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Aequitas: Seeking Equilibrium in Title IX

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AEQUITAS: SEEKING EQUILIBRIUM IN TITLE IX

Raymond Trent Cromartie

I. INTRODUCTION

In 2011, the Obama Administration introduced the Dear Colleague Letter, ("DCL" or "Letter")[1] which drastically reshaped the nature and scope of Title IX and redefined how sex-based discrimination is viewed and addressed on college campuses around the country.[2] While the overall intent of the Letter was to address historical mishandlings of sexual misconduct on the part of victims, including sexual assault in higher education,[3] many commentators have expressed the concern that the guidelines aggressively pursued this end without considering several sweeping impacts.[4] Where Title IX used to be a means for providing equal access to education through government oversight, through the Letter, critics have argued that it is more aptly characterized as guidance that has shaped college campuses into

[1] Russlynn Ali, Assistant Sec'y for Civil Rights, *Dear Colleague Letter: Sexual Violence*, OFF. FOR CIVIL RTS., U.S. DEP'T OF EDUC. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[2] *See* R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFAIRS (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix (discussing a theory known as "institutional leapfrogging," whereby the scope of Title IX was not redefined and redeveloped slowly and incrementally, but rather expeditiously through a single document).

[3] Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017), https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/?cid2=gen_login_refresh&cid=gen_sign_in.

[4] Hans A. von Spakovsky & Roger Clegg, *Withdraw the Obama Administration's "Dear Colleague" Letter on School Discipline*, HERITAGE FOUND. (June 18, 2018), https://www.heritage.org/education/commentary/withdraw-the-obama-administrations-dear-colleague-letter-school-discipline.

courtrooms.[5] Specifically, the Letter set forth broad definitions of what constitutes sexual misconduct, as well as required implementation of new procedures for investigating said claims.[6] This ambiguous guidance resulted in inadequate protections for all students involved in the Title IX process.

While it is undeniable that sexual assault is a serious issue that has not been effectively addressed on college campuses, a consensus has emerged that the Obama-era guidelines created an environment that deprived many college students of fundamental protections present in many other adversarial proceedings, such as civil lawsuits or administrative hearings.[7] Under the Obama administration, accused parties often had to proceed through their sexual misconduct investigation without the guidance of an attorney or advisor, without the ability to present or view evidence, or without a means of questioning the complaining party or potential witnesses.[8] Many investigations also utilized a single investigator model, whereby one university-affiliated individual would solely handle the fact-finding and decision-making, often resulting in biased determinations that were typically based on the individual's personal beliefs or interests.[9] The result of the 2011 Dear Colleague Letter, and the ensuing campus investigations, was widespread litigation by both complaining and responding parties, both of whom felt that a fair and impartial investigation was deprived by their academic institutions.[10]

Beginning in 2017, Title IX was further reformed after President Trump was elected to office and Betsy Devos was appointed the Secretary of Education.[11] The Trump Administration's guidelines drastically walked back the Obama-era guidance in terms of protections for complaining parties, and gave additional protections to students who were accused of sexual misconduct.[12] However, many believed that the Trump-era guidelines

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[5] *See generally* Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363 (2021).

[6] Ali, *supra* note 1, at 1–8.

[7] *See* Halley Sutton, *Title IX Lawsuits Related to Sexual Assault Investigations Have Exponentially Increased*, 16 CAMPUS SEC. REP. 9 (Feb. 14, 2020), https://onlinelibrary.wiley.com/doi/abs/10.1002/casr.30626 (generally finding that in greater than 50% of rulings related to Title IX sexual assault claims, courts ruled against the educational institution rather than the aggrieved individual).

[8] *See* Teresa R. Manning, *Repeal Title IX*, FIRST THINGS (Jan. 2023), https://www.firstthings.com/article /2023/01/repeal-title-ix ("The . . . Dear Colleague letter lowered the burden of proof, discouraged cross-examination, and encouraged a single-investigator process whereby the Title IX coordinators at colleges and universities were called to act as police, judge, and jury—all changes that tended toward more frequent findings of fault.").

[9] Jeremy Bauer-Wolf, *One Person as 'Prosecutor, Judge and Jury'*, INSIDE HIGHER ED (June 4, 2018), https://www.insidehighered.com/news/2018/06/05/george-washingtons-new-title-ix-processes-put-sexual-assault-cases-hands-single.

[10] *See* Sutton, *supra* note 7, at 1.

[11] Candice Jackson, Acting Assistant Sec'y for Civil Rights, *Dear Colleague Letter*, OFF. FOR CIVIL RTS., U.S. DEP'T OF EDUC. (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.

[12] Lauren Camera, *New Title IX Rules Bolster the Rights of Those Accused of Sexual Assault*, U.S. NEWS & WORLD REP. (May 6, 2020, 3:42 PM), https://www.usnews.com/news/education-news/articles/2020-05-06/trump-administration-publishes-final-title-ix-campus-sexual-assault-regulations.

provided far too many protections for accused students and consequently had an adverse impact on a potential victim's ability to navigate the Title IX process.[13] Consistent with prior regimes, the Biden administration published its own proposed guidelines in June 2022, which again reshaped the Title IX landscape as we know it.[14]

Although numerous administrations have published guidelines to assist educational institutions with the proper enforcement of Title IX through quasi-judicial sexual misconduct investigations, the guidance has often been unclear and led to the deprivation of fundamental protections for students involved in those processes. Given the extensive state and federal litigation and complaints that have been submitted by male and female students who believed their rights were deprived by their academic institutions, the time is ripe for an in-depth analysis of the new guidelines ("Biden Guidelines"), while ensuring that sexual misconduct is effectively addressed, and all involved parties adequately protected.[15]

This Article is one of the first pieces of legal scholarship to analyze the Biden Guidelines and their potential impact in higher education. This Article is also the first journal article prepared by someone who was wrongly accused of sexual assault shortly after President Obama's Dear Colleague Letter was published.[16] Moreover, this piece delves into an important discussion about race and how one's diverse background may affect the manner in which he or she is treated in the realm of Title IX. It will identify five areas, with demonstrative case law, where the proposed guidelines may not offer enough protection to responding parties, while recognizing the potential impact upon complaining parties, and will discuss a framework through which schools may offer enough protection to both complainants and respondents. The Article will therefore discuss the sufficiency of the proposed guidelines in the aforementioned areas, analyze their potential

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[13] *See* Nicole Bedera, *Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point*, TIME (May 14, 2020, 1:32 PM), https://time.com/5836774/trump-new-title-ix-rules/ ("The new Title IX rule has given universities the power to choose when survivors are heard and when they are not by making it impossible for them to speak up for themselves.").

[14] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, OFF. FOR CIVIL RTS., U.S. DEP'T. OF EDUC. (June 23, 2022), https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm.pdf.

[15] As one of its first moves, the Trump administration substantially revised the Obama-era guidelines to provide additional procedural protections/requirements. Nick Anderson, *Trump Administration Rescinds Obama-Era Guidance on Campus Sexual Assault*, WASH. POST (Sept. 22, 2017, 5:10 PM), https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e_story.html. Since taking office, the Biden administration has walked back the Trump-era guidance in a number of areas and reverted back to processes enacted by President Obama. Morgan Chalfant, *Biden Orders Review of Trump-Era Rule on Campus Sexual Misconduct*, THE HILL (Mar. 8, 2021, 2:17 PM), https://thehill.com/homenews/administration/542146-biden-orders-review-of-trump-era-rule-on-campus-sexual-misconduct/.

[16] Although military academies are exempt from Title IX, the political and social climate at the time of my sexual assault allegation certainly influenced how my investigation was handled. *See infra* Part I and IV.

practical effect, and suggest changes to the current guidance so both parties are adequately protected. The five areas will include: (1) the ability to cross-examine; (2) the right to view and present evidence; (3) the opportunity to utilize an advisor/counsel; (4) the use of a single investigator; and (5) the applicable burden of proof. Each of these areas are addressed in the Biden Guidelines and have also been the subject of significant litigation and investigations in years past.[17]

The Article's analysis therefore serves a timely and important function: each time new guidelines are released, universities around the country are forced to adjust their respective Title IX policies and procedures to comply.[18] Depending upon how a school interprets and implements the proposed guidelines, it could have significant impacts on all parties. This Article will discuss the sufficiency of the proposed guidelines in the aforementioned areas, analyze their potential practical effect, and suggest changes to the current guidance so both parties are adequately protected.

Ultimately, this Article is meant to facilitate a more candid discussion about five controversial areas in the Title IX realm so that both parties, the accused and accuser, can be equally represented and protected. Protecting potential victims while affording responding students with adequate procedural protections need not be mutually exclusive.[19]

Finally, I wish to note that my analysis of the Biden Guidelines should not be taken to mean that I endorse the handling of sexual misconduct investigations by schools. To the contrary, I am opposed to it for a number of reasons that I will explore in more detail in future work.[20] In the end, our

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[17] *See* Sutton, *supra* note 7, at 1.

[18] Unfortunately, as one author has noted, it appears that Title IX has become nothing more than a vessel for furthering political ideologies, as the nature of Title IX will yet again change under the Biden administration, resulting in a "political seesaw." Mann, *supra* note 5, at 367.

[19] The scope of this Article will be limited to student against student investigations and will not extend beyond the hearing stage of the Title IX process, meaning this Article will not focus on a student's ability to appeal the school's initial decision nor the associated processes.

[20] First, the 2011 Dear Colleague Letter, as well as subsequent guidance, has essentially placed pressure on schools to adopt the guidelines and implement them into their Title IX policies and procedures. *See An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 27, 2011), https://www.insidehighered.com/views /2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students (detailing a dear colleague letter drafted by an anonymous university president to his peers. In the letter, the unidentified individual states, "my fear – yes, it's fear – of seeing my institution's name in *Inside Higher Ed* or *The Chronicle of Higher Education* as the subject of an investigation, or, even worse, having the 'letter of agreement' OCR makes public displayed for all to read – makes me toe the line in a way I sometimes have trouble justifying to myself."). By doing so, the federal government has placed academic institutions in a position where they must administer and enforce the Title IX guidelines in order to maintain federal funding yet do so in a fair and impartial manner; *see* Richard Dorment, *Occidental Justice: The Disastrous Fallout When Drunk Sex Meets Academic Bureaucracy*, ESQUIRE (Mar. 25, 2015), https://www.esquire.com/news-politics/a33751/occidental-justice-case/ ("The Department of Education has created a square-peg/round-hole phenomenon by asking colleges to take on a function that is simply not innate, or intuitive, for those who work on college campuses. And I think what's happening on a lot of campuses is they're feeling the pressure of OCR to push things forward that really should not be."). As discussed in greater detail below, this dichotomy has sometimes resulted in conflicts of interest among Title IX investigators and adjudicators, as well as other school officials, so they feel compelled to substantiate findings of fault in

legal system and law enforcement are best suited to actually investigate and adjudicate sexual misconduct on academic institutions or, in the alternative, develop some sort of partnership with Title IX offices so investigations can be facilitated by both parties.

Regardless of my general position, Title IX currently requires post-secondary institutions to investigate and prosecute sexual misconduct within their community.[21] Thus, my analysis will focus on the current proposed

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order to avoid scrutiny from the Office of Civil Rights. *See* Ashley Sarkozi, *Criminals, Classrooms, and Kangaroo Courts: Why College Campuses Should not Adjudicate Sexual Assault Cases*, 50 LOY. L.A. L. REV. 123, 142 (2017) ("Rather than an unbiased jury deciding guilt, biased school administrators who have strong financial incentives decide responsibility in these cases. College campuses have enormous financial incentives in sexual assault cases because acquitting an accused student carries the threat that OCR could exercise its enforcement authority."). Next, most school officials, including Title IX personnel, are not equipped to effectively investigate and adjudicate sexual misconduct cases, especially given the legal doctrine incorporated into Title IX guidance. *See* Lauren Bizier, *Maintaining the Delicate Balance Between Due Process and Protecting Reporting Students from Re-Traumatization During Cross-Examination: Title IX Investigations in the Wake of the Trump Administration's Proposed Regulations*, 25 ROGER WILLIAMS U. L. REV. 242 (2020). As discussed later in the Article, Title IX investigators and adjudicators must assess evidence and rule on evidentiary issues such as relevance, credibility, and bias, among other things. Natalie Powell, et al., *Title IX Training*, OFF. COLO. ATT'Y GEN. (July 28, 2020), https://www.ucdenver.edu/docs/librariesprovider102/default-document-library/title-ix-training-materials.pdf?sfvrsn=54b191b9_2. Although all Title IX personnel are required to receive training on how to conduct investigations and hearings, as well as instruction on the applicable law, most are not lawyers capable of effectively performing this function. *See* Bizier, *supra*. Although some proponents of campus adjudications argue that universities are better suited to handle Title IX claims because they are more educated and receive more training than an average juror, I find this argument unpersuasive. *See* Mary Emory Shingleton, *Dear Colleague: Due Process is not Under Attack at Colleges and Universities, as Shown Through a Comparative Analysis of College Disciplinary Committees and American Juries*, 27 WM. & MARY BILL RTS. J. 213 (2018) (while Ms. Shingleton argues, in part, that jurors are not capable because they do not have advanced degrees and cannot understand complex concepts, thus resulting in arbitrary findings, she fails to recognize that jurors are often educated through expert testimony during criminal and civil trials). Schools are better suited for a compliance-driven approach that focuses more on implementing programs dedicated to prevention rather than adjudication, which is purely reacting to the problem (i.e., addressing sexual assaults). *See* Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. 103 (2015). Thus, resources dedicated to Title IX should be committed to prevention efforts through campus Title IX offices and should be utilized to bolster our existing legal system so campus sexual assaults can be adequately addressed and effectively adjudicated. *See* Audrey Wolfson Latourette, *Title IX Office of Civil Rights Directives: An Assault Against Due Process and First Amendment Rights*, 23 J.L. BUS. & ETHICS 1, 18 (2017) ("While recognizing the authority of institutions to implement disciplinary policies and procedures, principally in matters 'for which they possess a particular expertise, such as academic violations like plagiarism, or in situations involving minor conduct code violations,' criminal assault allegations should be reported to law enforcement, 'recognizing that the criminal justice system possesses greater investigative authority and expertise, can impose meaningful sanctions on perpetrators of felony-level crimes, and is less susceptible to bias than campus disciplinarians.'"). I recognize that the legal system has historically failed to properly address sexual assault in the past; however, as a former President of the University of California system stated: "[R]ather than pushing institutions to become surrogates for the criminal justice system, more work should be done to improve that system's handling and prosecution of sexual assault cases. Law enforcement has the tools to effectively investigate these crimes. The criminal justice process has the authority to impose serious punishments on offenders, including incarceration. The most serious sanction that a college can impose is dismissal, which is wholly inadequate where a crime has been committed. Having law enforcement conduct investigations ensures, if properly done, that effective investigations will be conducted and that there will be appropriate punishments that have a strong deterrent effect, all to the ultimate benefit of the survivors and the safety of the university community as a whole." Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 400–01 (2015).

[21] Title IX of the Education Amendment of 1972, Pub. L. No. 92–318, 20 U.S.C. § 1681 et. seq., 86 Stat. 235 (1972).

guidelines and how they may impact both complainants and respondents. This Article proceeds in four parts. Part I sets forth my background because it bears on my perception of the issues. Here, I discuss the autoethnographic method that I employ,[22] explaining why throughout this Article, at times I interject my personal experience. Part II provides an overview of the history and progression of Title IX law. Part III analyzes each of the aforementioned areas in five distinct subparts, each concluding with a suggestion for how the proposed guidelines may be improved. Finally, Part IV concludes with a brief case analysis that hopefully highlights the importance of maintaining adequate protections for both parties in the five areas during any sexual misconduct proceeding or investigation. My hope is that this Article will serve as an invaluable resource to educational institutions and Title IX participants such that all involved may effectively tailor their policies and procedures.

II. AUTO-ETHNOGRAPHY

I still recall the moment as if it were yesterday. The prosecution was about to rest its case in my court martial and we were prepared to present our own. However, just prior to resting, the prosecution had one last tactic. "Your honor, given the severity of the allegations against Mr. Cromartie, the prosecution would like to seek life during the sentencing phase."[23] This was the first time during my trial that I felt as though my life was over, the second being when I stood at attention awaiting the verdict. Although those moments lasted mere seconds, both felt like an eternity.

In the summer of 2011, while attending the United States Military Academy at West Point ("West Point") as a cadet, I was falsely accused of a sexual assault by a fellow classmate. As a biracial man being accused of a violent crime by a white woman, the investigation was polarizing in that sense. Although it has been many years, I remember with perfect clarity the exact day I learned of the allegations against me. As part of the West Point training regimen, my entire class was training at Camp Buckner the summer after our freshman, or "plebe," year. My classmates and I had just returned from our final multi-day field training exercise[24] and were cleaning our weapons prior to dinner. Many of us were still sleep deprived, dehydrated, and hungry. After some time, my cadet company commander informed me that I was needed at the military police station for an unknown reason. Although my mind immediately began racing, I followed his orders and departed for the station. After arriving, I was immediately forced against a

[22] *See generally* Maybell Romero, *Ruined*, 111 GEO. L.J. 237 (2022).

[23] Much of the recollection of the proceedings are to the best of the author's memory. All transcripts of the trial are sealed.

[24] Essentially, a combat exercise where the cadets "deploy" against an opposition force and perform a variety of missions.

wall, feet spread, searched, and placed in an interrogation room with a one-way mirror. I sat in silence for some time in that drab room, mind still racing. Eventually, a Criminal Investigations Division ("CID") agent entered the room and informed me of the allegations. Naively, I waived my right to counsel and provided a sworn statement in an effort to cooperate. At the conclusion of hours of questioning, I was exhausted, terrified, and wanted nothing more in the world than to leave that room. So, I briefly scanned my statement and left, unaware of what lie ahead.

Overall, my investigation lasted approximately two years and culminated in a court martial where I was facing many years in prison. As soon as I awoke every single day, I questioned why I was still attending class or performing any of my duties. This was my morning routine. I realized any of the charges would lead to, at the very least, my expulsion from the Academy and serious jail time. Most of all, I knew that a guilty verdict on any of the sexual allegations would lead to me becoming a registered sex offender. While my fellow classmates were stressing about upcoming exams or assignments, I was often thinking about how many days I had left until my life was essentially over. This was my reality. Every single day. There were days where I quite literally had to drag myself out of bed in the morning and cry myself to sleep at night. My mind was never at ease. Throughout my investigation, and long past its conclusion, I suffered mood swings, anger issues, severe depression, suicidal ideations, and post-traumatic stress disorder ("PTSD").

Although I was ultimately found not guilty of all the sexual accusations, I was found guilty of a separate, unrelated charge and expelled from the Academy in June 2013, the summer entering my senior year.[25] While my criminal investigation may have ended in 2013, the effects of that investigation will stay with me forever. However, it was my investigation that inspired me to become an attorney as it was wrought with injustice.[26]

My goal with this Article is not to demean, overshadow, or discredit sexual assault allegations and survivors. My experience does not cause me to cast doubt on sexual assault allegations or permit me to make hasty generalizations when evaluating similar cases. False accusations harm the accused, but primarily injure actual survivors. In fact, I fully support those who have the courage and fortitude to confront their assailant through our justice system. I want nothing more than to promote a process whereby those who accuse and those who are accused feel safe during Title IX proceedings,

[25] I was ultimately found guilty of providing a false official statement because, following my initial interrogation, I returned to CID, reviewed my statement thoroughly, and changed one detail. For doing so, I was charged and convicted. Following my discharge, I submitted an appeal to the Army Discharge Review Board, which eventually upgraded my discharge to Honorable after it determined that the characterization was "inequitable."

[26] James Taranto, *A Strange Sort of Justice at West Point*, WALL ST. J. (July 26, 2013, 7:41 PM), https://www.wsj.com/articles/a-strange-sort-of-justice-at-west-point-1376453937.

so every party involved is afforded a fundamentally fair process. My argument is that, regardless of race, sex, or status as complainant or respondent, every student deserves a fundamentally fair investigation and proceeding that affords all parties an equal opportunity to present their case. As discussed in greater detail below, the stakes on both sides are too high to settle for anything less.[27]

Through autoethnography, I will connect my personal experience with the larger Title IX context and each of the five issues. [28] In writing this section, I take a page from Maybell Romero:

> Rather than writing about a problem that I find profoundly troubling but refusing to connect it to my own experiences, I am fully acknowledging that I am not approaching [it] "from a neutral, impersonal, and objective stance," but neither are most other legal scholars who might root their own scholarship in models, vocabularies, or methods that only appear to be objective.[29]

III. BACKGROUND OF TITLE IX

Title IX of the 1972 Education Amendments prohibits sex discrimination in education programs and activities that receive federal financial assistance.[30] While Title IX is an area of law that is now widely known, the scope of Title IX has metamorphosized over recent years. Although a federal ban on sex discrimination in academia was memorialized in 1972, the shift towards sexual equality began in 1964 when the Civil Rights Act was enacted to prevent discrimination in the employment context through the Equal Employment Opportunity Commission.[31] Following the introduction of Title IX, which began as a broad prohibition against sex discrimination, its scope was further defined in 1975 when President Gerald Ford enacted additional provisions that specifically prohibited the same in athletics.[32]

In 1980, when the Department of Education ("DOE") was formed and the Office of Civil Rights ("OCR") was provided oversight power, the federal

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[27] I recognize that Title IX does not apply to military academies such as West Point and the Uniform Code of Military Justice, as the law that applies to all military personnel, has different standards than Title IX proceedings. However, many of my experiences overlap with the issues that will be discussed in this Article (i.e., the right to view and present evidence, right to cross-examination, and the single investigator model).

[28] Romero, *supra* note 22.

[29] Romero, *supra* note 22; *see generally* Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159 (2006).

[30] Title IX of the Education Amendment of 1972, Pub. L. No. 92–318, 20 U.S.C. § 1681 et. seq., 86 Stat. 235 (1972).

[31] This is not to say that women did not advocate for equal rights prior to 1964, it is meant to reflect the legal shift from a federal standpoint.

[32] As evidenced throughout its life, the scope of Title IX has continued to evolve largely based upon political ideologies.

government truly began to regulate Title IX compliance. But in 1984, the scope of Title IX was attacked and diminished following the *Grove City College v. Bell* decision.[33] In that case, the Supreme Court determined that Title IX did not apply to athletics and that the regulation merely bound programs and activities which received direct federal financial assistance.[34] Despite a veto by President Ronald Reagan, the impact of the *Bell* case was ultimately negated by Congress with the passage of the 1988 Civil Rights Restoration Act, which required all academic institutions receiving federal financial aid, whether direct or indirect, to abide by the requirements of Title IX.[35] In 1996, Title IX compliance in the athletic context was further strengthened by the Equity in Athletics Disclosure Act, which required schools to disclose specific information regarding their athletic programs, including, but not limited to, budgets and roster sizes or composition.[36] I provide this background to highlight the origin of Title IX and how it has been shaped throughout the years by legislative and legal action.

The transformation of Title IX from its original civil rights roots to its current quasi-criminal status is the foundation for understanding what feminist legal scholar Kelly Alison Behre calls the "survivor narrative."[37] But, before diving into the strand of the feminist legal scholarship on Title IX, I wish to acknowledge the history, and gravity, of the problem of sexual assault of women in the United States. In order to adequately address this question, I think it is important to recognize and discuss the severity of sexual assault in the United States and how that societal issue influenced the trajectory of Title IX. This background is especially important given the current state of Title IX and the significant influence of academic institutions upon its student population.[38] Although Title IX is a somewhat recent law,

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[33] *See generally* Grove City Coll. v. Bell, 465 U.S. 555 (1984).

[34] *Id.* at 572. (although this was one of a number of Supreme Court rulings that would impact the course of Title IX, courts across the United States would soon become inundated with Title IX litigation; as discussed in greater detail below, courts have become a common vessel for carving out the responsibilities of academic institutions and rights of all parties involved in Title IX adjudication).

[35] As referenced above, this situation is a prime example of how Title IX can become a political pendulum anchored by broad social mindsets.

[36] *See* Kelly Alison Behre, *Deconstructing the Disciplined Student Narrative and its Impact on Campus Sexual Assault Policy*, 61 ARIZ. L. REV. 885, 889 (2019) (this narrative encompasses survivors' experiences during Title IX investigations and the effects of the same, including, but not limited to: victim-blaming; failures to investigate; lack of access to mental health resources or accommodations; and retaliation. "[T]he survivor narrative clearly identifie[s] colleges as separate characters whose failure to mitigate the harm caused by the sexual assault exacerbated trauma and negatively impacted student survivors' access to education.").

[37] *See id.* (although Ms. Behre frames the survivor narrative as a movement by survivors to communicate their experiences and the impact of failures by academic institutions in the Title IX context, I am using the term to broadly reference society's recognition of the sexual assault pandemic and the move to address the same).

[38] Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1073 (2015) (Ms. Silbaugh posits that academic institutions are especially influential because they engage in transformative education, meaning they do not just manage student populations, they facilitate interactions among those populations [student housing, dining facilities, extracurricular activities, etc.]; through the campus climate and its administration, the norms of the student population will be shaped).

especially in the realm of sexual misconduct adjudication, sexual assault has been prevalent in the United States since at least the 1700s when women of color were frequently subjected to unwanted sexual contact.[39] In fact, in her book entitled "Against Our Will," Susan Brownmiller states that "[c]oncepts of hierarchy, slavery and private property flowed from, and could only be predicated upon, the initial subjugation of women."[40]

Since that time when sexual assault was viewed as a norm, instead of an issue, women have advocated for reform and additional protections from unwanted sexual contact, as well as other areas of civil rights. However, the survivor narrative did not gain significant traction until the 1970s when the movement sought to change a society "that permitted and encouraged the oppression of women and sexual violence against them."[41] This decade saw the creation of America's first rape crisis centers and the continuous expansion of rape prevention laws. The efforts of this movement culminated in the passage of the Violence Against Women Act ("VAWA") in 1994, which promoted the investigation and prosecution of sexual crimes, among other things.[42] Although sexual assault reform has continued since the passage of VAWA, the problem as of yet remains intractable in our society, especially on college campuses.[43] In fact, one report estimated that one in five female students in the United States experiences some form of unwanted sexual contact during her undergraduate career.[44]

Although sexual assault has long been an epidemic on college campuses around the country, the passage of the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act") in 1990, and its subsequent amendments, fostered the disclosure of information related to crime occurring on or around college campuses.[45] While the Clery Act did not explicitly define what crimes had to be reported, it evidenced a clear intent by the federal government to address criminal conduct on campus.[46] In 1997, the survivor narrative and collegiate crime movements

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[39] Michael White, *How Slavery Changed the DNA of African Americans*, PACIFIC STANDARD, https://psmag.com/news/how-slavery-changed-the-dna-of-african-americans (Dec. 20, 2017).

[40] SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 17–18 (Simon & Schuster, 1975).

[41] Barbara G. Collins & Mary B. Whalen, *The Rape Crisis Movement: Radical or Reformist?*, 34 SOCIAL WORK 61 (1989).

[42] 42 U.S.C. §13701 et. seq. (1994).

[43] In 2013, The Campus Violence Elimination Act Regulations for the 2013 VAWA Amendments to the Clery Act (Campus SaVE Act) was published, which required schools to provide reasonable accommodations and protections for survivors. *Clery Act*, RAINN, https://www.rainn.org/articles/clery-act#:~:text=The%20Jeanne%20Clery%20Disclosure%20of,occur%20on%20or%20near%20campus (last visited Sept. 23, 2023).

[44] *See* David Cantor, et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N AM. UNIV. (Oct. 20, 2017), https://www.assessmentresearch.arizona.edu/sites/default/files/2021-08/aau-campus-climate-survey-on-sexual-assult-and-misconduct.pdf.

[45] 20 U.S.C. §1092.

[46] *Clery Act*, RAINN, https://www.rainn.org/articles/clery-act#:~:text=The%20Jeanne%20Clery%20Disclosure%20of,occur%20on%20or%20near%20campus (last visited Sept. 23, 2023).

began to merge, eventually resulting in the current Title IX system. During this year, the OCR published a document entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," which prohibited sexual harassment on college campuses and defined it as any conduct that is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment."[47] Thus, the foundation was laid for campus sexual misconduct adjudication.

Soon after the OCR's publication, the Supreme Court issued a ruling that would greatly shape the current Title IX landscape. In *Davis v. Monroe County Bd. of Educ.*, the court held that schools can be responsible for damages under Title IX if they have actual knowledge of student-on-student harassment and fail to take appropriate steps to address the same (i.e., "deliberate indifference").[48] In effect, the *Davis* ruling exposed academic institutions to private causes of action for failing to take reasonable steps to address any known conduct. Then on August 4, 2004, the burden on colleges was heightened after the OCR issued the first of a series of Dear Colleague Letters.[49] This first letter primarily required post-secondary institutions to take additional steps to prevent and address sexual misconduct by: (1) creating and designating a Title IX Coordinator; (2) preparing and distributing a nondiscrimination policy; and (3) developing grievance procedures to address complaints of sex discrimination.[50] The previously-established foundation for campus sexual misconduct adjudication now had framing.

On April 4, 2011, the Obama Administration would issue another iteration of the DCL, which supplemented the 2001 guidance and changed the Title IX landscape forever by mandating a new quasi-judicial establishment in American society, the college courtroom.[51] Among other things, the 2011 DCL outlined educational institutions' obligations to protect students from sexual harassment and sexual violence. Specifically, the letter set forth requirements related to student-on-student sexual harassment, the

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[47] This publication was revised by the OCR in 2001. *Revised Sexual Harassment Guidance: Harassment of Students by Employees, Other Students, or Third Parties*, OFF. FOR CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (last visited Oct. 2, 2023). In relevant part, the Clery Act requires schools to compile crime statistics for offenses involving rape, fondling, incest, and statutory rape. *The Jeanne Clery Act*, CLERY CTR., https://www.clerycenter.org/the-clery-act (last visited Oct. 2, 2023).

[48] Davis v. Monroe Cnty. Bd. Educ., 526 U.S. 629, 650 (1999).

[49] Kenneth L. Marcus, Assistant Sec'y for Civil Rights, *Dear Colleague Letter*, OFF. FOR CIVIL RTS., U.S. DEP'T OF EDUC. (Aug. 4, 2004), https://www2.ed.gov/about/offices/list/ocr/responsibilities_ix_ps.html.

[50] *Id.* at 2 (although schools prohibited sexual misconduct long before the OCR's August 2004 DCL, the prior primary vessel for enforcement was each institution's student conduct code/policy).

[51] Ali, *supra* note 1, at 1–2, 16, 19 (while the 2011 DCL was purported to be guidance and not law, it had the same binding effect as law because it threatened any school that did not abide by its measures with forfeiture of federal funding).

responsibility to take proactive steps to prevent the same, including training among employees with the authority to address harassment, and specific procedures each institution must adopt in order to remain compliant.[52] Following the 2011 "guidance," schools across the country scrambled to develop Title IX policies and procedures to comply so they did not risk losing federal funding.

Following the passage of the Campus Violence Elimination Act Regulations in 2013 VAWA Amendments to the Clery Act ("SaVE Act"), schools were also required to report a wider range of sexual crimes occurring on their campus, including domestic violence, dating violence, stalking, and sexual assault.[53] Given the heightened burden established by the 2011 DCL, which was fairly broad and vague, as well as the scrutiny that flowed from public disclosure of sexual crimes under the SaVE Act, postsecondary institutions and advocates across the nation desired further clarification from OCR in order to remain compliant. In response, the OCR published the April 29, 2014, Questions and Answers on Title IX and Sexual Violence ("Q&A"), which "provide[d] [schools] with information to assist them in meeting their obligations, and . . . provide[d] members of the public with information about their rights, under the civil rights laws and implementing regulations that [OCR] enforce[s]."[54] Essentially, the Q&A clarified provisions of the 2011 DCL and set forth more explicit compliance requirements.

Since the 2011 DCL and Q&A, Title IX and campus sexual assault has become a hotbed for political and social debate, as well as litigation. In fact, the scope of Title IX and the procedures afforded to students involved in sexual misconduct investigations seemingly change with each new administration. This became especially evident after both the DCL and Q&A were rescinded following the election of President Donald Trump and the subsequent appointment of Betsy Devos as Secretary of Education in 2017.[55] In fact, the Trump administration's Title IX guidance substantially diverged from that of the Obama Administration's, and diminished protections for complaining parties while bolstering rights to accused students.[56] After the

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[52] Ali, *supra* note 1, at 5, 9, 12 (generally, the 2011 DCL requires that a school's investigation into sexual misconduct be prompt, thorough, and impartial); *Id.* at 9–12 (The letter specifically requires "adequate, reliable, and impartial investigation [,] . . ." the use of a preponderance of the evidence standard (i.e., more likely than not), and the opportunity for both parties to present witnesses and evidence, yet discourages the involvement of legal counsel and the ability to cross-examine during hearings).

[53] *Federal Legislation Affecting Colleges*, FRIS, https://www.fris.org/Laws/Fed-Colleges.html#:~:text=With%20the%20VAWA%202013%20changes,violence%2C%20sexual%20assault%20or%20stalking (last visited Oct 4, 2023). It also codified much of OCR's Title IX guidance, including informing survivors of their rights, permitting legal counsel in hearings, affording equitable disciplinary proceedings, and publicly disclosing prevention initiatives.

[54] Catherine E. Lhamon, Assistant Sec'y for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, OFF. FOR CIVIL RTS., U.S. DEP'T OF EDUC. (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[55] Jackson, *supra* note 11, at 2.

[56] Bedera, *supra* note 13, at 2–4.

Trump-era guidance took effect in August 2020, schools were once again forced to revise their Title IX policies and procedures in order to comply, giving rise to a new wave of litigation and public outcry.[57] This see-sawing has now become the norm. When one regime departs, so do its morals, values, and Title IX policies, only to be reformed and reshaped by the incoming administration. This trend has continued into the current presidency and will surely proceed into the next.[58]

In January 2021, President Joe Biden was elected to office and with him came a new set of proposed Title IX guidelines.[59] Although the guidelines were recently open for public comment, a final set has yet to be published.[60] Regardless, and true to societal form, a debate has surged since the release of the proposed guidelines in June 2022.[61] Thus, the time is ripe to propose a framework for assessment, given the quasi-criminal nature of Title IX as it currently stands, that is grounded in the following foundational elements: (1) the ability to cross-examine; (2) the right to view and present evidence; (3) the opportunity to utilize an advisor or counsel; (4) the use of a single investigator; and (5) the applicable burden of proof, to analyze their potential practical effects, and to suggest changes so both complainants and respondents are adequately protected. In the end, Title IX adjudications "are supposed to be about individuals, not symbols;" based upon "facts and evidence, not social theories;" and focused on a finding of "guilt or innocence, not social transformation."[62]

IV. DISCUSSION

I mention the history of sexual assault law in our country to highlight how far we have progressed as a nation. However, as discussed below, I recognize the fact that reform is still necessary in a number of areas. In fact, compared to other nations, the United States is only considered to be 91.3% equal in terms of female versus male rights.[63] I also recognize that, while I

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[57] Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 6, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations.

[58] Mann, *supra* note 5, at 367.

[59] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 10.

[60] Jeremy Bauer-Wolf, *The Public Comment Period for Biden's Title IX Proposal is Over. What's Next?*, HIGHER ED DIVE (Sept. 15, 2022), https://www.highereddive.com/news/the-public-comment-period-for-bidens-title-ix-proposal-is-over-whats-nex/631847/.

[61] Robby Soave, *5 Ways Biden's New Title IX Rules Will Eviscerate Due Process on Campus*, TITLE IX (June 23, 2022, 4:35 PM), https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus/.

[62] Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 87–88 (2013) (quoting Michael S. Greve, *Sexual Harassment: Telling the Other Victims' Story*, 23 N. KY. L. REV. 523, 541 (1996)).

[63] *See generally* Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 980 (2015) (detailing the timeline in the United States for legal reform in the context of rape); Brooke Knappenberger & Gabrielle Ulubay, *36 Ways Women*

advocate for and propose changes to Title IX law, a field that is traditionally tied to women's rights, again, my goal is not to diminish the rights of women, but to envision a system whereby all parties, regardless of sex, are provided equal rights and a fundamentally fair process. Such a system is what we should aspire to achieve in many areas of society. As discussed throughout this Article, this should not come at the reduction or forfeiture of others' rights. We need to develop a means of addressing the pervasive and ongoing problem of sexual assault against women while also avoiding a witch hunt to meet this end.

I further understand that survivors of sexual assault can include people from all walks of life and that the issue is not solely limited to women's rights. In fact, there are a number of well-known Title IX cases whereby the complainant was not a woman,[64] as well as cases where the responding party was a woman accused of Title IX infractions.[65]

A. Standard of Proof

As mentioned above, the 2011 DCL and the 2014 Q&A provided procedural guidelines for the handling of sexual misconduct investigations and hearings on academic institutions.[66] One of the areas addressed was the standard of proof, or the burden of proof, that post-secondary institutions used to rely upon when adjudicating these matters.[67] Specifically, the DOE mandated that schools utilize the preponderance of the evidence standard,[68] which is typical in most civil cases around the nation.[69] This standard is described as requiring the factfinder to determine whether the disputed fact(s) are more probable than not, or "fifty percent [plus] a feather."[70]

Still Aren't Equal to Men, MARIE CLAIRE, https://www.marieclaire.com/politics/news/a15652/gender-inequality-stats/ (Mar. 8, 2023) (citing a 2022 study by the World Bank which revealed that, due to a lack of laws related to parental leave, equal pay, and equal pensions, the United States ranks alongside Taiwan and Albania in terms of women equality while 12 other countries scored a perfect 100%).

[64] Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016) (following the end of their romantic relationship, one male student accused another of unwanted sexual conduct during the course of their relationship).

[65] *See Four-Word Joke Results in Five Conduct Charges for University of Oregon Student*, FIRE (Aug. 26, 2014), https://www.thefire.org/news/four-word-joke-results-five-conduct-charges-university-oregon-student (finding in 2014, the University of Oregon filed various conduct charges against a female student after she yelled "I hit it first" at an unknown male/female couple from a dormitory window; the university subsequently charged her with harassment, among other things, and the charges were not dismissed until the university faced public outcry).

[66] Ali, *supra* note 1, at 1, 10–11; Lhamon, *supra* note 54, at 1–2.

[67] Ali, *supra* note 1, at 10.

[68] Ali, *supra* note 1, at 11 (this is the lowest standard available to both civil and criminal parties with the clear and convincing standard being the second highest and beyond a reasonable doubt the highest burden of proof. Given the substantial interests involved by both Title IX litigants, the burden for substantiating a claim has been hotly debated since the DOE published its 2011 guidance).

[69] Dorothy Kagehiro & Clark Stanton, *Legal vs. Quantified Definitions of Standards of Proof*, 9 LAW AND HUM. BEHAV. 159, 160 (1985).

[70] Whitener v. Sec'y Health & Hum. Servs., No. 06-0477V, 2009 WL 3007380 *1, *1 (Fed. Cl. Spec. Mstr. Sept. 2, 2009).

On one side of the discussion are people who recognize the quasi-criminal nature of the allegations faced by respondents and the significant harm an adverse outcome may cause.[71] Individuals with this mindset typically argue, at the very least, schools should be required to adjudicate sexual misconduct cases under the clear and convincing standard; however, some even go as far as advocating for the beyond a reasonable doubt standard.[72] On the other side are people who believe that a lower standard must be implemented given the historical failure of how our nation has addressed sexual assault, the strong need for a system that protects survivors so they may have access to an education, and the potential chilling effect of implementing a higher standard.[73] After careful consideration of the rationales of both, I argue for a balanced approach.

Under the current version of President Biden's proposed standards, schools are now required to use the preponderance of the evidence standard "*unless the school uses the clear and convincing standard in all other comparable proceedings*."[74] This deviates from the Trump-era guidance, which permitted schools to choose between the preponderance of the evidence or clear and convincing standards when investigating or adjudicating Title IX claims.[75] As mentioned above, these suggested changes have been the focus of much debate and controversy. On one hand, there are some who believe the shift away from the former guidance is a step backwards for the rights of accused parties.[76] On the other side are those who feel that the proposed guidelines empower survivors to pursue Title IX complaints and fosters a safe environment.[77] In addition to a discussion regarding each side's stance on the

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[71] Barclay Sutton Hendrix, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 611– 12 (2013) (arguing that, given the quasi-criminal nature of the proceedings, the beyond reasonable doubt standard should apply).

[72] *See* John Villasenor, *A Probabilistic Framework for Modelling False Title IX 'Convictions' Under the Preponderance of the Evidence Standard*, 15 LAW, PROBABILITY & RISK 223, 223 (2016) (providing quantitative data which demonstrates that an "innocent defendant faces a dramatically increased risk of conviction when tried under the preponderance of the evidence standard as opposed to under the beyond a reasonable doubt standard.").

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

[74] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 342 (emphasis added).

[75] Jackson, *supra* note 11, at 1–2.

[76] *See* Joseph Cohn, et al., *Comment of the Foundation for Individual Rights and Expression in Opposition to the Department of Education's Proposed Regulations on Title IX Enforcement*, INSIDE HIGHER ED (Sept. 12, 2022), https://www.insidehighered.com/sites/default/server_files/media/FIRE%20Comment%20on%20Docket%20No.%20ED-2021-OCR-0166%2C%20RIN%201870-AA16%2C%20091222.pdf (the Foundation for Individual Rights and Expression ("FIRE") believes that, given the seriousness of the allegations and repercussions, as well as the lack of "robust procedural protections [,]" the proposed legal standard is inappropriate); Racheal A. Goldman, *When is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students*, 47 PEPP. L. REV. 185, 209–10 (2019) (advocating that the clear and convincing standard should apply given that schools are adjudicating what is purported to be felony-level offenses); Sarkozi, *supra* note 20, at 123, 138– 39 (2017) (proposing the use of a clear and convincing standard given the interests at stake).

[77] S*ee* Shingleton, *supra* note 20, at 232, 239, 248 (arguing, in part, that the majority of schools already implemented a system utilizing preponderance of the evidence standard prior to being required to do so

proper legal standard, it is also important to highlight the potential repercussions or impacts that may result from the implementation of each standard. Without considering the impact of these standards, we cannot develop a system that will adequately protect each party. Given the historical diverging views on this issue, as well as the remaining issues in this Article, I will address the reasoning and legal support for each side's position prior to proposing a solution. Specifically, how do courts, as well as other scholars, view each issue?

Proponents of higher burdens of proof, whether it be clear and convincing or beyond a reasonable doubt, are those who typically advocate for greater protections for accused students.[78] The motivation for such a position is multifactorial. Primarily, proponents of a higher standard believe the harm that may be suffered by accused parties is significant and likely permanent given the seriousness of the allegations.[79] Although Title IX proceedings are viewed as administrative in nature, the allegations against accused students are significant.[80] Similarly, the reputational and societal harms that will ensue after a finding of responsibility are significant as sexual misconduct is rightly viewed with disfavor and outrage.[81] For example, while I was acquitted of all sexual charges against me, I have since experienced judgment and lost professional opportunities because my case was published in a news article.[82]

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and that, functionally speaking, the standard does not differ significantly from that of the clear and convincing).

[78] Cohn, *supra* note 76, at 50 (advocating that, given the lack of "robust procedural protections" throughout the Title IX process, a higher standard should be applied); Goldman, *supra* note 76, at 211; Hendrix, *supra* note 71, at 611–612; Sarkozi, *supra* note 20, at 138–139.

[79] *See* Laura Perry, *From Brock Turner to Brian Brooks: Protecting Victims and Preserving Due Process in the New Area of Title IX*, 14 DEPAUL J. FOR SOC. JUST. 1, 34 (2021). For example, after a finding of responsibility, some schools, through their own policies and procedures, place a permanent transcript notation on the student's academic records, which will follow him or her even if he or she transfers to another institution. *Id.* ("[S]ome states like—New York and Virginia . . . [have begun] to pass legislation requiring schools to note on a student's transcript whether the student was suspended or expelled for sexual misconduct, [they] may face severe restrictions, similar to being put on a sex offender list, that curtail [their] ability to gain a higher education degree."); *see also* Fernand N. Dutile, *Students and Due Process in Higher Education: Of Interests and Procedures*, 2 FLA. COASTAL L.J. 243, 254 (2001) ("In the context of higher education, the threatened loss of an already-awarded degree presents the best case for procedural protection as 'property' under the Due Process Clause.").

[80] Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, MICH. L. REV. 155, 175 (2017) (arguing that students with notations may face severe restrictions, "similar to being put on a sex offender list . . . ," that will inhibit their ability to pursue a degree; harm can also arise from the use of transcript notations as a finding of responsibility for such charges acts as a criminal record of sorts).

[81] Doe v. Cummins, 662 Fed. Appx. 437, 445–446 (6th Cir. 2016); Doe v. Baum, 903 F.3d 575, 581–582 (6th Cir. 2018) ("Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. The student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled.").

[82] During one interview with a law firm, the interviewer explicitly informed me that clients would view my background with disfavor and that it would impact my ability to practice. Even though one can be found innocent of any sexual charges, the accused party still carries a social stigma. This stigma is so

On the other side of this debate are those who firmly believe that only the preponderance of the evidence standard is appropriate for Title IX proceedings.[83] The primary reason for this position is that a higher burden of proof may have a chilling effect on the reporting of sexual misconduct on campuses.[84] In fact, a 2015 study by the Association of American Universities indicated that the most common reason for non-reporting was a lack of faith in the system.[85] Additionally, proponents of this standard believe requiring a higher burden may also signal that society generally does not believe survivors, as any greater standard will amount to a 50/50 or he-said-she-said case in favor of the accused party.[86] Importantly, courts have not ruled on what legal standard should apply in campus proceedings, but have generally held that Title IX investigations and proceedings must provide for "fundamental fairness."[87] Still, courts have also held that, in other campus disciplinary proceedings, such as hearings adjudicating plagiarism, schools need not apply the higher clear and convincing standard.[88]

Although my discussion of repercussions and the impact of Title IX policy change has focused solely on the views of survivor and accused advocates, we must not forget to consider the effect of any legal reform upon communities that are typically underrepresented and under protected in society, including in our legal system. Specifically, communities of color. In fact, Black men have historically been the target of disparate treatment and disproportionate punishment when faced with sexual assault charges.[89] Similarly, women of color have also endured unequal treatment during sexual assault cases when compared to their white peers.[90]

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prolific that, during a lobbying meeting with a Texas state legislator's Chief of Staff, I was informed that his office "did not care about accused rights" when discussing proposed Title IX legislation.

[83] Shingleton, *supra* note 20, at 232–33; Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 516–17 (2012); Behre, *supra* note 36, at 910–12.

[84] *See* Perry, *supra* note 80, at 31–32 ("A clear and convincing evidence standard makes it more difficult for victims to win their cases. Since the campus adjudication process takes time and is emotionally draining, students often feel discouraged from reporting an assault when they do not think they have a chance of being believed by the university.").

[85] *See AAU Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N. OF AM. UNIV. (Sept. 3, 2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual-assault-and-sexual-misconduct-2015.

[86] Perry, *supra* note 79, at 45 ("The integrity of victims is often questioned, and many are not believed. This is particularly true in campus climates that promote rape culture.").

[87] *See* 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.").

[88] Reilly v. Daly, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996) (following allegations of cheating, a school disciplinary expelled the offender, who subsequently sued the institution and alleged that she was not afforded due process; the court ultimately held that due process only requires schools to base their suspensions or expulsions by clear and convincing standard of proof).

[89] Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape Viewed Through the Prism of a Modern-Day Emmett Till*, AM. BAR ASS'N (July 16, 2019), https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/.

[90] Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 366–368 (1993) (following the abolishment of slavery and other legal reform, even when criminal proceedings were instituted following the rape of a Black woman, allegations often were not taken seriously and sentencing of guilty offenders was much more lenient when compared to cases involving White survivors); Matthew

As a biracial man of a white mother and Black father, my family and I certainly considered any potential impact of my racial makeup upon my investigation at an early stage.[91] Although my investigation occurred while I was in the Army, where the only color should be green, we still recognized that people from diverse backgrounds sometimes face different circumstances and treatment when navigating the criminal realm.[92] The racial composition of each party is not the only hurdle that people of color must overcome when involved in a criminal matter and the same issues may arise in the context of Title IX. For example, in the context of my discussion regarding the right to counsel, the ability of underserved communities to exercise such a privilege is not guaranteed. As discussed by another scholar, people of color are often first generation college students who come from a community or family that does not have the ability to support them financially.[93] As such, a person of color who is involved in the Title IX process may not be able to afford an attorney to assist them throughout an investigation, which may result in him or her being assigned an advisor who may not be a licensed attorney, thus promulgating the age-old issue of underrepresentation. People of color also have a higher likelihood of coming from an non-English speaking immigrant family, making navigation and communication throughout the Title IX process all the more complex.[94] In order to mitigate the effect of any Title IX procedures, the federal government should explore the intersectionality of sexism, racism, genderism, and classism.[95]

Accordingly, the best system to implement in Title IX hearings is a sliding scale that functions based on the severity of the punishment faced by an accused student. This is obviously contrary to the current proposed guidelines, which, again, require the preponderance of the evidence standard,

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J. Breiding, et al., *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization – National Intimate Partner and Sexual Violence Survey, United States, 2011*, 63 CTRS. FOR DISEASE CONTROL & PREVENTION: SURVEILLANCE SUMMARIES 1, 6 (2014), https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf (the study showed that multiracial women experienced sexual harassment 4.8% to 32.2% more than any other racial group of cisgender women or men in the United States. *Id.* at 12).

[91] This is not to say that the allegations against me or my investigation were racially motivated.

[92] Perry, *supra* note 79, at 42–43 (noting that, "[w]hile there are no official national statistics on how race affects campus sexual assault complaints, there is a long history of bias against Black men with regards to rape allegations by white women."); Heyne v. Metro. Nashville Pub. Sch., 655 F.3d 556, 569–571 (6th Cir. 2011) (holding that the plaintiff, a Black high school student, had sufficiently pled a claim against his school principal after the student was suspended for 10 days based in part on the student's race; in fact, the principal instructed decisionmakers "to enhance both the charges against and the discipline imposed on . . ." the student because of his race).

[93] Nancy Chi Cantalupo, *And Even More of Us are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J. L. & GENDER 1, 27–28 (2019) ("Similarly, compared to men students and white students, more women students and students of color are first-generation college students, who are significantly more likely to be low-income than students whose parents had at least some experience with college.").

[94] *Id.* at 29–30.

[95] *Id.* at 70; *see* Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 19 (1995) ("Race and class can never be just 'subtracted' because they are in ways inextricable from gender. The attempt to subtract race and class elevates white, middle-class experience into the norm, making it the prototypical experience.").

unless the school uses the clear and convincing standard in all other comparable proceedings. As noted by numerous courts, in cases where students face severe punishments, such as expulsion or suspension for an extended period, greater protections must be afforded as the consequences and interests at stake are higher.[96] Regardless, we must balance the interests of the accused parties with the interests of complaining parties so sexual assault and harassment are still effectively addressed on college campuses and all parties are afforded equal access to education. In order to balance these interests, I propose using the clear and convincing standard when accused parties are facing a severe punishment, such as expulsion or a prolonged suspension.[97] However, in all other cases, the preponderance of the evidence standard should apply. Given that the governing legal standard may impact how each party, and the investigator(s), approach a case, a determination on potential sanctions or punishment against the accused should be made as early in the process as possible. Should new evidence or conduct impact this analysis, schools should consider briefly delaying hearings or investigations to permit the parties to appropriately prepare their respective cases.

This proposed system is similar to what is implemented in some civil cases around the country. For example, under California and Colorado civil law, defendants engaged in a defamation suit may submit a motion to dismiss the allegations against them under Anti-Strategic Lawsuits Against Public Participation ("Anti-SLAPP") laws.[98] The goal of each statute is to promote free speech and public debate without the threat of private action.[99] Once a motion to dismiss is filed, the court must consider whether the alleged defamatory statement was made about a matter of public concern and, when it is, the complaining party must then demonstrate by clear and convincing evidence that he or she will succeed on the claim should the matter proceed to trial.[100] As referenced above, courts and legislators advanced these laws because they promote constitutionally protected rights. My proposed system is also analogous to some civil cases where the complaining party seeks punitive or exemplary damages, which heightens the exposure of the defending party and his or her vested interest.[101] Under such conditions, Colorado law requires the plaintiff, upon motion, to demonstrate beyond a

[96] Siblerud v. Colo. State Univ. Bd. Agric., 896 F. Supp. 1506, 1516 (D. Colo. 1995) (finding that, when a student is faced with expulsion in a disciplinary proceeding, his or her private interest is "exceptionally robust"); Goss v. Lopez, 419 U.S. 565, 575–76, 584 (1975) ("Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.").

[97] What constitutes a "prolonged suspension" will be left to the discretion of each institution and its Title IX department.

[98] COLO. REV. STAT. § 13-20-1101 (2019); CAL. CIV. PROC. CODE § 425.16.

[99] § 13-20-1101; CIV. PROC. § 425.16.

[100] Lewis v. McGraw-Hill Broad. Co. 832 P.2d 1118, 1122–23 (Colo. App. 1992) (explaining that when the statement involves a matter of public concern, a plaintiff will not succeed unless he or she can prove by clear and convincing evidence that the defending party "published the defamatory statement with actual malice . . .").

[101] COLO. REV. STAT. § 13-21-102 (limiting the amount of recovery until the plaintiff can substantiate a claim for greater damages).

reasonable doubt that the injury alleged was attended by circumstances of fraud, malice, insult, or a wanton and reckless disregard of the injured party's rights and feelings.[102] Both situations demonstrate that courts have practically implemented a sliding scale to adjust the legal burden to appropriately fit the interests involved by both parties. The same should apply in the Title IX context.

While I recognize that neither civil nor criminal procedure govern in Title IX proceedings, both systems certainly inform and influence the way Title IX law is implemented. As one court noted, "the rules that govern a common law trial need not govern a university disciplinary proceeding. But the rules of trial may serve as a useful benchmark to guide our analysis [on Title IX procedure]."[103] Certainly the implementation of this system will have its drawbacks and each party will feel aggrieved in some manner by the proposed standards; however, a sliding scale strikes the right balance for facilitating a fair process for both parties while adequately protecting the interests on each side.

B. Right to View And Present Evidence

Although the right to view and present evidence may seem like an essential element of any adversarial proceeding, the nature and extent of the same has been another focus of Title IX debate since the introduction of the 2011 DCL.[104] In terms of scope, this section will focus primarily on the ability of parties involved in Title IX cases to review evidence gathered by the university during its investigation, including the nature of the allegations levied against the accused, the ability of each party to present evidence in support of one's case, including witnesses, and the opportunity to settle the merits of a case at a live hearing.[105]

Although the DCL explicitly required schools to develop Title IX

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[102] § 13-21-102(1).

[103] Haidak v. Univ. Mass.-Amherst, 933 F.3d 56, 67 (1st Cir. 2019) (internal citations omitted).

[104] As Judge Jose Cabranes of the United States Court of Appeals for the Second Circuit observed in *Vengalatorre v. Cornell Univ.*, 36 F.4th 87, 99 (2d Cir. 2022), "[T]his case describes deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX and other closely related statutes. In many instances, these procedures signal a retreat from the foundational principle of due process, the erosion of which has been accompanied — to no one's surprise — by a decline in modern universities' protection of the open inquiry and academic freedom that has accounted for the vitality and success of American higher education . . . . There is no doubt that allegations of misconduct on university campuses — sexual or otherwise — must, of course, be taken seriously; but any actions taken by university officials in response to such allegations must also comport with basic principles of fairness and due process. The day is surely coming — and none too soon — when the Supreme Court will be able to assess the various university procedures that undermine the freedom and fairness of the academy in favor of the politics of grievance. In sum: these threats to due process and academic freedom are matters of life and death for our great universities. It is incumbent upon their leaders to reverse the disturbing trend of indifference to these threats, or simple immobilization due to fear of internal constituencies of the 'virtuous' determined to lunge for influence or settle scores against outspoken colleagues." *Id.* at 114–115.

[105] For purposes of this section, I will not discuss cross-examination of witnesses and will reserve that for subsequent discussion.

grievance procedures that provided for "[a]dequate, reliable, and impartial investigations of complaints, including the opportunity for both parties to present witnesses and other evidence[,]" the guidelines provided little else in terms of guidance.[106] Thus, schools were left to speculate when developing and implementing policies and procedures to abide by the federal mandate. This lack of clarity partially prompted the 2014 Q&A, which set forth additional direction as to what rights were afforded to each party in terms of evidentiary issues.[107] Given the amount of leeway afforded to schools, investigations around the nation varied greatly in terms of the extent of evidence gathered, the nature of evidence relied upon in reaching a determination, and the use of a live hearing to determine the merits of a Title IX complaint.

Similar to the other areas of Title IX debate, these evidentiary guidelines were subsequently rescinded and reworked by the Trump administration.[108] Under the latter guidance, schools were required to permit parties to review all evidence obtained by the designated investigator(s).[109] Schools were further required to provide the parties with a written report that "fairly summarizes [the] relevant evidence" relied upon by the school within ten days of the Title IX hearing.[110] Most notably, the Trump guidance explicitly required schools to conduct live disciplinary hearings, which was attended by a number of protections and additional guidelines in terms of procedure.[111] While advocates for the accused lauded these changes as a step towards due process,[112] supporters of survivors perceived the same as a step

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[106] Ali, *supra* note 1, at 9.

[107] In relevant part, the subsequent guidance states that a Title IX investigation "may include a hearing to determine whether the conduct occurred, but [it] does not necessarily require a hearing." Lhamon, *supra* note 54, at 25. The non-binding use of the word "may" obviously permitted schools to forego any live hearing during the Obama-era. The 2014 guidance further provided that a school's investigation *may* include "conducting interviews of the complainant, the alleged perpetrator, and any witnesses; reviewing law enforcement investigation documents, if applicable, reviewing student and personnel files; and gathering and examining other relevant documents or evidence." *Id.* at 26. Again, the language of the 2014 document was non-binding, provided schools the discretion to entirely forego collection of evidence so long as the investigation leads to a "sound and supportable decision[]." *Id.*

[108] "That the Trump administration would withdraw the Obama administration's Title IX guidance and revise its investigation strategy was a foregone conclusion. Less clear was what would replace those policies." R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), https://www.brookings.edu/articles/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.

[109] Jackson, *supra* note 11, at 1.

[110] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 108, 407.

[111] For example, the guidance permitted the use of cross-examination by the parties but placed restrictions on the same. Said restrictions essentially tracked each state's existing rape shield laws and any protections afforded under the Family Education Rights and Privacy Act ("FERPA"), most importantly, the ability of schools to disclose information related to a student's health. *See Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 28, 53, 301.

[112] Bret Stephens, *For Once, I'm Grateful for Trump*, N.Y. TIMES (Oct. 4, 2018), https://www.nytimes.com/2018/10/04/opinion/trump-kavanaugh-ford-allegations.html (reflecting upon the Trump-era guidance in the wake of the Justice Kavanaugh proceedings); Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html ("The new Education Department

back for sexual assault reform.[113] For the third time in almost a decade, schools and students alike were forced to once again navigate a rapidly evolving Title IX landscape. Similar to prior iterations, the Biden administration's rendition of Title IX guidelines addresses each party's ability to view and present evidence during a misconduct investigation.[114]

Based on the Biden administration's version of the guidelines, postsecondary institutions must still implement procedures that "require an objective evaluation of all relevant evidence, consistent with the definition of relevant in § 106.2 – including both inculpatory and exculpatory evidence," which is similar to the Trump-era guidance, and to avoid credibility determinations based solely on a party's status as complainant or respondent.[115] Additionally, while schools primarily bear the burden of furthering an investigation by gathering evidence, each party must be provided an equal opportunity to present evidence, including fact and expert witnesses,[116] without impermissible restriction from the school.[117] However,

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rules give more protections to the accused, primarily young men who face discipline or expulsion as a result of allegations of sexual misconduct.").

[113] Rachel N. Stewart, *How the #MeToo Era Can Facilitate Empowerment and Improvements to Title IX Shortcomings in Schools, Colleges, and Universities*, 14 CHARLESTON L. REV. 597, 599 (2020) ("[M]uch of Title IX's shortcomings, underreporting, and lax punishments can be attributed to the Trump Administration's rescinding of the Obama Administration's policies undermining the protection of victims and placing a new attitude into campuses about due process."); Diane Heckman, *The Nascent Trump Administration and the Vaporizing of the Title IX Arsenal of Policy Documents*, 370 ED. L. REP. 479, 511 (2019) (among other things, referencing and supporting a letter dated October 12, 2017, whereby eight senators corresponded with then Secretary Betsy DeVos regarding her decision to rescind the Obama-era guidance; in relevant part, the letter stated that "the new interim guidance promulgated by the Department raises serious concerns about fairness to survivors and student safety, and threatens to derail the tremendous progress we have made in recent years to ensure schools take seriously their responsibilities under Title IX to effectively respond to complaints of sexual assault.").

[114] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 28.

[115] *See id.* at 684 (emphasis added). Interestingly, this necessitates an analysis of what constitutes relevant evidence by the investigator(s), which will be discussed in greater detail in the following section.

[116] Much like any other adversarial proceeding, the use of expert witnesses will prove useful to Title IX litigants, investigators, and decision makers alike. Expert witnesses can assist the finder of fact in assessing evidence and interpreting complex ideas. For example, from the accused perspective, an expert witness may be used to interpret forensic evidence like cell phone data or photographs in order to render testimony related to authenticity. On the other hand, survivors may utilize such witnesses to opine on trauma response and how a survivor may exhibit trauma from a behavioral and psychological standpoint. As mentioned previously, the use of expert testimony in Title IX proceedings will serve the same function as a criminal or civil jury trial, it will allow parties to lay foundation for evidence and educate the finder of fact on fields that are highly specialized and require advanced education, experience, and training. Naomi Shatz, *New Title IX Regulations Require Schools to Allow Expert Witnesses in Disciplinary Proceedings*, BOSTON LAW. BLOG (May 7, 2020), https://www.bostonlawyerblog.com/new-title-ix-regulations-require-schools-to-expert-witnesses-to-be-heard-in-disciplinary-proceedings/.

[117] By "impermissible restriction," I am referring to measures that are enacted by schools that improperly impede a party's ability to gather evidence based upon the Title IX guidelines. For example, a party cannot obtain another student's mental health or medical records without a signed release from the interested individual, which is a permissible restriction under the proposed guidelines and FERPA. Similarly, evidence pertaining to a complainant's prior sexual behavior is impermissible unless offered to establish that someone other than the responding party committed the alleged offense or to prove consent, which is congruent with rape shield protections. I mention impermissible restrictions because, under prior iterations of the Title IX guidelines, schools enforced essentially gag orders against students whereby they were not permitted to discuss the allegations without the school's permission, which significantly impaired the ability to gather evidence. *See* Doe v. Amherst Coll., 238 F. Supp. 3d 195, 212 (D. Mass. 2017) (finding

in furtherance of providing an "adequate, reliable, and impartial investigation. . . [,]" schools are only required to provide a *description or summary* of the relevant evidence, as well as a reasonable opportunity to respond, to each party.[118] Practically, this means that schools are not obligated to allow the parties to access the actual evidence until a party requests such information.[119] In fact, some schools have already implemented policies that impede a student's ability to obtain evidence collected by the school.[120]

Probably the most notable change implemented by the proposed guidelines is the elimination of the live hearing requirement, which was previously required under the Trump guidance unless the parties agreed to informal resolution.[121] Importantly, a 2021 report published by the Foundation for Individual Rights in Education ("FIRE") revealed that, out of fifty schools, thirty-three did not guarantee a meaningful hearing whereby participants could view and present evidence relied upon in reaching a determination, which may be indicative of how schools will interpret the current verbiage.[122] Prior to delving into the respective positions of complainants and respondents, as a general proposition, I believe that both

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that during the investigation, the responding party was instructed not to discuss the investigation without the school's consent; the respondent was also not permitted to present evidence during the hearing).

[118] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972, supra* note 14, at 687–88 (emphasis added).

[119] *Id.* at 693.

[120] For example, the University of Denver's latest Title IX Sexual Harassment Procedures allow parties to view and access the evidence, but not possess it; "[Parties] may not download, photograph, copy or otherwise duplicate, share or transmit the evidence provided by the Investigator." *Office of Equal Opportunity & Title IX Title IX Sexual Harassment Procedures –2022-2023*, UNIV. OF DENV., at 25 (Aug. 15, 2022), https://www.du.edu/sites/default/files/2022-08/DU%20Title%20IX%20Procedures.pdf.

[121] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972, supra* note 14, at 399 (A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence as provided under paragraph (6)(i) of this section prior to the determination of whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing); *Id.* ("[A] postsecondary institution must provide for a live hearing for cross-examination in its grievance procedures for complaints of sex-based harassment.").

[122] *Spotlight on Due Process* 2020-2021, FIRE, https://www.thefire.org/research-learn/spotlight-due-process-2020-2021#:~:text=FIRE%20therefore%20rated%20156%20policies,presumed%20innocent%20until%20proven%20guilty (last visited Sept. 30, 2023). The findings from this study must be considered alongside each of the parties' ability to refuse participation or cooperation in investigations and hearings, as well as the parties' inability to subpoena or otherwise compel participation in Title IX proceedings. Another factor that will certainly influence a party's ability to present evidence or participate in a live hearing is the presence of a parallel criminal investigation. For example, if an accused student is faced with sexual assault charges and a criminal proceeding is being furthered, then the responding party likely will not meaningfully participate in the Title IX process in order to avoid potential damage to his or her defense in the criminal matter. In furtherance of the same, the party will most certainly assert his or her right to silence under the Fifth Amendment. This issue must be considered moving forward as it will most certainly impede any accused party's ability to defend him or herself in the Title IX realm without sacrificing his or her constitutional protections in a criminal context. *See* Doe v. Regents Univ. of Cal., 210 Cal. Rptr. 3d 479, 491, 520–21 (Cal. Ct. App. 2016) (although the respondent was afforded an opportunity to present witnesses, evidence, and testimony during a hearing, upon the advice of his counsel, he pled the Fifth throughout the hearing because a criminal investigation was ongoing; the Title IX panel subsequently found him responsible for sexual misconduct and the appellate court noted, in part, that his refusal to actively participate was his decision and, thus, the university's finding was supported).

parties will benefit from the ability to present and view evidence and a live hearing; however, the nature and extent of both will differ between each party's viewpoint. Accordingly, my discussion of each position will focus on each aspect in turn.

Although both parties will benefit from any latitude to collect and present evidence, including the ability to present argument at a live hearing in support of such evidence, historically, accused parties have primarily been on the receiving end of inadequate evidentiary procedures through their schools.[123] However, survivors have also faced unfair treatment that has impeded their ability to present evidence and witnesses to substantiate their allegations.[124] Accordingly, both parties must be provided an equal opportunity to present evidence in support of his or her claims or defenses and to view evidence that has been collected by the university or other party. Contrary to the Biden administration's proposed guidelines, schools should be explicitly required to provide each party with a copy of all evidence, not just a description or a report that summarizes the findings.[125] Academic institutions should also be required to disclose the evidence without a formal request from the parties.[126] This will promote an atmosphere of transparency and fairness as each party will be afforded an opportunity to fully assess all

[123] *See* Doe v. Amherst Coll., 238 F. Supp. 3d 195, 203, 212–14 (D. Mass. 2017) (during the school's investigation, the investigator failed to collect exculpatory text messages from the complaining party and failed to collect other relevant evidence; the accused party was also prohibited from presenting evidence during the live hearing); *see also* Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 570, 604–06 (D. Mass. 2016) (respondent was not permitted to view evidence collected by the school, nor was he informed of the allegations he was facing; the accused party was also not afforded a live hearing and could not review the investigator's report until the matter was concluded); *see also* Neal v. Colo. State Univ.-Pueblo, No. 16-CV-873-RM-CBS, 2017 WL 633045, at *3, *5, *11 (D. Colo. Feb. 16, 2017) (following a third-party complaint, the respondent was not informed of witness identities and was not given a description of the allegations, nor a copy of the investigative report prior to the hearing, among other things. The investigator also failed to consider the purported victim's representations regarding the consensual nature of the sexual encounters with the respondent and evidence supporting her position. I refer to the female student as an "purported victim" because she supported the responding party throughout his ordeal and because the pair consistently maintained that their sexual encounters were all consensual (the Title IX complaint was submitted by an acquaintance of the purported victim). In fact, the female student even provided the following statement to the investigator: "[O]ur stories are the same and he's a good guy. He's not a rapist, he's not a criminal, it's not even worth any of this hoopla!" Regardless, the investigator decided to give no weight to this statement and even disregarded other exculpatory evidence).

[124] In September 2013, a female freshman student at Hobart and William Smith Colleges was gang raped by a number of football players at a fraternity party while other students stood by and observed/recorded the assault. *See* Bogdanich, *supra* note 73, at 1 (following the assault, the student reported the incident, and it was subsequently investigated by the school. Although she was ultimately afforded a hearing, the school decided to proceed with the proceeding prior to obtaining a copy of the rape examination results. In fact, a preliminary assessment from the examining nurse indicated that the survivor exhibited blunt trauma indicating "intercourse with either multiple partners, multiple times or that the intercourse was very forceful." During the hearing, the panel also misrepresented evidence and questioned the survivor about a campus police report that she had never been provided).

[125] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 290–91, 398–99.

[126] *See* Averett v. Hardy, No. 3:19-cv-116-DJH-RSE, 2020 WL 1033543, at *6 (W.D. Ky. Mar. 3, 2020).

evidence and prepare their respective cases.[127] Courts around the nation have supported this position as an integral part of any fair and impartial disciplinary proceeding.[128] Stated plainly, there is no reasonable justification for schools to prohibit, resist, or refuse the disclosure of relevant evidence to all parties and their representatives.[129] As history has shown, many lawsuits and Title IX complaints have been submitted as a result of schools failing to provide or allow presentation of relevant evidence.[130] As stated by one organization, "[w]ithout procedural fairness, the outcome of a proceeding is more likely to be overturned by either the institution or a court, forcing the complainant to go through the process repeatedly. Complainants, respondents, and institutions all benefit when the institution gets it right the first time."[131]

In addition to the required disclosure of relevant evidence, the proposed guidelines must be modified to mandate a live hearing at the conclusion of a school's investigation.[132] Similar to the ability to obtain and present evidence, a live hearing furthers each party's ability to present their case and address the proffered evidence and testimony. Live hearings also afford the parties an equal opportunity to question witnesses, which will be further discussed in Part III(E).[133] While advocates for the accused typically argue that live hearings must be required and conducted with both parties in the same room,[134] survivor activists generally contend that such a requirement

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[127] I recognize that, under the proposed guidelines, a party's ability to view evidence may be limited by what the investigator considers to be "relevant evidence," which is the only type of evidence that must be disclosed by schools. However, as discussed in the following section, the nature and extent of an investigator's training and potential biases may dictate how evidence is perceived by campus adjudicators. *See infra* Part IV Sections C, D. This will lead to inculpatory and exculpatory evidence being improperly excluded or included by investigators who may have inadequate training or bias. However, I fully support the Biden administration's use of rape shield protections to protect survivors from harassment and traumatization. I do not believe evidence that falls under the ambit of the shield should be disclosed. As discussed in the following section, the importance of proper training for investigators, especially as it pertains to rape shield protections, is vital to maintaining a fair and impartial process.

[128] *See* Goss v. Lopez, 419 U.S. 565, 581 (1975) ("[D]ue process requires . . . that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story."); *see also* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (finding that "fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights," after the university withheld evidence); *see also* Boehm v. Univ. Pa. Sch. Veterinary Med., 573 A.2d 575, 582 (Pa. Super. Ct. 1990) (the court held that the disciplinary proceedings were "fundamentally fair" because the procedures included (1) notice of the allegations; (2) providing the accused student with the evidence against them; (3) allowing the accused students to participate in a live hearing; and (4) allowing the students to call their own witnesses, among other things); *see also* Doe v. Univ. Scis., 961 F.3d 203, 214 (3d Cir. 2020) (a fair process in sexual misconduct proceedings includes, in part, the ability to present evidence).

[129] I acknowledge that the kind of evidence a rape victim might turn over may qualitatively differ from the evidence a respondent may turn over. For example, a summary of the results of the rape kit may be disclosed in lieu of the comprehensive results, which may contain protected information.

[130] *See Joint Anti-Fascist Refugee Comm.*, 341 U.S. at 191, 170–71, 180.

[131] Cohn, *supra* note 76, at 32.

[132] As previously mentioned, the proposed guidelines do not require a live hearing. *See supra* p. 56.

[133] *See infra* note 152.

[134] Jonathon Taylor, *Our Comment on the Department of Education's Proposed Regulations*, TITLE IX FOR ALL (Sept. 12, 2022), https://titleixforall.com/our-comment-to-the-department-of-educations-proposed-regulations/ ("Live hearings enhance the transparency and accountability of the grievance process. They also bolster fact-finding accuracy and reduce bias."); Josh Moody, *What Biden's Title IX*

would potentially discourage reporting by survivors and that alternative methods should be implemented in lieu of a hearing.[135] Others fall in between the two aforementioned positions.[136] Courts, similarly, are divided on the issue. While a number of courts have held that live hearings are an essential part of campus disciplinary proceedings,[137] others have held the opposite.[138]

My proposed solution hopefully balances the interests of both parties. First, as previously mentioned, schools should be required to proceed with a live hearing. Because there have been cases where both sides have been aggrieved by their schools due to a lack of a fair hearing, a proceeding whereby both parties have an equal opportunity to discuss and present relevant evidence is vital. Again, this would further transparency and further support any decision made by the decision maker, which would hopefully result in fewer Title IX complaints and lawsuits. However, while I argue a live hearing is required, I recognize that re-traumatization and intimidation are also potential effects of conducting such a proceeding, especially when the allegations involve elements of violence, stalking, or abuse.

In order to identify cases involving these circumstances, schools should conduct a safety or risk assessment to assess how to proceed with the Title IX investigation and hearing. Should the school determine that the accused party poses a potential risk to the complainant and his or her ability to testify at a hearing, then the hearing should be conducted in real time

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Rules Mean for Due Process, INSIDE HIGHER ED (June 29, 2022), https://www.insidehighered.com/news/2022/06/30/new-title-ix-rules-raise-concerns-accused (highlighting a quote from Senator Richard Burr, who viewed the proposed changes by the Biden administration as an effort to place "accusations of guilt above fair consideration of the evidence . . . ").

[135] Asia Fields & Taylor Blatchford, *In Survivors' Words: How Colleges Should Better Respond to Sexual Misconduct*, SEATTLE TIMES (Mar. 6, 2022), https://projects.seattletimes.com/2022/sexual-misconduct-title-ix-washington-college-survivors-words/ (The University of Washington utilizes a volunteer faculty board that conducts paper reviews instead of live hearings "to reduce the possibility of re-traumatization . . . ."). This position is especially prevalent when the ability to cross-examine witnesses, including the involved parties, is permitted. *See* Benjamin Wermund, *The Biggest Sticking Point in Devos' Title IX Rules*, POLITICO (Nov. 19, 2018, 10:00 AM), https://www.politico.com/newsletters/morning-education/2018/11/19/the-biggest-sticking-point-in-devos-title-ix-rules-420436 (following the initial publication of the Trump-era proposed guidelines, the University of California staunchly opposed the proposal because of the live hearing requirement, which it viewed as "inherently intimidating.").

[136] For example, one scholar believes that a live hearing should be required but that the protections and procedures implemented during the proceeding should not be equivalent to that of a criminal matter. *See* Sarah O'Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. PITT. L. REV. 511, 531 (2018).

[137] *See* Haidak v. Univ. Mass. – Amherst, 933 F.3d 56, 71–2, (1st Cir. 2019) ("In the school disciplinary context, the opportunity to be heard requires 'some kind of hearing.'") (citing Goss v. Lopez, 419 U.S. 565, 579 (1975)); *see also* Doe v. Baum, 903 F.3d 575, 581 (6th Cir. 2018) (finding that procedural fairness means that a university must hold some sort of hearing before imposing a severe sanction upon an accused student).

[138] Murakowski v. Univ. Del., 575 F. Supp. 2d 571, 585–86 (D. Del. 2008) ("A university's primary purpose is to educate students: '[a] school is an academic institution, not a courtroom or administrative hearing room.' A formalized hearing process would divert both resources and attention from a university's main calling, that is education. Although a university must treat students fairly, it is not required to convert its classrooms into courtrooms."); Knight v. S. Orange Cmty. Coll. Dist., 275 Cal. Rptr. 3d 139, 148–49, 153 (Cal. Ct. App. 2021) (finding that, when allegations of assault or violence are not involved, students are not entitled to a hearing).

through a video stream. While I recognize that this measure will not entirely eliminate further trauma for the complaining party, it will greatly diminish the same as the responding party will not be in the same physical space. The testimony of each party should be further insulated from the opposing party through technical protections. Specifically, the virtual system through which each party provides his or her testimony should not display a video stream of the other party. Again, this will ensure that neither party can intimidate or otherwise detract from the other party's testimony. Still, the testimony should be depicted in real time so that each party's advisor, as well as the decision maker(s), can accurately assess the testimony for credibility purposes.[139]

C. Right To An Advisor or Counsel

Although the 2011 DCL permitted schools to allow students the use of an attorney during a Title IX investigation, the DOE seemingly discouraged implementation of this measure in its directive.[140] However, the guidance did permit the use of attorneys so long as the right to legal counsel, and their level of involvement, was applied to both parties equally.[141] The use of attorneys or advisors in campus proceedings was further clarified in the 2014 Q&A.[142] Since the publication of the 2011 DCL, as well as the 2014 guidance, schools have differed greatly as to how they approach this issue. Specifically, the Title IX procedures implemented by academic institutions following the aforementioned guidance varied primarily in terms of the ability of students to utilize a licensed attorney and the extent of involvement afforded to each student's attorney or advisor during proceedings.[143] Similar to many other

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[139] This will allow all parties involved to observe and assess a witnesses' physical presentation while being questioned.

[140] "*While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings*, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties." *See supra* note 1, at 12 (emphasis added). Through the emphasized language, the DOE appeared to diminish the importance of involving attorneys in the Title IX process.

[141] *See* Ali *supra* note 1, at 12.

[142] Importantly, the subsequent clarifying guidance included, for the first time, the use of the term "advisor" to describe the parallel role for a non-attorney counselor dedicated to guiding a student throughout the Title IX process. Specifically, the 2014 guidance states, "[i]f the school permits one party to have lawyers *or other advisors* at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers *or other advisors* to speak or otherwise participate in the proceedings must also apply equally." Lhamon, *supra* note 54, at 26 (emphasis added). This language seemingly walks back the attorney-driven approach of the DCL and replaces it with a more lenient standard, which affords schools the choice of offering an advisor to the student instead of a licensed attorney. The 2014 document makes the DOE's intent clear on the following page, a section dedicated to the "key differences between a school's Title IX investigation . . . and a criminal investigation." *Id.* at 27. In this section, the DOE states, "The U.S. Constitution affords criminal defendants who face the risk of incarceration numerous protections, including, but not limited to, the right to counsel . . . . By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required." *Id.* Clearly, the Obama administration sought to exclude the participation of licensed attorneys in Title IX campus proceedings.

[143] For example, the accused party in *Doe v. Amherst Coll.* was permitted to select an advisor; however, he was not allowed to use an attorney, nor could his advisor advocate for him during the hearing. 238 F. Supp. 3d 195, 212 (D. Mass. 2017). Essentially, the school's procedures relegated the advisor in that case to a "potted plant" role, meaning he or she did nothing but sit in the same room and consume oxygen. In another case, the responding party was permitted counsel who actively participated in the Title IX

aspects of Title IX, this area of law was substantially revamped following the election of President Trump and the appointment of then Secretary Betsy DeVos, who facilitated the issuance of interim guidelines.[144]

Compared to the Obama-era guidelines, the Trump Administration's substantially expanded the role of advisors and attorneys in campus sexual misconduct proceedings. First, the guidelines required that schools explicitly inform students of their right to an advisor or attorney in writing.[145] This was a drastic shift from the prior guidance, which essentially dissuaded schools from promoting the use of attorneys, especially considering the inclusion of a provision that prohibited schools from restricting a student's choice of advisor.[146] Next, the 2017 guidelines permitted the use of advisors, who may be licensed attorneys, and also afforded those representatives the opportunity to participate in hearings.[147]

As discussed above, although schools previously took a broad approach to this issue, they were now required to permit some level of participation by each student's advisor.[148] Additionally, the Trump-era guidelines permitted a delay, extension, or postponement of the Title IX investigation should good cause arise, which included the absence or unavailability of an advisor.[149] Finally, the former guidelines required schools to provide a party with an advisor, who may be an attorney, without charge and for the purpose of conducting questioning if a party did not have one.[150]

The Biden Administration's current guidelines again reshape the role of advisors and attorneys in Title IX proceedings by redefining their level of involvement. Admittedly, the changes to this issue are far less extensive than the other issues discussed in this Article. The primary difference, and likely the most detrimental to students' use of an advisor attorney, is the lack of a live hearing requirement, as previously discussed.[151] The lack of a

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investigation and even responded to the investigator's interrogatories through written responses. *See* Doe v. Regents Univ. Cal., 210 Cal. Rptr. 3d 479, 503 (Cal. Ct. App. 2016). Yet, in another matter, the school permitted the complaining party to use an attorney, who was also allowed to actively participate in the investigation and hearing, including questioning witnesses, but prohibited the responding party from doing the same. *See* Doe v. Lynn Univ., 235 F. Supp. 3d 1336, 1337–38 (S.D. Fla. 2017).

[144] Nick Anderson, *Trump Administration Rescinds Obama-Era Guidance on Campus Sexual Assault*, WASH. POST (Sept. 22, 2017, 5:10 PM), https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e_story.html.

[145] 34 C.F.R. §106.45(b)(2)(i)(B) (2020), *invalidated by* Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104 (D. Mass. 2021).

[146] 34 C.F.R. §106.45(b)(5)(iv).

[147] For example, the 2020 guidelines require schools to permit student advisors to question witnesses, which will be discussed in greater detail below. 34 C.F.R. §106.45(b)(6)(i).

[148] However, schools were still permitted to impose restrictions on the extent of participation so long as the restrictions applied equally to each party's advisor. Ali, *supra* note 1, at 12.

[149] 34 C.F.R. §106.45(b)(1)(v).

[150] 34 C.F.R. §106.45(b)(6)(i).

[151] *See Spotlight on Due Process 2021-2022*, *supra* note 122.

disciplinary hearing would substantially limit the active involvement of any advisor or attorney.[152] Although the proposed guidelines maintain most of the provisions from the former guidance, this omission drastically transforms the Title IX landscape. Stated plainly, the importance of an advisor or attorney actively and substantively participating in the grievance process cannot be understated and their involvement must be promoted by strengthening the current guidelines.[153] Still, there are differing perspectives that must be considered prior to exploring a potential solution.

While some parties feel that the use of an advisor, who may be legal counsel, is a basic element of fairness that must be incorporated into Title IX proceedings,[154] others argue that the ability to retain legal counsel is

[152] I recognize that the advisor would be able to counsel the student throughout the grievance procedure; however, the ability to advocate for a client at a live hearing and to question witnesses is an invaluable tool for any party involved in an adversarial proceeding. Interestingly, the proposed guidelines still require schools to "provide a process that adequately assesses the credibility of the parties and witnesses, to the extent credibility is in dispute and relevant to evaluating one or more of the allegations of sex discrimination." *See Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 384. As an aside, I struggle to think of a case where the credibility of a witness is not relevant or in dispute as credibility is assessed in most, if not all, legal proceedings. While I concede that Title IX misconduct hearings are not "legal proceedings" *per se*, they are certainly quasi-judicial in nature. Nonetheless, this provision appears to recognize the importance of assessing credibility yet allows schools to relegate that responsibility solely to the decisionmaker, which, as discussed below, has its own issues.

[153] Although I acknowledge that my criminal matter differed from Title IX proceedings in a number of respects, I can fully appreciate the impact of having access to competent legal counsel in any disciplinary proceeding because the landscape of my matter drastically shifted once I was being advised by attorneys. Prior to obtaining legal counsel, I waived my right to counsel during my initial interrogation and foolishly signed a statement that was altered by the investigating officer. My decision to forego legal counsel resulted in me temporarily navigating a legal/criminal process that I was entirely unfamiliar with. Once charges were formerly brought against me, I was assigned counsel. Although my investigation was still very difficult, with counsel, I was at least educated on the status of my case, the nature of proceedings, potential outcomes, and evidentiary issues, among other things. I mention this to not only highlight the importance of counsel but also the mentality of many college-aged students when faced with serious disciplinary or criminal allegations. Similar to my case, students participating in a Title IX grievance process are navigating an adversarial situation, whether criminal or disciplinary, for the first time. Given the stakes for both parties, it is vital that each student receives effective and honest advice through a trained professional.

[154] *See* Bogdanich, *supra* note 73, at 5 (discussing how a school's hearing panel did not permit a survivor to utilize an advisor to further her case against multiple students, which resulted in the students initially being absolved of the allegations); Sarkozi, *supra* note 20, at 141 (arguing that, if a student cannot afford an attorney under the 2020 guidelines, one must be provided in order to ensure fairness); Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 327 (2017) ("Access to qualified attorneys may serve to mitigate the post-assault trauma experienced by student victims by providing them with confidential, individualized legal counseling, advocacy, and representation. Victims' attorneys can provide students with information about their rights and an analysis of their legal options necessary to promote informed consent before students engage in the school disciplinary process. Attorneys can help student victims identify their goals and address available legal relief and non-legal resources that may bring victims closer to their goals . . . . The idea that victims of sexual assault need access to trained civil legal attorneys is not novel, and yet it still falls outside the national conversation about campus sexual assault."); Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEMINISM 123, 148 (2017) (arguing that survivors should not only have the ability to be represented by legal counsel, but that schools should provide attorneys to answer legal questions, provide advice, promote recovery, and make the entire process less overwhelming).

detrimental to the overall goal of preventing and mitigating sexual assault.[155] Similar to the other issues discussed in this Article, courts are generally split as to the extent of how an advisor or attorney is utilized during grievance procedures.[156] Although courts appear reluctant to find that legal counsel is a requirement under Title IX, I firmly believe that access to a trained attorney will benefit both parties equally, so long as each party is actually represented by counsel.[157] This is a valid and important point to consider when evaluating the proposed guidelines. Accordingly, I propose that each student must either retain his or her own attorney or, if the student cannot locate or afford one, an attorney must be provided to the student. This will ensure equal access to legal representation.[158] Another source of concern for attorney involvement is potential re-traumatization through aggressive questioning during a live hearing.[159]

While I recognize the potential additional stress a live hearing may place on the parties, it is still the most effective and fair manner of handling these cases, especially because schools can implement limitations or

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[155] Alyssa S. Keehan, *Student Sexual Assault: Weathering the Perfect Storm*, UNITED EDUCATORS (Aug. 2011), https://contentz.mkt5031.com/lp/37886/394531/Student%20Sexual%20Assault_Weathering%20the%20Perfect%20Storm.pdf (this report provided recommendations to Title IX departments; in terms of this issue, United Educators acknowledge that claims are being asserted by students after being deprived legal counsel; ultimately, United Educators encourages prohibiting attorneys or, in the alternative, permitting counsel but relegating them to a non-advocacy role); *see* Mann, *supra* note 5, at 416 (arguing primarily that the use of attorneys will place a substantial financial and administrative burden on schools as they will be forced to train employees and other participants in the Title IX process on legal doctrine). Although the author also argues that the use of attorneys will result in inequity in that the ability to retain counsel is dependent upon one's financial position, she was rebutting the 2020 version of the guidelines, which required an advisor to be assigned to any student who did not have one; however, Section 106.45(b)(6)(i) of the former guidelines did not require an assigned advisor to be an attorney, which could have resulted in one party being represented by legal counsel and the other not. Suzannah Dowling, *(Un)Due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 ME. L. REV. 123, 161 (2021) (similarly to Ms. Mann's argument, this author also believed that the 2020 guidelines would result in inequity, especially for underrepresented communities or communities of color).

[156] *See* Johnson v. Temple Univ. — Commonwealth Sys. Higher Educ., No. 12-515, 2013 WL 5298484, at *26 (E.D. Pa. Sept. 19, 2013) (the court found that it is "[t]he general consensus on a student's right to an attorney is that '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 in the usual way of trial counsel . . .'."); Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (noting that, at the time of the decision, the Second Circuit had never recognized a right to counsel).

[157] *See* Sarkozi, *supra* note 20, at 125–26, 142 (the majority of criticism for attorney-driven Title IX proceedings is inequality, meaning one party has access to counsel while another does not).

[158] I concede that this phrase is slightly misleading because, while, for example, an indigent student may be assigned counsel through the school, the assigned counsel's skill and expertise may differ substantially from that of a private attorney who is retained by a student who comes from an affluent family. However, we must also recognize that this is a common problem throughout our legal system. In fact, in every legal system, criminal, civil, administrative, etc., the quality and effectiveness of a party's legal counsel will generally be determined by their ability to finance the representation. Unfortunately, our legal system is largely monetarily driven and functions as a "gate keeper" of sorts. Regardless, much like the criminal realm where defendants who cannot afford a lawyer, and who financially qualify under state law, are assigned a public defender, students involved in Title IX proceedings should be afforded the same opportunity as most students are not making enough to afford a private attorney.

[159] Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s*, BRIT. J. CRIMINOL. 3 (2016) ("[I]n an adversarial trial the defendant is presumed innocent, and defence lawyers have a duty to defend their clients by discrediting the evidence against them, whatever form that evidence takes.").

restrictions on the advisor's involvement. Importantly, advisors should be permitted to actively participate in all meetings and hearings, and any limitation or restriction imposed by the school should not eliminate or significantly diminish the role of the advisor. For example, the University of Colorado at Boulder's Title IX procedures place a number of restrictions on the participation of counsel, including a provision that prohibits advisors from "engag[ing] in . . . conduct that would constitute harassment or *retaliation* against any involved party. . . ."[160] I find such a limitation to be entirely appropriate as it will allow Title IX personnel to mitigate or prevent any potential exacerbation of existing trauma and will diminish the adversarial aspect of proceedings. Conversely, I draw issue with a policy that greatly hinders an advisor's ability to counsel and represent his or her student.[161]

Accordingly, the proposed guidelines should incorporate language that clarifies the extent of any restrictions that may be implemented against advisors so schools can strike a fair balance between the rights and interests of both parties.

D. Single Investigator Model

As previously referenced in this Article, the Biden Administration's proposed guidelines have eliminated mandatory live hearings, and instead allow schools to choose between a formal proceeding or a single investigator model.[162] Again, as indicated by a study conducted by FIRE, schools have historically foregone a live hearing when given the latitude to do so.[163] In fact, following a public hearing to address questions and concerns related to the 2020 guidelines, which occurred prior to the publication of the Biden Administration's proposed guidelines, schools voiced opposition to the live hearing requirement and described it, in part, as "too prescriptive and

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[160] *See Administrative Policy Statement: Sexual Misconduct, Intimate Partner Violence, and Stalking*, #5014 APS 10, UNIV. COLO. (2021), https://www.cu.edu/sites/default/files/aps/79746-aps-5014-sexual-misconduct-intimate-partner-violence-and-stalking/aps/5014.pdf.

[161] For instance, the University of Denver's Title IX policy prohibits advisors from presenting information on behalf of a party, submitting documents on behalf of party, discussing any matter with the university in the absence of a party, or advocating or otherwise actively participating in any proceeding. *Comprehensive Discrimination and Harassment Procedures*, UNIV. DENV. OFF. EQUAL OPPORTUNITY & TITLE IX, (Aug. 14, 2020), https://www.du.edu/sites/default/files/2021-04/comprehensive_discrimination_harrassment_procedures.pdf. The policy further states that the Title IX office will not consider or accept any information received from the advisor. Policies such as this are contrary to common sense and will only place additional stress upon the students, rather than allow an advisor to bear some of the burden by participating in proceedings and facilitating the exchange of information. *Id*.

[162] *See Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 28 ("[T]he proposed regulations would enable recipients to tailor procedures to be effective at addressing sex discrimination in their educational environment by providing an *option* to conduct live hearings with cross-examination *or* have the parties meet separately with the decisionmaker and answer questions submitted by the other party when a credibility assessment is necessary . . . .") (emphasis added); *see also id.* at 695 ("A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing.").

[163] *See Spotlight on Due Process 2020-2021 supra* note 122.

burdensome to apply effectively."[164] Thus, it appears that many Title IX recipients will once again incorporate the single investigator model, a method that has historically led to a deprivation of rights for both complainants and respondents, erroneous outcomes, and abuses of discretion during the investigation.[165]

But what is the single investigator model? As stated in the current proposed guidelines, it is a "model in which one person or one team both investigate[] a complaint and ma[k]e findings of fact as to whether a respondent violated the recipient's prohibition on sexual harassment."[166] In practice, schools take a variety of approaches to this method; however, generally:

> an institution's designated Title IX investigator interviews witnesses identified by the parties and reviews evidence provided by the parties. There is no independent effort to obtain information from third parties or other sources. The investigator then draws a conclusion about whether the accused student has violated school policies. There is no hearing where a party can present evidence and cross-examine adverse witnesses in front of a neutral fact-finder. The investigator literally serves as the police, judge and jury.[167]

While some support this shift back to a single investigator, others have already staunchly opposed such a move. Unfortunately, courts have not provided much guidance on the system as there are only a few cases that directly address this issue.[168] Regardless, courts generally view the single

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[164] *See Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 251.

[165] The single investigator model was a system utilized during the Obama Administration but was subsequently prohibited by the Trump-era guidance. *See* R. Shep Melnick, *supra* note 109.

[166] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 282.

[167] Scott H. Greenfield, *Can The "Single Investigator" Model Ever Be Fundamentally Fair?*, SIMPLE JUST. (Apr. 6, 2020), https://blog.simplejustice.us/2020/04/06/can-the-single-investigator-model-ever-be-fundamentally-fair/.

[168] Note: this is not an exhaustive list of the applicable cases. *See generally* Doe v. Allee, 242 Cal. Rptr. 3d 109 (Cal. Ct. App. 2019) (based on the university's single investigator structure, the school only permitted an accused party to appeal an investigator's decision if the decision was not consistent with information the investigator chose to include in his or her investigative report. Since the investigator maintained discretion as to what facts were included in the report, the success of any appeal was minimal. Following an appeal, the California Courts of Appeal found the university's use of a single investigator model to be "fundamentally unfair"); *see also* Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297 at *47–48 (N.D.N.Y. Feb. 24, 2016) (in supporting its determination that the single investigator model was flawed, the court stated, "[p]laintiff alleges a host of facts demonstrating particular evidentiary weaknesses in the case against him. These include allegations that the investigators failed to question certain witnesses about Doe's outward signs of intoxication; accepted the victim's account of her level of intoxication despite numerous statements to the contrary; misconstrued and misquoted witnesses' statements; used an on-line BAC calculator and Doe's self-reported weight and alcohol consumption to conclude that Doe was in a state of extreme intoxication; accepted Doe's statement that she allowed Plaintiff to sleep in her bed because of her family's 'sailboat community values;' drew prejudicial

investigator model with disfavor when there is evidence of bias, conflicts of interest, or an absence of checks and balances that would ensure oversight through an independent decisionmaker.[169]

Opponents of the single investigator model echo concerns voiced by our courts.[170] In addition to the aforementioned issues raised by courts, scholars have also pointed at the substance of training received by Title IX investigators as an exacerbating factor under the single investigator model.[171] While the proposed guidelines have considered this viewpoint and attempt to mitigate potential bias by requiring training on Title IX procedures and law, the same guidelines, admittedly to a lesser degree, were present in the 2014

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conclusions without sufficient evidentiary support; and cast Plaintiff's actions in highly inflammatory terms"); *see also* Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 606 (D. Mass. 2016) ("[t]he dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions. The dangers of such a process can be considerably mitigated if there is effective review by a neutral party, but here that right of review was substantially circumscribed"); *see also* Neal v. Colo. State Univ.-Pueblo, No. 16-CV-873-RM-CBS, 2017 WL 633045, at *27 (D. Colo. Feb. 16, 2017) ("[The investigator's] alleged failures to (among other things) consider that Jane Doe told [the investigator] the sexual encounter was consensual, the physical or documentary evidence in which she consistently said the same thing, her motivation to not be disciplined by her department for her prohibited relationship with a football player, [t]he . . . conflicts of interest, [the investigator's] failure to question any witnesses favorable to [the accused] . . . , and [the investigator's] failure to identify to [the accused] the witnesses against him before completing the investigation all suggest bias and inaccuracy in the outcome.").

[169] *See Allee*, 242 Cal. Rptr. 3d, 129–30.

[170] *See* Jake New, *The Right to Confront*, INSIDE HIGHER ED (July 22, 2015), https://www.insidehighered.com/news/2015/07/23/suit-against-u-california-san-diego-could-provide-framework-other-students-accused (quoting Mr. Gary Pavela, a former president of the International Center for Academic Integrity, when he stated, "I would expect other judges to look at these kinds of issues and also be concerned that the investigator is reaching a conclusion of guilt or innocence on the same standard the hearing panel is supposed to use . . . . Here we have someone held up as an expert, and they've concluded this guy is guilty, so what's the panel supposed to think? If we want credible, enforceable, reliable sexual assault polices, we've got to have adequate due process for the accused, because that will create legitimacy in the process for everyone."); *see also* David Rudovsky et al., *Open letter from members of the Penn Law School faculty to the University of Pennsylvania* (Feb. 18, 2015) https://media.philly.com/documents/OpenLetter.pdf ("Our legal system is based on checks and balances precisely because of the risks associated with concentrating so much power in the hands of a single investigator or Investigative Team. What is needed is a procedure that allows the accused student's lawyer or representative to challenge the Investigative Team's version of events, to ensure that the panel will hear all the evidence that is submitted by both sides and reach its own conclusions as to the veracity of witnesses and the responsibility of the accused student"); Jason Song & Richard Winton, *U.S. investigates handling of alleged sex assaults at USC*, LOS ANGELES TIMES (July 22, 2013), https://www.latimes.com/local/la-xpm-2013-jul-22-la-me-usc-sexual-harassment-20130723-story.html (summarizing an investigation by the DOE into USC's mishandling of sexual assault complaints through a single investigator model); Tom Bartlett, *The Proposed Title IX Change That Worries Some Experts*, CHRON. HIGHER EDUC.(July 26, 2022), https://www.chronicle.com/article/the-proposed-title-ix-change-that-worries-some-experts (citing Mr. Daniel Carter, a victims' right advocate, when he stated the following about the single investigator model: "[w]hat you're doing is allowing a single person to be in charge of everything, with no oversight until you get to the appeal. I think that's crazy.").

[171] *Stanford Trains Student Jurors That 'Acting Persuasive and Logical' is Sign of Guilt; Story of Student Judicial Nightmare in Today's 'New York Post,'* FIRE (July 20, 2011), https://www.thefire.org/news/stanford-trains-student-jurors-acting-persuasive-and-logical-sign-guilt-story-student-judicial ("The material provided to student jurors, much of which comes from a book titled *Why Does He Do That: Inside the Minds of Angry and Controlling Men*, is generally directed not at ensuring a fair trial for both the accuser and the accused, but at ensuring that accused men are presumed guilty.").

guidance.[172] Yet, as highlighted by the aforementioned court cases, students were still wronged through the single investigator model even with investigators receiving mandatory training. For example, one aspect of Title IX training that has faced harsh scrutiny is the use of a trauma-informed approach when investigating sexual misconduct claims.[173] Under a true trauma-informed approach, investigators are instructed how to approach interviewing survivors so the process does not result in further re-traumatization and how to recognize the effects of trauma upon the investigation in a neutral manner.[174] However, depending on how an investigator approaches or is trained to implement a trauma-informed approach, the investigator could significantly, and improperly, alter what information or documentation is considered or included in Title IX reports and investigations.[175] Another aspect of Title IX training that has been criticized is the quality and substance of any legal training received by Title IX personnel. Under the current Title IX system, investigators who do not hold a law degree or have any legal training are placed into a position where they now must understand and practice complex legal doctrine such as credibility assessments and relevancy.[176] Thus, the ability of an investigator to implement this legal training will similarly depend upon the sufficiency and content of any instruction.

Conversely, there are parties who strongly support the single investigator model because it will negate the need for a live hearing and because the system will reduce financial and logistical burdens upon the school.[177] Unfortunately, the potential utility of utilizing a true single

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[172] *See* Lhamon, *supra* note 54, at 38–41.

[173] Cynthia V. Ward, *Trauma and Memory in the Prosecution of Sexual Assault*, 45 LAW & PSYCH. REV. 87, 96 (2021).

[174] *The Prevalence of Trauma and Trauma-Informed Interviewing*, RUBIN THOMLINSON, LLP (Mar. 2, 2021), https://rubinthomlinson.com/the-prevalence-of-trauma-and-trauma-informed-interviewing/ (defining the trauma-informed approach as "an understanding of trauma and an awareness of the impact it can have across settings, services, and populations. It involves viewing trauma through an ecological and cultural lens and recognizing that context plays a significant role in how individuals perceive and process traumatic events, whether acute or chronic.").

[175] Title IX investigators are sometimes instructed to ignore inconsistent statements from complainants and instead attribute any inconsistencies to the associated trauma. *See* Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, THE ATLANTIC (Sept. 8, 2017), https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/ (discussing a Title IX complaint where the investigator ignored inconsistencies and concluded that "stories shifted because [the alleged victim] suffered from trauma-induced memory problems"). Although trauma can cause issues with recalling details and timing of events, any inconsistencies should not be disregarded but should instead be included in any report or case file prepared by the investigator and school. This will preserve all relevant evidence (credibility is almost always an assessment in adversarial proceedings) and ensure that the parties and decisionmakers are afforded an opportunity to assess the same information, which will further transparency and fairness during the process.

[176] *See* Angela F. Amar et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Sexual Assault*, 29 VIOLENCE & VICTIMS 579, 584 (2014) (discussing legal training received by schools' hearing board personnel and finding that, on average, they only receive approximately 16 hours of training annually).

[177] U.S. DEP'T EDUC. OFF. FOR CIVIL RIGHTS, *Transcript of Virtual Public Hearing on Title IX of the Education Amendments of 1972* 262–64 (2021), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-publichearing-complete.pdf (during which Dr. Amber Blair, the Director of Student Engagement

investigator model is far outweighed by the risk of any resulting prejudice or detriment to the student litigants. In fact, there are real-life examples of this occurring for both complainants and respondents.[178] During my own criminal investigation, I personally witnessed and experienced the impact a biased investigator can have in the Title IX process.[179] During my initial interrogation, the investigating agent spent hours drafting my statement while he contemporaneously questioned me. However, I was not permitted to draft my own statement nor view the monitor while the initial statement was being prepared.

Following the interrogation, I naively trusted the accuracy of the statement, potentially made a few changes to major inaccuracies I noticed, and quickly signed off on the document. After thoroughly reviewing my statement at a later date, my counsel and I discovered that my statement included language I did not use, and the investigating agent had instead supplemented it with similar but not exact terminology. During my court martial, a number of witnesses who were also interviewed by the same investigating agent provided a similar account. Two female cadet witnesses provided the following testimony:

> Cadet 1: [The agent] suggested a lot of things about me and what happened on the trip . . . I signed and swore to [the] statement. I have reviewed it since. There are some phrases therein that I would have never had said . . . There would be an alcohol impairment chart, he would ask what my level of intoxication was according to the chart. I would be confident and say I was a 1 or 2 on the chart; he would ask, "are you sure it wasn't a 5 or a 6?" . . . He wanted different phrasing than what I wanted to use for the statement.
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> Cadet 2: He would ask me what happened, but then he would tell me what to say. For example, I told him what I thought

and Grant Initiatives for the Louisiana Community and Technical Colleges System, testified that a single investigator model will benefit smaller institutions that do not have adequate staff or funding to accommodate another system); *see also id.* at 953–57 ("[t]he requirement that a school separate the investigators and adjudicators is burdensome for schools who do not have a large number of adequately trained staff for the process.").

[178] *See* Doe v. Columbia Univ., 831 F.3d 46 (2d Cir. 2016) (during the grievance process, the single investigator was not impartial as she entirely ignored representations from the respondent and never requested evidence from him, failed to interview key witnesses, and prepared an inaccurate and incomplete report to the decisionmaker. The court ultimately found that the investigator's report was an attempt to influence the Dean and hearing panel that was motivated by the investigator's own bias. It further reasoned that "[a]lthough [investigator] was not the decision-maker, she allegedly had significant influence, perhaps even determinative influence, over the . . . decision"); ALEXANDRA BRODSKY, SEXUAL JUSTICE, SUPPORTING VICTIMS, ENSURING DUE PROCESS, AND RESISTING THE CONSERVATIVE BACKLASH 57 (Macmillan Publishers, Metropolitan Books 2021) (referencing an example whereby a single investigator relies upon rape myths when deciding to dismiss a Title IX complaint).

[179] Although the military academies are exempted from Title IX, the circumstances from my investigation highlight how one individual can completely derail the legitimacy and morality of an investigation.

> on one occasion, and he told me that what I thought was wrong. I would give an answer, he would argue with me about my answer, we would talk about my answer for 20 minutes, and then he would put it down.[180]

Additionally, during the trial, the investigating agent admitted that he did not follow Army regulations by failing to record the interviews and for destroying my first printed statement, which he testified included pen and ink changes. Had the investigating agent been solely in charge of both the investigation and decision making in my case, I would be behind bars and a registered sex offender.

Given the substantial risk associated with empowering a single individual to investigate and decide a Title IX investigation, the proposed guidelines should be revised to explicitly prohibit the same and instead require a live hearing. Title IX investigations should be conducted in teams of two or three, rather than by one person. The personnel presiding over the live hearing would include a three-person panel, which must include one individual with a law degree in order to assist with legal assessments such as relevancy and credibility. The hearing panel would not include anyone who was involved in the investigation so that the investigators will not be able to influence the panel's determination. Similarly, the hearing panel will be prohibited from consulting with any investigators to avoid an air of impropriety or bias. The investigators' role should be strictly limited to information gathering and a neutral presentation of the facts through a report and the panels limited to rendering a decision based on the investigative report, as well as any testimony or evidence presented during the hearing.

E. Right To Cross-Examination

Cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." [181] The words uttered by Mr. John Henry Wigmore have been cited for decades throughout courtrooms to emphasize the importance of a mechanism through which litigants may assess the truthfulness and credibility of a witness. However, since the 2011 DCL, which signaled a rapid transformation of Title IX litigation, this phrase and the underlying mechanism it supports has been the topic of heated debate.[182] While the ability to cross examine a witness in the civil, criminal, and administrative realms is well-established, the extent of a party's ability to question a witness in the Title IX context, if any, is less clear, especially when

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[180] During cross-examination, Cadet 2 testified, "I answered all my questions truthfully, but the agent and I would discuss my answer for 10 minutes before he wrote it down."

[181] JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW §1367, at 27 (2d ed., vol. 3 1923).

[182] This is not to say that cross-examination has not been analyzed and criticized prior to 2011. In fact, the topic has been widely discussed for many years. However, the more-recent Title IX changes have acted as a catalyst for renewed, fervent debate in this area of law.

analyzing the Biden Administration's proposed guidelines.[183] Still, regardless of whether the latest version of the guidelines ultimately remain the same, the nature and extent of cross-examination in Title IX proceedings is a subject that demands scrutiny in order to better understand the potential practical effects upon students and institutions alike.

In order to truly comprehend this issue, we must first explore why this method of questioning has sparked public outcry under Title IX. While the words of Mr. Wigmore still remain largely true today, he authored the same during a time when the rights of women were not well developed or equal to that of their male counterparts, especially in legal proceedings involving an element of sexual misconduct where the survivor was female.[184] As such, his perception as to the universal utility of cross-examination may have been limited in that respect. The concern related to this line of questioning in Title IX proceedings can be distilled into three primary areas of interest: (1) the potential re-traumatization of survivors through aggressive, adversarial questioning; (2) the existence of inadequate procedural protections for survivors; and (3) the undermining of the underlying purpose of Title IX.[185] We will explore each of these issues, along with typical counterarguments from proponents of a live cross-examination requirement, and conclude with discussing how courts have interpreted this topic prior to presenting a proposed solution that will hopefully adequately protect the interests of both complainants and respondents.

Needless to say, sexual assault, as well as any type of sexual misconduct, can have drastic, long-lasting impacts on a survivor's life in the form of trauma. As such, it is important to understand how cross-examination can potentially affect survivors during a Title IX proceeding.[186] Oftentimes, the form of questioning forces survivors to relive the traumatic event, which sometimes results in an exacerbation of existing symptoms.[187] This

[183] As previously discussed, the proposed guidelines do not require schools to hold live hearings at the conclusion of their Title IX investigations. Rather, schools are permitted to choose between the single investigator model or a live hearing. Additionally, even when a school opts to proceed with a live hearing, a complainant does not have to submit to questioning and may voluntarily abstain. Thus, this section will largely proceed by analyzing situations where a cross-examination is permitted, and the complainant submits to the same.

[184] I fully recognize that anyone, not just women, can be a survivor of sexual misconduct; however, this portion of the discussion is limited to analyzing the historical trends that have led to the current Title IX debate. Additionally, we need to remember that minority women survivors have faced even harsher circumstances while seeking justice.

[185] Kathryn J. Holland et. al., *The Selective Shield of Due Process: Analysis of the U.S. Dept. of Educ.'s 2020 Title IX Reguls. on Live Cross-Examination*, 20 ANALYSES OF SOC. ISSUES AND PUB. POL'Y, 584, 592–594 (2020). Although other concerns are also voiced by opponents of cross-examination, for example the burden placed upon schools to implement a system that utilizes cross-examination, these three categories are the most prevalent.

[186] However, re-traumatization is not just limited to one's experience while being cross-examined as it can occur at any stage of the proceeding, especially during the investigative phase when survivors may have to recall difficult circumstances in excruciating detail.

[187] Letter from Judith L. Herman, Prof. of Psychiatry, Harv. Med. Sch. et. al., to Kenneth L. Marcus, Asst. Sec. for Civ. Rts., Dep't of Educ. (Jan. 30, 2019) (https://perma.cc/EN38-FE7G) ("students who file

consequence can be particularly prevalent when questioning is conducted by a layperson who is not a legal professional or when the questioning is presented by overly zealous counsel.[188] Proponents of cross-examination in Title IX proceedings generally counter these concerns by arguing that certain measures can be established, or already exist, to mitigate the potentially re-traumatizing nature of questioning.[189] Supporters also routinely rely upon the proposition that credibility plays a key role in Title IX proceedings and cross-examinations arethe most effective means of exploring that component, especially given that the responding party must primarily rely upon the school to gather and assess evidence.[190] Accordingly, we must view the proposed guidelines with a practical understanding of how the ability to cross-examine may personally impact Title IX litigants' psyches.

While still an important consideration when analyzing the ability to cross-examine, the lack of adequate procedural protections during questioning has been somewhat addressed by the current proposed guidelines when compared to the 2020 guidelines. For instance, one major criticism of the Trump-era guidance is that it required schools to conduct a live hearing

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formal Title IX complaints . . . submit to cross-examination . . . [which] means being forced to relive their traumatic experience[] . . . a situation almost guaranteed to aggravate their symptoms of post-traumatic stress.").

[188] Because lay people may not have a firm grasp on how to appropriately phrase questions and what questions are permissible, they may ask survivors questions that are re-traumatizing. *See* Andrea Pino, *The Second Rape: Battling PTSD and Betrayal*, HUFFPOST, https://www.huffpost.com/entry/the-second-rape_b_3655062 (Jan. 23, 2014) (detailing the story of a survivor who experienced PTSD and other psychological conditions following her assault and the school's handling of the investigation, as well as how questioning by third parties impacted her mental health). However, overly aggressive defense counsel may have a more significant impact. "It is not uncommon for complainants to report that the suspicion and disbelief that they encounter during cross-examination feels like a repeat of the trauma of being raped . . . a phenomenon often referred to as 'secondary victimization'." Zydervelt, *supra* note 159, at 553; *see* Judith Lewis Herman, *The Mental Health of Crime Victims: Impact of Legal Intervention*, 16 J. TRAUMATIC STRESS 159, 159 (2003) ("Indeed, if one set out intentionally to design a system for provoking symptoms of posttraumatic stress disorder, it might look very much like a court of law.").

[189] The 2020 guidelines noted that schools should develop policies and procedures that prevent irrelevant, disrespectful, and abusive schools that permit cross-examination maintain a Title IX policy that includes similar language. Additionally, the Biden Guidelines preserve rape shield protections in that complainants cannot be asked about their sexual behavior unless the information sought falls under one of two narrow exceptions. *See Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 302 ("Proposed § 106.45(b)(7)(iii) would explain that although evidence concerning specific incidents of a complainant's prior sexual conduct with the respondent may be permissible when offered to prove consent, the mere fact that prior consensual sexual conduct between the complainant and respondent occurred or that there are similarities in the types of communications related to consent does not itself demonstrate or imply the complainant's consent to the alleged sex-based harassment and does not preclude a determination that sex-based harassment occurred.").

[190] *See Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) ("It is understandable that the panel would wish to alter the proceedings in an effort to protect the alleged victim from additional trauma. However, . . . [r]egardless of how 'sensitive' the proceeding was deemed to be, the [school] remained bound to observe the [respondent's] constitutional rights [to cross-exam] . . . At the very least, in light of the disputed nature of the facts and the importance of witness credibility . . . , due process required that the panel permit the [respondent] to hear all evidence against him and to direct questions to his accuser through the panel"); *see also* Nancy Gertner, *Sex, Lies, and Justice*, AM. PROSPECT (Jan. 12, 2015), https://prospect.org/justice/sex-lies-justice/ ("However flawed, the way we test narratives of misconduct-on whichever side-is by questioning the witness, by holding hearings . . .").

with cross-examination through an advisor of the student's choice.[191] This was primarily concerning because, practically, respondents were permitted to select a fellow student to serve as his or her advisor.[192] As referenced above, the risk of selecting an untrained lay person to cross-examine witnesses and potentially re-traumatize participants is significant. The Biden Administration addressed this issue by providing schools the option to select a live hearing or opt for a "process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses . . . ."[193] Should a school decide to permit a live hearing with cross-examination under the current proposed guidelines, the questions posed through a student's advisor are limited in such a manner that will further protect survivors from the conduct of a chosen advisor.[194] While this does provide additional procedural protections for complaining parties, as discussed above, the optional live hearing requirement could have a detrimental impact on a respondent's ability to present a defense. As one proponent of cross-exam observed,

> The way we sort through fact and fiction in any process that's fair is by putting accusations through scrutiny. We can do things that try to make it less difficult [for the accuser], but it can't be avoided. Nobody is suggesting a "Did you order the code red?" level of questioning, but merely a guarantee that the accused (or his representative) can ask reasonable questions of the accuser (if not directly then through a representative) about the accusations.[195]

Finally, cross-examination has been viewed as a mechanism that undermines the general purpose of Title IX in that it would chill reporting of sexual misconduct, thereby resulting in a barrier to one's academic pursuits. This is not a new idea in the realm of sexual assault as it has been evidenced and well documented in the criminal context as survivors are hesitant to report a sex crime to law enforcement due, in large part, to how authorities

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[191] *See* 34 C.F.R. §106.45(b)(6)(i).

[192] Dowling, *supra* note 155, at 140 (citing the Chancellor of the State University of New York when she argued that this "would allow the fraternity brother or sorority sister, parent, roommate, or anyone else to conduct cross-examination.").

[193] *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 415.

[194] Advisors are explicitly prohibited from asking questions about a complainant's sexual history unless the question is offered to establish consent between the parties or the responsibility of a third-party, which is also a provision from the 2020 guidelines that has been preserved. Additionally, questions must be formulated in such a manner that insulates the witness from harassing conduct. (The Department's tentative position is that it is important to explicitly require in the regulatory text that a postsecondary institution prohibit questions that are unclear or harassing of the party being questioned because a proceeding in which questions are unclear or harassing is not an equitable proceeding and not one likely to produce accurate information needed for evaluating the allegations of sex-based harassment and assessing credibility which impacts the postsecondary institution's ability to determine whether sex-based harassment occurred and effectuate Title IX's nondiscrimination mandate. A question would be unclear if it is vague or ambiguous such that it would be difficult for the decisionmaker, or the party being asked to answer the question to discern what the question is about.) *Federal Register Notice of Proposed Rulemaking Title IX of the Education Amendments of 1972*, *supra* note 14, at 413–14.

[195] Dorment, *supra* note 20.

historically perceived and handled investigations.[196] Thus, opponents of cross-examination argue that cross-examination in Title IX proceedings will have a similar effect in that survivors will recognize they may ultimately face questioning during a live hearing, which may be perceived as a slight against the veracity of the allegations.[197] Arguably, this impact will be more prevalent in the Title IX realm as parties do not have the ability to utilize typical tools of discovery, such as subpoenas or search warrants, to obtain evidence, meaning campus officials are often forced to rely upon and assess each party's recitation of the facts.[198] Conversely, supporters of cross-examination, while generally recognizing that the process is uncomfortable for all parties involved, argue that the rights and interests of responding parties cannot be sacrificed by eliminating the ability to question the accusing party.[199] Advocates also contend that the lack of procedural mechanisms through which a responding party can present a defense necessitates the use of cross-examination.[200] Although a number of courts have found that cross-examination is not a necessary element of all Title IX cases, many have determined that it is a basic element of a fundamentally fair proceeding,

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[196] *See* Emma Sleath & Ray Bull, *Comparing Rape Victim and Perpetrator Blaming in a Police Officer Sample*, 39 CRIM. JUST. & BEHAV. 646, 648–49 (2012) (discussing research that indicated a tendency for police to perceive survivors' with disbelief and suspicion); *see also The Criminal Justice System: Statistics*, RAINN, https://www.rainn.org/statistics/criminal-justice-system (last visited Sept. 23, 2023) (finding that approximately 20% of female students report sex crimes to law enforcement, and of that population, 13% decided not to report the sexual misconduct because they believed police would not do anything to assist).

[197] Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 UNIV. PA. L. REV. 1, 27 (2017) (discussing the idea of "credibility discounting," which the author argues is a form of discrimination arising out of law enforcement's initial improper assumptions about women who allege rape; credibility discounting may stem from traditional rape myths and fuel beliefs that a rape accuser is lying about the incident, feels regret about engaging in the sexual activity, or is incapable of determining whether she actually consented due to intoxication).

[198] *Id.* at 6.

[199] *See* Gertner, *supra* note 190 (supporting the use of cross-examination in Title IX proceedings as a means of effectively exploring allegations. "It will be traumatic for the complainant to confront her accuser, even if only through her representatives rather than directly. It will be traumatic for the complainant to be asked to repeat her story over again." Opponents of cross-examination "assume the outcome – that the complainant's account is true – without giving the accused an opportunity to meaningfully test it. . . . We should not substitute a regime in which women are treated without dignity for one in which those they are accusing are similarly demeaned. Indeed, feminists should be concerned about fair process, not just because it makes fact-findings more reliable and more credible, but for its own sake." This is referring to a previous argument by the author where she stated that the more men who come forward and credibly claim they were falsely accused/convicted, the more resulting damage to the prevention of sexual violence.).

[200] As mentioned above, parties cannot issue subpoenas, utilize search warrants, compel testimony, or issue written interrogatories to the opposing party. Additionally, proponents of cross-examination contend that responding parties will be placed in an unwinnable situation if they attend a school that utilizes the preponderance of the evidence standard, forgoes a live hearing with cross-examination, and relies upon a single investigator model as those components, taken together, significantly impair one's ability to mount a defense. This is especially the case since schools have the primary burden of furthering an investigation and gathering evidence to explore the viability of allegations. Should a complaining party opt out of participating in the Title IX process, a responding party would essentially have to trust the school and/or the single investigator to properly gather and assess evidence without an effective means of rebutting the same.

especially when credibility is at issue.[201]

My criminal investigation provides a perfect example of how cross-examination can be used in an effective manner to elicit information the finder of fact can rely upon when analyzing a Title IX complaint. Throughout my investigation, my accuser firmly asserted that our sexual encounter resulted in her bleeding profusely and that it left blood stains on a bed located in her hotel suite, a lodging she shared with three other female cadets. Because there was a lack of physical evidence, the jury had to almost exclusively assess and rely upon testimony from witnesses, as well as their credibility. During my trial, my accuser testified about the blood stains and maintained that they would have been apparent to anyone in the suite, including her suite mates, who she allegedly discussed the blood stains with during the ski trip. During cross-examination, my defense counsel used the opportunity to further explore the alleged blood streaks. After being asked to describe the bed, my accuser testified that "[t]here were four or five streaks . . . twenty-four inches wide, six inches deep blood streaks along the side of the bed, which had white sheets."[202] She further testified that her roommates "were grossed out by it and wondered whose blood it was." It was not until we had an opportunity to cross-examine my accuser that this information was elicited. My defense attorneys then used this information during direct examination of the accuser's suite mates. None of the three other female cadets corroborated that there was blood anywhere in the suite. In fact, all three of the roommates later testified that they saw no blood and recalled no discussion about blood throughout the ski trip. This piece of evidence and the associated testimony

[201] *See* Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (finding that, when a case involves a credibility assessment, "cross-examination of witnesses might [be] essential to a fair hearing."); Doe v. Regents Univ. Cal., 210 Cal. Rptr. 3d 479, 504 (Cal. Ct. App. 2016) (voicing concern that the respondent was not provided an opportunity to adequately cross-examine the complainant as only a third of the questions his attorney submitted to the panel were asked. "[W]here the [p]anel's findings are likely to turn on the credibility of the complainant, and respondent faces very severe consequences if he is found to have violated school rules, we determine that a fair procedure requires a process by which the respondent may question . . . the complainant."); *see also* Doe v. Univ. Cincinnati, 872 F.3d 393, 400–02 (6th Cir. 2017) ("[The university] assumes cross-examination is of benefit only to [the respondent]. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused . . . . Cross-examination is 'not only beneficial, but essential to due process' in a case that turns on credibility because it guarantees that the trier of fact makes this evaluation on both sides. When it does, the hearing's result is most reliable. Reaching the truth through fair procedures is an interest [respondent] and [the university] have in common."); *see also* Doe v. Baum, 903 F.3d 575, 578 (6th Cir. 2018) ("[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."); *see also* Neal v. Colo. State Univ.-Pueblo, No. 16-CV-873-RM-CBS, 2017 WL 633045, at *68 (D. Colo. Feb. 16, 2017) (recommending that, when the matter hinges upon an issue of credibility, cross-examination of witnesses might be essential); Doe v. Univ. Miss., 361 F. Supp. 3d 597, 612 (S.D. Miss. 2019) ("It is at least plausible in this he said/she said case, that giving [the respondent] an opportunity to cross-examine [the complainant] could have added some value to the hearing . . .").

[202] This quote is of the author's personal remembrance of the events as his transcripts are sealed documents.

was damning for my accuser's credibility and certainly contributed to the not-guilty verdict.

Based on the foregoing, I propose the following solution. As I am a proponent of mandating live hearings, I also believe that cross-examination through an advisor or attorney must be required in lieu of the unspecified alternative credibility assessments offered by the Biden Administration. As referenced above, the advisor must be an attorney or someone who is legally trained. While I firmly believe that a live hearing with cross-examination is the most effective means of ensuring a fair process for both parties, especially given the parties' inability to effectively gather evidence through discovery or legal avenues (subpoenas, interrogatories, etc.), I also recognize that cross-examination can be a demanding process for the litigants. Therefore, schools should enact or maintain policies that target any harassing, aggressive, or irrelevant conduct by the advisor. Depending upon the circumstances of each case, schools and Title IX litigants should also be afforded the opportunity to conduct cross-examination through a virtual medium. Although this will not entirely eliminate the stress placed upon witnesses during questioning, it will at least ensure the parties are kept in separate locations so that some of the discomfort will be mitigated. In order to prevent the introduction of improper questions, parties, through their advisors, should submit a list of questions that they would like to ask each witness. This will allow the hearing panel, which must have a licensed attorney present, to evaluate the relevance and form of each question so any improper questions can be flagged for further review. Counsel will also have to submit an estimate as to how long the questioning will last for each witness, which will permit the panel to allocate a sufficient amount of time to the hearing.

Ideally, this process will take place in advance of the hearing and the panel will meet with the parties and their advisors individually to accomplish the same. After reviewing the questions, the panel will inform each advisor of its decision and detail which questions are being stricken and the basis for the decision. Each advisor will then have an opportunity to respond to the panel's initial finding in order to establish the relevance and need for the question. The panel will then reach a final determination as to each disputed question and include its findings in the investigative file. This way, each party or advisor will understand which questions will be permitted at the hearing and it will hopefully streamline the evidentiary issues. This process will also ensure that there is detailed documentation as to what questions were admitted and excluded during the hearing, which will assist in the Title IX appellate process and any civil lawsuit.

Should the opposing counsel object to a permitted question during the hearing, the panel will briefly pause the hearing to hold a sidebar where the advisors and panel will discuss the form of the question and argue its

admissibility outside the presence of the student litigants. I recognize that additional questions will often arise during cross-examination depending upon the nature of the responses from each witness and that the initial "vetting" process of the questions will certainly hinder the ability to ask any follow-up without objection. So, following cross-examination, each advisor will be afforded an opportunity to submit proposed follow-up questions to the panel and the panel will again determine the admissibility of each. The panel will also be permitted to ask questions throughout the process and, in circumstances where the advisor has breached the rules of decorum as set forth in the school's policies and procedures, it may ask the witnesses questions in lieu of the breaching advisor. In this manner, the panel can address and quickly resolve any aggressive tone or mannerism the advisor may be exhibiting during the line of questioning. However, once a question is approved by the panel, the panel must ask the question verbatim and not paraphrase or otherwise alter the form of the inquiry. This will ensure that each party is afforded an opportunity to pursue the desired information efficiently. While I understand that this is an imperfect process that will certainly have its growing pains, we must ensure that both parties are afforded a fundamentally fair process while not significantly diminishing the rights of either individual. This is not a mutually exclusive concept.

V. THE ROAD NOT TAKEN

Although this Article has already discussed the importance of balancing the protections afforded to Title IX litigants in each of the five areas, I will now illustrate just how differently my sexual assault investigation may have proceeded without the aforementioned safeguards, again, setting aside the fact that my case did not fall under Title IX. There are already a number of instances where this Article has already addressed some of these areas in relation to my case; so, I will reiterate those points where appropriate.

First, as previously discussed, the ability to cross-examine my accuser proved to be a turning point early on in the trial. Her testimony regarding the dimensions of the non-existent blood streaks, as well as other inconsistent, exculpatory testimony, provided the jury a great deal of information that bolstered our defense. Without the ability to cross-examine, such exculpatory information may never have been elicited because the lead investigator failed to inquire about the dimensions during questioning of witnesses. In fact, my accuser's statement simply represented that blood was present in the room where the purported assault occurred.

Next, the right to view and present evidence. In October 2011, shortly before I was officially charged by West Point, my accuser's father, a West Point graduate, authored a handwritten letter to the Commandant of

Cadets (the second in command at the academy) in which he labeled me as a rapist and implored the Commandant to hold me responsible. Importantly, the letter addressed the Commandant by his first name, was delivered to the Commandant's home address, and highlighted the fact that the two graduated in the West Point class of 1983. It was a deliberate attempt to influence the handling of my investigation. Unfortunately, this correspondence was not disclosed to us until February 2012, four months later. Had the letter been disclosed in a timely manner, we would have been able to promptly address the situation and raise concerns about potential undue influence. Instead, a blatant conflict of interest with the second in command was deliberately withheld. Due to West Point's failure, the letter had its intended effect as the Commandant met personally with my accuser during the investigation.

As to the right to counsel and the use of a single investigator, I will focus solely on my initial interrogation because my false official statement conviction is ultimately what led to me being expelled from the academy. Had I exercised my right to counsel, or had counsel been assigned to me prior to my interrogation, given my physical condition at that time, I would have understood my rights and more than likely refused to participate in questioning. Instead, I hastily skimmed the inaccurate statement and adopted it as prepared by the investigator without further revision. As evidenced by the above-referenced testimony of the cadet witnesses, the investigator took advantage of the lack of counsel throughout investigative questioning by attempting to influence or alter statements. He further failed to abide by standard procedures for questioning, such as utilizing video or audio recording and maintaining copies of all versions of written statements. As such, evidence was permanently lost or destroyed during the investigation. Had the lead investigator been adequately trained and supervised, these egregious acts and omissions may have been mitigated.

Finally, the standard of proof. Given the amount of time that passed between the claimed assault and the initiation of a formal investigation, there was an entire lack of physical evidence in my case because there was no attempt to initially contact local law enforcement. Had the assistance of local authorities been invoked, any physical evidence may have been preserved. Therefore, almost all of the evidence introduced during my investigation was via witness and party testimony. Because most witnesses were consuming alcohol at the time of the alleged incident, the passage of time certainly did not aid with recollection during questioning. However, the presence of alcohol in sexual misconduct cases involving college-aged individuals is not unusual and appears often. It is a circumstance that post-secondary institutions routinely grapple with in Title IX investigations. If anything, alcohol does nothing but diminish the ability to recall specific facts and circumstances. During my investigation, there were a number of times witnesses could not recall events because they may have been under the

influence and/or because so much time had passed. To a certain degree, this hindered our and the prosecution's ability to assess the veracity of the claims and defenses. Had my case been tried under a preponderance of the evidence standard, the prosecution may have been able to manufacture enough question as to witnesses' memory, such that a guilty verdict would have been entirely possible. Accordingly, we must not only consider the stakes in Title IX cases in terms of potential impact upon accused parties, but also the well-known presence of alcohol and other substances on college campuses when considering the applicable standard of proof.

If the aforementioned issues had been avoided, or at least quickly addressed, my investigation may have been handled very differently. I may never have been formally charged with sexual assault. I may never have been expelled from the academy. I may have gone on to become an officer in the Army. Instead, like many other students, my life was irrevocably altered by an institutional failure.

VI. CONCLUSION

If this Article accomplishes nothing else, it emphasizes the importance of considering the appropriate balance between protecting all parties by affording them adequate protections while still meaningfully addressing the problem of sexual assault within higher education. Although I stand by my position that universities should not adjudicate sexual misconduct cases, we must collectively navigate the current Title IX landscape so that students across the nation, regardless of race and sex, may have equal access to an education. The future of our country deserves no less.