titleix.harvard.edu/files/title-ix/files/harvard\\_sexual\\_harassment\\_policy.pdf?m=1461104544](http://titleix.harvard.edu/files/title-ix/files/harvard_sexual_harassment_policy.pdf?m=1461104544). New York and California recently passed statutes requiring universities to adopt affirmative consent policies. CAL. EDUC. CODE § 67386 (West 2015); N.Y. EDUC. LAW § 6441 (McKinney 2015).

<sup>191</sup> See *supra* note 190. A greater number of schools are using affirmative consent standards (“yes means yes”). See Anderson, *supra* note 2, at 1979 (“A plurality of U.S. jurisdictions that define consent use the word ‘agreement’ or something stronger: for example, ‘positive cooperation in act or attitude.’); see also, e.g., VT. STAT. ANN. tit. 13, § 3251(3) (West, Westlaw through Adjourned Sess. of the 2017–2018 Vt. Gen. Assemb.) (defining “consent” as “words or actions by a person indicating a voluntary agreement to engage in a sexual act”); WIS. STAT. ANN. § 940.225(4) (West, Westlaw through 2017 Act 142) (defining “consent” as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact”). In most states, the consent standard requires that the sexual assault victim affirmatively indicate

Even if the less intensive civil model were used, the required elements of civil procedure would cut into the educational institution's interests in protecting its core function. For example, discovery, a common adversarial procedure used in civil litigation, illustrates the detriment that would result to the educational community if this outside system were imported. Discovery is rife with controversies over issues such as privilege, what disclosures are required, the appropriate wording of requests and whether responses are adequate.<sup>192</sup> The proliferation of discovery abuses and conflicts have led to the development of specialized ethical rules needed to guide attorneys with how to navigate these issues. Use of this device would add significantly to the costs of the disciplinary system. It would bog the system down, require new specialized knowledge from educational staff, and cost more than it added to the process.<sup>193</sup> Critically, it would make the system less accessible to students, which is the opposite of what those advocating for more student protections are seeking.

Neither criminal<sup>194</sup> nor civil models are required or appropriate in this context as they negatively impact the educational institution's ability to effectively and efficiently regulate itself and to focus on education.<sup>195</sup> In this context, mandatory adversarial processes cut against the learning goal of discipline, and superimpose a high conflict procedure onto a non-adversarial community and system.

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"no" to the conduct. *See, e.g.*, NEV. REV. STAT. ANN. § 200.366 (West, Westlaw through 79th Reg. Sess.) ("A person is guilty of sexual assault if her or she . . . [s]ubjects another person to sexual penetration, or forces another person to make a sexual penetration on himself or herself or another, or on a beast, against the will of the victim or under conditions in which the perpetrator knows or should know that the victim is mentally or physically incapable of resisting or understanding the nature of his or her conduct . . ."); *cf.* MO. ANN. STAT. § 566.031 (West, Westlaw through 2017 First Legis. Sess. & First Extra. Sess. of the 99th Gen. Assemb.) ("A person commits the offense of rape in the second degree if he or she has sexual intercourse with another person knowing that he or she does so without that person's consent.")

<sup>192</sup> The District Court of Maine noted:

Finally, this Court is doubtful that the incrementally enhanced fairness of the hearing from advanced notice of exhibits would justify opening a rich source of potential controversy. Instead of addressing the main event—whether a violation of the Code occurred—the Hearing Committee would inevitably become enmeshed in charges and countercharges of discovery violations, controversies a university hearing committee is ill-equipped to resolve.

*Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 25 (D. Me. 2004); *see also* *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

<sup>193</sup> *See supra* note 192.

<sup>194</sup> *Stoner, supra* note 185, at 7 ("Dedication to treating each student with *equal* care, concern, dignity, and fairness creates a far different system than a criminal system in which the rights of a person facing jail time are superior to those of a crime victim.")

<sup>195</sup> *See Gomes*, 365 F. Supp. 2d at 16 ("A university is not a court or law, and it is neither practical nor desirable it be one."); *Stoner, supra* note 185, at 8 (describing how a lawyer representing a respondent in a school disciplinary hearing may use traditional litigation tactics such as delaying the proceedings, which operates against the school's goals of quickly resolving the issues within the living and learning environment).

Further, Title IX provides a critical check on the development of fair disciplinary systems due to long-standing requirements that the personnel investigating and adjudicating sexual assault cases are appropriately trained in Title IX and sexual assault.<sup>196</sup> This includes both the Title IX investigator and the Board. This training increases the likelihood of achieving a fair result because personnel will be trained in assessing and documenting: credibility and bias; the dynamics of sexual assault; the institution's conduct code and system; and assessing the impact of alcohol in sexual assault cases.<sup>197</sup> Educational institutions are incentivized to have properly trained people because it is a Title IX obligation. With this training, educational institutions are well-equipped to conduct fair and reliable disciplinary proceedings.

## 2. *Sexual Assault is Not a Sui Generis Disciplinary Problem*

There is a long history of sexual assault being treated differently than other cases, including in both the criminal and tort context.<sup>198</sup> This has commonly been referred to as “rape exceptionalism.”<sup>199</sup>

In the criminal context, this was exhibited through additional, often onerous, requirements for victims of sexual assault to meet before the criminal justice system would protect their rights.<sup>200</sup> Victims' testimony was required to be corroborated, they had to demonstrate that they had resisted to the “utmost of [their] ability” during the alleged assault, and jurors were told to treat the victim's testimony with caution.<sup>201</sup> These requirements stood apart from those applied to crime victims as a whole. For example, no such requirements were placed on victims of other physical crimes, such as assault

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<sup>196</sup> These requirements are well-laid-out in the 2001 Sexual Harassment Guidance, *supra* note 4, and the 2015 Dear Colleague Letter, *supra* note 79. Importantly, the recent DeVos rescinding of Obama-era Title IX guidance did not include rescinding either of these documents.

<sup>197</sup> See *infra* note 223; see also VOLUNTARY RESOLUTION AGREEMENT: YALE UNIVERSITY (UNIVERSITY) COMPLAINT NO. 01-11-2027, U.S. DEP'T OF EDUC.: OFFICE FOR CIVIL RIGHTS 3–4 (June 11, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf> (requiring Yale to implement these elements).

<sup>198</sup> See Anderson, *supra* note 2, at 1954–59 (discussing the increased requirements for sexual assault victims in criminal law); Martha Chamallas, *Vicarious Liability in Torts: The Sex Exception*, 48 VAL. U. L. REV. 133 (2013) (discussing “sexual exceptionalism” in tort law).

<sup>199</sup> Anderson, *supra* note 2, at 2000; see also Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957 (2008) (“Rape is an exceptional area of law.”).

<sup>200</sup> Anderson, *supra* note 2, at 1943, 1946–50 (detailing the use of requirements such as corroboration, use of force by the accused, and resistance “to the utmost of her physical capacity” by the victim).

<sup>201</sup> *Id.*

or robbery. This unequal treatment led to reductions in victim willingness to report<sup>202</sup> and in the rate of prosecution.<sup>203</sup>

Some of the arguments for increased procedural due process for those accused of sexual assault fit into this history. As Michelle Anderson has noted, many procedural due process advocates have fit into this history of “rape exceptionalism” by circumscribing their concerns to the sexual assault context, without addressing why/whether these protections should apply to other disciplinary situations on campuses involving similar remedies.<sup>204</sup>

Shifting the lens out from just sexual assault to all conduct matters that are potentially criminally prosecutable illustrates the problematic nature of arguing that, in these cases, procedural due process requires providing the additional rights due in criminal cases. Educational institutions handle a number of situations that are both school conduct code violations and potential criminal actions, such as drug use/dealing, threats/assaults and stealing.<sup>205</sup> If educational institutions were to provide, in each of these situations, counsel, the right to adversarial cross-examination, and the right to full discovery, the system would not only be overwhelmed, but it would also be turned into a functional extension of the court system. As detailed above, classrooms are not courtrooms<sup>206</sup> and should not be treated as such.

In addition, these arguments are at odds with the rights they seek to invoke. The fact that these arguments focus solely on sexual assault illustrates that their focus is on the nature of the alleged transgression. However, procedural due process is about the nature of the deprivation at stake, not the conduct that one is being accused of. While they are connected, they are not synonymous. Take for instance, plagiarism, which, like sexual assault, is often grounds for expulsion from the community. It also portends similar future

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<sup>202</sup> See FISHER ET AL., *supra* note 22, at 23 (finding that fewer than 5% of victims of completed or attempted rapes reported to law enforcement); see also CALLIE RENNISON, BUREAU OF JUST. STATS., CRIMINAL VICTIMIZATION 2001 10 (2002), <https://www.bjs.gov/content/pub/pdf/cv01.pdf> (illustrating the much lower reports of sexual assault in contrast to other crimes).

<sup>203</sup> See *Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 111th Cong. 246–49 (2010) (statement of Carol E. Tracy, Executive Director, Women’s Law Project); Megan A. Alderden & Sarah E. Ullman, *Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases*, 18 VIOLENCE AGAINST WOMEN 525, 540 (2012); Kimberly A. Lonsway & Joanne Archambault, *The “Justice Gap” for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 149–57 (2012).

<sup>204</sup> Anderson correctly notes that those who advocate for increased due process protection “must make the case for why respondents in campus sexual assaults should enjoy uniquely favorable rights—or make the case for increased process rights for all students accused of misconduct—neither of which, so far, they have done.” Anderson, *supra* note 2, at 1985–86.

<sup>205</sup> While it may be true that such cases may rarely be criminally prosecuted, the same is true for sexual assault.

<sup>206</sup> *Jaska v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1250 (E.D. Mich. 1984) (“While a University cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms.”).

repercussions, as it negatively affects the individual's ability to attend other educational institutions, and may preclude the individual from certain types of professions. However, the procedural due process scholars/advocates do not argue that every time a student is accused of plagiarism, they should have a right to counsel, adversarial cross-examination rights, and the right to full discovery.<sup>207</sup> This contrast illustrates that the arguments are really connected to a belief about the perceived *sui generis* nature of protections due to those accused of sexual assault, and thus fit into this "rape exceptionalism" model.

### 3. *Educational Institutions Must Calibrate the System and Its Remedies*

Procedural due process links potential deprivation to process rights, with the greater the potential deprivation of rights the greater the process that must be provided. In the criminal context, it is fair that the priority must be the accused's rights as the accused is facing the penalty of deprivation of liberty. However, in the educational disciplinary context, there is no deprivation of liberty itself. The largest consequence is that the student will not be able to stay at that educational institution. Expulsions are rare, and even with suspensions or expulsions, the respondent is often allowed back at the educational institution after the complainant graduates.<sup>208</sup>

By contrast, complainants are seeking school-specific remedies, such as living and class arrangements that will enable them to continue their education. They pursue the educational disciplinary process precisely because it gives them the education-related remedies that they need, and can't get elsewhere, such as extensions on degree requirements. They should not have to go through a process that replicates either the criminal or civil court system in order to obtain these internal educational institution remedies. To require a quasi-courtroom procedure would result in a mismatch between the rights afforded and the remedy being pursued and would place a disproportionate burden on the complainant.<sup>209</sup>

Rather, the system should be calibrated to the remedies. It should provide enough process such that those involved are fairly heard, but not so much

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<sup>207</sup> See *FIRE's Guide to Due Process and Campus Justice*, FIRE, [https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#\\_RefHeading\\_\\_2618\\_2127946742](https://www.thefire.org/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/#_RefHeading__2618_2127946742) (last visited Jan. 13, 2018) (providing information on individual's campus rights from the Foundation for Individual Rights in Education (FIRE), which has focused the great majority of its advocacy on procedural due process rights in the Title IX and sexual assault context).

<sup>208</sup> See Anderson, *supra* note 128.

<sup>209</sup> In some cases, the disproportionate burden is highly visible. See Joe Drape & Marc Tracy, *A Majority Agreed She Was Raped by a Stanford Football Player. That Wasn't Enough.*, N.Y. TIMES (Dec. 29, 2016), [https://www.nytimes.com/2016/12/29/sports/football/stanford-football-rape-accusation.html?smprod=nytcare-iphone&smid=nytcare-iphone-share&\\_r=1](https://www.nytimes.com/2016/12/29/sports/football/stanford-football-rape-accusation.html?smprod=nytcare-iphone&smid=nytcare-iphone-share&_r=1) (explaining how Stanford required a 5 member panel to vote at least 4-1 in favor of taking disciplinary action).

formality that it alters the underlying educational context or impairs the institution's ability to focus on its core functions. It must also provide both procedural due process and Title IX protections to students. Given the rudimentary nature of procedural due process and the more robust Title IX requirements, this balance often results in favor of protecting the complainant, which can be provided in a fundamentally fair manner, as detailed below.

#### 4. *Title IX Must Be Factored in as a Governmental Interest*

To date, the procedural due process case law has not consistently or explicitly factored in Title IX's equality mandate. Title IX reflects the societal decision to prioritize (by codifying) equal access to education based on sex. It places a direct legal obligation on educational institutions to provide this equal opportunity.<sup>210</sup> Therefore, when educational institutions act on sexual assault, Title IX's equality mandate must be explicitly factored into the governmental interest prong of the procedural due process analysis.

Equal opportunity in education includes creating and maintaining systems in which victims of sexual assault report sexual assaults and receive the education-related remedies that they need in order to continue their education. Victim reporting is critical to adequately meeting Title IX obligations.<sup>211</sup> Unless victims report, educational institutions may remain unaware of the contours of the problem and victims will not be provided equal access to education.<sup>212</sup>

Title IX obligates educational institutions to provide equal procedures to students. Some educational institutions have interpreted this to require that once they decide what procedures to apply in their disciplinary process, their obligation is limited merely to providing these chosen procedures equally to each party. Other educational institutions have decided that equal procedures in every stage are not required as long the process is fair overall.

As is often true of Title IX generally, the calculation is not so simple. It is not enough to state that any equally provided process—such as equal opportunity for adversarial cross-examination—is Title IX-compliant. Adversarial cross-examination has a negative effect on reporting, and is the most contentious manner in which to ascertain the reliability and credibility of evidence. In the educational context, which prioritizes the community and the learning process, and where the reliability and credibility of the evidence can be assessed through other formats, adversarial cross-examination is not necessary to provide a fair process. Further, it is detrimental to the educational community and to meeting Title IX goals.

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<sup>210</sup> See *supra* Part I.

<sup>211</sup> See Cantalupo, *supra* note 66, at 220 (detailing how a lack of reporting has hindered Title IX implementation).

<sup>212</sup> *Id.*

A process that balances the overall rights of the complainant and the respondent may also result in an unfair process per Title IX. This can be seen, for example, in Stanford University, where the school decided that it would balance the preponderance of the evidence standard of proof with the requirement that any adverse disciplinary action against the respondent would need the agreement of four of the five board members.<sup>213</sup> Stanford reasoned that this system was calibrated to provide for fair results. However, the consequence was that while the complainant needs to convince four of the panel members that she was sexually assaulted in order to get protection, the respondent needs merely to convince two panel members that he did not commit sexual assault in order to get protection. That inequity, viewed through the Title IX lens, is problematic.

As the Stanford example illustrates, at some point tough decisions need to be made. There are a finite number of rights and educational institutions must decide how this balance cuts in the Title IX context. Procedural protections must reflect priorities, including encouraging reporting. As explained by Katherine Baker,

On procedural matters, like a right to confrontation, the criminal law has always drawn a line that overprotects the accused at the expense of a victim. Discrimination law has drawn that line differently; it has overprotected a class that has been traditionally discriminated against at the expense of potentially innocent defendants.<sup>214</sup>

In this balancing of rights, Title IX is a key factor. Where an element is not required by procedural due process, Title IX mandates that we inquire whether it negatively affects the educational institution's ability to address sexual assault and meet their Title IX obligations. If it does, then the analysis should be whether another process, one that doesn't detract from Title IX's goals, can provide a fundamentally fair and reliable system.

### *B. Recommendations*

Sexual assault disciplinary systems vary widely, spanning the range of formal hearing processes that operate like civil court hearings, to systems that primarily or exclusively use a trained Title IX investigator.<sup>215</sup> The latter system has been criticized for a lack of fairness when it is structured to place investigatory, adjudicatory and appellate functions in the hands of one individual or office.<sup>216</sup>

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<sup>213</sup> Drape & Tracy, *supra* note 209.

<sup>214</sup> Baker, *supra* note 188, at 864.

<sup>215</sup> See *supra* note 80.

<sup>216</sup> See, e.g., *Rethink Harvard's Sexual Harassment Policy*, *supra* note 14 (objecting to "[t]he lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office"); see also ABA TASK FORCE RECOMMENDATIONS, *supra* note 80, at 3 (describing the "investigatory model" wherein "the decision-maker(s) consider(s) only the investigation report in determining whether a

An Investigator/Board<sup>217</sup> model, the general contours of which are set forth below, should be used because it appropriately balances the parties' rights and is calibrated for fair results. The specific procedures that are recommended are not unique to this Article; as described above, many different valuable procedures and disciplinary systems are found across the country.<sup>218</sup> My contribution is to recommend that this specific combination of procedures is best suited to bridge the gap between Title IX and procedural due process.

In this model, the Investigator will be the fact-finder, investigating and assessing the sexual assault allegations. The deliberative Board will determine both responsibility and any sanction (if appropriate). This two-tiered system allows for checks on the authority of each actor, and answers the concerns about lodging too much responsibility in one actor/office.<sup>219</sup>

Title IX requires that each covered educational institution "designate at least one employee to coordinate its efforts to comply with and carry out its [Title IX] responsibilities . . . including any investigation of any complaint . . ." <sup>220</sup> This person, usually referred to as the "Title IX Coordinator," <sup>221</sup> must ensure, among many other responsibilities, that the Investigator and the Board members are trained in Title IX and follow Title IX when they are "exercising their responsibilities." <sup>222</sup> This includes proper Title IX compliant training on issues such as: the dynamics of sexual assault; assessing and documenting credibility and bias; trauma and sexual assault victims; the institution's definitions of prohibited conduct; the institutions' definitions of consent; and examining the impact of alcohol in sexual assault cases.<sup>223</sup>

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violation occurred. Sometimes the investigator is also the decision-maker (the single investigator model), and sometimes the decision-maker is different from the investigator").

<sup>217</sup> This type of mixed Investigator and Board model is often called a "hybrid model," although the contours of some of the proposed models differ from the one I am proposing. *See, e.g.,* Pappas, *supra* note 5, at 134 ("The Hybrid Model uses an approach in which the investigator makes a determination, but the accused is entitled to a hearing if they reject the findings in whole or in part.").

<sup>218</sup> *See supra* note 80.

<sup>219</sup> *See supra* note 216; *see also* ABA TASK FORCE RECOMMENDATIONS, *supra* note 80, at 6 (expressing that the authors are "concerned by the use of the single model investigatory model [sic], in which the same person who investigates also determines whether a violation of school policy occurred.").

<sup>220</sup> 34 C.F.R. § 106.8(a).

<sup>221</sup> Pappas, *supra* note 5, at 126 ("Over thirty-years after Title IX's implementation, this role is now known as a Title IX Coordinator.").

<sup>222</sup> *See* 2015 Dear Colleague Letter, *supra* note 79, at 3, 5–6 (stating that the Title IX Coordinator is responsible for "the [educational institution's] grievance procedures for resolving Title IX complaints," and detailing the areas of law that the Title IX Coordinator must be trained in on an ongoing basis).

<sup>223</sup> Training on these topics are not unique to this Article. They are suggested in many model policies, OCR Resolution Agreements, and OCR guidance documents. For example, it has been noted that Title IX Coordinators should train those "involved in implementing a school's grievance procedures" in:

[I]nformation on working with and interviewing persons subjected to sexual violence; information on particular types of conduct that would constitute sexual violence, including same-sex sexual violence; . . . information on consent and the role drugs or alcohol can play in the ability to consent; . . . how to determine credibility; how to evaluate evidence

The Title IX Coordinator, Investigator and Board should also be trained in procedural due process requirements. This includes training to ensure that these parties properly: inform the accused student of the charges against him, provide the accused with notice of the conduct code violations he is being charged with, allow him to question the evidence, including bias and credibility issues, and allow him to submit evidence on his behalf.<sup>224</sup>

The Investigator is the primary individual determining the facts around what occurred. The Investigator will interview the students, take evidence from them (e.g., text messages, emails about the incident), and obtain the names of witnesses to be interviewed. The Investigator will “cross-examine” the parties through multiple interviews in which the parties and witnesses are questioned about their version of events and about conflicting and/or contradictory evidence. The Investigator will develop an interim report that contains: a summary of the facts, a statement of the claims and responses on both sides, an assessment about the credibility/veracity of anyone interviewed, his/her opinion as to any inconsistencies in the evidence, and an overall assessment of the case. The students will be permitted to review the interim report before it is sent to the Board, to challenge any factual errors and to request to provide information on key issues. This report will necessarily be time-intensive and allow the facts to be fleshed out in a much fuller fashion than in a hearing.

Once the Investigator finishes the interim report, it will be forwarded to the Board. The Board will review the Investigator’s interim report and may request that the Investigator conduct further investigation before the report is finalized. Any updated information will be provided to both parties, with the opportunity to respond.

Once the Investigator’s report, which should be comprehensive and detailed, is final, the Board will proceed with determining both responsibility and any sanctions. The Investigator will appear before the Board to present his/her findings and to answer any questions the Board may have, much like an expert witness does in a civil case. This can include questions about bias and consistency in the report. As members of the community, the Board will

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and weigh it in an impartial manner; . . . the effects of trauma, including neurobiological change . . . .

2014 QUESTIONS AND ANSWERS, *supra* note 69, at 40; *see also* RESOLUTION AGREEMENT: MICHIGAN STATE UNIVERSITY OCR DOCKET NUMBERS 15-11-2098 AND 15-14-2113, OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC. (Aug. 28, 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15112098-b.pdf>.

<sup>224</sup> *See* Goss v. Lopez, 419 U.S. 565, 581 (1975); Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 636, 641 (6th Cir. 2005) (deciding whether the “accused individual has the right to respond and defend, which will generally include the opportunity to make a statement and present evidence,” when the accused had the “opportunity to present his version of events . . . [and] point out inconsistencies or contradictions in the officer’s testimony”); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

also represent the community's interests and community standards, as articulated in the codes of conduct utilized by the educational institution. The parties will appear in front of the Board testify about specific material issues, not to re-testify about the entirety of the investigation and all its implicated facts. Each party may submit written questions to the Board that they would like the Board to ask of the other party (much as they did with the Investigator).<sup>225</sup> The Board utilizes its discretion and training when determining what questions to ask. After deliberation, the Board determines responsibility and any sanctions.

In order for the system to be fair without the use of counsel, the following procedures must be provided: (a) the Investigator and the Board must facilitate the students' understanding of the process and what is required of them, including the students' ability to relay their account of what occurred;<sup>226</sup> (b) the system must be accessible to students, explained to them in plain language and designed for them to represent themselves; and (c) students should be allowed access to an advisor of their choice<sup>227</sup> whose responsibility it is to explain the disciplinary system to the student and assist with navigating it. While this person can be an attorney, the advisor's role should be limited to a supporting role, not to acting as a representative. This serves the goal of providing the student with a guide that can help them meaningfully access the system, similar to the way that an attorney does for civil and criminal cases.

In order for the system to be fair without adversarial cross-examination, the following procedures must be provided: (a) the students will have multiple opportunities to provide evidence as the case develops (including new allegations and new evidence); (b) the students will have the opportunity to review the Investigator's report and respond to it in writing, which writing shall be sent to the Board; and (c) the students may make a written or oral statement to the Board about: any credibility issues; any inconsistencies they want to bring to the Board's attention regarding the other party; and the substance and/or process of the Investigator's report. These processes allow the stu-

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<sup>225</sup> The Board's role is not to re-do the Investigator's investigation. The Investigator should be properly trained, and larger issues about the competency of the investigation should be handled by the Title IX Coordinator.

<sup>226</sup> This is consistent with procedures for many administrative agencies when dealing with complainants, who are often unrepresented. For example, OCR's manual for case processing illustrates: OCR will assist the complainant in understanding the information that OCR requires in order to proceed to the investigation of the complainant's allegation(s). This will include explaining OCR's investigation process and the rights of the complainant under the statutes and regulations enforced by OCR. OCR will also specifically identify the information necessary for OCR to proceed to investigation.

CASE PROCESSING MANUAL, *supra* note 9, at 9.

<sup>227</sup> This is consistent with the amendments to the Clery Act under the Violence Against Women Reauthorization Act of 2013. *See* 79 Fed. Reg. 62,752, 62,752 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668) ("[T]he accuser and the accused have equal opportunities to have others present, including an advisor of their choice . . .").

dents, in a less adversarial manner tailored to the context, to have the opportunity to reflect on the evidence and on what occurred, and to thoughtfully respond to the other side's evidence. In fact, this process permits both students to have more opportunity to reflect and respond than the fast-paced context of adversarial cross-examination in a hearing setting. In short, it is a process that is more focused on understanding what happened than on "trapping" people through adversarial cross-examination.

Procedural due process will be satisfied because the accused student will be provided with the charges against him, notice of the conduct code violations he is being charged with, the ability to question the evidence, including bias and credibility issues, and the ability to submit evidence on his behalf.<sup>228</sup> In addition to these procedures required for procedural due process, fairness requires that the accused must be provided with the specific violations of the student conduct code he is being charged with, multiple opportunities to provide evidence and testimony on his behalf (if needed), and a clear explanation of the consequences for a finding that he violated the student code of conduct.<sup>229</sup>

Title IX will be satisfied because the process furthers the goal of equal educational opportunities to students based on sex. This includes procedures that encourage complainants to report sexual assault so that they can obtain the remedies needed to continue their education.

Additionally, the main burden for investigating and proving allegations of sexual assault will appropriately remain with the educational institution. As detailed above, the risk of adversarial models, such as using direct cross-examination and permitting attorneys, is that some of these investigatory and proof functions get shifted to students, which is contrary to Title IX's placing of this burden on educational institutions, not students.

## CONCLUSION

The debate over whose rights should be prioritized—those of the victim or those of the accused—is a classic civil rights dilemma. By carefully crafting disciplinary systems, educational institutions can effectuate the statutorily-based equality mandate of Title IX while not infringing on the constitutionally-based procedural due process rights of the accused.

Educational institutions must walk a fine line when balancing these competing set of rights. Title IX is intended to address and remedy important inequities in education and provides for robust protections for complainants. By contrast, procedural due process only provides for rudimentary protections for respondents in educational proceedings. Therefore, where proce-

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<sup>228</sup> See *supra* note 224.

<sup>229</sup> For articles that articulated concerns which this process will address, see *supra* note 14.

dural due process does not mandate that a process be used, educational institutions must ensure that they use proceedings consistent with Title IX's goals of ensuring equal educational opportunity based on sex. Educational institutions can achieve these results, together with a fair balance of Title IX and procedural due process rights, through reliance on the four principles enumerated in this Article and use of the Investigator/Board model.

