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SEXUAL MISCONDUCT ON CAMPUS

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United States District Court,
M.D. Pennsylvania.

Frantz BERNARD, et al., Plaintiffs
v.
EAST STROUDSBURG
UNIVERSITY, et al., Defendants.

No. 3:09 CV 00525.
|
Signed April 14, 2014.

MEMORANDUM OPINION

ROBERT D. MARIANI, District Judge.

I. PROCEDURAL HISTORY

***1** On February 13, 2009, Plaintiffs, Frantz Bernard, Timotheus Homas, Anthony Ross, William Brown, Jerry Salter and Dejean Murray brought this action in the Court of Common Pleas of Monroe County alleging violations of Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681, *et seq.*, as well as violations by Defendants, East Stroudsburg University, the East Stroudsburg University Board of Trustees and individual Trustees, Robert J. Dillman, Isaac W, Sanders, Kenneth Borland and Victoria L. Sanders[1], pursuant to 42 U.S.C. § 1983 and 42 U.S.C. § 1985. Further, the Plaintiffs alleged violations by Defendants, East Stroudsburg University Trustees, Dillman, Borland and V. Sanders, under 42 U.S.C. § 1986. (Doc. 1).

1 Isaac Sanders and Victoria Sanders are not related.

An Amended Complaint was filed by the Plaintiffs on April 7, 2009 (Doc. 4) and a Second Amended Complaint was filed on July 14, 2009. (Doc. 28).

This Court previously granted the Motion to Dismiss of the Defendants named above with respect to the claims of Plaintiffs William Brown, Dejean Murray and Jerry Salter, who have been dismissed by this Court because their claims were untimely. (Doc. 48).

Prior to this, counsel for the plaintiffs and defendants stipulated to the dismissal without prejudice of the members of the Board of Trustees of East Stroudsburg University, Defendants Darell T. Covington, Amy Schaeffer Welch, Trudi Q. Delinger, Harry F. Lee, Hussain G. Malick, Nancy V. Perretta, L. Patrick Ross, David M. Sanko, Robert H. Willever, and Eli Berman. (Doc. 7).

Defendants, East Stroudsburg University, Robert J. Dillman, Kenneth Borland and Victoria L. Sanders (collectively hereinafter University Defendants) have moved for summary judgment on the remaining Plaintiffs' claims. (Doc. 93). I. Sanders has also moved for summary judgment on the remaining Plaintiffs' claims. (Doc. 128). The Court will address I. Sanders' motion in a separate opinion. The issues have been fully briefed and the parties have submitted extensive documentary evidence in support of their respective positions.

For the reasons that follow, summary judgment will be entered in favor of Defendants, East Stroudsburg University, Robert J. Dillman, Kenneth Borland and Victoria L. Sanders, with respect to all claims of the Plaintiffs.

II. THE UNDISPUTED FACTS OF RECORD

In accordance with Local Rule 56.1, the University Defendants have submitted a Statement of Material Facts as to which they submit there is no genuine issue for trial. (Doc. 94). Plaintiffs have submitted their response to the University Defendants' Statement of Material Facts (Doc. 109) with the result that many of the numbered paragraphs of University Defendants' Statement of Material Facts have been admitted by the plaintiffs. In addition, there are other assertions of fact made by the University Defendants which, though responded to by the plaintiffs with a qualified denial, contain additional statements by Plaintiffs which are in substance admissions of the University Defendants' asserted facts.

***2** The following facts have been admitted except specifically noted:

East Stroudsburg University is a public university of higher education and one of the 14 Pennsylvania state system of higher education universities. (Doc. 94, ¶ 1).

Defendant, Robert J. Dillman (Dillman), was the President of East Stroudsburg from 1996 to 2012. (Doc. 94, ¶ 2).

Dillman, in the beginning of 2007, began to make plans to take a sabbatical and left East Stroudsburg University on sabbatical in January, 2008. He remained on sabbatical for 18 weeks and returned in May of 2008. (Doc. 94, ¶¶ 3, 4).

Defendant, Kenneth Borland (Borland), was the Provost and Vice–President for Academic Affairs of East Stroudsburg University in 2007 and 2008 and was Acting President while Dillman was on sabbatical. (Doc. 94, ¶ 5).

In 2007, Defendant, Victoria L Sanders (V.Sanders), was the Associate Vice–President for Special Projects and also the Assistant to the President for ESU. (Doc. 94, ¶ 6 [2]).

2 This statement of fact presents an example of the plaintiffs initially denying the asserted fact with the statement, "[d]enied as stated," and then admitting the statement in a following sentence: "It is admitted that, in 2007, Victoria Sanders ("V.Sanders") was the Director of Diversity and an Associate Vice–President as well as an Assistant to the President."

Isaac Sanders (I.Sanders), another Defendant in this case against whom Plaintiffs have alleged claims of sexual assault and harassment, was the Vice–President for Advancement at ESU as well as the head of the Advancement Office and the Chief Executive Officer of the East Stroudsburg University Foundation. (Doc. 94, ¶ 7). Isaac Sanders reported to two people, the Chair of the University Foundation Executive Committee, and Dillman. (Doc. 94, ¶ 8).

The employment of Isaac Sanders with ESU was suspended on July 1, 2008. Thereafter, Isaac Sanders was terminated for cause on October 22, 2008, effective December 21, 2008. (Doc. 94, ¶ 9 [3]).

3 Here again, the plaintiffs, in initially responding to Defendants' Statement of Fact, do so by responding, "Denied as stated." But, the very next sentence in Plaintiffs' Response is: "It is admitted I. Sanders was terminated for cause on October 22, 2008 effective December 21, 2008."

Plaintiffs Bernard, Homas and Ross are former students of ESU. Bernard was enrolled at ESU as an undergraduate from the Fall Semester of 2006 through the Fall Semester of 2011 and graduated on December 16, 2011. Plaintiff Homas attended ESU as an undergraduate student from the Summer Session of 2000 to the Summer Session of 2004 and graduated in August, 2004. Homas then attended ESU as a graduate student from the Fall Semester of 2004 to the Spring Semester of 2005 and from the Summer Session of 2006 to the Fall Semester of 2007. Homas was awarded a Masters Degree from ESU in 2008. Plaintiff Ross attended ESU as an undergraduate from the Fall Semester of 2003 to the Summer Session of 2006 and graduated on May 9, 2008. (Doc. 94, ¶¶ 10–13).

The Advancement Office, of which Isaac Sanders was head, raised funds for ESU. (Doc. 94, ¶¶ 7,14).

The East Stroudsburg University Foundation, of which Sanders was the Chief Executive Officer, is a private, non-profit corporation. (Doc. 94, ¶¶ 7, 15). In 2007 and 2008, the East Stroudsburg University Foundation was staffed by ESU employees who worked in the Advancement Office. (Doc. 94, ¶ 16).

ESU maintained a policy enacted on November 3, 1997 prohibiting discrimination and harassment. (Doc. 94, ¶ 17).

The policy expressly provided that:

> ***3** No student or employee of the University, or contractor/vendor conducting business with the University, may engage in illegally harassing conduct which creates a hostile learning or work environment for other students or employees of the University.

(Doc. 94, ¶ 18).

The policy defines harassment as "including unwelcome conduct based on gender; clearly offensive conduct; verbal, visual or physical behavior that is targeted at an individual adversely affect [*sic*] the learning environment; and criminal harassment." (Doc. 94, ¶ 19). ESU employees were required to take a course in sexual harassment. (Doc. 94, ¶ 20).

The University's policy prohibiting discrimination and harassment provided for a procedure for the submission and investigation of complaints of discrimination and harassment. (Doc. 94, ¶ 21), Arthur Breese, the University's Director of Diversity in Campus Mediation, believed that, in 2007, ESU was in compliance with its discrimination policy. (Doe.94, ¶ 22).

In August of 2007, Plaintiff Bernard, Margaret Omwenga, an ESU graduate student, and Micah Ash, an ESU student, contacted Attorney Albert R. Murray, Jr. for the first time regarding Bernard's allegations that he had been sexually harassed and assaulted by Isaac Sanders between May, 2007 and August, 2007 while working as a work-study student in the Advancement Office. (Doc. 94, ¶ 23). Plaintiffs, in their Answer to this statement deny that "ESU [*sic*] first notice of allegations of inappropriate conduct by defendant Sanders occurred in August 2007," and further assert that "employees and officials of ESU knew of I. Sanders' improper conduct with students prior to Bernard's complaint, and had an obligation to report same." (Doc. 109, ¶ 23).

Omwenga was Plaintiff Bernard's girlfriend during the summer of 2007 and Bernard frequently lived with her. (Doc. 94, ¶ 25). Plaintiffs admit that "initially Omwenga and Ash introduced Bernard to I. Sanders and had nothing negative to say about him." (Doc. 94, ¶ 26).

On or about August 23, 2007, Attorney Murray reached out to his friend and ESU professor, Dr. Donna Hodge, to set up a meeting for Bernard to report his allegations regarding Isaac Sanders to ESU. (Doc. 94, ¶ 27). That evening, Hodge called Victoria Sanders and informed her about the meeting with Bernard and asked her to attend. That conversation was the first time Victoria Sanders had heard of Bernard's complaint. (Doc. 94, ¶ 28). Plaintiffs, while admitting the above, further state in their answer: It was well known on campus that I. Sanders repeatedly engaged in improper sexual conduct with ESU students." (Doc. 109, ¶ 28).

University Defendants assert that before her conversation with Hodge, Victoria Sanders had not been aware of any student complaints of sexual harassment by Isaac Sanders. (Doc. 94, ¶ 29). Plaintiffs respond with, "Denied as stated." Plaintiffs then assert that "Plaintiff, Anthony Ross, states that Victoria Sanders' son, Lorenzo Sanders, who was a student at the University *probably* knew what was going on since he was friendly with another victim, Dejean Murray." (Italics added). (Doc. 109, ¶ 29). Plaintiffs further state: "In addition, it was well known on campus that I. Sanders repeatedly engaged in improper sexual conduct with ESU students." (*Id.*). These statements do not present a proper and sufficient denial of the University Defendants' assertion that Victoria Sanders, before she spoke with Professor Hodge, had not been aware of any student complaints of sexual harassment by Isaac Sanders.

***4** On August 24, 2007, Professor Hodge, Victoria Sanders, Plaintiff Bernard and Attorney Murray met at Hodge's home where Bernard informed Victoria Sanders of the specifics of his allegations against Isaac Sanders. (Doc. 94, ¶ 30).

This meeting was the first time that Plaintiff Bernard had put the University on notice of what had occurred with Isaac Sanders. (Doc. 94, ¶ 31). The Plaintiffs respond to this asserted statement of fact with "[d]enied as stated," and further state that "[p]rior to his complaint, Frantz Bernard notified Maggie Omwenga (Omwenga) about the incident with I. Sanders in the car. While Ms. Omwenga was a student at the time, she was also employed by ESU but did not report the improper activities of I. Sanders' reported to her by Bernard." Nonetheless, Plaintiff Bernard, in his Deposition (Doc. 95–1), admits that his meeting on August 24, 2007 at the home of Professor Hodge, at which Defendant, Victoria Sanders, was present with Plaintiff Bernard and his counsel, was the first time that

he put the University on notice of what had occurred with Dr. Isaac Sanders:

> Q. August 24, 2007, that Friday meeting at the home of Professor Hodge with Dr. Sanders present, your lawyer outside in the car, is that the first notice that you gave to the University about what had occurred with Dr. Sanders?
>
> A. Well, I didn't say he was outside in the car. I don't know where he was.
>
> Q. I thought you did. The record can bear me out. I thought you did say that?
>
> A. No. I said he was outside the house.
>
> Q. I thought he was outside in the car, pardon me for me. Was Professor Hodge her house, Dr. Sanders present, your lawyer outside not in a car, was that the first time that you put the University on notice of what occurred with Dr. Sanders?
>
> A. Yes."

(Doc. 95–1; 96, lines 21–25; 97, lines 1–13).

Defendant, Victoria Sanders, referred Plaintiff Bernard to the University's Office of Diversity to file a complaint. (Doc. 94, ¶ 32). Plaintiffs deny, "as stated" that Victoria Sanders also told Bernard that he needed to change his work-study assignment and, instead, state that "Bernard left his position at the Advancement Office after an incident in which I. Sanders attempted to touch his stomach and genitals." (Doc. 109, ¶ 32).

Immediately after the meeting of August 24, 2007, Victoria Sanders called University counsel, Andrew C. Lehman, and told him about Bernard's allegations against Isaac Sanders. (Doc. 94, ¶ 34).

Two days later, on Sunday, August 26, 2007, Victoria Sanders phoned Defendant Dillman and informed him of Bernard's allegations. (Doc. 94, ¶ 35.)

University Defendants then assert that Dillman, prior to the phone call from Victoria Sanders, had never been made aware of any student complaints against Isaac Sanders. (Doc. 94, ¶ 36). Plaintiffs deny this statement of material fact and state in support of their denial:

> In further response, as early as 2006, Dillman was told by numerous individuals, including Senior Staff members Bolt and Robert Kelly ("Kelly"), and then head of Human Resources Susan McGarry ("McGarry") that I. Sanders was hiring unqualified young African American males outside of University guidelines .... [and] [a]s early as 2006, there were also stories circulating in the Advancement Office that I. Sanders was running a 'sex ring' involving international students going back to 2003, Teresa Werkheiser, who was told the story in 2006 by Vicky Cooke, I. Sanders' former assistant, reported the information to Bolt, but that information was never investigated,

***5** (Deposition citations omitted.) (Doc. 109, ¶ 36).

Plaintiffs further state "[i]n addition, it was generally known around campus that I. Sanders was engaging in inappropriate sexual relationships with students he employed in the Advancement Office, including Homas." [Deposition citations omitted]. (*Id.*)

For the reasons explained later in this Opinion, these statements do not present a sufficient denial of the University Defendants' assertion that Dillman had never been made aware of any student complaints against Isaac Sanders prior to the phone call by Victoria Sanders. The assertion by Plaintiffs that Dillman was told that Sanders was "hiring unqualified young African–American males outside of University guidelines," is not a statement that Dillman was told of any acts of sexual harassment, inappropriate sexual relationships with students, or sexual assaults of students by I. Sanders. The assertion that "there were also stories circulating in the Advancement Office with respect to I. Sanders running a 'sex ring' ' presents

unsubstantiated hearsay with no indication that these "stories" were ever presented to Dillman. Likewise, the assertion that it was "generally known around campus" that I. Sanders was engaging in inappropriate sexual relationships with students does not present a sufficient denial of Dillman's lack of awareness of student complaints against Isaac Sanders prior to his phone call from Victoria Sanders on August 26, 2007.

On August 27, 2007, Plaintiff Bernard filed a complaint against Isaac Sanders with the Office of Diversity and Equal Opportunity. (Doc. 94, ¶ 37). Arthur Breese was the Director of Diversity in Campus Mediation at ESU at that time and he reported to Victoria Sanders, who was his immediate supervisor. (Doc. 94, ¶¶ 38, 39). One of Breese's duties as Director of Diversity in Campus Mediation was to investigate complaints of sexual or other type of harassment and to prepare a report and send that report to the ESU vice-president of the department where the accused ESU employee worked or to the President of ESU if the harassment allegation was made against a vice-president. (Doc. 94, ¶ 40).

Plaintiff Bernard had already stopped working in the Advancement Office before he first reported his allegations against Isaac Sanders to ESU on August 24, 2007. Bernard stopped working at the Advancement Office when Isaac Sanders tried to touch him in the Advancement Office kitchen some time in August, 2007. (Doc. 94, ¶ 41).

At the beginning of the Fall Semester, approximately one week after Bernard met with Victoria Sanders and Hodge on August 24, 2007, ESU moved Bernard to a work-study position in the Media Communications Department. Arthur Breese gave Bernard a list of work-study positions and Bernard chose the Media Communications Department position. (Doc. 94, ¶ 42).

The hours and wages for Bernard's new position at the Media Communications Department were the same as those Bernard received when he had worked in the Advancement Office so that Bernard lost no income by the move to the new job. (Doc. 94, ¶ 44).

***6** After Bernard filed his formal complaint on August 27, 2007, I. Sanders did not attempt to harass him further. (Doc. 94, ¶ 45).

Plaintiffs, however, assert that Defendant I. Sanders attempted to intimidate Plaintiff Bernard. They assert that in November of 2007 "upon seeing Bernard from a distance on the ESU campus, I. Sanders made a disgruntled gesture toward Bernard, throwing up his hands and looking over his glasses in apparent protest of Bernard's complaint against him." (Doc. 109, ¶ 45).

Bernard further asserts that he was "harassed on campus by persons associated with I. Sanders in an attempt to prevent Bernard from following through with his complaint, including Defendant Dillman, who glared at Bernard when he saw Bernard in a campus store during the investigation." (*Id.*)

Finally, Plaintiffs assert that in July of 2008, Bernard received a death threat on his cell phone "from what sounded like an African–American man with an accident [*sic*]." Plaintiffs further assert that Bernard "believed the threat was coming from I. Sanders, [Vincent] Dent's daughter or someone else connected with the case." (Doc. 109, ¶ 45).

In addition to notifying ESU of his allegations on August 24, 2007, Bernard, about that same time, reported his allegations against Isaac Sanders to the Monroe County District Attorney. (Doc. 94, ¶ 46). This resulted in the Monroe County District Attorney, David Christine, making a phone call to ESU counsel Lehman and to Jeffrey Cooper, then Chief Counsel for the State System of Higher Education, about the Bernard case. (Doc. 94, ¶ 47).

Arthur Breese, in accordance with instructions he received from ESU counsel Lehman, wrote to Bernard and told him that DA Christine wanted to talk with him about his allegations against Isaac Sanders. Breese provided Plaintiff Bernard with both the location and phone number of the District Attorney's Office. (Doc. 94, ¶¶ 47, 48).

ESU's Discrimination and Harassment Policy provides that: "If the initial complaint of a violation of this Policy is received by any employee of the University other than in the Office of Diversity and Equal Opportunity, the person contacted shall refer the complaint to the Office of Diversity and Equal Opportunity." (Doc. 94, ¶ 49).

As Director of the Office of Diversity and Equal Opportunity, Arthur Breese would handle a complaint as follows: the employee would come into his office and fill out a form; Breese would review the complaint and send out a letter to both the complainant and the alleged offender; once the letter was sent out, Breese would interview the complainant, the alleged offender, and witnesses from each of the two individuals; Breese would then prepare a report during which he would consult with both counsel for the University and his Supervisor, Victoria Sanders; once the report was prepared, Breese would send it out to both the complainant and the respondent, who could then submit comments on the report; at that point, the report would be sent to the appropriate vice-president. If the respondent were a vice-president, the report went to the President. (Doc. 94, ¶ 50). The parties agreed that Breese conducted 20 to 25 investigations at ESU. (Doc. 94, ¶ 51).

***7** In this case, Breese interviewed Bernard on August 28, 2007 and wrote a summary of Bernard's allegations against Isaac Sanders. (Doc. 94, ¶ 52). Bernard also provided Breese with a written statement that he had prepared. (Doc. 94, ¶ 53).

In his statement, Bernard alleged that between May 26, 2007 and August 26, 2007, Isaac Sanders acted inappropriately with Bernard on several occasions while Bernard was a work-study student in the Advancement Office. The statement alleged an off-campus sexual assault, two instances of attempted unwanted touching on campus, and several on and off campus unwelcomed comments. The statement also alleged that Isaac Sanders obtained a job for Bernard at the Alumni Center, secured financial aid for his summer courses and gave Bernard several personal gifts that included money. (Doc. 94, ¶ 54).

In addition to the gifts and financial assistance which Isaac Sanders gave to Bernard, Bernard later acknowledged to Breese that, two days after the off-campus sexual assault, Bernard telephoned Sanders for help in locating a place for Bernard to stay because he had an argument with Omwenga and did not want to stay with her. (Doc. 94, ¶ 55).

At the August 28, 2007 meeting between Breese and Bernard, Breese told Bernard who he was and what he was going to do. Breese told Bernard he would investigate the situation by looking at Bernard's statement and then contacting Isaac Sanders to let him know about the allegations against him. (Doc. 94, ¶ 56).

Breese also asked Bernard if he had witnesses. Bernard identified Micah Ash and Margaret Omwenga. Bernard told Breese that he had informed both Ash and Omwenga about the incidents with Isaac Sanders. Breese asked about other witnesses and Bernard could not give any other names other than what he had already provided. [4]

[4] Plaintiffs admit these facts but assert further that it was "the responsibility of Breese to do a thorough investigation and generate witnesses, documents and other evidence from Bernard's allegations." Plaintiffs further allege that "Breese did not interview any persons in the Advancement Office, former work study students and others that might have corroborated Bernard's claims because he was directed not to by Victoria Sanders and Lehman." (Doc. 109, ¶ 57). These statements do not present a denial of the facts asserted by the University Defendants in Paragraph 57 of the Statement of Material Facts.

In early September of 2007, Breese received two written responses from Isaac Sanders to Bernard's written allegations against Isaac Sanders. Breese told Bernard that he had notified Isaac Sanders of Bernard's allegations against him and informed Isaac Sanders that he would have a chance to respond to those allegations. (Doc. 94, ¶ 58).

At or about this same time, at Breese's request, Isaac Sanders identified Vincent Dent, who worked in the Advancement Office, as a witness. (Doc. 94, ¶ 59).

Later in September of 2007, Bernard and Breese met again. During the second meeting with Breese, Bernard was shown Isaac Sanders' written response to Bernard's allegations. Bernard was given the opportunity to comment on the response and identified what was true and false in the statements of Isaac Sanders and Dent, (Doc. 94, ¶ 60). Bernard submitted

two written statements to Breese for consideration as part of Breese's investigation. (Doc. 94, ¶ 61).

From late October of 2007 to mid-November, 2007, Breese interviewed Micah Ash, Isaac Sanders and Vincent Dent. (Doc. 94, ¶ 63). The interviews were recorded except for the interview with Plaintiff Bernard, who refused to be recorded. (Doc. 94, ¶ 64). Breese attempted to schedule an interview with Margaret Omwenga, but she refused in part because she had consulted with her attorney and was advised not to get involved. Breese wrote this in an e-mail to ESU counsel Lehman on October 18, 2007. (Doc. 94, ¶ 65).

***8** There were no known eyewitnesses to the improper conduct alleged by Bernard against Isaac Sanders aside from Bernard and Isaac Sanders. (Doc. 94, ¶ 66).

Isaac Sanders disputed Bernard's allegations of sexual harassment and assault but did not dispute most of Bernard's allegations concerning his assistance and gifts to Bernard. (Doc. 94, ¶ 67).

Isaac Sanders admitted that he processed a grant so that Bernard could enroll in classes for the summer and also told Breese that he secured a work-study position for Bernard in the Advancement Office. He further told Breese that he had helped Bernard with purchases, including prescription glasses. (Doc. 94, ¶ 68).

Bernard's written statements that he gave to Breese acknowledged that Bernard accepted assistance and gifts from I. Sanders after the date that Bernard alleged I. Sanders sexually assaulted him off-campus. (Doc. 94, ¶ 69), In admitting the above statement to be true, Plaintiffs further responded that Isaac Sanders provided these items, which were unsolicited by Bernard, to "groom and exploit Bernard." Plaintiffs further assert that "Bernard in fact rejected a gift of underwear that I. Sanders attempted to give him once he found the gift was from I. Sanders." (Doc. 109, ¶ 69).

On November 28, 2007, after having concluded his investigation, Breese sent a copy of his draft report to ESU counsel Lehman for review. (Doc. 94, ¶ 75).

Breese, in a cover memorandum to Lehman, wrote:

> Here is the summary of the final report. As the neutral investigator, it is difficult to ascertain if anything happened. Please review and advise. I would like to allow Bernard and Sanders to come in next week to review the report and, if they choose, to respond in writing to the written report. Thanks."
>
> (Doc. 95–19, 61:11–13)

When asked at his deposition what he meant by the above-quoted statement, Breese testified:

> A. Well, like I said, I was the neutral investigator, so I never assigned any blame or any guilt. It would be up to whoever-the vice-president of that department to really make that determination and ascertain if there was anything indicated.
>
> Q. But aren't you saying that it was difficult-based upon what you see it was difficult to determine whether anything happened?
>
> A. Well, from the way I-as facts as presented by that-you know, it was one person's word against another.
>
> Q. He said/he said?
>
> A. Exactly."
>
> (*Id.*, 61:18–25; 63:1–5).

Plaintiffs, in response to University Defendants' statement of fact with respect to Breese's deposition testimony quoted above, begin with a qualified denial. ("Denied as stated."). Further, Plaintiffs admit that Breese made these comments but assert that he made them "initially" before the completion of the investigation.

Given Breese's deposition testimony quoted above as to his cover memorandum and its meaning, there is no issue of material fact as to the content of Breese's statements.

***9** ESU counsel Lehman made "some minor grammatical edits to Breese's report." (Doc. 94, ¶ 78).

Thereafter, Breese informed Bernard and Isaac Sanders that his report was available for review

and Breese allowed them to review the report and comment on it. (Doc. 94, ¶ 79). Both Bernard and Isaac Sanders reviewed the report and submitted comments which Breese incorporated into the final report that he ultimately submitted to Dillman. (Doc. 94, ¶ 80).

Breese, in his deposition testimony, acknowledged that Victoria Sanders did not give him her opinion as to the merits of the case initially when Plaintiff Bernard was about to file his complaint. (Doc. 94, ¶ 81; Doc. 109, ¶ 81).

Plaintiffs go beyond this admission in paragraph 81, asserting that Victoria Sanders directed Breese to only investigate the sexual harassment issue and not to inquire into the financial aspects of the case. Plaintiffs further assert that Victoria Sanders and Lehman directed Breese only to interview Bernard, Isaac Sanders, and any witnesses those two individuals specifically identified. They further assert that as a result, Breese was "unable to interview other employees or students in the Advancement Office." Lastly, Plaintiffs assert that Victoria Sanders and Lehman "strictly limited the scope of Breese's investigation into the specific allegations in Bernard's complaint, causing him to omit relevant evidence from the investigation, including the e-mail of the stick figure with a gas pump inserted in his rectum." Breese testified that Victoria Sanders turned over to him an e-mail from Isaac Sanders which she described as a "stick figure with a gasoline pump up someone's rectum." (Doc. 95–19; 37:4–18). Breese testified that the picture described above had been taken from Isaac Sanders' computer and given to him by Victoria Sanders. He testified that Victoria Sanders said that the e-mail was "inappropriate." (*Id.*, 2–19).

Breese testified at his deposition that ESU counsel Lehman never hindered or prevented him from performing his investigation:

> Q. Did he ever hinder or prevent you from performing your investigation?
>
> A. No."
>
> (Doc. 95–19; 112:24–25; 113:1).

In their Statement of Material Facts, ¶ 83, University Defendants assert as fact that Dillman knew nothing about the details of Breese's investigation until he received his final report on December 10, 2007. University Defendants further assert as fact that other than the initial phone call from Victoria Sanders in August of 2007, "Dillman never talked to Arthur Breese or Victoria Sanders about Bernard's allegations."

Plaintiffs, in response, resort to the "denied as stated" qualified denial, Then, after asserting matters which they submit were within Dillman's knowledge, but are not responsive to University Defendants' assertion that Dillman knew nothing of the details of Breese's investigation until he received Breese's final report, state: "It is admitted that Dillman never talked to Arthur Breese about his investigation until the investigation was concluded ."

***10** The parties agree that Breese acknowledged that Victoria Sanders never told him that she was updating Dr. Robert Dillman on the investigation and never mentioned to Breese anything about the possible impact of his investigation on President Dillman. (Doc. 94, ¶ 84).

Breese further acknowledged that he did not discuss the investigation with Dillman while Breese was conducting his investigation. (Doc. 94, ¶ 85), Breese's final report was submitted to Dillman on December 10, 2007 and, after he submitted his final report, he had a brief telephone conversation with Dillman. (Doc. 94, ¶¶ 86, 87).

Plaintiffs dispute the University Defendants' assertion that before Bernard's complaint on August 24, 2007 regarding Isaac Sanders, "[i]t was ESU's practice not to accept anonymous letters as a basis for an investigation into discrimination or harassment." (Doc. 94, ¶ 88) Plaintiffs, however, in further response, state: "Breese stated it was ESU's practice not to follow up on accusations made **solely** through anonymous letters." (Emphasis in the original).

Breese himself testified that during his investigation of the Bernard complaint, he heard nothing about anonymous letters being sent out and received no anonymous letters in connection with his investigation from Victoria Sanders which related to

his investigation into the Bernard complaint. (Doc. 95–19; 63–25; 65:1–20).

On October 1, October 10 and November 6, 2007, ESU received three anonymous letters addressed to Defendant Dillman. On November 15 and November 20, 2007, ESU received copies of two more anonymous letters, both dated November 1, 2007. One of these two letters had been addressed to ESU's Council of Trustees and the other had been addressed to a former ESU Foundation Board member. All of the anonymous letters were received after Bernard made his initial allegations to Breese in August of 2007. (Doc. 94, ¶ 91).

The first letter, dated September 28, 2007, made no reference to any alleged sexual improprieties involving Isaac Sanders. (Doc. 94, ¶ 93).

The four remaining letters that referred to Isaac Sanders make various accusations. However, they do not provide details of Isaac Sanders' alleged misconduct, including dates, times, names of witnesses or any victim, except that Plaintiff Bernard is mentioned once by his first name. Nor do these letters state the source of the writer's information, any information indicating that the source was reliable, or how the writer became aware of the information provided. (Doc. 94, ¶ 94). The letters contained a threat to send the letters to the ESU Council of Trustees, law enforcement and the press if Defendant Dillman did not take action. The letters were in fact sent to the aforementioned parties. (Doc. 94, ¶ 95).

The anonymous letters consist of a letter dated September 28, 2007 to Dr. Dillman (Doc. 95–13, p. 21), which is directed at then-ESU Foundation employee, Vincent Dent; a letter dated October 10, 2007 directed to Dr. Dillman, which makes reference to Isaac Sanders' "assignations" and "gay liaisons" with students (Doc. 95–13, p. 24); and an undated letter which bears a receipt stamp of November 6, 2007 to Dr. Dillman, which references both Dent and Isaac Sanders and notes that "people are disgusted with those that use their position to gain sexual favors from young people (even if they are slightly over 18)." This letter makes reference to unidentified students and characterizes Isaac Sanders as a "full fledged predator"; an additional letter dated November 1, 2007, addressed to Dr. Dillman, wherein the writer, with respect to Isaac Sanders, observes only that: "You have your hands full with Sanders...." Finally, a similar letter was sent addressed to former Foundation Chair William Cramer.

***11** Because one of the anonymous letters stated that Isaac Sanders had been arrested, Dillman asked ESU's Chief of Police, Robin Olson, to review campus police records and to check with Stroud Area Regional Police Department to see if Isaac Sanders had been charged with anything. (Doc. 94, ¶ 97).

Olson, it is admitted by Plaintiffs, did not find arrest records. (Doc. 94, ¶ 98 [5]).

5 Plaintiffs' response to Statement of Material Facts, ¶ 98, begins with the phrase, "Denied as statedf,]" but then admits that Olson did not find arrest records.

The parties agree that some of these letters were turned over to authorities, (Doc. 94, ¶ 99).

On January 7, 2008, Dillman sent his written decision to Bernard. (Doc. 94, ¶ 107). Dillman wrote that he found that there was "insufficient evidence to support the allegation of sexual harassment." (Doc. 94, ¶ 108). Plaintiffs, while admitting this fact, assert that "Dillman based his decision on an investigation that Breese stated 'was not thorough'." Plaintiffs further assert that "there is substantial evidence that Dillman dismissed the complaint to protect I. Sanders' and Dillman's reputations." Plaintiffs make reference to Charmaine Clowney, Esquire, former PASSHE Assistant Vice Chancellor for Diversity and Multicultural Affairs, and assert that "V. Sanders told her that ESU's administration wanted to prevent Dillman from receiving another vote of no confidence from the faculty after he had received two such votes, the last in 2006." Plaintiffs then assert, "[k]eeping the investigation strictly confidential and dismissing the complaint protected Dillman and his reputation." (Doc. 109, ¶ 108). A review of the Verified Statement With Exhibit of Charmaine Clowney (Doc. 110–31) and the attachment to her statement of a newspaper article containing an interview she gave to the *Pocono Record*, published on March 15, 2009, shows Clowney criticized East Stroudsburg University and the Pennsylvania State

System of Higher Education in general for failure to track complaints of discrimination, including sexual discrimination and sexual harassment. She stated that she "worried" about the qualifications of ESU's Social Equity Director, Victoria Sanders. She then indicated that she was "perturbed by statements she heard Victoria Sanders make twice." The newspaper article attached to the Verified Statement of Clowney then states:

> According to Clowney, Victoria Sanders said that the purpose of EEO policy was to protect faculty and administration from being subjected to student complaints.
>
> Clowney contends that Victoria Sanders explained to her that ESU administration wanted to prevent Dillman from receiving another vote of no confidence from the faculty. He received two such votes, the last in 2006. Keeping faculty and administration free from complaints was a way to prevent that, Clowney said of Victoria Sanders."
>
> (Doc. 110–31, p. 12).

On this basis, Plaintiffs assert, as noted above, "there is substantial evidence that Dillman dismissed the complaint to protect I. Sanders' and Dillman's reputations."

After Defendant, Kenneth Borland, assumed the position of Acting President, he had a series of meetings with staff from the Advancement Office. These meetings involved complaints about Isaac Sanders' management of the Advancement Office and alleged mistreatment of full-time staff. Borland met separately with John Ross, Vincent Dent, Isaac Sanders, and Bob Kelley on January 4, 2008. Borland met with Carolyn Bolt on January 14, 2008. (Doc. 94, ¶¶ 109–111). Borland also met at separate times with Teresa Werkheiser, John Shewchuck and Christina Mace. On January 16, 2008, Borland met with Tanya Williams, (Doc. 94, ¶¶ 115, 116). Plaintiff Bernard's allegations against Isaac Sanders were not discussed at any of these meetings and nor were any other student complaints of sexual harassment or sexual assault by Isaac Sanders discussed. (Doc. 94, ¶ 117).

***12** University Defendants assert that "no member of the Advancement Office who has been deposed in this case had ever witnessed any improper conduct between Isaac Sanders and any student in the Advancement Office." (Doc. 94, ¶ 118). Plaintiffs respond with "[d]enied as stated." (Doc. 109, ¶ 118). In support of such denial, the Plaintiffs state: "Werkheiser stated that she found it 'odd' that I. Sanders would 'take home' the international students (deposition citations omitted). Werkheiser also testified that Drame told her that Plaintiff Homas came to her and told her about I. Sanders' sexual assaults of him." (*Id.*). Plaintiffs also make reference to the Verified Statements of Dent and LaShawne Pryor. Thus, Plaintiffs have not addressed by an admission or denial the specific assertion of fact in paragraph 118.

Plaintiffs, in denying that Defendant Borland was not aware of Bernard's allegations against Isaac Sanders until mid-January of 2008 (Doc. 94, ¶ 120), base their denial on statements that "Victoria Sanders provided a copy of the Breese report to Borland, on or about January 3, 2008, when Borland took office as Acting President, and prior to January 7, 2008...." Plaintiffs also assert that Borland, prior to becoming Acting President, "knew of allegations and rumors regarding I. Sanders' sexual improprieties, was aware that there was an investigation pending against I. Sanders, and heard other rumors about the anonymous letters but did not see them until later," citing to Borland's deposition. Plaintiffs also assert that Borland, in October of 2007, "heard rumors on campus that I. Sanders had been stopped by the police near Stroudsmoor and was found with a man," again citing to Borland's Deposition. Whether these assertions present a sufficient basis for a denial of Defendants' assertion that Borland was not aware of Bernard's allegations against Isaac Sanders until mid-January, 2008 is addressed in the analysis portion of this Memorandum.

Plaintiff Bernard, on March 26, 2008, initiated the complaint filing process with the Pennsylvania Human Relations Commission. ESU was not served with the PHRC Complaint until July, 2008 and, thereafter, ESU filed an Answer with the PHRC denying liability. (Doc. 94, ¶¶ 121–123).

PHRC, by letter dated March 16,2009, notified ESU that it had reviewed Bernard's complaint of discrimination and determined that it should be closed

administratively and gave Bernard notice of his right to sue. (Doc. 94, ¶ 124).

On June 8, 2008, the *Pocono Record* ran a story that additional students were coming forward claiming that Isaac Sanders had sexually harassed or abused them. (Doc. 94, ¶ 125).

Dillman placed Isaac Sanders on administrative leave, after discussing the matter with University counsel and Thomas Krapsho, the State System's Vice–Chancellor for Human Resource and Labor Relations. The decision to place Isaac Sanders on administrative leave was made jointly between Dillman and Krapsho. (Doc. 94, ¶ 126).

***13** While admitting these facts, Plaintiffs also assert that "Dillman failed to place I, Sanders on administrative leave until almost a year after Bernard made his complaint, even though, when allegations had been made against Julie Anne Simpson, the women's basketball coach, Dillman had directed that Simpson be placed on administrative leave until the investigation was complete because he might 'have to deal with Coach Simpson in follow-up activities surrounding these charges.' " (Doc. 109, ¶ 126).

At this time, ESU hired an outside law firm to conduct an investigation into the allegations reported in the *Pocono Record* (Doc. 94, ¶ 27) and, by letter dated July 1, 2008, Isaac Sanders was placed on administrative leave "effective immediately." (Doc. 94, ¶ 128). The letter placing Isaac Sanders on leave instructed him that, "absent prior approval by Dillman or Victoria Sanders, he was not permitted on campus, nor could he contact any University employee, student, donor or potential donor."

While admitting these facts, Plaintiffs further respond that despite the explicit instructions prohibiting Isaac Sanders from returning to campus or from contacting any students, Isaac Sanders did attempt to contact Plaintiff Anthony Ross multiple times, caused Bernard to be threatened and, through Dent, attempted to intimidate Salter and dissuade him from pursuing his claims against Isaac Sanders. (Doc. 109, ¶ 128).

In paragraph 129 of Defendants' Statement of Material Facts, Defendants assert that during the summer of 2008, ESU was notified through Bernard's counsel that five former ESU students were going to bring claims against the University. Plaintiffs admit that only five former students were the subject of unwanted sexual harassment and assault by Isaac Sanders and that three of the students who initially joined in this suit with Bernard, William A. Brown, III, Dejean Murray and Jerry Salter had their claims dismissed as untimely.

Of the remaining Plaintiffs, Homas alleges that he was sexually assaulted by Isaac Sanders off campus in the Fall of 2004 while a graduate student and that he was again sexually assaulted by Isaac Sanders at the end of the Spring Semester 2005. (Doc. 94, ¶¶ 130, 131). Homas left ESU after the Spring Semester of 2005 and, when he returned to ESU for the summer session of 2006, he accepted a work-study position with Isaac Sanders in the Advancement Office. (Doc. 94, ¶ 132). Homas then alleges that in the spring of 2007, he was sometimes tricked and at other times forced by Isaac Sanders into performing sexual acts on numerous occasions. (Doc. 94, ¶ 133).

Plaintiffs deny that Homas failed to report the sexual assaults to ESU prior to reporting it to his attorney in the summer of 2008, Plaintiffs, in support of this denial, assert that Homas would hide in the office of Michelle Drame, who was an ESU employee in the Advancement Office and that, from time to time, Homas mentioned to Drame that Isaac Sanders was Intimate with student workers and staff and that there were Inappropriate things going on sexually' [Homas Dep. 172:2–175:25, 177:16–25, 178:4–182:5]." (Doc. 109, ¶ 134).

***14** Plaintiff Anthony Ross alleges that he was subjected to unwelcome touching on approximately three occasions between May, 2006 and January, 2007, He further alleges that Isaac Sanders also made unwelcome comments during that time. (Doc. 94, ¶ 135).

Plaintiff Ross did not report his allegations to ESU until July of 2008, after Isaac Sanders was placed on leave. (Doc. 94, ¶ 138).

William A. Brown, III, whose complaint in this matter was dismissed, never reported his allegations to ESU

until after he came forward in the summer of 2008 through Attorney Murray. (Doc. 94, ¶ 141).

Dejean Murray, whose complaint in this matter was dismissed, never reported his allegations to ESU until after he came forward in the summer of 2008 through Attorney Murray. (Doc. 94, ¶ 144).

Jerry Salter, whose complaint in this matter was also dismissed, never reported his allegations to ESU until he came forward in the summer of 2008 through Attorney Murray. (Doc. 94, ¶ 147).

ESU terminated Isaac Sanders' employment in the following sequence:

Dillman received the investigation report from the outside law firm on September 26, 2008.

Following receipt of the report, Dillman conducted a pre-disciplinary conference with Isaac Sanders on October 3, 2008.

On October 22, 2008, Dillman sent Isaac Sanders a letter stating that his employment with the University was being terminated for cause. The letter set forth the reasons for the termination, including sexual advances towards students. The termination was effective December 21, 2008. (Doc. 94, ¶¶ 148–150).

Since August 24, 2007, Plaintiff Bernard admits that there was no further unlawful touching by Isaac Sanders. Bernard, however, asserts attempts by Isaac Sanders to intimidate him. (Doc. 109, ¶ 151).

Plaintiff Homas denies that there have been no subsequent incidents of sexual harassment by Isaac Sanders since May of 2007, asserting that Isaac Sanders, after his dismissal from ESU, approached Homas and his son on or about June of 2009, and "stood close to Homas and tried to touch him as Sanders laughed." (Doc. 109, ¶ 152).

Defendant Ross denies that aside from Isaac Sanders' attempts to hug him in May of 2008, there have been no incidents of sexual harassment by Sanders since early 2007. In support of this denial, Ross testified that Isaac Sanders continued to call him and send him text messages through October of 2008. (Doc. 109, ¶ 153).

II. STANDARD OF REVIEW

Through summary adjudication, the court may dispose of those claims that do not present a "genuine issue as to any material fact ." FED. R. CIV. P. 56(a). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c); *Turner v. Schering–Plough Corp.*, 901 F.2d 335, 340 (3d Cir.1990). "As to materiality, ... [o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

***15** The party moving for summary judgment bears the burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317,323,106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once such a showing has been made, the non-moving party must offer specific facts contradicting those averred by the movant to establish a genuine issue of material fact. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S.Ct. 3177, 111 L.Ed.2d 695 (1990). Therefore, the non-moving party may not oppose summary judgment simply on the basis of the pleadings, or on conclusory statements that a factual issue exists. *Anderson*, 477 U.S. at 248. Rather, the opposing party must point to a factual dispute requiring trial and the district court "may limit its review to the documents submitted for the purposes of summary judgment and those parts of the record specifically referenced therein." *Carmen v. San Francisco Unified School Dist.*, 237 F.3d 1026, 1030–1031 (9th Cir.2001); *see also Forsyth v. Barr*, 19 F.3d 1527 1527, 1537 (5th Cir.1994). "Inferences should be drawn in the light most favorable to the non-moving party, and where the non-moving party's evidence contradicts the movant's, then the non-movant's must be taken as true." *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir.1992), *cert. denied* 507 U.S. 912, 113 S.Ct. 1262, 122 L Ed.2d 659 (1993).

III. ANALYSIS

A. Count I–Title IX

In relevant part, Title IX provides that "no person ... shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance ." 20 U.S.C. § 1681(a). Title IX can also be enforced through a private right of action wherein monetary damages are available. *Gebser v. Lago Vista Indep. School Dist.*, 524 U.S. 274, 281, 118 S.Ct. 1989, 158 A.L.R. Fed. 751 (1998) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L Ed.2d. 560 (1979); *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028, 117 L Ed.2d 208 (1992)). In imposing a duty upon a funding recipient not to discriminate on the basis of sex, Title IX encompasses sexual harassment, including when a teacher "sexually harasses and abuses a student." *Franklin*, 503 U.S. at 75.

Under Title IX, a plaintiff cannot recover damages "unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual knowledge of, and is deliberately indifferent to, the teacher's misconduct." *Gebser*, 524 U.S. at 277. Accordingly, in a case such as this, under Title IX, to proceed on a claim against an educational institution, the student must establish a prima facie case demonstrating that (1) he was subjected to a sexually hostile environment or *quid pro quo* sexual harassment; (2) an "appropriate person", who at minimum had authority to take corrective measures on the district's behalf, was given actual notice; and (3) the institution's response to the misconduct or harassment amounted to "deliberate indifference." *Klemencic v. Ohio State University*, 263 F,3d 504, 510 (7th Cir.2001); *Morse v. Regents of the Univ. of Colorado*, 154 F.3d 1124, 1127–28 (10th Cir.1998) (citing *Gebser*, 524 U.S. at 289–91).

***16** A person with authority to take corrective actions is a person with the "supervisory power over the offending employee," including the power to discipline the employee and take action to end the abuse in question. *Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648, 660 (5th Cir.1997).

Recovery based on the principles of *respondeat superior* or constructive notice "frustrate[s] the purposes" of Title IX, and therefore the school official must have actual knowledge in order for the plaintiff to prevail. *Gebser*, 524 U.S. at 285. Actual notice necessitates more than a simple report of inappropriate conduct, however the standard "does not set the bar so high that a school district is not put on notice until it receives a clearly credible report of sexual abuse from the plaintiff-student." *Escrue v. Northern OK College*, 450 F.3d 1146, 1154 (10th Cir.2006) (quoting *Doe v. School Administrative Dist. No. 19*, 66 F.Supp.2d 57, 62 (D.Me.1999)). Therefore, while actual knowledge does not require absolute certainty that harassment has occurred, there must be more than an awareness of a mere possibility of the harassment. *Bostic v. Smyrna School Dist.*, 418 F.3d 355, 360 (3d Cir.2005). The educational institution has ' "actual knowledge' if it knows the underlying facts, indicating sufficiently substantial danger to students, and was therefore aware of the danger." *Id.* at 361.

Upon a showing of actual knowledge, Plaintiff must show that the funding recipient exercised deliberate indifference. A funding recipient is "deliberately indifferent" when the recipient's response to the harassment, or lack of response, is "clearly unreasonable in light of the known circumstances." *Davis Next Friend LaShona D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 648–643, 119 S.Ct. 1661, 143 L Ed.2d 839 (1999). Deliberate indifference requires an "official decision by the recipient not to remedy the violation." *Gebser*, 524 U.S. at 290. This is an exacting and strict standard requiring that the official disregard a known or obvious consequence of his action or inaction. Therefore, the appropriate remedial action necessarily depends on "the particular facts of the case-the severity and persistence of the harassment, and the effectiveness of any initial remedial steps." *Rosa H.*, 106 F.3d at 661.

Furthermore, deliberate indifference incorporates a causation requirement. The Title IX funding recipient's deliberate indifference must subject the students to further harassment, to wit, the indifference must "cause students to undergo harassment or make them

liable or vulnerable to it." *Davis,* 526 U.S. at 644–645 (internal quotations omitted). This harassment must take place in a context subject to the school's control. *Id.* at 645. Therefore, the school is only liable when "the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs." *Id.* This causation element results in a requirement that harassment, or the likelihood or vulnerability of a student to be subjected to it, must occur subsequent to an official's decision to not remedy a known violation.

***17** The fact that the appropriate person's initial response does not remedy or prevent the harassment, or that the school does not use a particular method to remedy or prevent the harassment, does not provide sufficient grounds for liability. *Baynard v. Malone,* 268 F.3d 228, 236 (4th Cir.2001). While "a minimalist response is not within the contemplation of a reasonable response," the absence of a more aggressive action does not amount to deliberate indifference. *Escrue,* 450 F.3d at 1155 (quoting *Vance v. Spencer County Pub. School Dist,* 231 F.3d 253, 260 (6th Cir.2000)). Consequently, the funding recipient is not required to "engage in [a] particular disciplinary action." *Davis,* 526 U.S. at 648.

1. Quid Pro Quo Sexual Harassment

To establish a prima facie case against an educational institution under Title IX, a plaintiff must first show the presence of a genuine issue of material fact as to whether he was subjected to *quid pro quo* sexual harassment or a sexually hostile environment. *Klemencic,* 263 F.3d at 510. Here, Plaintiffs allege a claim of *quid pro quo* harassment by I. Sanders toward Bernard, Homas, and A. Ross. (Doc. 107–2, at 51). Plaintiffs have not claimed, nor argued, that there is evidence of a sexually hostile educational environment, asserting instead that whether the conduct that they have alleged rises to the level of a hostile educational environment is "plainly irrelevant." (*Id.* at 52). Therefore, it is unnecessary for the Court to analyze whether a hostile educational environment claim is viable given Plaintiffs' statements that "the evidence in the record here plainly states a claim of *quid pro quo* harassment for all three Plaintiffs" and that "it is plainly irrelevant whether or not the conduct alleged rises to the level of a hostile educational environment." (*Id.* at 51, 52).

As Plaintiffs and Defendants correctly state, to establish a *quid pro quo* sexual harassment claim, the plaintiff must show that (1) he belongs to a protected group; (2) he was subject to unwelcome sexual harassment; (3) the harassment was based on his sex; and (4) that submission to, or rejection of, the sexual harassment resulted in a tangible educational action. *E.N. v. Susquehanna Twp. School Dist.,* No. 1:09–CV–1727, 2011 WL 3608544 at *13 (M.D.Pa.2010) (citing *Bonenberger v. Plymouth Twp.,* 132 F .3d 20, 27 (3d Cir.1997) (enumerating elements of a Title VII claim for *quid pro quo* sexual harassment)); *see also McGraw v. Wyeth–Ayerst Labs., Inc.,* 1997 WL 799437 at *3 (E.D.Pa. Dec. 1997) ("To make out a claim for *quid pro quo* sexual harassment, an employee must show that a supervisor conditioned tangible job benefits on the employee's submission to unwelcome sexual conduct or penalized [him] for refusing to engage in such conduct."). Under Title IX, the plaintiff must establish that a tangible educational action resulted from plaintiff's refusal to submit to the sexual demands. *Crandell v. New York College of Osteopathic Medicine,* 87 F.Supp.2d 304, 318 (S.D.N.Y.2000).

***18** Plaintiffs argue that "the record ... is replete with evidence of I. Sanders giving the Plaintiffs gifts, offering and/or providing them with jobs and paying the tuition for their classes, all as an inducement or in return for their submission to his sexual advances." (Doc. 107–2, at 52).

With respect to Bernard, I. Sanders did not deny most of Bernard's allegations concerning his assistance and gifts to Bernard and admitted that he processed a grant so that Bernard could enroll in summer classes. (Doc. 94, ¶¶ 67–68). According to I. Sanders, this help included money for food, prescription glasses, rent, and to have his car repaired. (Internal Investigation Memorandum, Doc. 95–13, Ex. 18, at 3–4). Nonetheless, in Bernard's letter in response to Breese's internal investigation report, Bernard stated that "[he] was not promised or told by Isaac Sanders that [he] would be given these things" (referring to money and food), that he "never requested anything from [I. Sanders]," and that he told I. Sanders that

paying for his eyeglasses "was not necessary." (Doc. 95–13, Ex. 18, at 1–2). Bernard also claimed that when I. Sanders attempted to fondle him in the car, Bernard rebuffed his advances, that he refused to accept underwear from I. Sanders, told I. Sanders not to send him e-mails such as the picture depicting a stick-figure and gas pump, and that he "jerked back" when I. Sanders reached over to touch Bernard's stomach in the Advancement Office kitchen, and then pulled away when I. Sanders attempted to touch his private parts on that same occasion. (Internal Investigation Memorandum, Doc. 95–13, Ex. 18, at 3–4).

Plaintiffs also rely on Breese's "finding that there were, in fact, claims of *quid pro quo* harassment claims." (*Id.*). However, Breese only stated in his deposition that he "thought, maybe, *quid pro quo* would come in" and therefore wanted more latitude to investigate financial matters, but admitted that Bernard never alleged *quid pro quo* and never suggested to Breese that he had given sexual favors in exchange for things that I. Sanders was doing for him. (Dep. of Arthur Breese, at 19, 137–138).

With respect to A. Ross, in June, 2006, I. Sanders allegedly put "his hands in [Ross] upper thighs next to [Ross'] genitals" while telling Ross that he "[would] take care of everything." (Stmt. of Anthony Ross, at 5–6). During this encounter, I. Sanders also hugged Ross and rubbed his back "down towards [Ross] butt." (*Id.* at 6). In July or August, 2006, I. Sanders allegedly offered Ross a graduate assistantship working for him in the Advancement Office, telling Ross that "all [Ross] had to do was pretty much get paperwork stuff done and [I. Sanders] was going to pretty much take care of the rest...." (Dep. of Anthony Ross, at 25–26, 79–81). Ross rejected this offer. Later that year, while in I. Sanders' office, I. Sanders rubbed Ross' back, leaned his body against Ross' back, and put his genitals against Ross' shoulder. (*Id.* at 8). Ross further alleges that I. Sanders also made unwelcome and inappropriate comments during that time. (Stmt. of Anthony Ross, at 5–8). I. Sanders also paid Ross' outstanding tuition bill to the University in September, 2007. However, I. Sanders did not tell Ross about this payment. I. Sanders allegedly attempted to have further contact with A. Ross after this time, including an allegation that I. Sanders attempted to hug Ross when Ross went to I. Sanders' office to pick up a reference from him in May, 2008.

***19** Homas returned to ESU to complete his graduate degree in the Summer of 2006. Homas claims that, in Spring, 2007, while working in the Advancement Office, I. Sanders would regularly trick Homas into performing oral sex on him in I. Sanders' office. (Dep. of Timotheus Homas, at 118, 132–134). [6]

6 While Plaintiffs broadly assert that "the evidence in the record here plainly states a claim of *quid pro quo* sexual harassment for all three Plaintiffs," they do not cite to any specific instances. (Doc. 107–2, at 51). In turn, University Defendants assert that "there is no evidence in this record supporting a quid pro quo claim by either Bernard or Ross." (Doc. 120, at 25). University Defendants previously admitted that Homas' allegations, if true, could meet the Title IX requirement of a sexually hostile work environment. (Doc. 102, at 28). It is unclear whether University Defendants also believe that Homas could meet the requirement to establish *quid pro quo.*

Plaintiffs' specific claims of sexual advances by I. Sanders, in conjunction with I. Sanders' admissions that he gave money and gifts to Bernard, paid A. Ross' tuition bill, and provided A. Ross with a job reference, raise triable issues of fact as to the presence of *quid pro quo* sexual harassment. However, while the Court recognizes the presence of these factual issues as to each Plaintiff, the plaintiffs fail to establish the other elements necessary to establish liability on the part of the University Defendants under Title IX, specifically, actual notice and deliberate indifference. As the Court will discuss in detail when addressing these two elements, *infra*, with respect to Bernard, ESU immediately began an investigation of Bernard's official complaint; this investigation was in accordance with the University's Notice of Nondiscrimination; the investigation was not clearly unreasonable; and Dillman, as the appropriate person, considered the final investigation report and determined that it contained insufficient evidence to support Bernard's allegation of sexual harassment. Therefore, as a matter of law, the University Defendants were not deliberately indifferent as to Bernard. Further, as to Ross and Homas,

the two plaintiffs did not come forward until June, 2008. Consequently, with respect to Breese's investigation, there cannot be allegations of an inadequate investigation because Ross' and Homas' claims had not been presented at the time of this investigation and therefore University Defendants cannot be said to have had actual notice as to these claims. When Ross' and Homas' claims were presented in June, 2008, Dillman promptly acted on the allegations, resulting in I. Sanders' suspension in July, 2008, and subsequent termination in October, 2008.

Therefore, for the reasons that follow, while we find that there are triable issues of fact as to whether each Plaintiff was subjected to *quid pro quo* sexual harassment, these issues are insufficient to allow Plaintiffs to survive summary judgement. Bernard, Ross, and Homas must still demonstrate deliberate indifference and actual knowledge on the part of an appropriate person, specifically Dillman, in order to succeed on their Title IX claim. However, Plaintiffs' fail to show any triable issues that University Defendants had actual knowledge of I. Sanders' alleged sexual misconduct prior to Bernard's official complaint and that, upon receiving the complaint, their response was one of deliberate indifference. As to Homas and Ross, summary judgment must be entered for the University Defendants because when they were provided actual notice of these plaintiffs' complaints of sexual harassment at the hands of I. Sanders, there was a virtually immediate response resulting in I. Sanders' suspension in July, 2008, and termination in October, 2008.

2. Actual Knowledge

***20** Here, the University Defendants do not dispute that East Stroudsburg University receives federal financing assistance and is subject to Title IX's requirements. (Doc. 102, at 17). I. Sanders, as Vice–President for Advancement at ESU, head of the Advancement Office, and the CEO of the ESU Foundation, reported to Dillman and the Chair of the University Foundation Executive Committee. (Doc. 94, ¶¶ 7, 8). Therefore, as President of the University and I. Sanders' supervisor, Dillman clearly had the authority to take corrective measures on the University's behalf.

Plaintiffs contend that University Defendants, and specifically Dillman, had actual knowledge of I. Sanders' harassment, or at minimum, knowledge of underlying facts indicating a sufficiently substantial danger to the students. (Doc. 107–2, at 45–47). In support of this claim, they cite to several incidents and witness statements, none of which this Court finds sufficient to establish actual knowledge on the part of any University Defendant prior to Bernard's official complaint.

Plaintiffs first point to the deposition of former ESU police officer Randy Nelson. (Doc. 107–2, at 45). According to Nelson, other officers told him that I. Sanders was gay and related to him an incident that occurred prior to 2004 wherein I. Sanders was found in a car on a dark part of campus, late at night, with another man. [7] (Dep. of Randy Nelson, at 35–38; Stmt. of Randy Nelson, at 5). The mere fact that I. Sanders was in a car with another man cannot impute any level of knowledge to the University Defendants that I. Sanders was engaging in sexual harassment of male students.

[7] Plaintiffs erroneously state that I. Sanders was found with a "male student." There is no evidence in Officer Nelson's statement or deposition to support this contention. At most, Officer Nelson stated that the police "were trying to confirm whether [I. Sanders] was in this car with a student." (Stmt. of Randy Nelson, at 5). The statement does not say whether or not this was confirmed and Officer Nelson's deposition regarding this incident only refers to the other person in the car as "the other male." (Dep. of Randy Nelson, at 35).

Plaintiffs also state that Dent "admitted that he was aware of I. Sanders' long standing history of sexual misconduct with students." [8] (Doc. 107–2, at 4546). Dent's statement details his relationship with I. Sanders, and his eventual discovery of I. Sanders' bisexuality or homosexuality. Arguably, the most probative statements that Dent made that could be used to indicate that Dent had prior knowledge of a history of sexual misconduct on the part of I. Sanders are that "Dr. Sanders would often meet with grad students in his office behind closed and locked doors," that "it was not uncommon for Dr. Sanders to go out to

lunch or even dinner with these students" and that "there did come a time when [Dent] became aware that something was not quite right." (Stmt. of Vincent Dent, at 2). However, Dent also stated that "none of the students ever came to [him] with any concerns about Dr. Sanders" and admitted that he told Breese that he "had not witnessed any inappropriate behavior between Dr. Sanders and Frantz as [he] had not." (*Id.* at 3, 5). Dent's statements are therefore far cries from any evidence that he "was aware of I. Sanders' long standing history of sexual misconduct with students," or even that he had any knowledge of sexual acts taking place between I. Sanders and his students. [9]

8 While Plaintiffs' cite to Dent's Statement, p. 2, it is not clear to what part of this page they are referring. However, the Court will look to the entirety of Dent's statement for support of Plaintiffs' contention.

9 Even if Dent's statements could be construed to indicate a prior knowledge of sexual misconduct, I. Sanders was Dent's supervisor so that it does not appear on the record evidence that Dent was an "appropriate person" for the purpose of compliance with the "actual notice" requirement. Furthermore, there is no indication that Dent did tell, or attempted to tell, anyone of any concerns that he may have had. Therefore, it is impossible to impute any possible knowledge that he may have had to any of the University Defendants.

***21** "Most importantly" to the Plaintiffs is their assertion that;

> Dillman was personally aware of I. Sanders' improper conduct with students as early as 2006 ... [and] was told by numerous individuals, including senior staff members Bolt and Kelly (*sic*), and then head of Human Resources McGarry that I. Sanders was hiring unqualified young African American males outside of the university guidelines.

(Doc. 107–2, at 46). This statement does not present a sufficient denial or dispute of fact as to the University Defendants' assertion that Dillman had never been made aware of any student complaints against I. Sanders prior to the phone call by V. Sanders on August 26, 2007. (Doc. 102, at 21–22). The hiring of "young African American males outside of the university guidelines" is not indicative of "improper conduct with students." Nor can these hiring practices be reasonably construed as indicative of sexual misconduct. At best, as Bolt stated, I. Sanders' hiring practices may have been suggestive of "a double standard for people of different colors." (Dep. of Carolyn Bolt, at 80).

Finally, Plaintiffs assert that "I. Sanders had developed a reputation for engaging in inappropriate sexual relationships with students he employed in the Advancement Office." (Doc. 107–2, at 46). As such, Plaintiffs point to stories circulating in the Advancement Office that "I. Sanders was running a 'sex-ring' involving international students going back to 2003" and that these stories had reached employees in other offices, including Bernard's then-girlfriend Omwenga. (*Id.*). This argument raises multiple issues. First, there is no evidence that I. Sanders actually did run a 'sex-ring' or what specific activity, if any, occurred. Werkheiser, to whose deposition and verified statement Plaintiffs cite to support this contention, stated that she "was told in 2006 by Vicky Cooke, assistant to Isaac Sanders before Laurie Schaller that a custodian at ESU, knew and told her that Sanders was running a 'sex ring' involving international students back in 2003 or so." (Stmt, of Teresa Werkheiser, at 4). Furthermore, in response to a question regarding her understanding of Cooke's statement as to what I. Sanders was doing, Werkheiser merely responded that "I didn't really—. I mean, it's kind of self-explanatory with the word in it and, you know, some kind of ring. I really didn't know any details or anything...." (Dep. of Teresa Werkheiser, at 26). Second, Werkheiser's statement is unsubstantiated double hearsay at best. Third, absent any testimony from Omwenga, it is impossible to know what she specifically heard or knew. Moreover, she was under no duty to report such rumor-like statements to her supervisors and it does not appear that she did so. Finally, Plaintiffs present no evidence that, even if these rumors were circulating in the office, Dillman ever heard or was aware of the stories, or that it is even plausible to infer that unsubstantiated rumors can amount to notice for Dillman.

***22** In turn, University Defendants contend that the first time ESU became aware of a charge of harassment against I. Sanders was on August 23, 2007. (Doc. 102, at 21). It is undisputed that on this evening, Attorney Murray contacted ESU professor, Dr. Donna Hodge, to set up a meeting regarding Bernard's allegations, and that, on this same evening, Hodge subsequently asked V. Sanders to attend this meeting. (Doc. 94, ¶ 28). It is further undisputed that this was the first time that V. Sanders had heard of Bernard's complaint and that she did not notify Dillman about Bernard's allegation until August 26, 2007. (*Id.* at ¶¶ 28, 35). Given the fact that neither of the other plaintiffs, A. Ross and Homas, or the dismissed Plaintiffs, Brown, Salter, and Murray, came forward with their allegations prior to August 23, 2007, Bernard's complaint is indisputably the first official allegation of sexual harassment against I. Sanders by an ESU student.

University Defendants assert that before her conversation with Hodge, V. Sanders had not been aware of any student complaints of sexual harassment by I. Sanders. (Doc. 94, ¶ 29). Plaintiffs assert that "Plaintiff, Anthony Ross, states that Victoria Sanders' son, Lorenzo Sanders, who was a student at the University *probably* knew what was going on since he was friendly with another victim, Dejean Murray." (Italics added). (Doc. 109, ¶ 29). Plaintiffs further state; "In addition, it was well known on campus that I. Sanders repeatedly engaged in improper sexual conduct with ESU students." (*Id.*). These statements do not present a proper and sufficient denial of, nor create a triable issue of fact as to, the University Defendants' assertion that V. Sanders, prior to speaking with Hodge, was not aware of any student complaints of sexual harassment by I. Sanders.

Consequently, Plaintiffs have failed to present a triable issue of fact as to the University Defendants' assertions that Dillman had never been made aware of any student complaints against I. Sanders prior to the phone call by V. Sanders on August 26, 2007, and that V. Sanders had no knowledge of sexual harassment by I. Sanders of any ESU students prior to the phone call from Hodge on August 23, 2007. Further, while the exact time that Borland became aware of Bernard's allegations is in dispute, aside from Plaintiffs' broad assertions that Borland "knew of allegations and rumors regarding I. Sanders' sexual improprieties, was aware that there was an investigation pending against I. Sanders, and had heard other rumors about the Anonymous Letters ... [and] also heard rumors on campus that I. Sanders had been stopped by the police ... and was found with a man", there is no genuine issue of fact that Borland actually knew of any sexual harassment by I. Sanders, until early-January, 2008, at the earliest. (Doc. 102, at 22; Doc. 109, ¶ 120). There is an absence of any genuine issue of fact as to the University Defendants' assertion that Dillman, V. Sanders, and Borland, were not aware of any sexual harassment by I. Sanders prior to August 23, 2007. The Court determines that while the fact as to the timing of the University Defendants' actual knowledge is material, Plaintiffs have not put this fact at issue.

3. Deliberate Indifference

***23** Plaintiffs have also failed to present any genuine issue of fact as to the University Defendants' assertion that they were not deliberately indifferent to Plaintiffs' allegations. (Doc. 102, at 17–28). The parties put at issue whether (1) ESU's response to the plaintiffs' allegations caused the plaintiffs to be subjected to further harassment and inappropriate conduct after August 2007, and (2) the adequacy of the investigation conducted by Breese, and the reasons for Dillman's dismissal of Bernard's complaint.

a. *Whether Plaintiffs were subjected to further harassment and/or inappropriate conduct after August 2007.*

If the intentional acts of discrimination have ceased "by the time a supervisory employee ... learns of it, there is no liability in a private suit for that conduct based on some personal failure to take 'proper remedial action' thereafter," *Rosa H.*, 106 F.3d at 661. In response to University Defendants' contention that "nothing ESU did or failed to do subjected the plaintiffs to further discrimination," Plaintiffs argue that Dillman's failure to place I. Sanders on administrative leave, or take other action against him prior to his dismissal, allowed I. Sanders to continue his inappropriate conduct.[10] In support of this argument, Plaintiffs briefly detail allegations of contact and inappropriate conduct between Plaintiffs

and I. Sanders. In regard to A, Ross, Plaintiffs point to the undisputed fact that I. Sanders paid Ross' tuition without his knowledge or consent. (Doc. 107–2, at 47). I. Sanders also attempted to hug Ross on May 30, 2008, and contacted Ross via phone calls and text messages through October, 2008. [11] (*Id.* at 47–48). Plaintiffs also contend that in 2009, I. Sanders approached Homas and his son at a mall, stood close to him, and, laughing, tried to touch Homas. (*Id.* at 48). Finally, Plaintiffs argue that evidence has been presented that after Bernard filed his complaint, I. Sanders, Dillman, and other persons associated with I. Sanders, attempted to intimidate him. [12]

10 Plaintiffs broadly assert that ESU and Dillman failed to take any action against I. Sanders "until more than a year after Bernard formally complained of harassment." (Doc. 107–2, at 48). This is a misleading statement. ESU conducted an investigation immediately upon receiving Bernard's complaint. The adequacy of this investigation is discussed later in the opinion.

11 There is no evidence in the record that I. Sanders texted A, Ross after August 2007. However, the University Defendants acknowledge that I. Sanders did (1) attempt to hug Ross when Ross went to I. Sanders' office to pick up a reference from him in May 2008; (2) left a message on Ross" cell phone in July 2008; and (3) called Ross in October 2008, although it is unknown whether or not he left a message, and If he did so, the contents of that message. (Doc. 120, at 14–15). Plaintiffs fail to mention the attempted hug by I. Sanders in their Response to Defendants' Motion for Summary Judgment, in relation to the Title IX argument, but the Court assumes that they would intend that this incident be considered as possible evidence of inappropriate conduct and contact.

12 While each "[attempt] to intimidate [Bernard]" is not specifically stated in this portion of Plaintiffs' brief, the Court interprets the statement as refening to Bernard's allegations that in November 2007, I. Sanders, from afar, "made some gesture to throw up his hands and look over his glasses" while looking at Bernard, Defendant Dillman glared at Bernard when he saw Bernard in a campus store during the investigation, a July of 2008 phone call wherein Bernard received a death threat on his cell phone "from what sounded like an African–American man with an accident [*sic*]," and Bernard's belief that "the threat was coming from I. Sanders, Dent's daughter or someone else connected with the case." (Doc. 109, ¶ 45; Dep. of Frantz Bernard, at 183).

Plaintiffs' reliance on these incidents is insufficient to put at issue University Defendants' assertion that their actions, or inactions, did not cause Plaintiffs to suffer further harassment.

Post–August, 2007, with the exception of I. Sanders' payment of A. Ross' outstanding bill, each incident alleged by Ross occurred after he had officially graduated. Ross graduated May 9, 2008. (Doc. 94, ¶ 13). I. Sanders attempted to hug Ross, albeit on campus, on May 30, 2008, and called him in July and October of 2008. Furthermore, I. Sanders had been placed on leave at the time of the two phone calls, Given that Title IX protects against exclusion from participation in, or the denial of the benefits of any education program or activity receiving Federal financial assistance, a person no longer enrolled at ESU cannot be considered to fall within its protections. Additionally, the University suspended I. Sanders in July 2008 and specifically instructed him not to have any contact with any university employee or student; therefore there is no evidence that the University could have taken any further actions to prevent I. Sanders from contacting Ross. [13]

13 In response to University Defendants' Statement of Material Facts, wherein they state that "In late May 2008, Isaac Sanders tried to hug Ross, but Ross pushed himself away" (Doc. 94, ¶ 137), Plaintiffs inexplicably "den[y] as stated" and proceed to enumerate each of I. Sanders' alleged sexual acts and harassment against Ross, the large majority of which occurred prior to Bernard's official complaint. (Doc. 109, ¶ 137). Even more misleading is Plaintiffs' failure to include dates for any of the enumerated incidents that occurred prior to Bernard's allegations, in an apparent attempt to show misconduct by I. Sanders after August, 2007. Nonetheless, the Court interprets Plaintiffs' "denied as stated" to actually be an admission of Defendants' simple and straightforward statement.

I. Sanders paid A. Ross' outstanding $811 bill to the University in September, 2007. University

Defendants argue that this does not constitute harassment because Ross did not discover that the payment had been made until August, 2008. By this time, Ross had already graduated. This isolated payment, without more, is insufficient to establish further harassment. As University Defendants state, "while Ross may have justifiably resented Sanders for paying [the bill] without his knowledge, it can hardly be considered sexual harassment." (Doc. 120, at 16).

***24** I. Sanders' interaction with Homas in 2009 also fails to offer any factual support for Plaintiffs' arguments. The incident occurred off campus and I. Sanders was no longer employed by ESU at that time. It also occurred after Homas had been awarded his Masters degree. Therefore this event was completely outside of the University's control.

Bernard's allegation regarding a death threat in July, 2008, fails in two respects. First, Bernard said that the call:

> sounded like a African man has threaten me (*sic*) but because the mans (*sic*) accent was heavy and the reception was bad I could hardly hear what he was saying. To me it sounded like "death is coming your way" I said "what" and he said the same thing over and then hung up.

(Doc. 95–4, Ex. 9). Bernard also admitted that It could have been a crank call." (Dep. of Frantz Bernard, at 289). Given that Bernard could not relate the contents of the call with any certainty, and has not presented any evidence that the call is attributable to Dillman, I. Sanders, or anyone related to them, or that the call has any relationship to Bernard's complaint or the University's actions, the phone call's connection to this case presents nothing more than mere speculation. Second, the call took place after I. Sanders had been placed on leave from the University and told not to contact any university student or employee. Consequently, there is no evidence that University Defendants could have taken any action to prevent this threatening call, if it did indeed originate from I. Sanders, an assertion without any basis on the record.

Bernard argues that Defendant Dillman glared at him and that I. Sanders "made some gesture to throw up his hands and look over his glasses" from afar, and that these statements present issues of fact as to whether Bernard was subjected to further harassment or inappropriate conduct. However, as a matter of law, these isolated incidents cannot be deemed sufficient to create a genuine issue for trial to demonstrate retaliation and/or harassment. I. Sanders did not approach Bernard or attempt to speak with him in any way. There is no allegation that I. Sanders was following Bernard. As for Dillman, he stated that in August, 2007, he "didn't know who [Bernard] was." (Dep. of Robert Dillman, at 52). There is no indication in the record that he ever met Bernard prior to his final decision in January, 2008. Further, the statement that Dillman "glared at Bernard" does not carry with it a sufficient basis to infer that Dillman knew the identity of the person to whom he directed what Plaintiffs characterize as a glare.

Plaintiffs have failed to identify any discriminatory conduct after August, 2007, of which University Defendants had actual knowledge that could constitute sexual harassment. Therefore, Plaintiffs have not demonstrated any material issues of fact as to the existence or causation of any injuries as a result of alleged deliberate indifference.

b. *Whether the investigation conducted by Breese, and Diliman's reasons for dismissing Bernard's complaint, were adequate.*

***25** University Defendants detail the affirmative steps that V. Sanders, Dillman, and Breese took to address Bernard's complaint (Doc. 102, at 24–26): an investigation was begun soon after the initial complaint was filed, and Breese interviewed Bernard on August 28, 2007; Bernard was placed in a new work-study position in the Media Communications Department (*Id.*);[14] Breese notified I. Sanders of the allegations, obtained his written responses, and allowed Bernard to read and comment on I. Sanders' responses to the allegations; Breese interviewed I. Sanders as well as all witnesses identified by Bernard or I. Sanders;[15] and Breese sent a copy of his draft report to Lehman in November, 2007, and allowed Bernard and I. Sanders to review it and make comments which Breese subsequently incorporated

into the final report prior to sending it to Dillman. (Doc. 102, at 25–26). The University Defendants further state that upon learning of a local newspaper article in June, 2008, identifying five former students claiming that I. Sanders had harassed them, ESU placed I. Sanders on administrative leave, gave I. Sanders express written instructions that in the absence of approval by Dillman or V. Sanders, he was not allowed on campus or to contact any university employee, student, donor, or potential donor, and hired an outside law firm to conduct an investigation, which led to a pre-disciplinary conference between Dillman and I. Sanders, and ultimately I. Sanders' termination. (*Id.* at 26).

14 University Defendants' statement that they look immediate steps to separate Isaac Sanders from Bernard" requires explanation, (Doc. 102, at 24). By the time that Bernard filed his complaint, Bernard had already quit his job in the Advancement Office.

15 Bernard also gave Breese Omwenga's name. However, she refused to give a statement based, at least in part, on her attorney's advice,

Plaintiffs do not deny University Defendants' assertions regarding the steps that the University took prior to Dillman's final decision in January, 2008. Therefore, none of these facts are in dispute. Rather, the sufficiency of the investigation itself remains the only material fact at issue.

To establish that the University Defendants' actions subsequent to Bernard's complaint were inadequate, ESU's response must have been "clearly unreasonable." *Davis*, 526 U.S. 649. Here, Plaintiffs contend that the investigation was "clearly inadequate." (Doc. 107–2, at 49). Plaintiffs point to multiple facts in support of this argument: [16] Breese only interviewed Micah Ash, Vincent Dent, Bernard, and I. Sanders; V. Sanders and Lehman directed Breese how, and what to, investigate; [17] V. Sanders and Lehman limited the scope of the investigation by limiting Breese to the sexual harassment allegations and not permitting him to inquire into financial aspects of the case; Lehman reviewed and edited Breese's questions prior to Breese's interviews; V. Sanders and Lehman limited the scope of Breese's investigation to Bernard's specific complaint, causing Breese to omit relevant information about the case; [18] and Breese was not provided with any of the anonymous letters sent to ESU and its Trustees. (Doc. 107–2, at 49–50). Furthermore, Plaintiffs contend that Breese's failure to comply with the express requirements of ESU's Harassment and Discrimination Policy by not stating whether it was "more likely than not" that sexual contact had occurred resulted in an inadequate final report. (*Id.* at 50).

16 Plaintiffs broadly state that "Breeze (*sic*) was strictly limited by V. Sanders and Lehman as to who he could speak to, what evidence he could look into and even as to what questions he could ask." While Plaintiffs subsequently list several specific allegations, in an attempt to address every argument reasonably encompassed within Plaintiffs' statement, the Court has referred back to Plaintiffs' Counterstatement of Material Facts in their Memorandum of Law in Response to the Motion for Summary Judgment of Defendants East Stroudsburg University (Doc. 107–2, at 26–30), and supplemented the specific facts that it reasonably believes fall within Plaintiffs' statement.

17 To clarify, Breese testified that "[V. Sanders] told me that-and both her and Andy Lehman, I should say, both told me how to proceed. You know, 'Bring in Frantz. Have him tell you exactly what took place. Take notes.' " (Dep. of Arthur Breese, at 15–16).

18 In particular, the plaintiffs object to the omission of an email from I. Sanders to Bernard, depicting a stick figure with a gasoline pump in his rectum. (Doc. 107–2, at 29). However, it is worth noting that this email was provided to Breese by V. Sanders, not Bernard or I. Sanders. (Dep. of Arthur Breese, at 37–38).

***26** Analysing each of Plaintiffs' contentions in turn regarding the sufficiency of the University's investigation, it is clear that, while certain facts mentioned are material in an analysis to identify triable issues of deliberate indifference, none of these facts have been controverted by Plaintiffs and/or reach the strict unreasonableness standard set forth by the Supreme Court in *Davis.*

The University Notice of Nondiscrimination, instructing the Office of Diversity & Equal

Opportunity how to conduct an investigation into a complaint, states that the investigation "at a minimum shall include interviews with all complainants and respondents." (Notice of Nondiscrimination, at 10). There is no requirement that the Director, Breese in this case, must interview other people, particularly individuals not named by either Bernard or I. Sanders, or undertake an investigation of his own as to other possible witnesses. In all of Breese's prior investigations and reports, approximated at 20 to 25, he had never interviewed anyone who was not a party to the complaint, either as the complainant or the accused, or someone not identified by one of the parties to the complaint. (Dep. of Arthur Breese, at 142–143). There is also no indication that the University has any other interview procedures depending on the scope and/or gravity of the matters under investigation. Therefore, the decision to only interview Ash, Dent, Bernard, and I. Sanders did not depart from the accepted procedures.

There is no dispute that V. Sanders and Lehman were involved in the I. Sanders investigation. Plaintiffs raise multiple issues regarding the conduct of V. Sanders and Lehman, including that they directed Breese how, and what, to investigate and limited the scope of the investigation by restricting Breese to only the sexual harassment allegations, specifically only to Bernard's complaint, causing Breese to omit relevant information about the case. Breese stated that V. Sanders and Lehman "both told me how to proceed. You know, 'Bring in Frantz. Have him tell you exactly what took place. Take notes." ' (Dep. of Arthur Breese, at 15–16). Breese also admitted that he felt V. Sanders was controlling the investigation, step by step. (*Id.* at 32). Further, it is undisputed that Breese was told not to investigate the financial aspects of the case and that a separate investigation into financial improprieties was supposedly taking place. However, Plaintiffs fail to show how V. Sanders and Lehman's instructions were inappropriate. There is no evidence that either person was acting in bad faith or attempting to influence Breese's investigation or findings,[19] nor that their issuance of instructions was outside the scope of V. Sanders' and Lehman's duties. As to the separation of financial and sexual allegations, Breese stated that he was concerned about this limitation because some of Bernard's allegations could have been indicative of *quid pro quo* sexual harassment. (*Id.* at 19). Yet, Breese did address the financial allegations pertinent to Bernard's claims. In Breese's Internal Investigation sent to Dillman, Breese acknowledged that I. Sanders stated that he "processed a grant for funds to be transferred in the amount of $1000.00 to Bernard's university account," and gave Bernard money for food, prescription glasses, rent, and to have his car repaired. (Internal Investigation Memorandum, Doc. 95–13, Ex. 18, at 34). Therefore, Plaintiffs have not established the extent to which, if any, a further investigation by Breese into I. Sanders' financial transactions would have provided additional probative information in relation to the sexual harassment allegations.

19 In fact, in response to a question by I. Sanders' attorney, asking whether Lehman "ever hinder[ed] or prevented] [Breese] from performing [the] investigation", Breese stated that he did not. (Dep. of Arthur Breese, at 112–113).

***27** Plaintiffs' contention regarding Breese's omission of information purportedly relevant to the case appears to revolve around the omission of an email from I. Sanders to Bernard, depicting a stick figure with a gasoline pump in his rectum. (Doc. 107–2, at 29). This picture was originally mentioned by Bernard in his initial interview with Breese. (Doc. 95–13, Ex. 18, at 2). However, this email was provided to Breese by V. Sanders, not Bernard or I. Sanders. (Dep. of Arthur Breese, at 37–38). Breese stated that the reason the picture was not included in the report was because "it was not presented to [him] by the respondent or the complainant" and that "it was introduced by [his] supervisor, Victoria Sanders, and it was being addressed with her and Dr. Dillman." (Dep. of Arthur Breese, at 41, 113–114). The fact that V. Sanders provided the picture to Breese undercuts the plaintiffs' claims that V. Sanders was limiting the scope of Breese's investigation and withholding important information. Nor is there evidence in the record how the inclusion of the picture in the final report would have affected Dillman's final decision, given that Dillman was already aware of the picture.

It is once again undisputed that Lehman reviewed Breese's questions. According to Breese, Lehman "went over the questions and some of them-he felt as though he wanted to narrow them because he felt some of the questions were leading." (Dep. of Arthur Breese, at 16). In particular, Plaintiffs point

to Breese's testimony that, in response to a proposed question for I, Sanders asking "Did you fondle the complainant's genitals?", Lehman emailed Breese that "you can ask him if there was any contact b/w he and the student but I would not ask him if he was fondling the student's genitals. You can also ask if he ever had physical contact with Franz (*sic*) at any time, and, if so, when." (Doc. 95–20, Ex. 9). What Plaintiffs fail to state is that in Lehman's email in response to Breese's proposed list of questions, not only is this the only question that Lehman recommends should be changed, but Lehman actually provides additional questions for Breese to ask I. Sanders, Ash, and Dent. In any event, Lehman's suggested restructuring of this single question plainly was directed at developing a full account from I. Sanders by beginning with the broadest possible inquiries into I. Sanders' conduct.

Plaintiffs' reliance on Breese's failure to comply with the express requirements of ESU's Harassment and Discrimination Policy by not stating whether it was "more likely than not" that sexual contact had occurred as evidence of an inadequate final report, is unavailing. The nondiscrimination policy states that "the findings shall indicate whether it was more likely than not that a violation of this policy occurred." (Notice of Nondiscrimination, at 10). By its terms, the policy presupposes the investigator is able to make a finding. Breese stated in an email to Lehman that "as the neutral investigator it is difficult to ascertain if anything happened." (Doc. 95–13, Ex. 16). In his deposition, Breese admitted that the situation amounted to a "he said/he said." (Dep. of Arthur Breese, at 63). While Breese stated that he found "it hard to believe that [Bernard] would come and report something that didn't happen," he did not tell Dillman or V. Sanders that he found Bernard to be credible. (*Id.* at 83–84). Breese's statement to Lehman, his deposition testimony, and the report itself, establish that Breese did not find that a violation of the nondiscrimination policy was more likely than not. Therefore, the failure to make a finding "whether it was more likely than not that a violation of this [non-discrimination policy] occurred," is essentially tantamount to a statement that it is more likely than not that the violation did not occur.

***28** Dillman, V. Sanders, and Lehman, did not provide Breese with any of the anonymous letters sent to ESU and its Trustees. This fact does not raise the quality of the investigation to the level of a material fact at issue. It is undisputed that letters received by ESU were forwarded to Lehman. At least some of these letters were subsequently sent to the FBI for further investigation. (Doc. 94, ¶ 99; Doc. 109, ¶ 99). [20] Therefore, while Plaintiffs may contend that Breese was denied access to these letters, the University Defendants cannot be said to have been hiding the letters or attempting to suppress their contents.

20 Plaintiffs deny that every letter was sent to the FBI, although they fail to specify which letters were or were not sent. (Doc. 109, ¶ 99).

Of the five letters that Plaintiffs offer into evidence, and specifically address in Dillman's deposition, the last three are virtually identical. [21] (Doc. 95–13, Ex. 9–13). The first letter in question, dated September 28, 2007, only addresses allegations against Dent, and "suggest[s] that [Dillman] advise Sanders [22] of this letter ONLY after [Dillman] ha [s] verified the contents" of the letter. (Doc. 95–13, Ex. 9) (capitalization in original). According Plaintiffs every benefit of the doubt, this letter is still not material to a deliberate indifference analysis. The second letter also revolves around financial allegations, although it also mentions rumors about I. Sanders. Nonetheless, the letter does not allege any form of sexual harassment or non-consensual sexual acts. Rather, it relies on the fact that I. Sanders "was in a position of authority" and had "gay liaisons with his students." (Doc. 95–13, Ex. 10). In response to why Dillman did not provide this letter to Breese, Dillman stated that "this dealt with consensual relationships-gay bashing in my viewwith no complaints, no names, no indications of the substance, and Arthur Breese had a document in front of him by a legal supported person who went to his office and talked about sexual harassment." (Dep. of Robert Dillman, at 87).

21 The difference between the three letters is minimal. The fourth and fifth letters are copies of the third letter, with the exception of who is listed as the recipient, and a brief introduction to each recipient asking for their help. (Doc. 95–13, Ex. 11–13).

22 I. Sanders' name is mentioned several times throughout the letter, but only in the context of

> his position as Dent's supervisor. Further, at the end of the letter, the author stated that he/she "[has] no doubt that Sanders is doing a decent job." (Doc. 95–13, Ex. 9, at 2).

The third, fourth, and fifth letters are the most helpful to Plaintiffs' argument. The most important passage for the purposes of Plaintiffs' claim states:

> People are disgusted with those who use their positions to gain sexual favors from young people (even if they are slightly over 18).
>
> As you no doubt now know, this young man was one of many. You can easily find the others (another group on campus has identified four students so far). Run through the list of graduate assistants that he has had over the years. He picked them with a purpose. It was not a one-time event as he may have led you to believe. He is a full-fledged predator. So your cover-up of his arrest now is seen as so very wrong. We are sure that word of the other young man (under 18 when propositioned by Sanders) who came forward has not reached your ears or you would have taken some decisive action. This boy was also a student, so Sanders' sexual misconduct in (*sic*) a matter of concern to the University.

(Doc. 95–13, Ex. 11). Dillman addressed allegations within this letter that concerned him with Chief Olson. [23] In their conversation, Dillman recalls

23 It is unclear whether this letter was the specific trigger for Dillman's conversation with Chief Olsen. However, Dillman stated that he made this inquiry "roughly around the time of this and-yeah, I would have thought that this would have triggered something." (Dep. of Robert Dillman, at 100).

> ***29** want[ing] to know whether there was any truth to whether there was something going on on the campus and ... askpng] [Olson] if he had anything on record of anything that occurred on campus .... [and] if he could determine by talking to his counterpart in the Stroud Regional whether there was anything that would be an indication that this letter had some real substance to it because it cites in here that the-that Isaac was somehow caught.... (Dep. of Robert Dillman, at 99). After being told that there was "nothing on the local police, campus police, about Isaac and there wasn't anything in the Stroud Regional about Isaac," Dillman ended his inquiry. (*Id.* at 100–101).

ESU also had a policy not to accept anonymous letters, and "if the complainant or the individual, the respondent, did not come forward [the investigator] did not include them in [his/her] internal investigation reports." (Dep. of Arthur Breese, at 112). Nonetheless, Breese stated that had he seen the letters, he would have conducted his investigation differently, including trying to "seek, find out who wrote them ... and then [he] would have asked different questions of Isaac and Vincent [Dent]." (*Id.* at 145). He also would have addressed these letters with V. Sanders and Lehman. (*Id.*).

Even taking into account Breese's statements regarding conducting his investigation differently had he received some, or all, of the anonymous letters, and Dillman's decision not to provide Breese with any of the letters, these do not raise a triable issue of deliberate indifference on the part of the appropriate person, i.e. Dillman. Ultimately, Plaintiffs cannot deny the fundamental fact that Dillman was the decision-maker and person with the appropriate authority to take remedial measures. When presented with the anonymous letters, Dillman took action within a reasonably short period of time to investigate the more concrete allegations, such as I. Sanders' possible arrest, as well as forwarding the letters to the FBI. As with the picture of the stick figure, Dillman was already aware of the letters when he received Breese's final report. There is no evidence in the record that Breese's knowledge or possession of the letters, and their inclusion in the final report, might have affected Dillman's final decision in any way,

For the Court to draw the legal inference that Plaintiffs suggest, namely that Dillman had motive or intent to frustrate Breese's investigation and/or bring about a false conclusion regarding Bernard's claims, the plaintiffs would have to come forward with evidence showing genuine issues for trial as to each of the elements necessary to establish a finding of deliberate indifference. *See Davis,* 526 U.S. at 644–645; *Anderson,* 477 U.S. at 248 (stating that "only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that

are irrelevant or unnecessary will not be counted. This materiality inquiry is independent of and separate from the question of the incorporation of the evidentiary standard into the summary judgment determination. That is, while the materiality determination rests on the substantive law, it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." (Internal citations omitted)). Plaintiffs offer the affidavit and verified statement of Charmaine Clowney[24] in support of their contention that Dillman acted with improper motivation. Specifically, Plaintiffs point to a March 15, 2009, article in the *Pocono Record*, wherein Clowney is quoted stating that V. Sanders "said that the purpose of EEO policy was to protect faculty and administration from being subject to student complaints," and that V. Sanders "explained to [Clowney] that that ESU administration wanted to prevent Dillman from receiving another vote of no confidence from the faculty." (Doc. 110–31, Ex. I). These statements do not specifically indicate a connection with Bernard's claim or the subsequent investigation, and there is no indication as to when V. Sanders allegedly made these remarks. Therefore, the statements lack the requisite level of specificity needed to raise a triable issue of material fact as to whether Dillman's treatment of the investigation could constitute deliberate indifference.

24 While Plaintiffs do not reference Clowney's statements until addressing Count II of the Second Amended Complaint, regarding their § 1983 claim, Clowney's assertions are equally relevant here.

***30** In addition to all of the above, it must be noted that the University Defendants followed the Notice of Nondiscrimination handbook, detailing the necessary steps to be undertaken by the Office of Diversity & Equal Opportunity when conducting an investigation. The plaintiffs only point to Breese's omission of the "more likely than not" language in an attempt to show a violation of the University's investigation policies. Further, even assuming Plaintiffs are correct that the investigation was less thorough than it could or should have been, the absence of a more aggressive course of action is not in itself indicative of deliberate indifference. *See Escrue*, 450 F.3d at 1155 (quoting *Vance*, 231 F.3d at 260). Plaintiffs are essentially arguing that in the absence of a virtually unlimited investigation, extending well beyond the Bernard allegations against I. Sanders themselves, the University Defendants have been deliberately indifferent. This ignores the "clearly unreasonable" standard that must be adhered to in any determination of the validity of the recipient's response to the harassment. *Davis*, 526 U.S. at 658. This standard is aptly stated in *Baynard*, where the Court, citing the Supreme Court's decision in *Farmer v. Brennan*, stated that " 'deliberate indifference describes a state of mind more blameworthy than negligence' but 'is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result'. Indeed, a supervisory official who responds reasonably to a known risk is not deliberately indifferent even if the harm is not averted." *Baynard*, 268 F.3d at 236 (quoting *Farmer v. Brennan*, 511 U.S. 825, 835, 844, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)). Plaintiffs' argument has no support in the case law developed in the implementation of Title IX's prohibition against discrimination. Therefore, drawing all reasonable inferences in favor of the plaintiffs, Plaintiffs have failed to create a genuine issue of material fact that the University Defendants acted with deliberate indifference.

4. Conclusion

For the reasons set forth above, the Court will grant University Defendants' Motion for Summary Judgment on Plaintiffs' Title IX claim due to Plaintiffs' failure to present any genuine issues of material fact on the actual knowledge or deliberate indifference elements necessary to establish a Title IX claim.

B. Count II–42 U.S.C. § 1983

To succeed on a claim under 42 U.S.C. § 1983, the plaintiff must demonstrate a violation of a right protected by the Constitution or laws of the United States, committed by a person acting under color of state law. *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir.2000) (en banc). Therefore, in evaluating a § 1983 claim, a Court must first "identify the exact contours of the underlying right said to have been violated" and determine "whether the plaintiff has alleged a deprivation of a constitutional right at all." *Id.* (citing

County of Sacramento v. Lewis, 523 U.S. 833, 841 n. 5, 118 S.Ct. 1708, 140 L.Ed. 1043 (1998)). As applied in a case such as the one currently before this Court, under the Due Process Clause, the "contours" of a student's right to bodily integrity encompass the student's right to be free from sexual assaults by his teachers. *Stoneking v. Bradford Area School Dist.*, 882 F.2d 720, 727 (3d Cir.1989).

***31** Respondeat superior cannot be the sole basis for supervisory liability. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir.1990) (citing *Rizzo v. Goode*, 423 U.S. 362, 377, 96 S.Ct. 598, 607, 46 L.Ed.2d 561 (1976)). There must be affirmative conduct on the part of the supervisor that contributes to the discrimination. *Id.* Inaction and insensitivity alone are not sufficient. *Stoneking*, 882 F.2d at 730 (citing *Rizzo*, 423 U .S. at 336–337). Therefore, a supervisor can be held personally liable under § 1983 if he or she "participated in violating the plaintiff's rights, directed others to violate them, or, as the person in charge, had knowledge of and acquiesced in his subordinates' violations." *A.M. ex rel. J.M.K. v. Luzerne County Juvenile Detention Center*, 372 F.3d 572 (3d Cir.2004) (citing *Baker v. Monroe Township*, 50 F.3d 1186, 1190–1191 (3d Cir.1995)). Furthermore, the supervisor must have "contemporaneous, personal knowledge" of the violation and acquiesce in it, *Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir.2005).

Consequently, to establish supervisory liability for a subordinate's violation of a student's constitutional right to bodily integrity, the plaintiff must show that "(1) the defendant learned of facts or a pattern of inappropriate sexual behavior by a subordinate pointing plainly toward the conclusion that the subordinate was sexually abusing the student; and (2) the defendant demonstrated deliberate indifference towards the constitutional rights of the student by failing to take action that was obviously necessary to prevent or stop the abuse; and (3) such failure caused a constitutional injury to the student." *Chancellor v. Pottsgrove School Dist.*, 501 F.Supp.2d 695, 709 (E.D.Pa.2007) (citing *Doe v. Taylor Ind. School Dist.*, 15 F.3d 443, 454 (5th Cir.1994) (en banc)); *see also Alton v. Texas A & M University*, 168 F.3d 196 (5th Cir.1999) (applying this three pronged analysis to determine whether a university official had supervisory liability).

1. Contemporaneous and Personal Knowledge

In addressing Plaintiffs' § 1983 claim, University Defendants renew their arguments that V. Sanders first learned of sexual harassment allegations against I. Sanders on August 23, 2007, that this was the first time any University Defendant had actual knowledge of possible sexual misconduct, and that no further harassment took place after this time. (Doc. 102, at 36). In turn, Plaintiffs allege that ESU Defendants "misstate" the time at which Dillman knew about I. Sanders' improper conduct, and that Defendants "falsely state" that the harassment of the three plaintiffs ended before Bernard formally complained to V. Sanders. (Doc. 107–2, at 53). While the Court has already addressed these allegations in its analysis of Plaintiffs' Title IX claims, *supra*, we will briefly do so once more.

a. *Whether Dillman had knowledge of I. Sanders' improper conduct.*

***32** Plaintiffs claim that Dillman "had personal knowledge of I. Sanders' improper conduct with students as early as 2006." (Doc. 107–2, at 53). In support of this proposition, they cite to testimony and statements by McGarry, Bolt, Werkheiser, and Bernard. The portions of the record to which Plaintiffs point for support from McGarry's and Bolt's statements solely reference problems that each woman noticed, or had heard, in regard to I. Sanders' hiring and management methods. [25] While these contentions, and Dillman's knowledge of these allegations, can form the basis for an assertion that Dillman was aware of management problems in the Advancement Office, they do not indicate that I. Sanders' practice of hiring "minority candidates that may not [be] otherwise qualified" equates to improper sexual conduct, and more specifically, that the statements and allegations gave Dillman notice of I. Sanders' sexual harassment and/or assaults of students.

25 Bolt states that I. Sanders would hire the students and "it was kind of a mystery to [her]" how the students were hired and that she told Dillman that there "was a double standard for people of different colors" in the Advancement Office,

> which caused low morale. (Dep. of Carolyn Bolt, at 28, 80–81). Plaintiffs also rely on an email that McGarry sent Dillman, detailing I. Sanders' approach to the hiring process and indicating that he was intimidating people, pressuring staff to "recommend minority candidates that may not [be] otherwise qualified," that his employees were concerned about retaliation if they were not loyal to I. Sanders, and that he "[had] made subtle comments to [employees] about being racist, when they [did] not do as he wishe[d]." (Dep. of Susan McGarry, Ex. 1).

Werkheiser's and Bernard's deposition testimony cited by Plaintiffs is equally unconvincing to support Plaintiffs' contentions regarding when Dillman had notice. Plaintiffs once again point to Werkheiser's statements regarding I. Sanders' involvement in a sex-ring. (Dep. of Teresa Werkheiser, at 24–29). Furthermore, Bernard claimed that after he told Omwenga about the incident in the car;

> She mentioned to me that Doctor Sanders did seem kind of funny which was an implication to the fact of his sexual orientation that he might have been bisexual or gay or whatever you want to call it.
>
> She also told me rumors about him being with other possible students.
>
> She told me I believe she thought [Pryor] was attractive, but she may have found out that him and Doctor Sanders had a thing or something ...

(Dep. of Frantz Bernard, at 250–251). When asked to define "a thing," Bernard stated that "it could have been-I don't know, maybe a relationship of some sort.... A sexual relationship of some sort or maybe an occurrence happening sexually between them. I don't really know." (*Id.* at 251). Bernard also admitted that the way in which Omwenga characterized any possible relationship between I. Sanders and both Homas and Pryor "was more like a rumor but ... consensual." (*Id.* at 304). Bernard's characterization of Omwenga's statements amounts to summaries of nothing more than unsubstantiated rumors of consensual relationships between I. Sanders and students. Plaintiffs present no evidence that either Werkheiser or Omwenga ever conveyed these rumors to anyone else. Furthermore, neither Werkheiser nor Omwnega was under a duty to report such rumor-like statements to a supervisor. Even if these rumors were circulating in the office, there is no indication that Dillman ever heard or was aware of these stories, and it is not plausible to infer that unsubstantiated rumors can impute notice to Dillman.

Even if the Court subscribes to a theory that establishing supervisory liability under § 1983 requires a marginally lower standard of notice than Title IX,[26] Plaintiffs have failed to meet their burden to refute University Defendants' assertion that they were unaware of any sexual harassment by I. Sanders prior to August 23, 2007. *See Baynard*, 268 F.3d at 238 (stating that while Defendant could not be held liable under Title IX because there was "no evidence in the record to support a conclusion that [Defendant] was *in fact* aware that a student was being abused," the defendant "certainly should have been aware of the *potential* for [sexual] abuse, and for this reason was properly held liable under § 1983." (Italics in original)). Here, allegations of inappropriate hiring practices, low office morale, and rumors regarding possible consensual sexual relationships between I. Sanders and students, do not show that the potential for sexual abuse was present and are insufficient to show that Dillman had any form of notice of sexual abuse or of its potential existence.

26 Plaintiffs do not argue that a lower standard applies. However, in the interest of giving Plaintiffs every benefit, the Court finds it useful to evaluate Plaintiffs' claims under such a theory.

b. *Whether the harassment continued after Bernard filed a formal complaint*

***33** Plaintiffs repeat their assertion that "I. Sanders continued to press A. Ross to have an inappropriate personal relationship through October 2008 and attempted to intimidate Bernard and Salter to dissuade them from following through with their complaints against I. Sanders." (Doc. 107–2). As the Court has previously addressed A. Ross' and Bernard's alleged harassment postAugust 2007 in its Title IX analysis, *supra*, and dismissed the allegations as insufficient to establish any discriminatory behavior by I. Sanders over which the University Defendants had control, we will only address Salter's allegations.

The plaintiffs argue that:

> Dent contacted Salter in June 2008 at I. Sanders' direction to attempt to coerce Salter into revealing who had made the allegations against I. Sanders. I. Sanders then tried to get Salter fired by making false and defamatory statements about him and sent investigators to intimidate him.

(Doc. 107–2, at 48, n. 14).

First, and most importantly, Salter graduated in 2006. By June 2008, Dent was no longer an employee at ESU. Therefore, the University had no control over Dent, and was no longer responsible for Salter. It is plainly unreasonable to suggest that ESU could be expected to take any action to prevent Dent from contacting Salter. Nonetheless, in the interest of completely addressing Plaintiffs' argument, it is worth noting that while Salter did state that Dent called him, the entirety of the conversation appears to revolve around Dent's interest in whether Dejean Murray was planning on reporting I. Sanders, and if so, whether it was because Murray wanted money. (Doc. 95–30, Ex. 1, at 8–9). There is no evidence of attempted coercion. As to the investigator allegedly sent to intimidate Salter, this event occurred in July 2008, after I. Sanders was put on leave, and Salter stated that he did not "have any idea who this guy was," including whether the investigator was working for the University or I. Sanders. (Dep. of Jerry Salter, at 76).

Therefore, Plaintiffs' contentions do not present a genuine issue of material fact as to the University Defendants' assertion that no further harassment took place after Bernard filed his official complaint in August 2007.

2. Deliberate Indifference

There is no dispute that Plaintiffs have a Due Process right to be free from unjustified invasions of their bodily integrity and that sufficient evidence exists to establish that I. Sanders may have violated this right. (Doc. 120, at 27). Because the standard for deliberate indifference under § 1983 remains the same as the standard under Title IX, both Plaintiffs and Defendants renew the same arguments that the Court previously analyzed in Section lll(A) (2), *supra*. Given that the Court has already established a lack of knowledge on the part of any University Defendant prior to August 23, 2007, and the absence of any constitutional violations to Plaintiffs' bodily integrity after Bernard filed his official complaint, the only question of material fact at issue is whether the University Defendants acquiesced in I. Sanders' violations. [27]

27 There is no question that University Defendants did not participate in violating the plaintiffs' right to bodily integrity or direct I, Sanders to do so, therefore the Court need not address this issue.

***34** To establish acquiescence, the Plaintiffs must show that University Defendants accepted, complied, or tacitly submitted to I. Sanders' actions. Plaintiffs raise the identical factual allegations as previously stated under the Title IX deliberate indifference analysis, [28] none of which the Court found to be factually material and/or sufficient to establish deliberate indifference. Plaintiffs boldly assert that the allegations they put forth demonstrate that:

28 These include not putting I. Sanders on administrative leave prior to July, 2008; "dismiss[ing]" Bernard's complaint; Dillman's "actual knowledge of I. Sanders' history of inappropriate activities with students"; I. Sanders being found in a car with a man at night; the anonymous letters; V. Sanders "orchestrat[ing] and "limiting" Breese's investigation"; and Clowney's affidavit and verified statement. (Doc. 107–2, at 53–55).

> after [Defendants] knew of I. Sanders' sexual assaults and harassment of Plaintiffs, Dillman, Borland, and V. Sanders each engaged in numerous acts both individually and in concert with each other, that had the effect if not the purpose of covering up I. Sanders' improper actions with the Plaintiffs and other ESU students.

(Doc. 107–2, at 55). Despite this conclusory statement, as previously established, Plaintiffs' have failed to provide evidence to support this argument.

The only allegation that Plaintiffs raise which the Court has not yet addressed is in regards to Borland's actions.[29] Plaintiffs state that:

> after concerns similar to those raised before and after the Bernard complaint were brought to Borland's attention while he was acting President, he placed two of the complaining employees (Bolt and Kelley) on administrative leave while permitting I. Sanders to continue working, and failed to investigate at all the information regarding I. Sanders' inappropriate conduct with students.
>
> (Doc. 107–2, at 55). Given Plaintiffs' mention of Bolt and Kelley, the Court can only infer that the "concerns" are in reference to I. Sanders' hiring and management practices. The manner in which Borland handled allegations regarding personnel issues and disputes at the University, and how long he had been aware of complaints regarding I. Sanders' management style, do not allow for the inference that Borland engaged in any individual act, or in concert with any other University Defendant, to cover up sexual assaults and/or harassment. None of the complaints by University employees alleged improper sexual activity on the part of I. Sanders. Furthermore, Plaintiffs do not elaborate on the contents of the "information regarding I. Sanders' inappropriate conduct with students." The portions of Borland's deposition to which Plaintiffs cite only discuss the lack of an investigation into staff members' complaints about I. Sanders' attitude and treatment of them. (Dep. of Kenneth Borland, at 51–52, 81–82). There is no direct or implied reference to a lack of investigation into any student allegations of sexual improprieties. Accordingly, whether Borland conducted a thorough or timely investigation into I. Sanders' hiring and management practices does not raise an issue of material fact for trial as to whether Borland engaged in a personal or concerted effort to cover-up allegations of sexual misconduct.

For the reasons previously stated in the Court's Title IX analysis, as well as those addressed here, the plaintiffs have failed to show a triable issue of material fact as to the University Defendants' assertion that Dillman, V. Sanders, and Borland did not acquiesce in, or attempt to cover-up, I. Sanders' sexual misconduct.

[29] This allegation was not previously addressed because it appears to be irrelevant to the claims of sexual misconduct. Nonetheless, in the interest of addressing each of Plaintiffs' allegations, we will briefly dispose of the issue.

3. Constitutional Injury

***35** For the reasons discussed at length in Section III(A)(2), *supra*, even assuming that there was evidence sufficient to raise triable issues of fact as to University Defendants' knowledge and deliberate indifference, which the Court determined has not been shown, there is no evidence of record that any Plaintiff suffered an injury in the relevant time period, i.e. after August 2007.

4. Conclusion

For the reasons set forth above, the Court will grant University Defendants' Motion for Summary Judgment on Plaintiffs' § 1983 claim due to Plaintiffs' failure to present any genuine issues of material fact for trial.

C. Counts III and IVConspiracy

University Defendants also seek summary judgment on Counts III and IV of Plaintiffs' Second Amended Complaint, which allege a conspiracy to violate § 1985 on the part of I. Sanders, Dillman, V. Sanders, and Borland, and conspiracy to violate § 1986 on the parts of Dlllman, V. Sanders, and Borland. (*See* Doc. 28, at 51, 53).

Section 1985(3) does not create any substantive rights, instead allowing individuals to enforce their substantive rights against conspiring private parties. *Farber v. City of Paterson*, 440 F.3d 131, 134 (3d Cir.2006) (citing *Marino v. Bowers*, 657 F.2d 1363, 1371 (3d Cir.1981)). To state a claim under § 1985(3), a plaintiff must allege:

> (1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly

> or indirectly, any person or class of persons to the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation of any right or privilege of a citizen of the United States.

Lake v. Arnold, 112 F.3d 682, 685 (3d Cir.1997); *see Griffin v. Breckenridge*, 403 U.S. 88, 102–103, 91 S.Ct. 1790, 29 L.Ed.2d. 338 (1971); *see also Farber*, 440 F.3d at 136 (stating that "defendants must have allegedly conspired against a group that has an identifiable existence independent of the fact that its members are victims of the defendants' tortious conduct. This independent existence is necessary to preserve the distinction between two of the requirements of a § 1985(3) claim; that the conspirators be motivated by class-based invidiously discriminatory animus and that the plaintiff be the victim of an injury he or she seeks to remedy by means of § 1985(3).").

To establish a conspiracy, there must be an agreement or "meeting of the minds" and a concerted action. *Capogrosso v. Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir.2009); *Startzell v. City of Philadelphia*, 533 F.3d 183, 205 (3d Cir.2008) (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970)).

As a threshold matter, the Court cannot reach the other elements necessary to establish a violation of § 1985(3) in the absence of evidence establishing an agreement or meeting of the minds among the defendants to deprive Plaintiffs of their right to liberty. Here, Plaintiffs argue for the existence of conspiracy as follows:

> ***36** Plaintiffs have produced a substantial body of evidence that I. Sanders, Dillman, Borland, and V. Sanders, all state actors, acted together to cover up I. Sanders sexual assault and harassment of the Plaintiffs by (1) tightly orchestrating Breese's investigation, (2) failing to place Sanders on administrative leave while the first two investigation (*sic*) were on-going, [30] (3) failing to provide the anonymous letters (and other relevant evidence) to Breese but providing them to I. Sanders, [31] (4) editing Breese's report prior to submitting it to Dillman, and (5) turning the Borland investigation into an attack on Bolt and Kelley rather than an investigation into the allegations of I. Sanders' improper behavior.

30 Presumably Plaintiffs are referring to Breese's investigation into Bernard's complaint and Borland's investigation into allegations by Bolt and Kelley about management problems in the Advancement Office.

31 Dillman admitted that he showed I. Sanders "one of the letters" but was not sure if it was the first or second letter. (Dep. of Robert Dillman, at 90–91). As previously stated, the first letter only addressed allegations against Dent, and the second letter revolved principally around financial allegations, but did mention rumors about I. Sanders although there were no allegations of sexual harassment or non consensual sexual acts. There is no evidence that I. Sanders received, or saw, any other letters.

(Doc. 107–2, at 57). The Court has already addressed each of these allegations in turn and need not do so again. Each of Plaintiffs' assertions is either immaterial, a mischaracterization, or a legal conclusion absent any evidentiary basis on the record. Plaintiffs' contentions essentially amount to questions as to the thoroughness and breadth of the investigation. These issues alone do not indicate the existence of a conspiracy or an invidious, intentional purpose to discriminate between classes or individuals. Specifically, none of these contentions presents evidence of an agreement among the defendants to discriminate against African American males. Therefore, on this record, Plaintiffs have not shown a

triable issue of material fact as to the existence of a conspiracy.

In response to University Defendants' argument that Plaintiffs have failed to allege any class based animus as required under § 1985(3), as well as failed to offer any evidence of class based discriminatory animus on the part of Dillman, V. Sanders, or Borland, in investigating and responding to Bernard's claims (Doc. 102, at 39), Plaintiffs allege that there is "clear evidence that Plaintiffs were targeted by I. Sanders for sexual assault and harassment because they were young African American males. Therefore, his targeting of them was based on their race and gender" (Doc. 107–2, at 56). While this allegation may support a finding of class based animus by I. Sanders, it fails to present a triable issue of material fact as to University Defendants' assertion that there was no discriminatory animus on their part in addressing Bernard's complaint.[32] Further, as the Court previously established, there was no injury to any Plaintiff after Bernard filed his official complaint in August, 2007. In light of Plaintiffs' failure to offer any evidence indicative of the existence of a conspiracy or an invidious, intentional purpose to discriminate between classes or individuals on the part of University Defendants, as well as evidence of the presence of an injury to any Plaintiff subsequent to Bernard's complaint, the Court does not need to reach the issue of any acts in furtherance of the conspiracy under § 1985(3) to determine that summary judgment must be granted for the University Defendants on Plaintiffs' § 1985(3) claim.

32 Plaintiffs appear to recognize that their argument fails in regards to establishing any class based discriminatory animus on the part of University Defendants. Plaintiffs' statement that there is "clear evidence that Plaintiffs were targeted by I. Sanders for sexual assault and harassment because they were young African American males. Therefore, his targeting of them was based on their race and gender" forms the entirety of their argument on this subject. (Doc. 107–2, at 56).

***37** A § 1986 claim provides an additional safeguard for rights protected under § 1985 and Plaintiff must show that:

> (1) the defendant had actual knowledge of a § 1985 conspiracy, (2) the defendant had the power to prevent or aid in preventing the commission of a § 1985 violation, (3) the defendant neglected or refused to prevent a § 1985 conspiracy, and (4) a wrongful act was committed.

Clark v. Clabaugh, 20 F.3d 1290, 1295 (3d Cir.1994) (internal citations omitted). Consequently, if a plaintiff fails to establish a cause of action under § 1985, he cannot succeed on a § 1986 claim. *Rogin v. Bensalem Twp.*, 616 F.2d 680, 696 (3d Cir.1980). Here, due to Plaintiffs' inability to provide sufficient evidence to demonstrate a factual issue for trial on their conspiracy claim under § 1985(3), a claim for § 1986 also cannot go forward.

In the alternative to a claim of conspiracy under § 1985(3), Plaintiffs request that the Court allow Plaintiffs to amend their Complaint to include a claim of conspiracy under § 1983. (Doc. 107–2, at 57). Under a § 1983 claim for conspiracy, a plaintiff must prove that the defendant (1) deprived the plaintiff of a right secured by the Constitution and laws of the United States; and (2) deprived the plaintiff of this constitutional right while acting under color of law. *Adickes*, 398 U.S. at 150. However, Plaintiffs still fail to raise a triable issue of material fact. While University Defendants were acting under color of law, there is no evidence of record that any Plaintiff was deprived of his liberty in the relevant time period, i.e. subsequent to University Defendants' acquisition of "actual notice." Furthermore, as previously stated, there is no evidence of an agreement as necessary to establish the presence of a conspiracy. Therefore the Defendants also cannot be held liable for conspiracy under § 1983.

The Court has reviewed the record and found that the evidence presented by Plaintiffs fails show a triable issue as to the existence of a conspiracy or an invidious, intentional purpose to discriminate between classes or individuals. Because Plaintiffs have not come forward with any triable issue of material fact as to their contention that an agreement

existed among the University Defendants to violate the rights of African American males, the Court will grant University Defendants' Motion for Summary Judgment on Plaintiffs' § 1985(3), § 1986, and § 1983 conspiracy claims.

IV. CONCLUSION

For the foregoing reasons, the Court will grant University Defendants' Motion for Summary Judgment (Doc. 93). [33] A separate Order follows.

33 Given this conclusion, the Court does not need to reach the University Defendants' arguments regarding whether claims brought by A. Ross and Homas before February 2007 are barred by the statute of limitations. Accepting that some, or all, of Plaintiffs' claims have been timely filed, we have determined that Defendants are entitled to Summary Judgment as a matter of law.

ORDER

AND NOW, THIS *14th* OF APRIL 2014, upon consideration of Defendants', East Stroudsburg University, Robert J. Dillman, Kenneth Borland and Victoria L. Sanders, (University Defendants) Motion for Summary Judgment on Counts I, II, III, and IV (Doc. 93), and all accompanying briefs, **IT IS HEREBY ORDERED THAT** the University Defendants' motion is **GRANTED.**

***38** Judgment is **HEREBY** accordingly entered **IN FAVOR OF DEFENDANTS,** East Stroudsburg University, Robert J. Dillman, Kenneth Borland and Victoria L. Sanders and **AGAINST PLAINTIFFS,** Frantz Bernard, Anthony Ross, and Timotheus Homas.

All Citations

Slip Copy, 2014 WL 1454913

25 F.Supp.3d 598
United States District Court,
E.D. Pennsylvania.

Emily FRAZER, Plaintiff
v.
TEMPLE UNIVERSITY, et al., Defendants.

Civil Action No. 13–2675.
|
Signed June 5, 2014.

Synopsis

Background: Female student brought action against public university and male student asserting due process, equal protection, and illegal seizure claims under § 1983, hostile educational environment and retaliation claims under Title IX, and various state law claims. University moved to dismiss.

Holdings: The District Court, Nitza I. Quiñones Alejandro, J., held that:

[1] no special relationship existed between university and student to create constitutional duty to protect her from alleged assault by male student;

[2] student failed to state due process claim under state-created danger theory;

[3] student failed to state illegal seizure claim against university;

[4] student failed to state equal protection claim against university;

[5] student failed to state hostile educational environment claim under Title IX;

[6] student failed to retaliation claim under Title IX; and

[7] court would decline to exercise supplemental jurisdiction over student's remaining state law claims.

Motion granted.

West Headnotes (40)

[1] Civil Rights
Nature and elements of civil actions

To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[2] Civil Rights
Substantive or procedural rights

Section 1983 does not provide substantive rights, but instead, provides a remedy for the deprivations of rights established elsewhere in the Constitution or federal laws. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] Civil Rights
Acts of officers and employees in general; vicarious liability and respondeat superior in general

A governmental entity may not be held liable under § 1983 for constitutional violations caused solely by its employees or agents under the principle of respondeat superior. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[4] Civil Rights
Governmental Ordinance, Policy, Practice, or Custom

A municipality may be held liable under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted

and promulgated by that body's officers. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[5] Civil Rights

Governmental Ordinance, Policy, Practice, or Custom

Liability may be imposed on a municipality under § 1983 where its official policy or custom causes an employee to violate another's constitutional rights. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[6] Civil Rights

Governmental Ordinance, Policy, Practice, or Custom

A government policy or custom, as required to impose § 1983 liability on a municipality, can be established in two ways: (1) "policy" is made when a decision maker possessing final authority to establish municipal policy with respect to the action issues an official proclamation, policy, or edict; and (2) a course of conduct is considered to be a "custom" when, though not authorized by law, such practices of state officials are so permanent and well-settled as to virtually constitute law. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[7] Civil Rights

Lack of Control, Training, or Supervision; Knowledge and Inaction

A government custom, as required to impose § 1983 liability on a municipality, requires proof of knowledge and acquiescence by the decision maker. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[8] Civil Rights

Governmental Ordinance, Policy, Practice, or Custom

Civil Rights

Lack of Control, Training, or Supervision; Knowledge and Inaction

A plaintiff seeking to impose § 1983 liability on a municipality must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[9] Civil Rights

Acts of officers and employees in general; vicarious liability and respondeat superior in general

To establish municipal liability under § 1983, a plaintiff must first show an underlying constitutional violation. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[10] Constitutional Law

Duty to Protect; Failure to Act

While courts recognize that the Due Process Clause protects an individual's interest in his or her bodily integrity, the Constitution imposes no affirmative duty on municipalities to protect citizens from the acts of private individuals. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[11] Constitutional Law

Duty to protect; failure to act

Education

Duty to Protect Against Intentional Injuries

As a general rule, public university had no obligation under the Due Process Clause to prevent male student's alleged

assault of female student. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[12] Constitutional Law

Custody or restraint; special relationship

While government entities generally do not have a constitutional obligation to protect citizens from the conduct of private individuals, the Constitution does impose upon the State affirmative duties of care and protection where a special relationship exists between the state and a particular individual.

1 Cases that cite this headnote

[13] Constitutional Law

Custody or restraint; special relationship

A state actor's constitutional duty to protect citizens from the conduct of private actors does not arise merely from the state actor's knowledge of the individual's predicament or from its expressions of intent to help him, but rather, such a duty arises only where the state actor takes a person into its custody without consent, and by virtue of this custody, limits the individual's freedom to act.

Cases that cite this headnote

[14] Constitutional Law

Custody or restraint; special relationship

To create a special relationship, that could give rise to a state actor's constitutional duty to protect individual citizens from private actors, the state must affirmatively act to curtail the individual's freedom such that he or she can no longer care for him or herself.

1 Cases that cite this headnote

[15] Constitutional Law

Duty to protect; failure to act

Education

Duty to Protect Against Intentional Injuries

No special relationship existed between public university and female student sufficient to create a duty under the Due Process Clause to protect female student from the alleged assault by male student, who was her former boyfriend; female student voluntarily elected to enroll in the university. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[16] Constitutional Law

Creation of danger or risk

To assert a viable due process claim under § 1983 pursuant to the state-created danger exception to rule that state is not liable for its failure to protect its citizens against private violence, plaintiff must allege facts to support each of the following elements: (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state acted with a degree of culpability that shocks the conscience; (3) there existed some relationship between the state and plaintiff such that plaintiff was a foreseeable victim of the state's acts or a member of a discrete class of persons subjected to the potential harm brought by the state's actions; and (4) the state used its authority to create a danger to plaintiff or that rendered plaintiff more vulnerable to danger than had state not acted at all. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[17] Constitutional Law

Creation of danger or risk

Negligent conduct does not rise to the level of conscience shocking, as required

to assert a viable due process claim under § 1983 pursuant to the state-created danger exception to rule that state is not liable for its failure to protect its citizens against private violence. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[18] Constitutional Law
Duty to Protect; Failure to Act
Constitutional Law
Creation of danger or risk

It is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[19] Constitutional Law
Creation of danger or risk

A state's § 1983 liability for a due process violation under the state-created danger theory is predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of exposure to danger. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[20] Constitutional Law
Duty to protect; failure to act
Education
Duty to Protect Against Intentional Injuries

Female student failed to plead any affirmative conduct by public university that created a danger to her or that exacerbated a danger that she otherwise faced from male student who was her former boyfriend and who allegedly assaulted her, as required to establish a viable § 1983 claim under the state-created danger exception to general rule that university had no obligation under Due Process Clause to prevent male student's alleged assault; female student alleged only that university did not do enough to prevent her from being harmed once it knew of male student's propensity for violence after he had threatened to kill his male roommate. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[21] Education
Duty to Protect Against Intentional Injuries

Public university's alleged failure to properly implement and enforce its own security and discipline policies and procedures, including policy permitting suspension for violent and threatening behavior towards oneself or a fellow student, with respect to male student who allegedly assaulted female student in her dormitory after he had previously threatened to kill his male roommate, amounted to, at most, negligence, and not a constitutional violation.

Cases that cite this headnote

[22] Arrest
What Constitutes a Seizure or Detention

A person is "seized" under the Fourth Amendment when his freedom of movement is restrained either by means of physical force or a show of authority. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[23] Arrest
What Constitutes a Seizure or Detention

An unconstitutional "seizure" is defined as a governmental termination of freedom of movement through means intentionally applied. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[24] **Arrest**
Particular cases
Education
Dormitories or other accommodations

Female student's allegation that male student who was her former boyfriend blocked her passage from her dormitory room was insufficient to establish a Fourth Amendment claim that public university violated her Fourth Amendment rights by subjecting her to an illegal seizure; female student did not allege that university, through any of its agents, at any point, physically restrained her or used its authority in any way to confine her, nor did she allege facts showing that male student was either a state actor or a university agent. U.S.C.A. Const.Amend. 4.

Cases that cite this headnote

[25] **Constitutional Law**
Intentional or purposeful action requirement
Constitutional Law
Similarly situated persons; like circumstances

To succeed on a § 1983 equal protection claim, plaintiff must allege facts demonstrating purposeful discrimination and that she received different treatment from that received by other individuals similarly situated. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[26] **Constitutional Law**
Similarly situated persons; like circumstances

To meet the elements of a § 1983 equal protection claim, plaintiff must allege that: (1) she was a member of a protected class; (2) similarly situated to members of an unprotected class; and (3) treated differently from members of the unprotected class. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[27] **Constitutional Law**
Post-secondary institutions
Constitutional Law
Students
Education
Duty to Protect Against Intentional Injuries

Female student failed to allege that she received disparate treatment from public university on the basis of her gender or any other protected characteristic, as required to state § 1983 claim that university violated Equal Protection Clause in connection with alleged male student's assault on female student, who was his former girlfriend; female student alleged university failed to protect her from male student's aggressive conduct, she did not allege that his conduct was targeted at women or was sexual in nature, and her complaint described only one other incident in which male student assaulted and/or harassed someone, his former male roommate. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

Cases that cite this headnote

[28] **Civil Rights**
Sexual harassment; sexually hostile environment

To recover in a suit against a school under Title IX for student-on-student sexual harassment, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim students are

effectively denied equal access to an institution's resources and opportunities. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[29] Civil Rights

Sexual harassment; sexually hostile environment

A plaintiff bringing suit against a school under Title IX for student-on-student sexual harassment must allege facts showing that the school acted with deliberate indifference to known acts of harassment in its programs or activities. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[30] Civil Rights

Sexual harassment; sexually hostile environment

Female student did not allege facts showing that public university had actual knowledge of any sexual harassment by male student who was her former boyfriend prior to his alleged assault of her, and thus university could not have acted with deliberate indifference, as required to establish claim that university created a hostile educational environment in violation of Title IX; at most, female student alleged that university was placed on notice of male student's propensity for violence as it related to his former male roommate, but that abusive and intimidating conduct was not directed at female student, or women, and it was not sexual in nature. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

Cases that cite this headnote

[31] Civil Rights

Sexual harassment; sexually hostile environment

To assert a viable hostile education environment claim under Title IX, plaintiff must allege facts sufficient to establish that school acted deliberately indifferently to sexual harassment, of which school had actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive plaintiff of access to the educational opportunities or benefits provided by the school. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[32] Civil Rights

Sexual harassment; sexually hostile environment

Male student's alleged conduct towards female student during the month between his alleged assault of female student, who was his former girlfriend, and university disciplinary hearing, was not sexual harassment that was so severe, pervasive, and objectively offensive that it deprived female student of access to the educational opportunities or benefits provided by the school, as required to establish hostile educational environment claim under Title IX; female student alleged that male student was permitted to remain on campus following the assault, that during that time, he followed her, sat outside her dormitory, and followed her into the cafeteria and stood directly beside her and stared at her while she was having a conversation with a fellow student, and she alleged that she reported male student's conduct to university security, but no corrective measures were taken prior to his disciplinary hearing. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[33] Civil Rights

Sexual harassment; sexually hostile environment

Female student failed to allege facts sufficient to establish that public university exhibited deliberate indifference to her claims of sexual harassment by male student who was her former boyfriend, as required to assert a viable hostile education environment claim under Title IX; as alleged, university undertook relatively prompt remedial action by holding a disciplinary hearing within a month of the incident, which resulted in male student's being suspended. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

Cases that cite this headnote

[34] Civil Rights

Extracurricular activities; athletics

Female student failed to sufficiently allege a causal connection between her complaints to public university regarding alleged assault by male student who was her former boyfriend and her removal some 15 months later from university's volleyball team and the revocation of her athletic scholarship, as required to establish retaliation claim under Title IX; the 15–month gap was not so unusually suggestive to raise student's right to relief for Title IX retaliation above the speculative level, and she did not allege any antagonistic conduct or animus by university occurring between the time she allegedly reported the assault and the time she was removed from the volleyball team. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

Cases that cite this headnote

[35] Civil Rights

Sex Discrimination

To assert a viable claim for retaliation under Title IX, plaintiff must plead facts sufficient to plausibly show that school retaliated against her because she complained of sex discrimination. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

Cases that cite this headnote

[36] Civil Rights

Sex Discrimination

To assert a viable claim for retaliation under Title IX, plaintiff must allege: (1) that she engaged in conduct protected by title IX; (2) that school took adverse action against her; and (3) that a causal link existed between the protected conduct and the adverse action. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[37] Civil Rights

Sex Discrimination

To establish the requisite causal connection for a retaliation claim under Title IX, plaintiff must allege facts to demonstrate either: (1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[38] Civil Rights

Sex Discrimination

As to demonstrating a pattern of antagonism coupled with timing to establish a causal link, as would support retaliation claim under Title IX, plaintiff must allege facts showing actual antagonistic conduct or animus in the intervening period, between the protected activity and the retaliation. Education

Amendments of 1972, § 901, 20 U.S.C.A. § 1681.

1 Cases that cite this headnote

[39] Federal Courts
Effect of dismissal or other elimination of federal claims

Because district court dismissed all of Plaintiff s federal claims against public university under § 1983 and Title IX over which it had original jurisdiction, which arose from assault by male student, court would decline to exercise supplemental jurisdiction over her remaining state law claims, including those brought against male student. Education Amendments of 1972, § 901, 20 U.S.C.A. § 1681; 28 U.S.C.A. § 1367(c)(3); 42 U.S.C.A. § 1983.

Cases that cite this headnote

[40] Federal Civil Procedure
Pleading over

A district court must ordinarily provide a civil rights plaintiff an opportunity to file an amended complaint where the original complaint is subject to dismissal for failure to state a claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

Cases that cite this headnote

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MEMORANDUM OPINION

NITZA I. QUIÑONES ALEJANDRO, District Judge.

INTRODUCTION

Before this Court is a motion to dismiss filed by Defendant Temple University ("Defendant" or "Temple"), pursuant to Federal Rule of Civil Procedure (Rule) 12(b)(6), which seeks the dismissal of all federal and state claims asserted against it. [ECF 1–21]. Emily Frazer ("Plaintiff" or "Frazer") opposes the motion [ECF 1–27], making the motion to dismiss ripe for disposition. [1]

1 In ruling on Defendant's motion to dismiss, this Court has also considered Defendant's reply [ECF 1–28], Defendant's notice of supplemental authority [ECF 11] and the allegations contained in the complaint [ECF 1–1].

For the reasons stated herein, the motion to dismiss is granted.

BACKGROUND

On January 11, 2013, Plaintiff filed a civil rights action asserting various federal and state law claims against Temple, Andrew Cerett ("Cerett"), and Allied Barton Security Services, LLC ("Allied Barton"). The federal causes of action asserted against Temple are: civil rights claims under 42 U.S.C. § 1983 ("§ 1983") for violating Plaintiff's substantive due process and equal protection rights guaranteed by the Fourteenth Amendment; illegal seizure in violation of the Fourth Amendment; creating a hostile educational environment and retaliation in violation of Title IX, 20 U.S.C. § 1681; and violation of 20 U.S.C. § 1092(f) (the "Clery Act"). [2] The state law causes of action asserted against Temple are: negligence, intentional infliction of emotional distress, and violations of the Pennsylvania constitution. [ECF 1–1].

2 In her opposition brief, Plaintiff withdraws her claim under the Clery Act and for punitive damages under Title IX and § 1983.

Defendant filed the instant motion to dismiss on March 22, 2013. [3] When ruling on this motion, this

Court must accept, as true, the relevant allegations in Plaintiff's complaint, *to wit:*

[3] Previously, on March 11, 2013, Defendant Allied Barton was dismissed by stipulation. [ECF 1, Doc. 16]. Defendant Cerett, acting *pro se*, filed an answer to the complaint on September 13, 2013. [ECF 16].

Frazer is an adult female, and has been a full-time student at Temple since January 2010, (Comp. ¶¶ 6–7), and initially attended Temple on a full athletic scholarship to play volleyball. (*Id.* at ¶ 30).

Defendant Cerett is an adult male, who was a full-time student at Temple from May 2010 until May 2011. (*Id.* at ¶ 16). Cerett was also a student athlete with a full scholarship as a punter for the Temple football team during that same time period. (*Id.* at ¶¶ 17–18). When Plaintiff filed her complaint, Cerett was 21 years old, six foot five inches tall, and weighed 260 pounds. (*Id.* at ¶ 19).

At all relevant times, Plaintiff lived in Temple's dormitory building which has controlled access. That is, every Temple dormitory building is equipped with ***605** electronic card readers, (*Id.* at ¶ 37), and each dormitory resident has a student identification card that when swiped, grants access only into their own dormitory building. (*Id.* at ¶¶ 38, 40). When visiting another dormitory, guests must sign in and be granted access by security staff and then escorted by one of the dormitory residents. (*Id.* at ¶¶ 40–42). Security is required to retain a guest's identification until the guest signs out and leaves the building. (*Id.* at ¶ 45).

From August 2010 to May 2012, Plaintiff lived on the fifth floor of the Cecil B. Moore dormitory building with two roommates. (*Id.* at ¶ 46). Cerett lived on the same dormitory floor as Plaintiff with his roommate, Adam Metz, from August 2010 to December 2010, when Temple moved Cerett out of the dormitory. (*Id.* at ¶¶ 47, 49). Plaintiff and Cerett dated briefly on and off from August 2010 until January 2011. (*Id.* at ¶ 50).

On January 17, 2011, Plaintiff ended her relationship with Cerett. (*Id.* at ¶ 51). At approximately 10 PM on the evening of January 21, 2011, Cerett entered the lobby area of Plaintiff's dormitory building visibly intoxicated to the dormitory security. (*Id.* at ¶ 54). Contrary to established security protocols and procedures, the dormitory security did not ask Cerett for identification or require him to sign in and/or identify the guest he was visiting. (*Id.* at ¶¶ 56–58). Cerett walked past security uninterrupted and took the elevator to Plaintiff's floor. (*Id.* at ¶ 60).

At the time, Plaintiff and some of her friends were gathered in a dormitory room of another fellow student on Plaintiff's floor. (*Id.* at ¶ 61). Another student, Anthony Lee, knocked on the student's dormitory room door and asked to enter. (*Id.* at ¶ 62). Cerett, who was hiding behind Anthony Lee when the door was opened, forced his way inside the room. (*Id.* at ¶ 63). Cerett tried to convince Plaintiff to speak with him, but Plaintiff and her two roommates left the room immediately and entered another dormitory room across the hall. (*Id.* at ¶¶ 64–65). Cerett waited outside that dormitory room, and when that door was opened, he forced his way into the room and began yelling at Plaintiff. (*Id.* at ¶ 66–68). Plaintiff left the room and ran down the hall to her own suite. (*Id.* at ¶ 69). Once in her suite, Plaintiff attempted to shut the door behind her, but Cerett kicked the door open, entered without permission, (*Id.* at ¶¶ 70–71), screamed and threatened Plaintiff, stating "if I can't have you no one can have you." (*Id.* at ¶¶ 72–73).

Plaintiff repeatedly asked Cerett to leave. (*Id.* at ¶ 77). She ran to her bedroom within the suite and attempted to shut the door, (*Id. at* ¶ 78), but Cerett forced his way into the bedroom, slammed the door shut, and blocked the doorway. (*Id.* at ¶ 79). Cerett continued his threats to kill Plaintiff, as she pleaded with him to leave and not harm her. (*Id.* at ¶¶ 80–81). One of Plaintiff's roommates and another male student restrained Cerett, forced him into the common area of the suite, and called Temple's police. (*Id.* at ¶¶ 82–84). As the police were being called, Cerett left the suite, (*Id.* at ¶ 85), and punched through a window in the dormitory hallway leaving blood on the walls of the hallway. (*Id.* at ¶ 86).

While eluding the police, Cerett called and texted Plaintiff's cell phone. (*Id.* at ¶ 88). Campus police instructed Plaintiff to answer a call from Cerett and coax him into telling her where he was hiding. (*Id.* at ¶ 89). The campus police found Cerett hiding on the third floor of the dormitory building and took ***606** him into custody. (*Id.* at ¶ 90). While in custody, Cerett called Plaintiff several times that evening. (*Id.* at ¶ 92).

Plaintiff left campus and did not return until January 24, 2011. (*Id.* at ¶¶ 91, 93). A disciplinary hearing before the University Student Conduct Board (Board) pertaining to the January 21, 2011 incident was scheduled for February 18, 2011. (*Id.* at ¶ 94). In the meantime, Cerett was permitted to remain on campus pending the hearing. (*Id.* at ¶ 99). During that period, Cerett repeatedly followed Plaintiff, sat outside of her dormitory building, (*Id.* at ¶ ¶ 101–103), and on one occasion, followed Plaintiff into the cafeteria and stood directly beside her while she conversed with a fellow student. (*Id.* at ¶ 104). Plaintiff informed the University of Cerett's conduct but no corrective measures were taken, though Plaintiff was temporarily banned from the Edge dormitory building. (*Id.* at ¶¶ 105–107).

On February 18, 2011, the Board held a disciplinary hearing related to the January 21, 2011, incident and issued a decision on March 18, 2011. (*Id.* at ¶¶ 94–95). Cerett was found in violation of various sections of the Student Conduct Code and suspended until August 29, 2011. (*Id.* at ¶¶ 96–97).

Throughout this period, Plaintiff continued to participate on the Temple volleyball team. (*Id.* at ¶ 112). In May 2012, Plaintiff was removed from the volleyball team and her scholarship was revoked. (*Id.* at ¶ 114). Following a grievance procedure, although 50% of her scholarship was reinstated on July 9, 2012, (*Id.* at ¶ 116), Plaintiff was not permitted to return to the volleyball team. (*Id.* at ¶ 117).

Plaintiff also contends that Temple was aware of previous incidents by Cerett against other students, that he had psychological and anger issues, and that he had threatened to harm himself. (*Id.* at ¶ 118–126). On one occasion, in the November 2010 Fall semester, Cerett threatened to kill his roommate and fellow football teammate, Adam Metz. (*Id.* at ¶¶ 128, 131). Metz reported the incident to Temple and his football coaches, (*Id.* at ¶¶ 127–129, 133), and immediately moved out of the room he shared with Cerett. (*Id.* at ¶ 134). Plaintiff contends that despite university policy permitting suspension for violent and threatening behavior towards oneself or a fellow student, Temple failed to take proper disciplinary measures against Cerett after the incident with his roommate. (*Id.* at ¶¶ 137–138).

LEGAL STANDARD

When considering a Rule 12(b)(6) motion to dismiss for failure to state a claim, a court "must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210–11 (3d Cir.2009). The court must determine "whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief' " *Id.* at 211 (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 679, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)). The complaint must do more than merely allege the plaintiff's entitlement to relief; it must "show such an entitlement with its facts." *Id.* (citations omitted). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Iqbal*, 556 U.S. at 679, 129 S.Ct. 1937 (quoting Fed.R.Civ.P. 8(a)) (alterations in original). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is ***607** liable for the misconduct alleged." *Id.* at 678, 129 S.Ct. 1937 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice." *Id.* To survive a motion to dismiss under Rule 12(b)(6), "a plaintiff must allege facts sufficient to 'nudge [his] claims across the line from conceivable to plausible.' " *Phillips v. County of Allegheny*, 515 F.3d 224, 234 (3d Cir.2008) (quoting *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955).

DISCUSSION

In the complaint, Plaintiff asserts that Temple violated her due process and equal protection rights guaranteed by the Fourteenth Amendment, and her right to be free from illegal seizure under the Fourth Amendment. [4] Each of these claims will be addressed separately.

4 Plaintiff's complaint includes a "Summary of Claims" in which she states that she seeks additional relief under the Fifth and Ninth Amendments. However, nowhere in her complaint does Plaintiff make claims or allege facts under either of these constitutional amendments. Regardless, no relief is warranted because the Ninth Amendment does not provide a source of substantive rights, and the Fifth Amendment is only applicable to the Federal Government. *See B & G Constr. Co. v. Dir., Office of Workers' Comp. Programs,* 662 F.3d 233, 246 n. 14 (3d Cir.2011) (treating a due process claim against federal defendants as a claim under the Fifth Amendment's Due Process Clause, "as the Fourteenth Amendment applies only to acts under color of state law whereas the Fifth Amendment applies to actions of the federal government.")

[1] **[2]** To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law. *American Mfrs. Mut. Ins. Co. v. Sullivan,* 526 U.S. 40, 49–50, 119 S.Ct. 977, 143 L.Ed.2d 130 (1999); *Morrow v. Balaski,* 719 F.3d 160, 165–66 (3d Cir.2013). Section 1983 does not provide substantive rights, but instead, "provides a remedy for the deprivations of rights established elsewhere in the Constitution or federal laws." *Kopec v. Tate,* 361 F.3d 772, 775–76 (3d Cir.2004). Thus, to establish a § 1983 violation, Plaintiff must allege facts sufficient to establish that Temple, acting under color of state law, deprived Plaintiff of a right secured by the Constitution or by the laws of the United States. *See Robb v. City of Philadelphia,* 733 F.2d 286, 290–91 (3d Cir.1984). For purposes of § 1983, it is undisputed that Temple is a municipal subdivision. *See Franks v. Temple Univ.,* 2011 WL 1562598 (E.D.Pa. Apr. 26, 2011) (citing *Molthan v. Temple Univ.,* 778 F.2d 955, 961 (3d Cir.1985)).

[3] **[4]** **[5]** **[6]** A governmental entity, however, may not be held liable under § 1983 for constitutional violations caused solely by its employees or agents under the principle of *respondeat superior*. *Monell v. New York Department of Social Services,* 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Rather, a municipality may be held liable under § 1983 for monetary, declaratory, or injunctive relief where the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. *Id.* at 694, 98 S.Ct. 2018. That is, liability may be imposed on a municipality where its official "policy or custom" "causes" an employee to violate another's constitutional rights. *Id.; see also Brown v. School Dist. of Philadelphia,* 456 Fed.Appx. 88, 90 (3d Cir.2011) (citing *Santiago v. Warminster Twp.,* 629 F.3d 121, 135 (3d Cir.2010)). As set forth by the Third Circuit, a government ***608** policy or custom can be established in two ways:

> Policy is made when a "decision maker possess[ing] final authority to establish municipal policy with respect to the action" issues an official proclamation, policy, or edict. A course of conduct is considered to be a "custom" when, though not authorized by law, "such practices of state officials [are] so permanent and well-settled" as to virtually constitute law.

Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3d Cir.1990).

[7] **[8]** "Custom requires proof of knowledge and acquiescence by the decision maker." *McTernan v. York,* 564 F.3d 636, 658 (3d Cir.2009). In either instance, "a plaintiff must show that an official who has the power to make policy is responsible for either the affirmative proclamation of a policy or acquiescence in a well-settled custom." *Bielevicz v. Dubinon,* 915 F.2d 845, 850 (3d Cir.1990); *see also Andrews,* 895 F.2d at 1480.

[9] To establish municipal liability, however, a plaintiff must first show an underlying constitutional violation. *See Marable v. West Pottsgrove Twp.,* 176 Fed.Appx. 275, 283 (3d Cir.2006) ("[A] municipality may not incur *Monell* liability as a result of the actions of its officers when its officers have inflicted no

constitutional injury."). Therefore, in order to state a § 1983 claim against Temple, Plaintiff must allege facts to demonstrate: (1) the deprivation of a constitutional right; and (2) that such deprivation arose out of an official policy or custom of Temple. With these legal principles in mind, this Court addresses each of Plaintiff's § 1983 claims below.

Plaintiff's Fourteenth Amendment Due Process Claim

[10] Plaintiff alleges that Temple violated her Fourteenth Amendment due process rights by failing to protect her from the verbal and physical intimidation by fellow Temple student, Cerett. The Fourteenth Amendment provides that a state shall not "deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. While courts recognize that the Due Process Clause protects an individual's interest in his or her bodily integrity, the Constitution, however, imposes no affirmative duty on municipalities to protect citizens from the acts of private individuals. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195–96, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989); *Morrow*, 719 F.3d at 166. Specifically, in *DeShaney*, the Supreme Court noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. 998. "Its purpose was to protect the people from the State, not to ensure that the State protected them from each other." *Id.* at 196, 109 S.Ct. 998.

The Third Circuit has held that *DeShaney* "stands for the harsh proposition that even though state officials know that a person is in imminent danger of harm from a third party, the fourteenth amendment imposes upon those state officials no obligation to prevent that harm." *Horton v. Flenory*, 889 F.2d 454, 457 (3d Cir.1989); *see also Morrow*, 719 F.3d at 166 (stating as "a general matter, ... a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.") (quoting *DeShaney*). Following *DeShaney*, the Third Circuit has held that a state may be liable for its failure to protect its citizens against private violence when the state (1) enters into a "special relationship" with the plaintiff or (2) creates a danger which ***609** results in foreseeable injury to a discrete plaintiff. *See Ye v. United States*, 484 F.3d 634, 637 (3d Cir.2007); *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir.1996).

[11] In light of the above-cited case law, this Court finds that Temple generally has no constitutional obligation to prevent private, student-on-student violence, *i.e.*, Cerett's alleged assault of Plaintiff. This Court will consider, however, whether either of the two exceptions to the general rule applies to Plaintiff's claims.

1. Special Relationship Exception

[12] **[13]** **[14]** As stated, while government entities generally do not have a constitutional obligation to protect citizens from the conduct of private individuals, the Constitution does "impose[ ] upon the State affirmative duties of care and protection" where a "special relationship" exists between the state and a particular individual. *Morrow*, 719 F.3d. at 167. A state actor's duty to protect such citizens does not arise merely from the state actor's "knowledge of the individual's predicament or from its expressions of intent to help him...." *Id.* at 168. Rather, such a duty arises only where the state actor takes a person into its custody without consent, and by virtue of this custody, limits the individual's freedom to act. *Id.* A "special relationship" exists only in the limited circumstances where the state has taken a person into custody or otherwise prevented that person from helping him/herself. *Kneipp*, 95 F.3d at 1204–05; *D.R. by L.R. v. Middle Bucks Area Vo. Tech. School*, 972 F.2d 1364, 1370 (3d Cir.1992). To create a "special relationship," the "state must affirmatively act to curtail the individual's freedom such that he or she can no longer care for him or herself." *Regalbuto v. City of Philadelphia*, 937 F.Supp. 374, 379–80 (E.D.Pa.1995), *aff'd*, 91 F.3d 125 (3d Cir.1996); *see also Torisky v. Schweiker*, 446 F.3d 438, 446 (3d Cir.2006) (holding that the special relationship exception "must be confined to cases in which a person is taken into state custody against his will.").

The Third Circuit has repeatedly held that publicly-funded schools do not have a special relationship with their students that would create "a *constitutional* duty to protect students from private actors." *Morrow*, 719

F.3d at 170; *see also D.R.*, 972 F.2d at 1369–72 (holding that no special relationship existed between the school and student); *Brown v. School District of Philadelphia*, 456 Fed.Appx. 88, 90 n. 5 (3d Cir.2011) (noting the existence of the special relationship exception, but stating "a student in school does not have that relationship with the state.").

[15] In light of the Third Circuit's cited case law, this Court cannot find that a "special relationship" existed between Temple and Plaintiff. Just as a public high school does not have a special relationship with its minor children sufficient to create a constitutional duty to protect those students from the harmful acts of other students, neither does a publicly-funded university with regard to its adult students who voluntarily elect to enroll in the university. [5]

5 Neither party, nor this Court has identified any authoritative decision in which a public university was held to have such a constitutional obligation to its students.

2. State–Created Danger Exception

[16] **[17]** As to the second exception, the Third Circuit adopted the co-called "state-created danger" exception in *Kneipp v. Tedder*, 95 F.3d 1199, 1205 (3d Cir.1996). To assert a viable § 1983 claim under the "state-created danger" exception, Plaintiff must allege facts to support each of the following elements: (1) the harm ultimately ***610** caused was foreseeable and fairly direct; (2) Temple acted with a degree of culpability that shocks the conscience; (3) there existed some relationship between Temple and Plaintiff such that Plaintiff was a foreseeable victim of Temple's acts or a member of a discrete class of persons subjected to the potential harm brought by Temple's actions; and (4) Temple used its authority to create a danger to Plaintiff or that rendered Plaintiff more vulnerable to danger than had Temple not acted at all. *See Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir.2006). In the context of the state-created danger analysis, negligent conduct does not rise to the level of conscience shocking. *Kaucher v. Cnty. of Bucks*, 455 F.3d 418, 426 (3d Cir.2006).

In its motion, Defendant argues that the facts alleged in Plaintiffs complaint fail to satisfy the second and fourth elements. As set forth below, this Court finds that Plaintiff failed to meet the fourth element, and, therefore, it will limit its analysis to this element. *See Morse v. Lower Merion School Dist.*, 132 F.3d 902, 914 (3d Cir.1997) (holding that plaintiff's failure to meet any one of the elements requires dismissal of claim). [6]

6 This Court makes no findings as to whether Plaintiff has alleged facts sufficient to meet any of the other three elements.

[18] **[19]** To establish the fourth element of a state-created danger claim, Plaintiff must allege facts showing that Temple: (1) exercised its authority; (2) took an affirmative action; and (3) that this action created a danger to Plaintiff or rendered Plaintiff more vulnerable to danger than had Temple not acted at all. *See Ye*, 484 F.3d at 639. "[I]t is [the] misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause." *Bright*, 443 F.3d at 282. In other words, "[l]iability under the state-created danger theory is predicated upon the states' affirmative acts which work to the plaintiffs' detriments in terms of exposure to danger." *D.R.*, 972 F.2d at 1374.

The Third Circuit has repeatedly rejected state-created danger claims in cases involving student-on-student school violence, even where school officials were alleged to have known of the dangerous conditions within the school that ultimately resulted in injury to the plaintiff, on the ground that the schools did not affirmatively act to create the danger. *See e.g.*, *Morrow*, 719 F.3d at 178–179 (holding that the school's failure to expel harassing student, and permit the student to return following a suspension and board plaintiff's bus, did not constitute requisite affirmative act for state-created danger); *Brown*, 456 Fed.Appx. at 89–90 (holding that school's failure to expel or appropriately punish a violent student does not constitute a sufficient affirmative act for state-created danger); *D.R.*, 972 F.2d 1364 (holding that school's failure to adequately address and remediate known physical and sexual misconduct by students did not constitute an affirmative act for state-created danger).

In *Brown*, 456 Fed.Appx. 88, the plaintiff, a sophomore high school student with mild mental

retardation and her mother advised a teacher and an assistant principal that another student had assaulted the plaintiff after she had failed to meet him in the library for oral sex. *Id.* at 90. The teacher and/or assistant principal promised that the school would provide the plaintiff with one-on-one adult supervision. Notwithstanding the promise, two weeks later plaintiff was sexually assaulted by five fellow students during the lunch hour at school. *Id.* at 89. Plaintiff asserted that the school was liable under § 1983 for its ***611** failure to have fulfilled its promise of providing the plaintiff adult supervision and its failure to expel or appropriately discipline violent students. *Id.* at 90. Affirming the district court's dismissal of the claims, the Third Circuit held that the plaintiff had failed to allege the required affirmative acts on the part of the school to establish a state-created danger. *Id.* at 92.

Similarly, in *Pagan v. City of Philadelphia*, 2012 WL 1965386 (E.D.Pa. May 31, 2012), the plaintiff, a special needs student, was severely beaten by another student in a school stairwell. *Id.* at *1, *3. The plaintiff alleged that the school district violated his substantive due process right to personal bodily integrity through its acquiescence in a policy or custom of failing to provide adequate security to students. *Id.* at *2–4. The plaintiff had further alleged that the school was aware that other students had been assaulted by students in the school stairwells. *Id.* at *5. The court dismissed the plaintiff's due process claim because the plaintiff had alleged school conduct that amounted only to omissions and held that "only the affirmative exercise of state authority is actionable as state-created danger." *Id.* at *27.

[20] This case is, in many respects, similar to those discussed above and *Morrow*, 719 F.3d 160. In *Morrow*, two sisters were subjected to a series of ongoing verbal threats and physical assaults by a fellow student including, a physical attack in the school lunch room, an attempt to throw one of the victims down the school's stairs, and a strike to one victim's throat. *Id.* at 164. Each of these incidents was reported to the school. In response, the school temporarily suspended the aggressor; and a juvenile court adjudicated the aggressor delinquent and ordered the aggressor to have no contact with the victims. *Id.* Despite the court order and the school's knowledge of the incidents, the school district failed to keep the aggressor away from the victims, and the verbal and physical assaults continued. *Id.* The school advised the victims' parents to relocate their children to another school, and declined to remove the aggressor. *Id.* at 164–65. The victims brought § 1983 actions against the school for the alleged violations of the victims' due process rights, arguing that the defendant public school had a duty to protect them because the school created or exacerbated a dangerous condition. *Id.* at 177. The Third Circuit held that a public school's failure to use its disciplinary authority and to follow its own internal procedures was not sufficient to establish that the state affirmatively used its authority to create a danger to the student. *Id.* at 177–79.

[21] Like the plaintiffs in *Morrow*, Plaintiff in this matter has not pled any facts to establish that Temple affirmatively acted to place her in danger or increased danger. Rather, Plaintiff has alleged only that Temple did not do enough to prevent her from being harmed once it knew of Cerett's propensity for violence following his incident with his male roommate. While Plaintiff contends that these alleged *omissions* caused her injuries, she has failed to allege any affirmative conduct by Temple that created a danger to Plaintiff or that exacerbated a danger that Plaintiff otherwise faced. Absent allegations of such affirmative conduct by Temple, Plaintiff has failed to allege sufficient facts to establish a viable claim under the state-created danger exception. [7]

7 Though Plaintiff also seeks to impose liability on Temple based upon its alleged failure to properly implement and enforce its own security and discipline policies and procedures, as alleged, Temple's failure to follow those protocols amounts to, at most, negligence, and not a constitutional violation. *Cf.*, *Morrow*, 719 F.3d at 178 ("[W]e decline to hold that a school's alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here.").

***612** *Plaintiff's Fourth Amendment Claim*

[22] **[23]** Plaintiff also asserts that Temple violated her Fourth Amendment rights by subjecting her to an illegal seizure. A person is seized under the

Fourth Amendment when "his freedom of movement is restrained" either "by means of physical force or a show of authority." *Gwynn v. City of Philadelphia*, 719 F.3d 295, 300 (3d Cir.2013). An unconstitutional seizure is defined as "a governmental termination of freedom of movement through means intentionally applied." *Brower v. Cnty. of Inyo*, 489 U.S. 593, 596–97, 109 S.Ct. 1378, 103 L.Ed.2d 628 (1989).

[24] Plaintiff's complaint is completely devoid of any factual allegations to support an intentional "seizure" of her *by Temple* within the meaning of the Fourth Amendment. Plaintiffs complaint does not allege that Temple, through any of its agents, at any point, physically restrained her or used its authority in any way to confine her. The only facts pertaining to a "seizure" are those relating to Cerett's actions of blocking Plaintiff's passage from her dormitory room on January 21, 2011. (Comp. ¶ 79). Plaintiff has not alleged facts, nor can she, that can establish Cerett as either a state actor or a Temple agent. Plaintiff's lone allegation as to Cerett's seizure of her is insufficient to establish a Fourth Amendment claim against Temple, and, therefore, this claim against Temple fails.

Plaintiff's Equal Protection Claim

[25] **[26]** In addition, Plaintiff asserts a § 1983 claim based upon Temple's violation of her constitutional right to equal protection. To succeed on a § 1983 equal protection claim, Plaintiff must allege facts demonstrating "purposeful discrimination" and that she "receiv[ed] different treatment from that received by other individuals similarly situated." *Andrews*, 895 F.2d at 1478; *see also Chambers v. Sch. Dist. of Phila. Bd. of Educ*, 587 F.3d 176, 196 (3d Cir.2009). To meet the *prima facie* elements, Plaintiff must allege that: (1) she was a member of a protected class; (2) similarly situated to members of an unprotected class; and (3) treated differently from members of the unprotected class. *Oliveira v. Twp. of Irvington*, 41 Fed.Appx. 555, 559 (3d Cir.2005); *Keenan v. City of Philadelphia*, 983 F.2d 459, 465 (3d Cir.1992).

[27] In the complaint, Plaintiff fails to allege facts to show that she was the victim of purposeful discrimination or that she was treated differently because of a protected characteristic. As set forth above, Plaintiff bases her claims on Temple's alleged failure to protect her from Cerett's aggressive conduct. Plaintiff does not allege, however, that Cerett's conduct was targeted at women or was sexual in nature. To the contrary, Plaintiff's complaint describes only one other incident in which Cerett assaulted and/or harassed someone, *i.e.*, his former male roommate.

Plaintiff's complaint is also devoid of any allegation that Temple treated her less favorably than it treated Cerett's male victim. In fact, Plaintiff makes no attempt to identify any similarly situated individuals who were treated differently than she was. In addition, Plaintiff alleges that following the January 21, 2011, incident, Temple held a disciplinary hearing against Cerett within one month and suspended him for five months. Based on these alleged facts, this Court cannot find that Frazer received disparate treatment on the basis of her ***613** gender or any other protected characteristic in violation of the equal protection clause.

Plaintiff's Title IX Hostile Education Environment Claim

In addition to her constitutional claims, Plaintiff asserts that Temple created a hostile educational environment in violation of Title IX, 20 U.S.C. § 1681. This statute provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

[28] **[29]** The Supreme Court has recognized that a public school student may bring suit against a school under Title IX for student-on-student sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). To recover under the statute in such a case:

> a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim students are effectively denied

> equal access to an institution's resources and opportunities.

Id. at 651, 119 S.Ct. 1661. A plaintiff must also allege facts showing that the school acted "with deliberate indifference to known acts of harassment in its programs or activities." *Id.* at 633, 119 S.Ct. 1661.

For example in *Davis*, a fifth grade student endured continued sexual harassment by one of her classmates over a period of five months. *Id.* at 653, 119 S.Ct. 1661. Although the harassment was reported to teachers and the principal, the school board "made no effort whatsoever either to investigate or to put an end to the harassment," even after the student-aggressor pled guilty to criminal sexual misconduct. *Id.* at 654, 119 S.Ct. 1661. The Supreme Court held that under these circumstances, the school board's deliberate indifference to student harassment warranted Title IX liability. In reaching its decision, however, the Court cautioned:

> We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action ... School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.

Id. at 648, 119 S.Ct. 1661. The Court explained that in order to avoid liability, the school "must merely respond to known peer harassment in a manner that is not clearly unreasonable." *Id.* at 649, 119 S.Ct. 1661. The Court further stated that a "university might not ... be expected to exercise the same degree of control over its students that a grade school would enjoy," and opined that "in an appropriate case, there is no reason why courts, on a motion to dismiss ... could not identify a response as not 'clearly unreasonable' as a matter of law." *Id.*

[30] **[31]** Thus, under *Davis*, to assert a viable hostile education environment claim under Title IX, Plaintiff must allege facts sufficient to establish that Temple acted "deliberately indifferent to sexual harassment, of which [Temple had] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to ***614** deprive [Plaintiff] of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650, 119 S.Ct. 1661. Reading the allegations in Plaintiff's complaint in the light most favorable to Plaintiff, however, there are no factual allegations that Temple acted with deliberate indifference to *known acts* of sexual harassment. For example, Plaintiff does not allege that she notified Temple of any sexual harassment by Cerett prior to the January 21, 2011, assault or that any such sexual harassment had previously occurred. At most, Plaintiff alleges that Temple was placed on notice of Cerett's propensity for violence as it related to his former male roommate. (Comp. ¶ 71). While Cerett's previous conduct, as alleged, was certainly abusive and intimidating, this conduct was not directed at Plaintiff, women, nor was it sexual in nature. To establish actual notice for purposes of a hostile education environment under Title IX, the prior action by Cerett must have been directed at Plaintiff or some other similar victim because of her sex. Plaintiff's complaint contains no such allegations. As such, Plaintiff has not alleged facts showing that Temple had actual knowledge of any sexual harassment by Cerett. Therefore, Temple could not have acted with deliberate indifference.

[32] Plaintiff has also failed to assert a viable Title IX claim against Temple based upon Cerett's alleged conduct between the January 21, 2011, incident and the February disciplinary hearing, because Cerett's alleged conduct does not constitute "sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to" have deprived Plaintiff "of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650, 119 S.Ct. 1661. What Plaintiff contends is that following

the January 21, 2011, incident and pending the disciplinary hearing, Cerett was permitted to remain on campus, and that during that time, he followed her, sat outside her dormitory, and "followed Frazer into the cafeteria and stood directly beside her and stared at her while she was having a conversation with a fellow student." (Comp. ¶¶ 99–104). According to Plaintiff, she reported Cerett's conduct to university security, but no corrective measures were taken prior to Cerett's disciplinary hearing. (*Id.* at ¶¶ 105–06). As alleged, Cerett's conduct, which can be viewed as that of a jilted boyfriend, does not amount to sexual harassment or harassment of any kind that is sufficiently "severe, pervasive, and objectively offensive" for liability to attach under *Davis*. *Cf.*, *O'Hara v. Colonia School Dist.*, 2002 U.S. Dist. LEXIS 12153, at *18–19 (E.D.Pa. Mar. 25, 2002) (holding that plaintiffs allegations that harassing student continued to follow and stare at plaintiff after he was readmitted to school did not constitute the requisite severe and pervasive sexual harassment for Title IX liability); *Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139, 146 (W.D.Pa.1989) (holding that allegations that defendant stared at plaintiff in public was not actionable harassment of any kind, including sexual harassment).

[33] Plaintiff has also failed to allege facts sufficient to establish that Temple exhibited deliberate indifference to her claims of sexual harassment. As alleged, a disciplinary hearing was held within a month of the incident, which resulted in Cerett being suspended. (Comp. ¶¶ 94 and 97). In light of Temple's relatively prompt remedial action, Temple's conduct was not "clearly unreasonable," as required by *Davis* for the imposition of Title IX liability. *Davis*, 526 U.S. at 648–49, 119 S.Ct. 1661. Therefore, Plaintiff's hostile educational environment claim is dismissed.

***615** *Plaintiff's Title IX Retaliation Claim*

[34] **[35]** **[36]** Plaintiff also asserts a retaliation claim under Title IX based upon Temple's action of removing her from its volleyball team and revoking her athletic scholarship. Although Title IX does not explicitly provide a cause of action for retaliation, the Supreme Court has interpreted Title IX's prohibition of sexual discrimination to include retaliation. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). Thus, to assert a viable claim for retaliation under Title IX, Plaintiff must plead facts sufficient to plausibly show that Temple "retaliated against [her] because [she] complained of sex discrimination." *Id.* at 184, 125 S.Ct. 1497. Plaintiff must allege: (1) that she engaged in conduct protected by Title IX; (2) that Temple took adverse action against her; and (3) that a causal link existed between the protected conduct and the adverse action. *Charlton v. Paramus Bd. of Educ.*, 25 F.3d 194, 201 (3d Cir.1994); *Yan v. Penn State University*, 529 Fed.Appx. 167, 171 (3d Cir.2013); *Cabrera–Diaz v. Penn Kidder Campus Jim Thorpe Area School Dist.*, 2011 WL 613383, at *4 (M.D.Pa. Feb. 11, 2011).

[37] As the basis of her retaliation claim, Plaintiff alleges that Temple removed her from its volleyball team and revoked her athletic scholarship in May 2012 in retaliation for her complaint to Temple in January and February 2011 as to Cerett's conduct. In its motion, Defendant argues that Plaintiff has failed to allege facts sufficient to satisfy the third prong. Under the third prong, Plaintiff must plead facts that could establish a causal connection between her protected activity and Temple's adverse action. *Marra v. Phila. Housing Auth.*, 497 F.3d 286, 300 (3d Cir.2007). To establish the requisite causal connection, Plaintiff must allege facts to demonstrate either: "(1) an unusually suggestive temporal proximity between the protected activity and the allegedly retaliatory action, or (2) a pattern of antagonism coupled with timing to establish a causal link." *Cooper v. Menges*, 541 Fed.Appx. 228, 232 (3d Cir.2013) (citations omitted).

In *Clark County School Dist. v. Breeden*, 532 U.S. 268, 273–74, 121 S.Ct. 1508, 149 L.Ed.2d 509 (2001), the Supreme Court instructed that temporal proximity cannot support an inference of causal connection unless the alleged retaliatory action and the protected activity were "very close" in time, and that action taken twenty months after the protected activity "suggests, by itself, no causality at all." *See also Kriss v. Fayette County*, 504 Fed.Appx. 182, 188–89 (3d Cir.2012) (holding passage of nine months between protected activity and alleged retaliation insufficient to establish causation and stating "we have found, no cases where a gap of more than even two months was found to be unusually suggestive."); *Wadhwa v. Sec'y Dep't*

of Veterans Affairs, 505 Fed.Appx. 209, 215–16 (3d Cir.2012) (holding passage of one year between protected activity and alleged retaliation insufficient to establish causation).

Here, as stated, Plaintiff simply alleges that Temple removed her from its volleyball team and revoked her athletic scholarship in May 2012 in retaliation for her complaint to Temple in January and February 2011 about Cerett, more than a year earlier. (Comp. ¶¶ 114–15, 150–51). Without more and under the case law cited, this Court cannot find that a 15–month gap is so "unusually suggestive" to raise Plaintiffs right to relief for Title IX retaliation "above the speculative level." *Twombly,* 550 U.S. at 555, 127 S.Ct. 1955.

[38] As to demonstrating "a pattern of antagonism coupled with timing to establish ***616** a causal link," Plaintiff must allege facts showing "actual antagonistic conduct or animus" in "the intervening period," between the protected activity and the retaliation. *Kriss,* 504 Fed.Appx. at 188 (citing *Marra,* 497 F.3d at 302). Here, Plaintiff has not alleged any such antagonistic conduct or animus occurring between the time she allegedly reported Cerett's conduct and the time she was removed from the volleyball team. Absent such allegations, this Court finds that Plaintiff has failed to plead facts sufficient to suggest a causal connection between Plaintiff's protected activity and Temple's alleged retaliation.

Plaintiff's Remaining State Law Claims

[39] In the complaint, Plaintiff asserts various state law claims against Temple and Cerett. Plaintiff relies upon supplemental jurisdiction to support this Court's jurisdiction over these state law claims. (*See* Comp. at ¶ 4). Because this Court has dismissed all of Plaintiff's federal claims over which it has original jurisdiction, pursuant to 28 U.S.C. § 1367(c)(3), it declines to exercise supplemental jurisdiction over Plaintiff's remaining state law claims, including those remaining against Cerett. *See United Mine Workers v. Gibbs,* 383 U.S. 715, 726, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) ("If the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well."); *Figueroa v. Buccaneer Hotel Inc.,* 188 F.3d 172, 181 (3d Cir.1999); *Eberts v. Wert,* 1993 WL 304111, at *5 (E.D.Pa. Aug. 9, 1993) (holding that "Courts should ordinarily decline to exercise supplemental jurisdiction over state law claims when the federal claims are dismissed.").

Leave to Amend

[40] Although the Third Circuit has directed that a district court must ordinarily provide a civil rights plaintiff an opportunity to file an amended complaint where the original complaint is subject to dismissal under Rule 12(b)(6), *see Phillips,* 515 F.3d at 245 (reiterating the rule that leave to amend must be granted *sua sponte* in civil rights actions, "unless such an amendment would be inequitable or futile."), it is this Court's view that any such attempt to amend here would be legally futile. This Court has dismissed Plaintiff's civil rights claims against Temple, not because Plaintiff has failed to provide a well-pleaded complaint, but rather, because the detailed facts set forth in her complaint fail as a matter of law to establish a constitutional violation for purposes of § 1983 liability under either the "special relationship" or "state-created" danger exceptions. In addition, this Court cannot foresee any additional facts that could overcome the 15 month period between Plaintiff's alleged protected complaint under Title IX and Plaintiff's removal from the volleyball team and the revocation of her athletic scholarship. It is this Court's view, therefore, that any attempt to amend the complaint would be futile.

CONCLUSION

For the foregoing reasons, Defendant's motion to dismiss is granted, and Plaintiff's federal claims are dismissed with prejudice. An order consistent with this memorandum opinion follows.

ORDER

AND NOW, this 5th day of June 2014, upon consideration of the *motion to dismiss* of Defendant Temple University ("Defendant"), filed pursuant to Federal Rule of Civil Procedure 12(b)(6) [ECF 1–21], Plaintiff's opposition thereto [ECF 1–27], Defendant's

reply [ECF 1–28], Defendant's notice of supplemental authority ***617** [ECF 11], the allegations contained in the complaint [ECF 1–1], and for the reasons set forth in the accompanying memorandum opinion, it is hereby **ORDERED** that Defendant's motion to dismiss is **GRANTED** as to Counts I, II and II. It is further **ORDERED** that Plaintiff's remaining state law claims (Counts IV through IX) are **DISMISSED** without prejudice. The Clerk of Court is directed to close this matter for statistical purposes.

All Citations

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United States District Court,
E.D. Pennsylvania.

John DOE, Plaintiff,
v.
TEMPLE UNIVERSITY, Defendant.

Civil Action No. 14–04729.
|
Signed Sept. 3, 2014.

Attorneys and Law Firms

Sidney L. Gold, Sidney L. Gold & Associates, PC, Philadelphia, PA, for Plaintiff.

MEMORANDUM

ANITA B. BRODY, District Judge.

***1** Plaintiff John Doe ("Doe") brings suit against Defendant Temple University ("Temple"), asserting violations of civil rights, gender discrimination, and breach of contract. I exercise jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367. Currently before me is Doe's motion to proceed under a pseudonym. For the reasons set forth below, I will deny Doe's motion.

I. BACKGROUND

On September 22, 2012, a Temple student was sexually assaulted. Temple determined that Doe was responsible, and initiated disciplinary proceedings against him two days later. At the close of these proceedings Temple expelled him. Doe brings suit in this Court alleging that Temple violated its own policies and procedures, failed to provide Doe with sufficient notice of the charges and allegations against hi m, denied him access to counsel, and denied him the opportunity to confront his accuser in violation of his Due Process rights and enrollment agreement with the school. Pl.'s Mot. 3, ECF No. 2. Doe now moves for permission to proceed under a pseudonym.

II. Legal Standard

Federal courts strongly prefer open, public proceedings. "Identifying parties to [a] proceeding is an important dimension of publicness. The people have a right to know who is using their courts." *Doe v. Megless,* 654 F.3d 404, 408 (3d Ci r.2011) (quoting *Doe v. Blue Cross & Blue Shield United of Wis.,* 112 F.3d 869, 872 (7th Ci r.1997)); *see also* Fed.R.Civ.P. 10 (requiring the complaint and other pleadings to "name [ ] the parties"). Limited exceptions exist when a plaintiff can show he reasonably fears that severe harm will result from having his or her name attached to a lawsuit. *See Megless,* 654 F.3d at 408 (quoting *Doe v. Kamehameha Sch./Bernice Pauahi Bishop Estate,* 596 F.3d 1036, 1043 (9th Ci r.2010)). However, "embarrassment or economic harm" are not recognized bases to conceal a litigant's identity. *Id.*

The Third Circuit enumerates nine factors for District Courts to consider when determining whether to allow a party to proceed under a pseudonym. Those weighing in favor of anonymity include:

> (1) the extent to which the identity of the litigant has been kept confidential; (2) the bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives.

Id. at 409. Against these factors, a court must weigh:

> (1) the universal level of public interest in access to the identities of litigants; (2) whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

***2** *Id.*

III. Discussion

In this case, the potential harm to Doe and those similarly situated is not enough to outweigh the public's interest in an open proceeding. **Sexual assaults** on college **campuses**, and the measures universities are taking to respond to these incidents, are important issues commanding national attention. Doe chose not to appeal Temple's decision internally, an option that would have limited public disclosure of his identity. Def's Resp. 2, ECF No. 9. Instead, he filed suit in federal court to seek his exoneration. Because "one of the essential qualities of a Court of Justice [is] that its proceedings should be public," Doe's choice comes with a consequence. *Megless,* 654 F.3d at 408 (quoting *Daubney v. Cooper*, 109 Eng. Rep. 438, 441 (K.B.1829). The dispute, and Doe's name, will contribute to the current debate about **sexual assault** on college **campuses**.

Moreover, Doe does not assert a cognizable harm. Doe warns that allowing the public to connect his name with sexual misconduct would result in "further damage to his personal and professional reputation." Pl.'s Mot. 7. Specifically, he alleges that he will likely be unable to attend medical school unless his record is cleared. Compl. 23–24, ECF No. 1; Pl.'s Mot 3. As discussed, this is exactly the kind of "embarrassment [and] economic harm" that does not support the use of a pseudonym. *See Megless,* 654 F.3d at 408. Judge Goldberg in this District has recently reached the same conclusion, holding that diminished chances of acceptance into dental school because of expulsion for sexual assault did not warrant a pseudonym. *See John Doe v. Temple University,* Civ. A 13–5156 (E.D.Pa. Aug. 7, 2014).

Doe's arguments against an open proceeding are not persuasive. Doe asserts that his identity has been kept largely confidential and that he may not continue with the case if this motion is denied. Pl.'s Mot. 8. Because Doe's complaint alleges violations of his constitutional and civil rights, the public would suffer if the suit was terminated prematurely. However, no matter how sincere, a plaintiff's "refusal to litigate openly by itself cannot outweigh the public's interest in open trials." *Megless,* 654 F.3d at 410–11.

Finally, Doe maintains that even if the harm to him individually is insufficient that the public has a strong interest in allowing those falsely accused of sexual assault to proceed anonymously. Those that have been wrongly accused will be dissuaded from vindicating their rights in court because of the increased publicity that accompanies a public proceeding. *See* Pl.'s Mot. 3.

However, this prediction appears unfounded. There are many examples of plaintiffs proceeding with suits in their own names protesting sexual assault discipline from universities. *See, e.g., Johnson v. Temple Univ.-of Commonwealth Sys. OfHigher Educ.,* Civ. A. 12–515, 2013 WL 5298484 (E.D.Pa. Sept.19, 2013), *reconsideration denied*, Civ. A. 12–515, 2014 WL 3535073 (E.D.Pa. July 17 2014); *Dempsey v. Bucknell Univ.*, Civ. A. 4:11–cv–01 679, 2012 WL 1569826 (M.D.Pa. May 3, 2012); *Gomes v. Univ. of Me. Sys.*, 365 F.Supp.2d 6 (D.Me.2005); *Fellheimer v. Middlebury Coll.*, 869 F.Supp. 238 (D.Vt.1994); *Ruane v. Shippensburg Univ.*, 871 A.2d 859 (Pa.Commw.Ct.2005).

IV. Conclusion

***3** Because the public interest in an open proceeding outweighs the private interests seeking anonymity, I will deny Doe's motion to proceed under a pseudonym.

ORDER

AND NOW, this *3rd* day of September, 2014, it is **ORDERED** that Plaintiff John Doe's Motion for Permission to Proceed under a Pseudonym (ECF No. 2) is **DENIED.**

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United States District Court,
D. Massachusetts.

John Doe, Plaintiff,
v.
University of Massachusetts–Amherst, Defendant.

Civil Action No. 14–30143–MGM
|
Signed July 14, 2015

Attorneys and Law Firms

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MEMORANDUM AND ORDER ON DEFENDANT'S MOTION TO DISMISS

MASTROIANNI, District Judge

***1** Plaintiff, a resident of Connecticut and a former student at Defendant, University of Massachusetts—Amherst ("the University"), has brought this action against the University alleging it violated Title IX of the Education Amendments of 1972, 86 Stat. 373, 20 U.S.C. § 1681(a) (2012) ("Title IX") by applying disciplinary guidelines and regulations to Plaintiff in a discriminatory manner on the basis of Plaintiff's sex. In addition to this federal claim, Plaintiff asserts several claims pursuant to Massachusetts law.[1] Before the court is Defendant's Motion to Dismiss for Failure to State a Claim (Dkt. No. 17). For the reasons set forth below, the motion is ALLOWED.

[1] Plaintiff also asserts, for the first time, in his Memorandum of Law in Opposition to Defendant's Second Motion to Dismiss (Dkt. No. 47), that his due process rights protected by the Fourteenth Amendment were violated by the University. Pursuant to Fed.R.Civ.P. 8(a), a complaint must include "a short and plain statement of the claim showing that the pleader is entitled to relief." The purpose of this requirement is to "give the defendant fair notice of what the ... claim is and the grounds on which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). This requirement is not satisfied when a legal theory is advanced for the first time in an opposition to a defendant's motion to dismiss. *See Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1107 (7th Cir.1984) ("[I]t is axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss."). In ruling on Defendant's motion to dismiss, the court considers only those legal theories set forth in Plaintiff's complaint.

I. Background

Plaintiff, an individual proceeding under the pseudonym "John Doe," was a student at the University during the fall of 2013. (Dkt. 1, Compl.¶ 1.) The University is a recipient of federal funds. (*Id.* ¶ 108.) On the evening of September 13, 2013 Plaintiff attended a party at a University residence hall. (*Id.* ¶ 24.) While at that party he met a woman, referred to throughout as "Jane Doe." (*Id.* ¶ 26.) John Doe and the University have presented very different versions of the events that followed. As the court is considering a motion to dismiss, it accepts as true the version presented by John Doe. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009).

A. *Events of September 13–14, 2013*

Jane Doe approached Plaintiff around midnight. (Dkt.1, Compl.¶ 26.) Plaintiff and Jane Doe engaged in conversation with one another, both spoken and via text message; they watched videos together; and Plaintiff noticed that as he moved from one location to another, Jane Doe pursued him. (*Id.* ¶ 27.) Plaintiff consumed alcohol at the party, but he did not notice whether Jane Doe was also consuming alcohol. (*Id.*

¶ 26.) At no point during the evening did Plaintiff observe Jane Doe showing signs of intoxication. (*Id.* ¶ 28.) Plaintiff observed her speech to be coherent and intelligible and her text messages to include correct spelling, grammar, and punctuation. (*Id.* ¶ 28.)

***2** At approximately 2:00 a.m., Jane Doe texted her roommate, who was not attending the party, to request the private use of their shared room. (*Id.* ¶ 29.) When her roommate texted back to ask whether Jane Doe intended to spend the night with someone she had just met, Jane Doe responded with texts stating " 'it's all good,' that she was 'fine,' and that she was not 'drunk that much anymore.' " (*Id.*) Jane Doe and Plaintiff then made their way to Jane Doe's dorm room. (*Id.* ¶ 30.) With the agreement of Jane Doe, Plaintiff first stopped by his dorm room to get a condom. (*Id.*) He then met Jane Doe in her dorm room and the two became intimate. (*Id.* ¶¶ 32–33.) Plaintiff asked and obtained permission prior to each new act, such as removing an article of clothing or touching a part of Jane Doe's body. (*Id.* ¶ 34.) Around 4:40 a.m. Plaintiff and Jane Doe finished engaging in sexual activity. (*Id.* ¶ 36.) Jane Doe excused herself to use the shower and Plaintiff returned to his dorm room. (*Id.* ¶¶ 37–39.) As he considered the extent of his sexual contact with Jane Doe, Plaintiff became concerned they had not been as careful as they should have been. (*Id.* ¶ 39.) He texted Jane Doe to suggest she consider taking medication to prevent pregnancy. (*Id.*) Plaintiff then went to sleep. (*Id.* ¶ 40.) When he woke up he saw Plaintiff had not responded to his text and so he sent her another text. (*Id.* ¶ 41.) Plaintiff had hoped that his night with Jane Doe might have been the beginning of a dating relationship and was disappointed when the responses he received from Jane Doe indicated she was not interested in pursuing a relationship with him. (*Id.*)

B. *The Complaint Against Plaintiff and the Immediate Impact on Plaintiff*

When Jane Doe awoke on September 14, she began texting with some friends, claiming she could not recall the events of the prior night. (*Id.* ¶ 42–43.) At the urging of her friends, Jane Doe went to the University Health Services on September 14, 2013 and on September 15, 2013 she made a report to the Dean of Students Office. (*Id.* ¶ 43.) In that report, Jane Doe did not use the words "harassment," "assault," or "rape" to describe her encounter with Plaintiff and indicated that she did not know how to classify what had happened. (*Id.* ¶ 44.)

On September 18, 2013, the University notified Plaintiff that he had been charged with four violations of the University's Code of Student Conduct (the "Code"): Threatening Behavior, Sexual Harassment, Sexual Misconduct, and Community Living Standards. (*Id.* ¶ 45.) The University's Code sets out community standards and procedures governing the enforcement of those community standards. (*Id.* ¶¶ 17–21.) Among its many provisions, the Code provides that a student's responsibility for the consequences of his or her actions shall not be limited because the actions were consequences of voluntary consumption of alcohol or drugs. (*Id.* ¶ 18.) The Code, which is updated annually, also defines "sexual misconduct" to include sexual contact with a person who is (1) so intoxicated as to be incapable of understanding or unaware of the sexual contact or (2) otherwise physically incapable of resisting or communicating consent. (*Id.* ¶ 21.)

In addition to learning about the charges against him, Plaintiff also learned the University had determined he was a threat. (*Id.* ¶ 47.) He was ordered to have no contact with Jane Doe and he was banned from campus for all purposes other than attending classes. (*Id.*) The University gave him less than eight hours to leave campus. (*Id.*) In order to continue attending class, Plaintiff had to drive two hours, each way, from his family's home in Connecticut. (*Id.* ¶ 54.) Plaintiff was also notified that he was entitled to access the on-campus Counseling & Psychological Services, but he was not initially advised that he could access the University Student Legal Services for assistance with his disciplinary matter. (*Id.* ¶ 49.) Additionally, he was never informed the University employed a Title IX Coordinator from whom he could seek assistance. (*Id.* ¶ 50.)

Upon learning of the charges against him, Plaintiff tried to obtain a physical exam and STD testing at University Health Services and was denied care. (*Id.* ¶ 52.) Plaintiff was told University Health Services "had never been in this situation before and 'were not equipped to handle this.' " (*Id.*) The complaint does not include what, if any, explanation was given as to

the nature of the situation that prevented the University Health Services from providing care.

C. *The University's Initial Handling of the Complaint Against Plaintiff*

***3** Plaintiff asserts the University did not undertake "any material investigation" into the charges made against him and did not even interview witnesses or investigate Jane Doe's level of intoxication on the night of September, 13–14, 2013. (*Id.* ¶ 53.) The University did not assign a specially trained Title IX investigator to conduct the investigation, which Plaintiff characterizes as disorganized and chaotic. (*Id.* ¶) Information was gathered by several different University officials, none of whom had proper training to deal with sexual misconduct or the effects of alcohol consumption. (*Id.*)

On September 26, 2013, Plaintiff received a packet of documents from the University which he understood to be the investigation file. (*Id.* ¶ 57.) The documents included statements by Plaintiff and Jane Doe, copies of text messages between Plaintiff and Jane Doe, notes from meetings between Plaintiff and two University administrators, and emails from Plaintiff to the University regarding the incident. (*Id.*) As the time for Plaintiff's Student Conduct Hearing Board approached, Plaintiff came to believe there were other documents relevant to the charges. (*Id.* ¶ 58.) He requested the University provide him with all relevant documents by email on October 31, 2013, less than a week before the hearing was scheduled to take place. (*Id.*) That same day, in response to his email, he received copies of text messages between Jane Doe and her roommate and email statements from Jane Doe's roommate and two others, including the host of the party where Plaintiff met Jane Doe, all of which were dated October 31, 2013. (*Id.*) Plaintiff continues to believe the University had not provided him with all the relevant documents it had related to his case and which could have assisted his defense. (*Id.* ¶ 59.)

While preparing for his hearing, Plaintiff also prepared a list of questions for the Student Conduct Hearing Board to ask Jane Doe. (*Id.* ¶ 55.) He was required to submit those questions to a dean for preapproval. (*Id.*) When he did so, some of his questions, including questions about how much alcohol Jane Doe consumed on the night of the party and whether she remembered texting with John Doe, were not approved. (*Id.*)

D. *Plaintiff's Disciplinary Hearing*

A Student Conduct Hearing Board proceeding was held on November 5, 2013 and an audio recording was made. (*Id.* ¶¶ 60–69.) The Student Conduct Hearing Board included a chairperson and three members, one of whom was a student. (*Id.* ¶ 61.) Plaintiff alleges the chairperson was rude to him throughout the proceeding, asking him confusing questions and then becoming frustrated with him when he sought clarification of the questions, interrupting him, and alternating between belittling his answers and appearing to not listen to those answers. (*Id.* ¶ 63.) In contrast, Plaintiff asserts the chairperson questioned Jane Doe in a supportive manner. (*Id.* ¶ 64.)

Additionally, some of the questions Plaintiff wished to have asked of Jane Doe were not asked and the Student Conduct Hearing Board did not ask other questions of Jane Doe and her witnesses that Plaintiff believes were essential for the Student Conduct Hearing Board to fully understand what had happened. (*Id.* ¶ 65.) For example, Jane Doe was not questioned about the information she provided during the hearing, her use of anti-depressants, or any possible side-effects she might have experienced as a result of mixing alcohol and anti-depressants. (*Id.*) Additionally, Jane Doe's roommate testified about Jane Doe's level of intoxication, but was not asked questions about the basis for her knowledge, even though she had not attended the party or seen Jane Doe until the following morning. (*Id.* ¶ 66.) Plaintiff was also prevented from presenting documentary evidence regarding typical effects of blood alcohol content, which he believed contradicted Jane Doe's testimony. (*Id.* ¶ 64.)

***4** Two days after the hearing, the Student Conduct Hearing Board issued its report and concluded Plaintiff was responsible for three violations of the Code. (*Id.* ¶ 74.) The sanction imposed was expulsion. (*Id.* ¶ 82.) Plaintiff appealed the decision. (*Id.* ¶ 84.) In preparation for filing his appeal, Plaintiff reviewed the hearing board's report and made arrangements to listen to the recording of the hearing. (*Id.* ¶ 85.) When he listened to the recording, Plaintiff discovered the portion of the hearing during which Jane Doe's roommate had testified had not been recorded. (*Id.*)

E. *Post–Hearing Proceedings*

Plaintiff appealed the Student Conduct Hearing Board's decision on November 18, 2013, giving at least six grounds. (*Id.* ¶ 88.) First, he asserted the University had failed to fully and fairly conflict check the members of the Student Conduct Hearing Board and one student member had a conflict because she had previous exposure to criminal prosecution as a student intern in the office of the Suffolk District Attorney. (*Id.*) Next, Plaintiff argued the members of the Student Conduct Hearing Board had not all received proper training for deciding cases involving allegations of sexual misconduct and the effects of alcohol. (*Id.*) His third basis for his appeal was the incomplete audio recording of the hearing. (*Id.*) The fourth ground identified by Plaintiff was the hearing board's failure to ask Jane Doe questions about the extent of her alcohol use and any use of antidepressants. (*Id.*) Fifth, Plaintiff argued the hearing board had inaccurately characterized witness statements concerning details from the evening preceding the contested sexual encounter. (*Id.*) Sixth, and finally, Plaintiff asserted the Student Conduct Hearing Board had inappropriately relied on testimony from Jane Doe's roommate because it had been established she lacked personal knowledge concerning the events preceding the contested sexual encounter. (*Id.*)

Plaintiff's appeal was denied approximately one month after the initial hearing took place. (*Id.* ¶ 89.) Both the Student Conduct Hearing Board's finding he was responsible for violations of the Code and its sanction of expulsion were upheld. He received a short letter informing him of the outcome of the appeal, but not providing an explanation of, or any details about, the basis for the decision. (*Id.*)

F. *Plaintiff's Post–Appeal Efforts*

After his appeal was denied, Plaintiff came to believe he had not been given all of the documents in the possession of the University related to his disciplinary proceeding. (*Id.* ¶ 91.) Between December 2013 and May 2014, he made five formal public records requests seeking additional documents from the University. (*Id.* ¶ 92.) In response to his first request, the University sent a statement affirming everything in Plaintiff's student conduct file had already been provided to him. (*Id.* ¶ 93.) Plaintiff claims this answer was nonresponsive because he had clearly requested all relevant materials, whether or not they were in his conduct file. (*Id.*) The University ultimately responded to Plaintiff's requests over a period of, at least, nine months, but as of the date of his complaint, Plaintiff still believed the University had not provided all relevant documents to him. (*Id.* ¶ 96.)

Several days after his appeal was denied, Plaintiff filed his own complaint against Jane Doe accusing her of harassing him. (*Id.* ¶ 70.) Without specifying the factual basis for his harassment complaint, Plaintiff asserts the University did not adequately respond to his complaint. (*Id.* ¶ 71.) Specifically, he says the University did not contact him about his complaint and, even after he requested status updates, he did not receive any information. (*Id.*) Eventually, Plaintiff submitted a public records request for documents related to the University's response to his complaint. (*Id.* ¶ 72.) About two months later, the University provided him with information about the fees for staff time and photocopying associated with obtaining the documents he had requested. (*Id.* ¶ 73.) Plaintiff does not indicate whether he ever obtained any related documents from the University.

***5** In addition to describing the lack of information provided to him with respect to his harassment complaint against Jane Doe, Plaintiff notes that Jane Doe was never charged with a violation of the Code of Student Conduct in connection with her consumption of alcohol on the night of September 13–14, 2013. (*Id.* ¶ 74.) He characterizes the University's treatment of Jane Doe's complaint and its failure to charge her with a violation due to her consumption of alcohol as "preferential treatment" when compared to the way his complaint of harassment was treated and the fact that he was charged and disciplined with misconduct in connection with Jane Doe's report. (*Id.* ¶ 75.) Based on this characterization, Plaintiff asserts the "preferential treatment" was "undeniably linked" to Jane Doe's gender. (*Id.*) Though the court accepts as true the factual allegations set forth by Plaintiff, it does not accord the same weight to these conclusory statements. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678, (2009).

II. Legal Standard

A party moving to dismiss an action pursuant to Rule 12(b)(6) has the burden of demonstrating the complaint lacks "sufficient factual matter" to state a claim for relief that is actionable as a matter of law and "plausible on its face." *Iqbal*, 556 U.S. at 678 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); Fed.R.Civ.P. 12(b)(6). The court must accept all well-pleaded facts as true and draw all reasonable inferences in favor of a plaintiff, but "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice" to state a plausible claim for relief. *Id.* The moving party must show that the other party's assertions fall short of establishing "each material element necessary to sustain recovery under some actionable legal theory." *Centro Medico del Turabo, Inc. v. Feliciano de Melecio*, 406 F.3d 1, 6 (1st Cir.2005) (internal citation omitted).Where jurisdiction is based on diversity, the court must look to Massachusetts law for the elements of Plaintiff's claims. *See Edlow v. RBW, LLC*, 688 F.3d 26 (1st Cir.2012).

III. Analysis

A. *Eleventh Amendment—Counts II–VII*

Each of the seven counts in Plaintiff's complaint is brought solely against the University. The first count alleges violations of Title IX, while the other counts allege violations of state law. Defendant argues the Eleventh Amendment deprives this court of jurisdiction to consider all of Plaintiff's state-law claims because the University is an agency of a state. Pursuant to the Eleventh Amendment, citizens cannot normally sue a state or an arm of a state in federal court. *Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 26 (1st Cir.1999). Suits are permitted if the state has waived its immunity or Congress has acted to override immunity, but the burden is on the plaintiff to demonstrate one of these exceptions applies. *Id.* "[A] state can waive its immunity by clear declaration that it intends to submit itself to the jurisdiction of a federal court, by participating in a federal program that requires waiver of immunity as an express condition, or by affirmative litigation conduct." *Davidson v. Howe*, 749 F.3d 21, 28 (1st Cir.2014). Plaintiff argues that various actions of the University indicate it has consented to suit in federal court on state law claims to the extent the state law claims are related to Title IX claims, but these actions fall short of the type of express language or overwhelming implication that signals a state's consent to waive its immunity. *Id.*

"Judges in this District have consistently held that [the University] and its departments and agencies are arms of the state entitled to Eleventh Amendment immunity." *BT INS, Inc. v. Univ. of Mass.*, No. 10–11068, 2010 WL 4179678 (D.Mass. Oct. 19, 2010) (citing cases). The First Circuit has not ruled on the issue, but has declined the opportunity to reach a different conclusion. *Neo Gen. Screening, Inc.*, 187 F.3d at 27. Plaintiff has not presented the court with contrary authority, and the court has found no reason not to adopt the approach taken by the other courts in this district which have found the University to be an arm of the state. Therefore, this court concludes the Eleventh Amendment bars all of Plaintiff's state-law claims against the University. Having concluded this court lacks jurisdiction over those claims, the court dismisses all of Plaintiff' state law claims asserted in Counts II through VII of the complaint.

B. *Title IX —Count I*

***6** Congress validly abrogated "States' Eleventh Amendment immunity under Title IX," as to entities receiving federal funds. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284 (1998) (citing 42 U.S. § 2000d–7). As a recipient of federal funds, the University is thus subject to suit under Title IX. Plaintiff alleges the University violated Title IX by denying him, on account of his sex, a "prompt and equitable" resolution to Jane Doe's complaint. (Dkt.1, Compl.¶¶ 111–124.) Specifically, he asserts the University's adjudication of the allegations was biased against him because of his sex and, as a result, the process reached an incorrect conclusion. (*Id.* ¶ 122.) Additionally, he asserts that regardless of whether he should have been found responsible for violations of the Code, bias due to his male sex caused him to receive a disproportionately harsh sanction. (*Id.* ¶ 120.)

"Title IX prohibits gender-based discrimination in a wide array of programs and activities undertaken

by educational institutions."[2] *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir.2002). In relevant part, Title IX provides that "[n]o person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Title IX is a broadly applicable civil rights statute that bars discrimination on the basis of sex and is "patterned after Title VI of the Civil Rights Act of 1964," which barred racial discrimination by employers and educational institutions. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694 (1979). When Congress passed Title IX, it had "two principal objectives in mind: '[T]o avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective protection against those practices.' " *Gebser*, 524 U.S. at 286 (quoting *Cannon*, 441 U.S. at 704).

2 Though Title IX prohibits discrimination "on the basis of sex," the First Circuit's substitution of the word gender indicates its understanding that Title IX, like Title VII, prohibits discrimination on the basis of either a person's biological sex or the person's gender identity. *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 65 (1st Cir.2002) (using gender and sex interchangeably in the context of Title IX); *see also Price Waterhouse v. Hopkins*, 490 U.S. 228, 239 (1989) (using gender and sex interchangeably in the context of Title VII); *Miller v. New York Univ.*, 979 F.Supp. 248 (S.D.N.Y.1997) (ruling Title IX prohibition on discrimination on the basis of sex applied in case where plaintiff's biological sex and gender identity differed).

Within the context of Title IX, prohibited discrimination occurs when an individual is "subjected to differential treatment ... on the basis of sex." *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005). There is a long line of Title IX cases in which plaintiffs have alleged they received different treatment as a member of a "disadvantaged gender" or in retaliation for advocating on behalf of members of a disadvantaged gender. *See, e.g., id.* (ruling male coach of high school girls' basketball team could bring retaliation claim under Title IX because he was allegedly retaliated against on the "basis of sex" where he had complained the girls' team was not receiving resources equal to those provided to the boys' team); *Cannon*, 441 U.S. 677 (ruling plaintiff had adequately pled that defendant's decision to deny her admission violated Title IX); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir.1993) (affirming preliminary injunction to prevent cuts to athletics program that would preserve and slightly increase the disproportion between athletic opportunities for female students and their representation in the student body). A plaintiff seeking to establish a Title IX violation based on this type of discrimination must allege that members of the disadvantaged gender were disparately impacted and also must present "some further evidence of discrimination." *Cohen*, 991 F.2d at 895.

***7** In a separate line of cases, courts have ruled, because sexual harassment by teachers or other students can create a sexually hostile educational environment, Title IX also provides a remedy in cases where a school responds to allegations of sexual harassment with deliberate indifference. In these cases, the plaintiff need not assert they are a member of a disadvantaged gender, or even that there is a disadvantaged gender. Instead, Title IX provides a remedy in cases where a school's response to sexual harassment demonstrates deliberate indifference, regardless of the sex or gender of any student or teacher involved. *See Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999); *see also Frazier*, 276 F.3d 52. Thus, one line of Title IX cases concerns itself with differential treatment of individuals based on their status as a member of a disadvantaged gender, while another line of cases concerns itself with the efforts schools take to ensure that all students, regardless of gender, are fairly protected from sexual harassment.

The Department of Education (the "Department"), through its Office of Civil Rights, has published guidance for schools regarding the actions schools should take in response to allegations of sexual harassment., a phrase the Department defines to include acts of sexual violence.[3] Russlyn Ali, Dear Colleague Letter, U.S. Dept. of Educ. at 1 (Apr. 4, 2011), *available at* http:// www2.ed.gov /about/ offices/list/ocr/letters/colleague–201104.pdf. Sexual violence includes "physical sexual acts ... where a person is incapable of giving consent due to a victim's use of ... alcohol." *Id.* Pursuant to this guidance, a

school is required to respond when it "knows, or reasonably should know, about possible harassment" of a student, regardless of whether the harassed student actually makes a complaint. *Id.* This obligation does not arise because of the student's gender, but because the school has notice that the student may have been subjected to sexual contact to which the student did not or could not consent.

3 This court "must accord [the Department's] interpretation of Title IX appreciable deference." *Cohen v. Brown Univ.*, 991 F.2d 888, 895 (1st Cir.1993).

In responding to claims of sexual harassment, the University, like all schools, is directed by the Department to use the "preponderance of the evidence" standard of proof, requiring a finding that an accused is responsible if "it is more likely than not that sexual harassment or violence occurred." *Id.* at 11. The Department cautions that use of a higher standard of proof such as "clear and convincing," under which a party would be found responsible only if the evidence demonstrated it was "highly probable or reasonably certain that the sexual harassment or violence occurred," is "inconsistent with the standard of proof established for violations of ... civil rights laws" like Title IX. *Id.* The choice of standard in the case of Title IX and other civil rights statutes reflects a policy decision that impacts both the complainant and alleged perpetrator. As a practical matter, the choice of standard may tip the scale in favor of the complainant in cases where testimony from both parties is credible.

Plaintiff does not dispute Title IX required the University to respond to Jane Doe's complaint, but he asserts that as to him, the response did not comply with the Department's guidance and was biased against him as a male, thereby violating Title IX. Although the Department's guidance "requires schools to provide equitable grievance procedures" when responding to possible sexual harassment, the purpose of this requirement is to protect those students who may have been subjected to sexual harassment in order to prevent schools from acting with deliberate indifference to allegations of sexual harassment. *See e.g., Id.* ("[A] school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant's statement without also allowing the complainant to review the alleged perpetrator's statement."). A school that fails to provide equitable grievance procedures to a complainant may violate Title IX if its failure is part of a larger pattern of "deliberate indifference." The question raised by Plaintiff's complaint is when, if ever, a student disciplined after being found responsible for sexual harassment sufficiently asserts a Title IX claim based on alleged deficiencies with the school's disciplinary proceeding against that student.

***8** Though Plaintiff's case is one of many similar cases [4] in which male students assert that a school's response to a sexual harassment complaint was biased against the alleged perpetrator because of his gender, the First Circuit has not yet had occasion to analyze the sufficiency of a complaint in this type of case. Lacking guidance from the First Circuit, this court turns to the analytic framework set forth by the Second Circuit in *Yusuf v. Vassar College*, 35 F.3d 709 (2d Cir.1994). The plaintiff in *Yusuf*, like Plaintiff here, was a male college student who was disciplined after a college hearing board found him guilty of sexually harassing a female student. Looking to the "analogous bodies of law" interpreting Title VI and Title VII, the Second Circuit concluded "that Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." *Yusuf* at 715.

4 *See, e.g., Bleiler v. Coll. of the Holy Cross*, No. 11–11541, 2013 WL 4714340 (D.Mass. Aug. 26, 2013) (addressing complaint of male student disciplined for sexual harassment asserting college disciplinary proceeding against him was motivated by gender bias in violation of Title IX); *Doe v. Columbia Univ.*, No. 14–cv–3573, 2015 WL 1840402 (S.D.N.Y. Apr. 21, 2015) (same); *Yu v. Vassar Coll.*, No. 13–cv–4373, 2015 WL 1499408 (S.D.N.Y. Mar. 31, 2015) (same).

The Second Circuit identified the plaintiff's complaint as attacking his disciplinary proceeding in two ways: (1) asserting the outcome was erroneous due to "evidentiary weaknesses" or "particular procedural flaws" and (2) alleging selective enforcement

evidenced either by the severity of the penalty imposed or the fact that the disciplinary process was initiated at all. *Id.* at 715. As to the first theory, the Second Circuit examined the complaint for allegations of "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding." *Id.* In addition, the Second Circuit required "a particularized allegation relating to a causal connection between the flawed outcome and gender bias."[5] *Id.* Similarly, with respect to the second theory, the Second Circuit looked for both factual allegations demonstrating an inconsistency in enforcement and a causal connection to gender bias. *Id.*

5 The court notes that *Yusuf* was decided prior to the Supreme Court's *Iqbal* and *Twombly* decisions and so when the Second Circuit examined the sufficiency of the complaint in *Yusuf* it applied the prior, more relaxed, standard with respect to the sufficiency of the factual allegations.

Turning to Plaintiff's complaint, the court finds claims fitting within both of the categories set out in *Yusuf*, but insufficient factual allegations that would entitle Plaintiff to relief with respect to either of them. As to "erroneous outcome," Plaintiff has set forth a version of the events of September 13–14 and the disciplinary proceeding which is inconsistent with the hearing board's ruling against him. On the night in question, Plaintiff asserts he received **affirmative consent** from Jane Doe as to all **sexual** contact and there were no clues in her conduct indicating she was so intoxicated as to be unable to give consent. With respect to the disciplinary proceeding, Plaintiff points to difficulties getting information, deficiencies in the investigation, limits placed on his ability to cross-examine witnesses, the exclusion of some documentary evidence he wished to introduce, and the misuse of witness testimony by the hearing board. He also asserts the student member of the hearing board had a conflict due to an earlier internship within a criminal prosecutor's office. Taken together, the facts alleged by Plaintiff are sufficient to raise at least some questions about the outcome of his disciplinary proceeding. They may even accurately reflect that the University "treated Jane Doe more favorably than Plaintiff during the disciplinary process," but they are insufficient to suggest "that the disparate treatment was *because of* Plaintiff's sex." *Doe v. Columbia Univ.*, No. 14–cv–3773, 2015 WL 1840402 at *12 (S.D.N.Y. Apr. 21, 2015) (applying the *Yusuf* analysis). Plaintiff has not cited examples of any comments that targeted him based on his gender—as opposed to his status as a student accused of **sexual assault**—or any conduct suggestive of gender bias. "Indeed the alleged treatment could equally have been—and more plausibly was—prompted by lawful independent goals, such as a desire (enhanced, perhaps, by the fear of negative publicity or Title IX liability to the victims of **sexual assault**) to take allegations of rape on **campus** seriously and to treat complainants with a high degree of sensitivity." *Id.* (internal quotations omitted) (citing *Twombly).*

***9** Though he asserts that "male respondents in sexual misconduct cases at [the University] are discriminated against solely on the basis of sex" and are "invariably found guilty, regardless of the evidence, or lack thereof[,]" these statements are unsupported by even minimal data or credible anecdotal references; they are the type of conclusory statements that *Iqbal* and *Twombly* do not allow the court to consider. (Dkt. No. 1, Compl.¶ 122.) Plaintiff's suggestion that bias is evidenced because the Student Conduct Hearing Board credited Jane Doe's testimony rather than his own ignores the fact that the standard of proof used was the "preponderance of the evidence" standard. In the absence of specific factual allegations from which a factfinder could plausibly infer the influence of gender bias on the outcome of Plaintiff's disciplinary proceeding, that portion of his Title IX claim is dismissed.

The portion of Plaintiff's claim asserting selective enforcement must also be dismissed for similar reasons. As discussed above, Plaintiff has not pled facts from which a plausible inference of gender bias can be drawn. In addition, with respect to the selective enforcement claim, Plaintiff has not alleged any facts indicating male and female students accused of sexual harassment are treated differently by the university in terms of the way complaints are pursued or discipline is imposed.[6] Therefore, the court also dismisses that portion of Plaintiff's Title IX claim asserting selective enforcement based on his gender.

6 Plaintiff alleges he filed a harassment complaint against Jane Doe, but he does not describe the complaint as alleging sexual harassment.

IV. Conclusion

"Plaintiff's subjective belief that he was the victim of discrimination—however strongly felt—is insufficient to satisfy his burden at the pleading stage." *Doe v. Columbia Univ.* at *11. At this stage of the litigation, having accepted the assertions pled as true, the court recognizes Plaintiff's perception that the disciplinary process was stacked against him. On the other hand, none of the facts pled in his complaint indicate his disciplinary proceeding was tainted by gender bias, as opposed to bias against those accused of sexual harassment in violation of the University's Code. Even if there was that type of regrettable bias against any person merely accused, causing the disciplinary process to deviate from the Department's guidelines, it would not, on its own, violate Title IX. Plaintiff's allegations are simply not sufficiently detailed or specific; conclusory, threadbare assertions will not survive a dismissal challenge. Here, Plaintiffs allegations are not articulated in a way to support a plausible inference that the University's actions with respect to Plaintiff violated Title IX.

For the Foregoing reasons, Defendant's Motion to Dismiss is hereby ALLOWED.

It is So Ordered.

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GIVING CREDIT WHERE CREDIT ISN'T DUE (PROCESS): THE RISKS OF OVEREMPHASIZING ACADEMIC MISCONDUCT AND CAMPUS HEARINGS IN CHARACTER AND FITNESS EVALUATIONS

Veronica J. Finkelstein

Notwithstanding the plethora of jokes about sharks and lawyers, [1] it has long been a requirement that bar applicants both possess "good moral character" and demonstrate this good character to the bar prior to admission. [2] Each state bar must evaluate applicant character. Yet character is, in many ways, wholly subjective. Aside from other ethical and legal concerns raised by this type of subjective evaluation, a particular concern arises when prior academic misconduct or campus sexual assault forms the basis of a character evaluation. Given the paucity of due process protections provided in the academic setting, it is alarming that the outcome of campus hearings may result in a denial of admission to the bar for failure to demonstrate good moral character.

I. The History of the Character Requirement

The historical roots of the character requirement date back to nearly the beginning of law as an organized profession in the United States. [3] For example, colonial lawyers were required to meet certain character requirements before they were authorized to practice law in the burgeoning new country. [4] The character requirement remained in place thereafter and ***26** became more formalized at the end of the nineteenth century. [5] At that time, the American Bar Association (the "ABA") was founded to regulate the practice of law in the United States. [6]

In 1906, the ABA drafted its first set of bar admission rules. [7] These rules were subsequently approved in 1918. [8] The ABA rules required that there "be an examination by the board as to the moral character of each applicant for admission to the bar, which examination should be in addition to the requirement of certificates as to his moral character, and in addition to . . . educational qualifications." [9] In sum, pursuant to the ABA rules, not only did bar applicants have to certify their good character, but the bar of the state of admission was required to undertake an independent analysis into the character of each applicant.

With this requirement in place, the evaluation process for reviewing applicant character became more systemized. By 1920, many states had developed character committees. [10] These committees were tasked primarily with evaluating the character of bar applicants and practicing attorneys. [11] By 1927, a majority of all states required that applicants submit a formal application for review by the state's character committee as part of the admission process. [12] Although the process of evaluating applicant character certainly predated this time period, by the 1930s the process of evaluating applicant character became a more regular and uniform process with a specified procedure in many states.

In significant part, this procedure is utilized today. Although each state may set its own unique qualifications for bar admission, [13] all states require ***27** that bar applicants meet specified "character and fitness" requirements. [14] Merely passing a bar examination is not sufficient in any state; applicants must also have good character to join the ranks of practicing attorneys. [15] As part of their applications to the bars of any state, applicants must certify their good moral character. [16] Thereafter, the state's bar examiners may either accept any individual applicant's certification, or the bar may further inquire into an applicant's character. [17]

To provide bar examiners with the necessary information to inquire into character, each bar applicant is required to complete an extensive application and submit information to the bar examiners in the state where the applicant seeks admission. [18] Although each state has its own unique application questions, these questions are generally designed to elicit information that would reveal any past history of dishonesty or criminality. [19] The verbiage and specific questions may have changed over the years, but the substance of these "character and fitness" inquiries has varied little over time.

II. Defining Good Character

Given the longstanding nature of the character and fitness evaluation, one might reasonably assume that the definition of good moral character has been well solidified. To the contrary, the definition of good moral character has varied widely over the years. Initially, the character ***28** requirement was used to exclude applicants based on race, sex, and ethnicity. [20] In later years, the requirement was used to exclude applicants who maintained unpopular political affiliations or beliefs. [21]

Over time, applicants successfully challenged these definitions of good moral character. [22] The exclusion of applicants based on their political affiliation and beliefs was addressed by the United States Supreme Court in Schware v. Bd. of Bar Examiners of N.M., where the Court held that an applicant could not be excluded from the bar based on his status as a former member of the Communist Party. [23] In so holding, the Court noted that "a [s]tate can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law." [24] As a result of the Schware decision, a state cannot exclude an applicant from the bar for reasons irrelevant to the practice of law, such as political affiliation or sexual orientation. [25]

Cases like Schware and its progeny have helped define what lies outside the boundaries of good moral character. These cases are less instructive, however, when one tries to clarify the definition of what character lies inside the boundaries. Today, there is still no uniform definition of the term "good moral character," and states vary as to their interpretation and application of the term. [26]

***29** Although there is a divergence of state practice, there have been attempts to reach a consensus as to the definition of good moral character. In 1987, the ABA promulgated a set of "Character and Fitness Standards" to more clearly define good moral character. [27] These standards define good moral character as follows:

> A lawyer should be one whose record of conduct justifies the trust of clients, adversaries, courts and others with respect to the professional duties owed to them. A record manifesting a significant deficiency in the honesty, trustworthiness, diligence or reliability of an applicant may constitute a basis for denial of admission. [28]

The standards further delineate thirteen categories of "relevant conduct" that, if present, suggest that an applicant lacks good moral character. These categories include, among others, an applicant's prior unlawful conduct and academic misconduct. [29]

Even after the promulgation of these standards, the definition of good moral character continues to be defined on a state-by-state basis. Each individual state is free to adopt or reject the ABA standards. [30] Although most states have incorporated similar categories into their own definitions, many states continue to utilize their own separate standards for the purpose of evaluating applicants to the bar. [31]

As a result, today there still is no universally-accepted definition of what "good moral character" is sufficient for bar admission. [32] To the contrary, good moral character remains difficult to define, leading the United States Supreme Court to characterize the concept as "ambiguous" with an "almost unlimited number" of possible definitions. [33] What ***30** constitutes good moral character for admission to the bar may differ from what constitutes good moral character under other circumstances. [34] What constitutes sufficient evidence of good character for admission to the bar of one state may be insufficient for a different state. [35] Good character remains ambiguously defined, at best.

III. Character as a Basis for Denial of Admission to the Bar

Given the ambiguity and lack of uniform definition, much uncertainty remains as to the precise location of any bright line between good and bad character for purposes of bar admission. Notwithstanding this uncertainty, certain prior conduct by an applicant will near-uniformly result in a denial of admission. [36] Bar applications universally request detailed information about an applicant's criminal history. [37] An applicant's criminal history, perhaps more than any other prior conduct by an applicant, is likely to result in a denial of admission. [38]

In nearly all states, there are examples of an applicant, convicted of a violent felony, who has been denied admission to the bar on the basis of that conviction. [39] For example, the California state bar examiners have determined that applicants who have been "convicted of violent felonies, felonies involving moral turpitude and crimes involving a breach of ***31** fiduciary duty are presumed not to be of good moral character." [40] Similarly, an applicant to the bar of Arizona who pled guilty to attempted murder was denied admission. [41] An applicant who was convicted of murder and attempted robbery was similarly denied admission to the bar of the District of Columbia. [42] Applicants who have been convicted of violent felonies may reasonably assume that their admittance may be denied as a result of those convictions.

Applicants are also routinely denied admission in instances where the applicants' prior criminal history reveals evidence of dishonesty. Applicants have been denied admission for criminal dishonesty ranging from bribery, [43] to mail fraud, [44] to tax fraud, [45] and to perjury and false testimony. [46] For example, an applicant was denied admission to the bar of the District of Columbia because, amongst other criminal acts, he had testified falsely under oath and had been held in contempt for improper practice of law. [47] Similarly, the Georgia bar denied admission to an applicant who not only gave evasive answers to the bar examiners but who had previously lied under oath. [48] An applicant who has committed a serious crime of dishonesty may reasonably assume that this prior criminal behavior will serve as an impediment to bar admission.

Bar examiners also consider seriously a prior history of criminal sexual misconduct, even when the misconduct dates back to a time when the applicant was a minor. [49] For example, an applicant was denied admission to the Illinois bar on the basis that he lacked good moral character in part because, at the age of sixteen, the applicant had pled guilty to committing rape. [50] In general, conviction for sexual offenses is likely to prevent bar admission. [51]

***32** The effect non-criminal prior behavior will have on admission is less uniform. An applicant who discloses prior dishonesty that was not the subject of a criminal conviction may or may not be admitted to a state bar. [52] Most state bars have adopted admission rules patterned after the recommendations of the ABA-National Conference of Bar Examiners Committee (the "ABA-NCBE Committee"). [53] Pursuant to those recommendations, prior non-criminal behavior will not necessarily disqualify an applicant. [54] Instead, the disclosure of prior non-criminal behavior triggers an inquiry by the state bar examiners who may elect to admit the applicant after an inquiry into the applicant's prior behavior. [55]

The state bar examiners may consider, among other non-criminal conduct, evidence of prior academic misconduct. [56] The ABA-NCBE Committee's standard character and fitness application includes the following question, which directly solicits information relating to academic misconduct:

> Have you ever been dropped, suspended, warned, placed on scholastic or disciplinary probation, expelled, requested to resign, or allowed to resign in lieu of discipline from any college or university (including law school), or otherwise subjected to discipline by any such institution or requested or advised by any such institution to discontinue your studies there? [57]

Bar examiners are not obligated to accept the academic institution's prior determination that the applicant committed academic misconduct. [58] ***33** Instead, in some instances, bar examiners will treat prior academic misconduct as establishing a rebuttable presumption that the applicant lacks good moral character. [59] In other instances, bar examiners may simply defer to the prior determination by the academic institution and adopt the prior finding of academic misconduct. [60] In addition to evidence of academic misconduct disclosed by the applicant directly, the applicant's law school may independently provide evidence to the state bar associations. [61]

IV. The Inherent Dangers in Considering Evidence of Academic Misconduct

The fact that a bar association may consider a finding of academic misconduct, or even credit such a finding with no additional inquiry, raises grave concerns. A finding of prior academic misconduct is radically different from a prior criminal conviction. Unquestionably, accusations of student misconduct-- especially when there have been accusations of sexual assault--are serious. Yet, despite this seriousness, students are typically afforded limited due process protection in the academic setting.

The academic institution is generally responsible for identifying and addressing instances of academic misconduct, including plagiarism. [62] Typically, accusations of academic misconduct arise from violations of academic honor codes. [63] These codes vary from institution to institution. Academic proceedings for honor code violations generally provide students with very limited due process protection. At best, many honor codes require only that the student be given notice and an opportunity to be ***34** heard. [64] Other due process protection may be largely absent from the academic setting.

Although most public university honor codes now incorporate some limited due process protections, that was not always true. [65] The idea that students accused of academic misconduct have due process rights is relatively recent. The first major case to recognize that students were entitled to any due process protection in this type of academic setting was Dixon v. Alabama State Board of Education. [66] In Dixon, the Fifth Circuit held that public university students have a private interest in their education that requires some due process protection prior to expulsion. [67] The United States Supreme Court ultimately affirmed this reasoning, holding that students at public universities have some constitutionally protected due process rights. [68] Although some due process rights have been afforded to public university students, those rights are much more limited than would be required in other settings. [69]

As compared to the criminal law setting, many due process protections are absent in the academic setting. For example, in the academic setting at a public university, students may lack the right to be represented by counsel. [70] Students may not have the right to cross-examine witnesses. [71] Allegations of misconduct may be decided not by impartial judges but by panels of students or administrators. [72] For students subject to academic discipline, there is scant opportunity for judicial review. [73] These and other ***35** due process protections would be present in a judicial setting. [74] Even a cursory review of the missing due process protections shows how severely due process protections are limited in the academic setting. In essence, so long as the student is afforded notice and some basic adversarial process, due process requirements are met in a public university academic misconduct hearing. [75]

Students attending private universities and colleges have even fewer due process protections than students at public institutions. [76] Courts have declined to extend the reasoning of Dixon to due process challenges initiated by students at private universities. [77] So long as the private university employs hearing procedures that are "fundamentally fair," the university need not adhere to any traditional due process requirements. [78] Therefore, a student attending a private university may be found to have committed academic misconduct, even though this finding is the product of a campus hearing nearly devoid of any due process protection.

The stakes are certainly high for students. Absent full due process protections, an accusation of plagiarism may develop into a finding of misconduct that plagues the student many years later when the student has completed law school and seeks admission to the bar. Because honor codes and academic misconduct hearing procedures vary from campus to campus, the bar examiner evaluating the finding of academic misconduct likely knows little about the process culminating in the finding. The process may have included the right to counsel and a fair hearing, or it may have entailed little more than unfounded accusations credited in a biased forum. Simply put, there is no meaningful way to know whether the finding of a campus hearing is the product of a process that is worthy of crediting. This ***36** poses a genuine problem to state bars seeking to evaluate bar applicant character.

This problem is magnified when a student has been subjected to a campus hearing to address sexual assault or other serious criminal accusations. Now, it is not a mere act of dishonesty being considered, but an act that may be akin to a crime.

The stakes are high for both the student and the university. It is inarguable that sexual assault on campus is a serious problem facing colleges and universities. [79] The problem is sufficiently serious that Congress and the United States Department of Education have sought to reduce the levels of sexual assault through legislation, most notably Title IX of the Education Amendments of 1972. [80]

Unlike in cases of plagiarism, where the arguable "victim" is the university itself, in many instances, accusations of campus sexual assault involve student perpetrators (or accused perpetrators), as well as student victims. [81] The

academic institution must therefore carefully balance the interests of the accuser and accused, because both are students.[82] Although the law is clear that students "do not 'shed their constitutional rights' at the schoolhouse door," academic institutions nonetheless struggle to properly balance protections for the victim and the accused in the case of sexual assault.[83]

The problems inherent in the limited due process rights afforded students accused of academic dishonesty are no less present for students accused of sexual assault. In fact, the stakes are far higher, but the due process protections may be even more limited.[84] An accusation of rape, for example, may have criminal implications far more serious than an accusation of plagiarism. Not only may an accusation of rape expose the ***37** accused to criminal liability, the mere stigma of such an accusation may be long-lasting and far-reaching. Notwithstanding this fact, students accused of sexual assault who are subjected to a campus hearing may not be afforded the right to be represented by counsel[85] or to cross-examine witnesses.[86]

Recently, the balance has tipped sharply against due process protections for the accused. On April 4, 2011, the Department of Education issued a letter setting forth procedures applicable to universities pursuant to Title IX.[87] Most notably, the letter requires that universities utilize the "preponderance of the evidence standard" for hearings involving sexual assault.[88] This low standard contrasts sharply with the standard applied in the judicial setting, where accusations of criminal sexual assault would require proof beyond a reasonable doubt.[89] Unlike the defendant in a criminal case, the student accused of sexual assault is not considered innocent until proven guilty.[90] In many ways, the academic setting is far more hostile to the accused than a criminal setting.[91] As a result, it appears far more likely that a student will be found to have committed sexual assault if the accusations are made in a campus hearing rather than in a judicial forum.

As if the lowered standard was not enough reason for concern, on May 9, 2013, the Department of Education announced a new "blueprint" pursuant to which universities are directed to abandon any use of an objective standard for sexual harassment.[92] Rather than utilize the legal definitions of sexual harassment used in the Title VII context, the Department of Education suggests that sexual harassment should be broadly defined as any unwelcome conduct of a sexual nature, including speech, even where an objective person would not be offended by the ***38** conduct.[93] In other words, if any listener on campus is offended, sexual speech constitutes sexual harassment subject to an on-campus hearing and potential punishment. As a result, virtually any speech may result in academic discipline and the attendant consequences for bar admission.

V. Due Process Available for Applicants to the Bar

In contrast to the scarcity of due process protections offered in the academic setting, significant protections and due process are afforded to the bar applicant.[94] Bar applicants may demonstrate their good character using a burden-shifting standard that favors the applicant. In hearings before bar examiners, an applicant must initially prove that the applicant has good moral character.[95] The burden then shifts to the bar examiners to rebut the applicant's evidence with evidence of prior bad character.[96] If the bar examiners are able to demonstrate sufficient prior bad character, the burden shifts back to the applicant, who can rebut any evidence of bad character by showing, among other things, that the bar examiners are in error or that the applicant has been sufficiently rehabilitated.[97] Under the preponderance standard, all reasonable doubts are resolved in favor of the applicant.[98] The applicant is guaranteed due process in all regards and can be represented by counsel.[99]

If the applicant is denied admission, that applicant has a due process right of appeal, first through the highest levels of the state court system and ***39** ultimately to the United States Supreme Court. [100] The applicant's initial appeal entitles the applicant to a de novo review--the state court need not accept the findings of the bar examiners. [101] If denied relief by the state court, the applicant may pursue whatever state appellate process is available before petitioning the United State Supreme Court for review. At each step of the process, the applicant is afforded the same due process protection provided to any litigant in a civil case. Applicants have, on numerous occasions, successfully sought appeal and had the denial of admission overturned. [102] The due process protections in this process are evident.

As these protections show, although not an absolute right, the ability to pursue the practice of law without unnecessary obstruction is an entitlement that is taken seriously by the courts. It is an entitlement important enough to be given significant due process. It is not something that should be denied baselessly. Throughout the process of applying for admission to the bar, the applicants' rights must be protected. This includes, where appropriate, review by the highest court in the land. The applicant to the bar is entitled to due process; the student accused of on-campus assault may not be.

*40 VI. The Quandary Facing Bar Examiners

This highlights starkly the quandary facing bar examiners. Given the lack of due process protection afforded students in an academic setting, state bar examiners are faced with a quandary when evaluating findings of misconduct. On one hand, examiners may be loath to re-examine evidence regarding accusations of cheating years after the student has graduated from law school. The examiners may simply find the accusations too stale to merit re-examination. The examiners may prefer not to second-guess academic decision-making. On the other hand, by crediting the outcome of a campus hearing, the examiners may be giving undue weight to an unreliable decision that was fraught with unfairness when rendered.

The quandary is well illustrated in In re K.S.L., a case decided by the Georgia Supreme Court. [103] In that case, the applicant to the bar had been accused of plagiarism while he was a law student. [104] The law school held a formal hearing, and the hearing officer determined that although the applicant's law school paper was poorly written, it did not constitute plagiarism. [105] The applicant was absolved of the accusation of plagiarism.

The applicant's absolution was short-lived. After graduation, the applicant filed an application to the Georgia bar. [106] Rather than merely accepting the hearing officer's decision, the Georgia bar examiners themselves evaluated the applicant's law school paper, determined it contained material that was not properly attributed, and concluded that the paper was plagiarized. [107] The Georgia bar examiners denied admission to the bar. [108]

That finding, made years after the relevant facts occurred, was upheld on appeal. After the Georgia bar examiners denied his application, the student appealed to the Georgia Supreme Court. [109] On appeal, the court noted that although neither it nor the Georgia bar examiners were bound by the hearing officer's findings, there was evidence of plagiarism justifying the denial of the application. [110] The applicant was not admitted to the Georgia bar. [111]

The implications of this case are troubling. On one hand, the Georgia bar examiners certainly had an interest in determining whether the ***41** applicant possessed good moral character. On the other hand, by reviewing the evidence and finding contrary to the university, the Georgia bar examiners called into question the accuracy of the hearing officer's findings and the integrity of the university's hearing system. Moreover, the Georgia bar examiners placed the applicant in the difficult position of defending stale accusations.

Perhaps even more striking is the case of Doe v. Conn. Bar Examining Committee, a case decided by the Connecticut Supreme Court. [112] In that case, the applicant to the bar had been accused of plagiarism while he was a third-year law student at Quinnipiac College School of Law. [113] Specifically, he was accused of submitting a paper that contained not only his own work-product, but also the work of another student. [114] Rather than face a hearing, the applicant admitted that he had violated Quinnipiac's honor code. [115] After graduation, the applicant applied for admission to the Connecticut bar, disclosing the act of plagiarism in his application. [116]

Rather than merely examining the applicant's paper, as the Georgia bar examiners had done in In re K.S.L., the Connecticut bar examiners went a step further. The Connecticut bar examiners called the applicant to testify about the drafting of the paper. [117] The Connecticut bar examiners then contrasted this testimony to the applicant's prior testimony about the plagiarism and found inconsistencies. [118] The Connecticut bar found that the new testimony illustrated that the applicant had indeed submitted another student's work as part of his paper. [119] Ultimately, for these and other reasons, the Connecticut bar denied the applicant's admission. [120]

The potential hazards to bar applicants illustrated by this case are numerous. On one hand, given the conflict of testimony, it seems problematic that new testimony, given months after the operative events, might be credited rather than more contemporaneous testimony. Given a lapse of several months, it should be no surprise that there was inconsistency about the drafting of a student paper. By the time the applicant was applying for bar admissions, he had likely long-since stopped reflecting on the exact circumstances surrounding that paper.

Even more problematic, the contemporaneous testimony was taken in an academic setting, with fewer due process protections. The motivation ***42** for two sets of testimony was also quite different. Sanctions for plagiarism may vary widely in severity from a mere note in the student's file to expulsion. [121] A student facing only a mild sanction may admit to certain events and simply accept the meager punishment, even if that student has not actually committed plagiarism.

Aside from problems relating to the applicant's own testimony, reconsidering academic findings raises problems relating to witness testimony. Witnesses may be other students who have long since graduated, moved, and lost contact with the applicant and university. An applicant may, years after the fact, be unable to present an adequate defense due to witness unavailability.

Even assuming witnesses are available many years after the fact, it seems unnecessary to rake an applicant over the coals a second time after that applicant has already admitted to wrongdoing and accepted academic punishment. [122] It seems futile to force an applicant to endure a second hearing when that applicant has already admitted wrongdoing.

A prime example of this futility is relayed in In re Petition of Zbiegien. [123] The applicant in Zbiegien had admitted to plagiarizing information in a draft of a paper he submitted while he was a student at William Mitchell College of Law. [124] When confronted by the law school, he “did not deny the plagiarism.” [125] Instead, he conceded that he had been under stress due to his wife's recent car accident and agreed to accept the law school's sanction. [126] In his Minnesota bar application, the applicant disclosed the incident. [127]

Unfortunately for the applicant, he was not able to put this incident behind him. The Minnesota bar examiners scheduled a hearing and heard testimony from, among other witnesses, the applicant, his law school professor,

and the law school dean. [128] The applicant also called three character witnesses and detailed his lengthy history dating back to his military service and attendance of community college. [129]

This testimony was not sufficient. The Minnesota bar examiners "dissected the [[draft] paper line by line and phrase by phrase" during the hearing and obligated the applicant to admit each portion of text that had ***43** been plagiarized. [130] In the end, only after an appeal was the applicant deemed suitable for bar admission. [131]

As a profession, we ought to seriously question what benefit this hearing provided. Yet, a bar examiner who fails to inquire deeply into past misconduct may accidentally admit an applicant who is not fit to join the bar. When allegations of academic misconduct have been made, bar examiners are indeed faced with a quandary.

The quandary facing bar examiners becomes even more apparent in cases where an applicant has been found to have committed sexual assault in the academic setting. There is a serious stigma attached to even the mere accusation of sexual assault. Moreover, these allegations often involve disputes between students. In critical ways, hearings relating to sexual assault differ from those relating to plagiarism.

In the case of plagiarism, witness testimony is less critical. Take, for example, an allegation that a law school paper includes material copied from the Internet. The allegedly plagiarized paper can be examined by any neutral third-party and compared to the original Internet source to see whether it has been inappropriately copied. Although minds can differ about the intent of the accused plagiarizer, the evidence of unattributed text is more obvious. Even years after the incident, the plagiarized paper can be re-examined without having suffered the ill effects time has on human memory.

In contrast, in the case of sexual assault, the testimony often involves only the accuser's word against the accused. Serious stigma attaches to both parties, as even the mere accusation of sexual assault may damage the reputation and academic career of the accuser. Witnesses, if there are any, may be reluctant to testify. They may feel torn between the accuser and the accused. They may worry that they too will suffer stigma or be accused of wrongdoing for failure to intervene or report the sexual assault. Over time, witness testimony may become unreliable.

Yet, in cases of sexual assault, testimony may be the only evidence. This is especially true in cases involving disputes of consent. Take, for example, an accusation of rape. The accuser may testify that the sexual contact was nonconsensual. The accused may counter by testifying that there was, in fact, consent. Only witness testimony can resolve this dispute. Years after the incident, witnesses may lose their recollection or be unwilling to testify. Re-hearing allegations at the time of bar application may not be simple or even feasible.

Even more disturbing, an applicant may be denied bar admission based on relatively innocuous, albeit inappropriate, sexual conduct that was the ***44** subject of an academic disciplinary hearing. An applicant was denied admission to the North Carolina bar where he admitted to "peeping tom" behavior as an undergraduate student, including drilling holes in a ceiling to spy on women. [132] The stakes are high for students accused of any sexual misconduct, but the due process protections are minimal.

VII. Suggestions for Bar Examiners

As this article demonstrates, there are various problems associated with the character and fitness requirements for bar admission in cases where the bar applicant has had evidence of prior academic misconduct. There is no easy answer. Clearly, one partial solution to the problem would be more standardization of academic honor codes and misconduct hearing procedures. This solution would be particularly effective if universities moved towards adoption of full due process protections for academic misconduct hearings. At the very least, a uniform rule

that counsel be provided to students accused of sexual assault would be a step towards ensuring adequate due process protections are met during campus hearings. This solution, however, seems unlikely as the trend at many universities has been to lower the standard of proof and reduce due process protections rather than heighten these protections.

Even if the lower standard of evidence is applied, academic institutions should adopt measures to ensure the outcome of campus hearings can be appropriately assessed by bar examiners. All primary sources, such as allegedly plagiarized student papers and the underlying plagiarized material, should be retained by the university for a period sufficient to ensure that bar examiners can review this primary source material independently. Additionally, campus hearings should be recorded or transcribed to prevent the need to recall witnesses and re-present evidence many years after the hearing.

Another partial solution would be to compile a database of academic honor codes and misconduct hearing due process procedures that could be referenced by state bar examiners. In that way, at least bar examiners would have a more comprehensive basis from which to evaluate prior allegations and findings of academic misconduct.

Ultimately, it may behoove state bar committees to carefully weigh these concerns and their interest in character and fitness and to develop uniform procedures to apply in the case of academic misconduct. There is a difficult balance that must be found between procedures that render it easy for the character committee to consider the full scope of applicant character and procedures that prevent undue weight from being given to ***45** findings that resulted from faulty procedures. If the due process protection provided to bar applicants when they apply is any indication, the right to practice law as a profession is an important one. Applicants should not be unfairly excluded as a result of evidence of "bad character" that, upon inspection, was the process of an academic procedure devoid of traditional due process protections.

Only by recognizing some of the concerns outlined in this article, and carefully considering how they may impact a bar character and fitness analysis, can the legal community truly ensure all interests are fairly balanced. Jokes about lawyers aside, we certainly want to exclude sharks from the ranks of practicing attorneys. We do not, however, want to muddy the waters by over emphasizing the results of campus hearings.

Footnotes

1 Why won't sharks bite lawyers? Professional courtesy.

2 Matthew A. Ritter, The Ethics of Moral Character Determination: An Indeterminate Ethical Reflection upon Bar Admissions, 39 Cal. W. L. Rev. 1, 2 (2002); see also Marshall Scott May, Partin v. Bar of Arkansas: The Good Moral Character Requirement for Arkansas Bar Applicants, 49 Ark. L. Rev. 829, 833 (1997); Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 493-96 (1985).

3 Richard R. Arnold, Jr., Comment, Presumptive Disqualification and Prior Unlawful Conduct: The Danger of Unpredictable Character Standards for Bar Applicants, 1997 Utah L. Rev. 63, 65 (1997).

4 Stephanie Denzel, Second-Class Licensure: The Use of Conditional Admission Programs for Bar Applicants with Mental Health and Substance Abuse Histories, 43 Conn. L. Rev. 889, 894 (2011); see also Rhode, supra note 2, at 493-96.

5 Sonya Harrell Hoener, Due Process Implications of the Rehabilitation Requirement in Character and Fitness Determinations in Bar Admissions, 29 Whittier L. Rev. 827, 828-29 (2008).

6 See Judith Resnik, The Addison C. Harris Lecture: Building the Federal Judiciary (Literally and Legally): The Monuments of Chief Justices Taft, Warren, and Rehnquist, 87 Ind. L.J. 823, 863-64 (2012) (noting that the ABA was

founded in 1878 to highlight the "overlapping interests of the bench and the bar"); see also Allison Marston, Guiding the Profession: The 1887 Code of Ethics of the Alabama State Bar Association, 49 Ala. L. Rev. 470, 470-71 (1998) (noting that the founders of the ABA were reformers seeking to "uphold the honor of the profession").

7 Caroline P. Jacobson, Academic Misconduct and Bar Admissions: A Proposal for a Revised Standard, 20 Geo. J. Legal Ethics 739, 741 (2007).

8 Id.

9 A.M. Hendrickson, Rules for Admission to the Bar in the Several States and their Territories of the United States xi (West Publishing Co., 1917); see also Edson R. Sunderland, History of the American Bar Association and its Work 143 (R. H. Smith, 1953).

10 Vijay Sekhon, The Over-Education of American Lawyers: An Economic and Ethical Analysis of the Requirements for Practicing Law in the United States, 14 Geo. Mason L. Rev. 769, 790 (2007).

11 Id.

12 Carol M. Langford, Barbarians at the Bar: Regulation of the Legal Professional Through the Admissions Process, 36 Hofstra L. Rev. 1193, 1205 (2008); see also C.A. Lightner, A More Complete Inquiry Into the Moral Character of Applicants for Admission to the Bar, 38 Rep. A.B.A. 775, 781-82 (1913).

13 For example, the state of Montana extends a "diploma privilege" to graduates of Montana law schools. Pursuant to this privilege, the graduates need not pass a bar examination to be admitted to the bar. See Huffman v. Montana Supreme Court, 372 F. Supp. 1175, 1176 (D. Mont. 1974). Candidates must nonetheless produce satisfactory testimonials of good moral character. Id.

14 Langford, supra note 12, at 1194; see, e.g., Roe v. State Bar, 74 F. App'x 490, 492 (6th Cir. 2003) (citing the good moral character requirement for bar admission in Michigan); Dugas v. Harahan, 978 F.2d 193, 198 (5th Cir. 1992) (citing the good moral character requirement for bar admission in Illinois); In re Leff, 618 P.2d 232, 232 (Ariz. 1980) (citing the good moral character requirement for bar admission in Arizona); Doe v. Conn. Bar Examining Comm., 818 A.2d 14, 24 (Conn. 2003) (citing the good moral character requirement for bar admission in Connecticut).

15 Aaron M. Clemens, Facing the Klieg Lights: Understanding the "Good Moral Character" Examination for Bar Applicants, 40 Akron L. Rev. 255, 255-56 (2007); see also Ritter, supra note 2, at 3; Michael K. McChrystal, A Structural Analysis of the Good Moral Character Requirement for Bar Admission, 60 Notre Dame L. Rev. 67 (1984).

16 Langford, supra note 12, at 1193; see also Ritter supra note 2, at 14-15.

17 Barry H. Grodsky, Department: Focus On Professionalism: "Character And Fitness," 56 LA Bar Jnl. 125 (2008).

18 Standard-01 Character and Fitness Application (2005), available at http://www.ncbex.org/character-and-fitness/servicesl [hereinafter Standard Application]; see also Deborah Landan Spranger, Are State Bar Examiners Crazy?: The Legality of Mental Health Questions on Bar Applications Under the Americans with Disabilities Act, 65 U. Cin. L. Rev. 255 (1996); Margaret Fuller Corneille, Bar Admissions: New Opportunities to Enhance Professionalism, 52 S.C. L. Rev. 609, 614 (2001).

19 Spranger, supra note 18; see also Corneille, supra note 18. Law schools may also be asked to submit information, which again varies by state. Robert L. Jones, Jr., Gerard F. Glynn, & John J. Francis, When Things Go Wrong in the Clinic: How to Prevent and Respond to Serious Student Misconduct, 41 U. Balt. L. Rev. 441, 494-95 (2012).

20 Hoener, supra note 5, at 828-29; see also Audrey Wolfson Latourette, Sex Discrimination In The Legal Profession: Historical And Contemporary Perspectives, 39 Val. U. L. Rev. 859 (2005); Jon Bauer, The Character of the Questions and the Fitness of the Process: Mental Health, Bar Admissions and the Americans with Disabilities Act, 49 UCLA L. Rev. 93, 206-07 (2001); see, e.g., Bradwell v. State, 83 U.S. 130, 141 (1872) (utilizing character standards to exclude women).

21 In re Anastaplo, 366 U.S. 82, 83-84 (1961) (upholding the right of the Illinois bar to deny admission to an applicant who refused to answer questions relating to his membership in the Communist Party); see also In re Summers, 325 U.S. 561 (1945) (upholding the Illinois bar's right to exclude an applicant on the basis that he had refused to serve in the military and instead had been a conscientious objector to WWII). Today, some argue that these same requirements are used to exclude disabled applicants, particularly those with mental health disabilities. See, e.g., Clark v. Virginia Bd. of Bar Exam'rs, 880 F. Supp. 430, 446 (E.D. Va. 1995) (holding a bar examination questionnaire seeking information relating to mental health to be a violation of the Americans with Disabilities Act).

22 Challenges on the basis of vagueness have been unsuccessful. See, e.g., In re Griffiths, 413 U.S. 717, 722-23 (1973); Law Students Civil Rights Research Council, Inc. v. Wadmond, 401 U.S. 154, 159-60 (1971); Konigsberg v. State Bar of Cal., 366 U.S. 36, 40-41 (1961).

23 Schware v. Bd. of Bar Exam'rs of N.M., 353 U.S. 232, 249 (1957) (Frankfurter, J., concurring).

24 Schware, 353 U.S. at 238-39.

25 In re Florida Bd. of Bar Exam'rs, 358 So. 2d 7, 9-10 (Fla. 1978) (noting the Schware opinion in holding that sexual orientation would not bar admission).

26 Marcus Ratcliff, The Good Character Requirement: A Proposal for a Uniform National Standard, 36 Tulsa L.J. 487, 495 (2000) (noting that certain states have promulgated no definition of good character); The Bar Examiners' Handbook 123 (Stuart Duhl ed., 2d ed. 1980) (noting that “no definition of what constitutes grounds for denial of admission on the basis of faulty character exists”).

27 Corneille, supra note 18, at 614.

28 A.B.A. Section of Legal Educ. & Admissions to the Bar & Nat'l Conference of Bar Examiners, Comprehensive Guide to Bar Admission Requirements 2000 viii (Margaret Fuller Corneille & Erica Moeser, eds. 2000) (the “ABA Admission Guide”).

29 Id. at viii.

30 Sekhon, supra note 10, at 790.

31 Anthony J. Graniere & Hilary McHugh, Are You In or Are You Out? The Effect of a Prior Criminal Conviction on Bar Admission & A Proposed National Uniform Standard, 26 Hofstra Lab. & Emp. L.J. 223, 231-36 (2008).

32 Sekhon, supra note 10, at 795; see also Arpa B. Stepanian, Law Student Clerkships; Walking a Thin Line Requirement of “Good Moral Character” for Admission to the Bar, 3 J. Legal Advoc. & Prac. 67, 71-72 (2001); May, supra note 2, at 834 (noting the lack of a “black letter” definition of good moral character).

33 Konigsberg v. State Bar of Cal., 353 U.S. 252, 262-63 (1957) (“The term ‘good moral character’ has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However the term, by itself, is unusually ambiguous. It can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.”).

34 Larry Craddock, “Good Moral Character” as a Licensing Standard, 28 J. Nat'l Ass'n L. Jud. 449, 469 (2008) (comparing the good moral character requirement for admission to the bar with similar requirements for other professional licenses); see also McChrystal, supra note 15, at 70-71 (noting that the definition of good moral character for admission to the bar diverges from the character requirements imposed by the ethical rules applicable to practicing lawyers).

35 See, e.g., Kwasnik v. State Bar, 791 P.2d 319, 328 (Cal. 1990) (admitting to practice law in California an applicant who had previously been denied admission in Florida, in part due to apparent rehabilitation in the time between the two applications); In re W.D.P., 91 P.3d 1078, 1092 (Haw. 2004) (denying admission to the Hawaii bar an applicant who had been admitted and readmitted to the Missouri bar).

36 Theresa Keeley, Good Moral Character: Already an Unconstitutionally Vague Concept and Now Putting Bar Applicants in a Post-9/11 World on an Elevated Threat Level, 6 U. Pa. J. Const. L. 844, 847 (2004) (noting that, in the past, merely holding an unpopular political position could be grounds for denial).

37 Donald H. Stone, The Bar Admission Process, Gatekeeper or Big Brother: An Empirical Study, 15 N. Ill. U. L. Rev. 331, 342-43 (1995).

38 Clemens, supra note 15, at 278-80; see also Jayne W. Barnard, Renewable Bar Admission: A Template For Making "Professionalism" Real, 25 J. Legal Prof. 1, 2 (2001); see, e.g., In re Hamm, 123 P.3d 652, 661 (Ariz. 2005) (denying admission to an applicant with a prior first degree murder conviction, and noting that showing good moral character in light of the conviction was "a near impossibility").

39 In re G.L.S., 745 F.2d 856, 857 (4th Cir. 1984) (affirming the Maryland bar's refusal to admit an applicant who pled guilty to bank robbery); see also In re Hamm, 123 P.3d at 654-55 (affirming the Arizona bar's refusal to admit an applicant who pled guilty to first degree murder); In re Dortch, 860 A.2d 346, 348-49 (D.C. 2004) (affirming the District of Columbia bar's refusal to admit an applicant who was convicted of second-degree murder, attempted armed robbery, and conspiracy).

40 Graniere, supra note 31, at 232 (citing the State Bar of California, Statement on Moral Character Requirement for Admission to Practice Law in California).

41 In re King, 136 P.3d 878, 886 (Ariz. 2006) (denying admission to the applicant although the applicant had been previously admitted to the bar of Texas).

42 In re Dortch, 860 A.2d at 363 (noting that because the applicant was sentenced for the offenses of murder and attempted armed robbery, the bar was unwilling to consider his admission absent a pardon or commuted sentence).

43 Fla. Bd. of Bar Exam'rs Re Castro, 87 So. 3d 699, 702 (Fla. 2012); see also In re Fleischman, 553 N.E.2d 352, 352-53 (Ill. 1990).

44 In re Application of B., 434 A.2d 541, 544-46 (Md. 1981).

45 In re Wigoda, 395 N.E.2d 571, 572 (Ill. 1979).

46 In re Application of Taylor, 647 P.2d 462, 464-65 (Or. 1982).

47 In re Demos, 579 A.2d 668 (D.C. 1990).

48 In re Adams, 540 S.E.2d 609, 610-11 (Ga. 2001).

49 In re Hinson-Lyles, 864 So.2d 108, 112 (La. 2003); see also In re Childress, 561 N.E.2d 614 (Ill. 1990).

50 In re Childress, 561 N.E.2d at 90-91.

51 See, e.g., In re T.J.S., 692 A.2d 498, 500 (N.H. 1997) (denying admission to an applicant who had been convicted of sexual assault).

52 In re White, 656 S.E.2d 527 (Ga. 2008) (affirming the decision of the Georgia board examiners denying bar admission to an applicant who had submitted a plagiarized paper as a second-year law student); see also In re Zbiegien, 433 N.W.2d 871, 877 (Minn. 1988) (holding that a single instance of academic plagiarism is insufficient to bar admission); In re Widdison, 539 N.W.2d 671, 672 (S.D. 1995) (permitting an applicant to re-apply for admission after he had been found to have committed plagiarism).

53 Hoener, supra note 5, at 829.

54 Id.

55 Id.

56 ABA & Natl. Conference of Bar Exam'rs., Code of Recommended Standards for Bar Examiners Preface (adopted Aug. 1987), available at http:// www.abanet.org/legaled/publications/compguide2005/codeofstandards.pdf; see also Keith Swisher, The Troubling Rise Of The Legal Profession's Good Moral Character, 82 St. John's L. Rev. 1037, 1043 (2008); Friedman v. Conn. Bar Examining Comm., 824 A.2d 866, 873 (Conn. App. Ct. 2003) (considering accusations that an applicant cheated on a law school examination); In re Bedi, 917 A.2d 659, 672 (D.C. 2007) (denying admission to an applicant on the basis that he had cheated on the bar examination); In re K.S.L., 495 S.E.2d 276, 278 (Ga. 1998) (considering an unprosecuted incident in which the applicant had entered unlocked cars to steal money and an instance of alleged plagiarism by the applicant while he was a student).

57 Standard Application, supra note 18.

58 In re Widdison, 539 N.W.2d at 678 n.14 (noting that the academic institution "is a separate and distinct entity from the Board of Bar Examiners. While both may have mutual interests, the decisions of one board has [sic] no binding effect on the other."); see also In re Zbiegien, 433 N.W.2d at 873 (declining to accept the findings of the academic hearing and instead re-hearing the allegations).

59 Arnold, supra note 3, at 63-64; see also Maureen M. Carr, The Effect of Prior Criminal Conduct on the Admission to Practice Law: The Move to More Flexible Admission Standards, 8 Geo. J. Legal Ethics 367, 381 (1995).

60 Steven K. Berenson, What Should Law School Conduct Codes Do?, 38 Akron L. Rev. 803, 838 (2005).

61 Elizabeth Gepford McCulley, School of Sharks? Bar Fitness Requirements of Good Moral Character and the Role of Law Schools, 14 Geo. J. Legal Ethics 839, 850 (2001); see, e.g., In re Application of Converse v. Nebraska State Bar Comm'n, 602 N.W.2d 500, 502 (Neb. 1999) (finding a lack of good moral character where an applicant failed to disclose misconduct during law school which was disclosed to the Nebraska bar examiners by the applicant's law school); see also A.B.A. Comm'n On Professionalism, In The Spirit Of Public Service: A Blueprint For The Rekindling Of Lawyer Professionalism, reprinted in 112 F.R.D. 243, 269 (1986).

62 Jacobson, supra note 7, at 747.

63 Roger Billings, Plagiarism in Academia and Beyond: What Is the Role of the Courts?, 38 U.S.F. L. Rev. 391, 410 (2004); see also Kimberly C. Carlos, Comment, The Future of Law School Honor Codes: Guidelines for Creating and Implementing Effective Honor Codes, 65 UMKC L. Rev. 937, 938 (1997).

64 Robert N. Roberts, Public University Responses to Academic Dishonesty: Disciplinary or Academic, 15 J. L. & Educ. 369, 372 (1986).

65 Berenson, supra note 60, at 835-38.

66 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

67 Id. at 156-57.

68 See Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 86 (1978) (noting the need for "flexible" due process requirements in the academic setting, reasoning that dismissals for academic reasons do not require a formal notice and hearing because the academic setting is a non-adversarial process).

69 See id. at 90-91.

70 Lisa L. Swem, Due Process Rights in Student Disciplinary Matters, 14 J.C. & U.L. 359, 361 (1987); see also Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988) (holding that the constitutional rights to retain counsel and to cross-examine witnesses do not apply in the academic setting); Due v. Fla. Agric. & Mech. Univ., 233 F. Supp. 396, 403 (N.D. Fla. 1963) (finding that "it is not necessary to due process requirements that a full scale judicial trial be conducted by a university disciplinary committee with qualified attorneys either present or formally waived as in a felonious charge under the criminal law. There need be no stenographic or mechanical recording of the proceedings."); Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007) (holding that there is no due process right to cross-examine witnesses, and that the rules of evidence may not apply to academic hearings).

71 Danso, 919 A.2d at 1108; see also Gorman, 837 F.2d at 16.

72 Joseph Cohn, Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges, The Chronicle of Higher Education (October 1, 2012).

73 Thomas A. Schweitzer, ‘‘Academic Challenge” Cases: Should Judicial Review Extend to Academic Evaluations of Students?, 41 Am. U.L. Rev. 267, 367 (1992).

74 See, e.g., United States v. Carll, 105 U.S. 611 (1881) (noting the right to notice of an indictment); Powell v. Alabama, 287 U.S. 45 (1932) (discussing the right to assistance of counsel in criminal cases); Barker v. Wingo, 407 U.S. 514 (1972) (noting the right to a speedy trial).

75 Lavinia M. Weizel, The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-On-Student Sexual Assault Complaints, 53 B.C. L. Rev 1613, 1626-27 (2012).

76 Larry A. DiMatteo & Don Wiesner, Academic Honor Codes: A Legal and Ethical Analysis, 19 S. Ill. U. L.J. 49, 85-86 (1994); see also Douglas R. Richmond, Students' Right to Counsel in University Disciplinary Proceedings, 15 J.C. & U.L. 289, 305-08 (1989).

77 Matthew R. Triplett, Note, Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection, 62 Duke L.J. 487, 502 (2012).

78 PSI Upsilon of Phila. v. Univ. of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (“‘[T]he relationship between a private college and its students [i]s contractual in nature. Therefore, students who are being disciplined are entitled only to those procedural safeguards which the school specifically provides.’ The only caveat applied to this principle is that the disciplinary procedures established by the institution must be fundamentally fair.”) (quoting Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 579 (Pa. Super. Ct. 1990) (emphasis removed) (internal citation omitted)); see also Millien v. Colby Coll., 874 A.2d 397, 405-06 (Me. 2005) (holding that a student need not be given the right to cross-examine witnesses in an academic hearing).

79 Christopher P. Krebs et al., The Campus Sexual Assault (CSA) Study: Final Report 5-5-2007 (unpublished report submitted to the National Institute of Justice), available at http://www.ncjrs.gov/pdffilesl/nij/grants/221153.pdf.

80 Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2006).

81 Triplett, supra note 77, at 487 (noting that “student-on-student” sexual assault is a major problem for universities); see also Weizel, supra note 75, at 1614-15 (noting the extent to which colleges struggle to balance interests when both the accused and accuser are students).

82 Holly Hogan, The Real Choice in a Perceived “Catch-22”: Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings, 38 J.L. & Educ. 277 (2009); see also Lisa Tenerowicz, Note, Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings, 42 B.C. L. Rev 653, 682 (2001).

83 Goss v. Lopez, 419 U.S. 565, 574 (1975) (quoting Tinker v. Des Moines Indep. Cnty. Sch. Dist., 393 U.S. 503, 506 (1969)).

84 Academic institutions are free to develop and utilize their own standards for hearings involving academic dishonesty and may opt to use a more “pro-student” burden of proof. In the case of campus hearings for sexual assault, the Department of Education has insisted that the preponderance of the evidence standard applies. Therefore, a student accused of plagiarism may be subject to a more lenient burden of proof than a student accused of rape at that same academic institution. See infra note 87.

85 Kimberg v. Univ. of Scranton, 411 F. App'x 473, 481 (3d Cir. 2010).

86 Millien, 874 A.2d at 405.

87 Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), available at http:// www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

88 Prior to this guidance, the Department of Education had not specified which standard applied. See Letter from Will Creeley, Dir. of Legal & Pub. Advocacy, Found. for Individual Rights in Educ. (FIRE), to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ. 6 (May 5, 2011) [hereinafter FIRE Letter], available at http:// thefire.org/public/pdfs/48934710c977d689391d03alda867dc7.pdf?direct.

89 Id.

90 Triplett, supra note 77, at 497-98.

91 See generally id.

92 See Letter from Anurima Bhargava, Chief of the U.S. Dep't of Justice, Civil Rights Div., Educ. Opportunities Section, and Gary Jackson, Reg'l Dir., U.S. Dep't of Educ. Office for Civil Rights, Seattle Office, to President Royce Engfrom, Office of the President, Univ. of Mont., and Lucy France, Esq., Univ. Cousel, Univ. of Mont. 1 (May 9, 2013), available at http://www.justice.gov/opa/documents/um-ltr-findings.pdf.

93 Id. at 4-5.

94 Although more due process is provided, the levels still fall short of what would be required in a formal legal proceeding. See infra note 95.

95 Stepanian, supra note 32, at 70; see also Rhode supra note 2, at 547; see, e.g., In re Gossage, 5 P.3d 186, 196 (Cal. 2000); In re Manville, 494 A.2d 1289, 1294 (D.C. 1985); In re Stepsay, 98 P.2d 489, 491 (Cal. 1940); In re Peterson, 439 N.W.2d 165, 166 (Iowa 1989).

96 Mark R. Privratsky, Note, A Critical Review Culminating in Practical Bar Examination Application Techniques in Regards to the "Good Moral Character Requirement," 74 Neb. L. Rev. 324, 340 (1995); see also Charles Broome, Note, Constitutional Law--Bar Admissions--Challenge to Bar Admissions Committee's Implementation of Good Moral Character Requirement, 48 Tul. L. Rev. 155, 157 (1973); Fla. Bd. of Bar Exam'rs Re R.D.I., 581 So.2d 27, 29 (Fla. 1991); Greene v. Comm. of Bar Exam'rs, 480 P.2d 976, 978 (Cal. 1971).

97 Ratcliff, supra note 26, at 493; see also In re Menna, 905 P.2d 944, 948 (Cal. 1995) (demonstrating remorse but failing to demonstrate rehabilitation); March v. Comm. of Bar Exam'rs, 433 P.2d 191, 192 (Cal. 1967) (holding on appeal that the applicant had satisfied his burden to demonstrate good moral character).

98 See, e.g., Seide v. Comm. of Bar Exam'rs, 782 P.2d 602, 604 (Cal. 1989) ("While the applicant bears the burden of showing that the State Bar's findings are not supported by the evidence or that its recommendation is erroneous, all reasonable doubts are resolved in his favor.").

99 See Castro v. Bar Examining Comm., No. 032-05-50, 1994 Conn. Super. LEXIS 380, at *3-6 (Conn. Super. Ct. Feb. 18, 1994) (remanding to the bar examiners for a re-hearing where the original hearing lacked procedural due process safeguards); see also In re Lobb, 157 So. 2d 75, 76 (Fla. 1963) (noting the applicant's right to be represented by counsel before the board of bar examiners); In re Application for Admission to the Bar, 828 N.E.2d 484, 491 (Mass. 2005) (noting the applicant's rights to be informed of charges and confront witnesses).

100 Mitchell M. Simon, What's Remorse Got to Do, Got to Do with it? Bar Admission for those with Youthful Offenses, 2010 Mich. St. L. Rev. 1001, 1009 (2010); see also D.C. Court of Appeals v. Feldman, 460 U.S. 462 (1983) (noting that final state court judgments denying bar admission may be reviewed by the Supreme Court); Clulow v. State of Okla., 700 F.2d 1291, 1296 (10th Cir. 1983); Craig v. State Bar of Cal., 141 F.3d 1353, 1354 (9th Cir. 1998); Thomas v. Kadish, 748 F.2d 276, 277 (5th Cir. 1984).

101 McCulley, supra note 61, at 842-43. The state court is permitted, as often occurs, to heavily weigh the finding of the bar examiners. See also In re Petition of Cunningham, 502 N.W.2d 53, 57 (Minn. 1993) ("Only with greatest reluctance do we come to a conclusion other than that which the Board recommends."); In re Application of Howard, 855 N.E.2d

865, 867 (Ohio 2006) (adopting the examiner's recommendation to deny admission where, among other things, the applicant failed to display candor relating to plagiarism of a law school paper); In re Application of Valencia, 757 N.E.2d 325, 327 (Ohio 2001) (adopting the findings of the board that the applicant had committed multiple acts of plagiarism and should be denied permission to take the bar examination); Radtke v. Bd. of Bar Exam'rs, 601 N.W.2d 642, 649 (Wis. 1999) (affirming the board's decision to decline the applicant's character and fitness for bar admission).

102 See, e.g., In re Dreier, 258 F.2d 68, 69-70 (3d Cir. 1958) (reversing the district court's denial of admission and remanding for a consideration of whether the applicant's rehabilitation post-conviction sufficiently demonstrated he possessed good moral character); see also Lubetzky v. State Bar, 815 P.2d 341, 351 (Cal. 1991) (admitting to the California bar an applicant who had been denied where the California Supreme Court determined that the bar examiners failed to rebut petitioner's prima facie case of good moral character); In re Courtney, 319 P.2d 991, 994-95 (Ariz. 1957) (admitting to the Arizona bar an applicant who appealed after he had been denied admission by the Arizona bar examiners).

103 In re K.S.L., 495 S.E.2d 276, 277 (Ga. 1998).

104 Id. at 276.

105 Id. at 277.

106 Id.

107 Id.

108 In re K.S.L., 495 S.E.2d at 277.

109 Id.

110 Id. at 278.

111 Id.

112 Doe, 818 A.2d at 14.

113 Id. at 18-19.

114 Id.

115 Id. at 18-19.

116 Id. at 19.

117 Doe, 818 A.2d at 14.

118 Id. at 25.

119 Id. at 27.

120 Id.

121 Kim D. Chanbonpin, Legal Writing, the Remix: Plagiarism and Hip Hop Ethics, 63 Mercer L. Rev. 597, 603 (2012).

122 See In re Zbiegien, 433 N.W.2d at 876-77.

123 Id.

124 Id. at 872.

125 Id.

126 Id.

127 In re Zbiegien, 433 N.W.2d at 872-73.

128 Id. at 873.

129 Id. at 873-74.

130 Id. at 876-77.

131 Id. at 877.

132 In re Elkins, 302 S.E.2d 215, 216-17 (N.C. 1983).

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Articles

"LET'S TALK ABOUT SEX": LEGISLATING AND EDUCATING ON THE AFFIRMATIVE CONSENT STANDARD

Wendy Adele Humphrey [a1]

And we're a people who believe every child deserves an education that allows them to fulfill their God-given potential, free from fear of intimidation or [[sexual] violence. And we owe it to our children to live up to those values.

--President Obama [1]

Introduction

IN 1991, Salt-N-Pepa released the classic hip-hop song "Let's Talk about Sex" [2] to address an otherwise private and intimate topic. Now, almost twenty-five years later, in light of the prevalence of sexual violence on college campuses, the song's title takes on a whole new meaning. Indeed, sexual assault on college campuses across the nation has been receiving an unprecedented level of attention, and news ***36** headlines about sexual assault and the portrayal of sexual behavior on college campuses are thus becoming all too common:

My Rapist is Still on Campus, May 14, 2015:

> I was raped by a fellow classmate the first day of my sophomore year. I didn't report it at first because I didn't feel like dealing with the emotional trauma. But then I met two other women who told me the same person who had assaulted me assaulted them, and I decided I had to do something. We all reported our cases, and all three were dismissed. [3]

More College Men are Fighting Back Against Sexual Assault Cases, June 7, 2014:

> Peter Yu, Drew Sterrett and Lewis McLeod were headed toward bright futures at prestigious colleges and universities when each got involved in one-night sexual encounters. All three young men claimed the encounters were consensual-- but the women asserted otherwise. In each case, campus officials found the men responsible for sexual assault and expelled or suspended them. [4]

Texas Tech Frat Loses Charter Following 'No Means Yes, Yes Means Anal' Display, October 4, 2014:

> On Sept. 19, the Phi Delta Theta fraternity held a hurricane theme party where a "No Means Yes" banner was put up in addition to a display of a woman's genitals around a sprinkler. The

> national office investigated the incident after photos leaked online and announced Monday it was placing the Texas Tech chapter "in escrow" and removing members involved in organizational violations. [5]

***37** These news headlines reflect the pervasive problem of sexual assault on college campuses, a problem that has even been coined a crisis of "epidemic proportions." [6] In fact, partially due to the nature of the college atmosphere, [7] college women are put in greater danger of sexual violence than college-age males, who account for only seventeen percent of rape and sexual assault victimizations. [8] Some research indicates that possibly one in five women is sexually assaulted while in college, [9] and unfortunately, the statistics for young women who are in ***38** high school are equally disturbing. [10] In regard to college sexual assault, studies have discovered that the large majority of sexual assault incidents are a result of acquaintance rape, [11] which occurs when the victim and the attacker know each other, as opposed to stranger rape, when they do not know each other. [12] Moreover, repeat predators in campus sexual assaults may account for up to nine out of every ten rapes. [13]

After an unwanted sexual encounter in a college setting, the alleged victim has several options: seek criminal charges through the criminal justice system, file a civil lawsuit against the alleged perpetrator, or file a sexual misconduct grievance with the institution of higher education. [14] The majority of sexual assault victims, however, do not report their sexual assaults to law enforcement officials, [15] so ***39** they do not initiate formal criminal charges. Some researchers attribute the lack of reporting to confusion about what constitutes sexual assault [16] and to the fear of not being believed. [17] This reality has led some critics to argue that colleges and universities should not be investigating and adjudicating allegations of sexual misconduct at all, [18] or that they should wait to investigate only after local law enforcement completes a criminal investigation. [19] Under current federal law, however, colleges and universities that receive federal funding are required to provide students protection against discriminatory practices, including sexual harassment. [20]

As a result, the prevalence of sexual assault on college campuses has triggered sweeping reform. [21] To comply with federal law, and with guidance from the White House Administration, colleges and universities have developed policies and procedures to advance the goal of preventing sexual assault. [22] One such policy that has gained momentum is the concept of affirmative consent. [23] Under the typical "yes means yes" affirmative consent standard, the initiator of sexual activity must get voluntary agreement, either verbally or nonverbally, at each ***40** stage of a sexual encounter. [24] This means that during campus investigations and adjudications of sexual misconduct allegations, the conversation shifts from a "no means no" victim-focused standard to a "yes means yes" perpetrator-focused standard. [25] Whether one supports or opposes the affirmative consent standard, sexual assault has been catapulted into the national discourse, and the yes means yes standard is one way that college campuses are trying to fundamentally shift how sexual assault is addressed. Moreover, based on the momentum that the affirmative consent movement is gaining, it is doubtful that the standard will lose support at any time in the near future.

Part I of this Article briefly examines the relevant legislation and White House administrative action to provide context for the evolution of the yes means yes affirmative consent standard. [26] Part II then focuses on the yes means yes standard, recognizing that although the large majority of colleges and universities are not yet required to adopt an affirmative consent policy, many have done so on their own initiative. [27] In addition, Part II looks

at both state and federal legislation that has mandated or may mandate schools to adopt an affirmative consent standard. [28]

Finally, because affirmative consent is now being advanced on college campuses and because Title IX applies to primary and secondary schools, Part III presents logical, compelling reasons why affirmative consent education before college is necessary to combat the problem of sexual assault. [29] In this regard, Part III argues that, based on research and on the existing educational framework in most states, high schools should be required to include instruction about the affirmative consent standard. [30] While there is no one-size-fits-all solution for addressing the problem of sexual assault on college campuses, requiring evidence-based awareness and prevention education during high school about affirmative consent is one tool to help young people start thinking differently about sexual violence.

*41 I. Sexual Assault Legislation and Administrative Action

An understanding of the affirmative consent standard necessitates a brief explanation of the federal legislation and administrative action that has contributed to the paradigm shift from "no means no" to "yes means yes." Part I sets forth the relevant law, guidelines, and policies that have helped the yes means yes affirmative consent standard evolve into its present form.

A. Title IX and Sexual Harassment

The roots of Title IX can be traced back to the Higher Education Act of 1965, [31] which promoted higher education by adding funding through federal grants and loan programs. The Higher Education Act of 1965, however, did not initially condition the grant of federal funds on non-sexually-based discrimination. [32] In 1972, Congress amended the Higher Education Act of 1965, and Title IX of the Educational Amendments of 1972 states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . . ." [33] Accordingly, the purpose of Title IX is to avoid the use of federal funding to support discriminatory practices and to provide individual citizens protection against those discriminatory practices. [34]

In 1980, the National Advisory Council on Women's Educational Programs conducted a review of Title IX [35] and determined that Title IX should be interpreted to prohibit sexual harassment. [36] The Council ***42** contacted the U.S. Department of Health, Education, and Welfare's Office of Civil Rights (OCR) and urged it to implement regulations consistent with its sexual harassment interpretation. [37] The following year, the OCR determined that under Title IX, sexual harassment encompasses "verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX." [38] Finally, in 1992 the U.S. Supreme Court in *Franklin v. Gwinnett County Public School* recognized that sexual harassment could fall under Title IX. [39]

Title IX is enforceable at the administrative level [40] and through an implied private right of action. [41] At the administrative level, the OCR is charged with conducting investigations over concerns that colleges and universities violated the gender equity law under Title IX in their handling of sexual misconduct cases. [42] Currently, the OCR is ***43** conducting over 160 investigations at colleges and universities regarding concerns

that the schools violated Title IX in their handling of sexual violence cases.[43] In 2014, the OCR determined that six of the schools it investigated violated Title IX.[44]

Based on the implied private right of action, a number of Title IX lawsuits have been filed alleging that higher education institutions did not properly respond to allegations of sexual misconduct.[45] For example, last year a group of college students collectively filed complaints with the Department of Education against Columbia University, alleging that the university mishandled cases involving sexual assault.[46] One of the complainants, Emma Sulkowicz, received national attention for carrying a mattress around campus for months in protest of the alleged mishandling of her sexual assault case.[47] Sulkowicz has become the face of the college sexual assault survivors' movement and ***44** she even attended the 2015 State of the Union address as a guest of Senator Kirsten Gillibrand.[48] On the other hand, college men are increasingly filing Title IX lawsuits against universities for the alleged failure to handle allegations of sexual misconduct in ways that comport with due process.[49] Thus, the number of OCR investigations and Title IX lawsuits demonstrates that sexual assault on college campuses continues to be a pervasive issue with which our nation's colleges and universities struggle as they attempt to comply with Title IX.

B. The OCR's Sexual Harassment Guidance And "Dear Colleague" Letter

The OCR published its first Sexual Harassment Guidance in 1997[50] and then revised it in 2001 ("2001 Guidance Document").[51] The 2001 revisions explained that, to comply with Title IX, schools have the responsibility to adopt a sexual harassment policy, designate a Title IX Coordinator, and provide grievance procedures for sexual harassment victims.[52] Additionally, the 2001 Guidance Document addressed ***45** institutions of higher education by engaging response protocol to stop sexual harassment, acting to prevent the recurrence of harassment, and taking steps to restore complainants of sexual harassment.[53] Moreover, because public colleges and universities are considered state actors, they must abide by the Fourteenth Amendment's prohibition against depriving students of property without due process of law.[54] In this regard, the 2001 Guidance Document stressed that the procedures adopted by a school covered by Title IX must not only "ensure the Title IX rights of the complainant," but must "[accord] due process to both parties involved . . . ."[55] Of course, due process requirements in university disciplinary proceedings are not the same as the requirements within criminal or civil courts.[56]

In April of 2011, the OCR issued a letter (the "'Dear Colleague' Letter"), asking schools to take proactive steps to end sexual violence on campus.[57] The "Dear Colleague" Letter included guidelines and procedural requirements to help colleges and universities nationwide better understand their obligations under federal civil rights law to prevent and respond to reports of sexual violence on campus.[58] The "Dear Colleague" Letter explained the educational measures colleges and universities should take to help prevent sexual violence.[59]

Specifically, the letter explained that proactive measures include designating an employee to coordinate Title IX compliance and publishing a list of sexual misconduct grievance procedures for students.[60] In addition, the letter suggested that schools implement sexual assault ***46** orientation programs for new students, faculty, and staff.[61] Likewise, other persons who have a higher likelihood of coming into contact with sexual assault victims and perpetrators--campus law enforcement, coaches, student athletes, and residence hall assistants--should receive sexual assault training.[62] All of the implemented orientation programs and training should educate attendees on the school's definition of sexual assault, encourage reporting, explain the school's sexual assault policies, and explain the potential consequences of sexual assault.[63]

Furthermore, the "Dear Colleague" Letter directed schools to follow certain procedures when investigating and adjudicating allegations of sexual violence.[64] In regard to disciplinary proceedings, the letter directed schools to use a "preponderance of the evidence" standard.[65] Although some have criticized the preponderance of the evidence standard for being too low when determining a claim of sexual violence on campus,[66] others maintain that the standard is appropriate for determinations at the campus level.[67] Recent California legislation included the preponderance of the evidence standard and ***47** proscribed that the standard be used in campus disciplinary proceedings when adjudicating allegations of sexual misconduct.[68]

Most recently, in April 2014, the OCR issued a question and answer document to provide additional guidance to federally funded educational institutions. This document further clarified the legal requirements under Title IX, the OCR's 2001 revised Guidance Document, and the OCR's 2011 "Dear Colleague" Letter.[69]

C. Required Reporting under the Clery Act

Also relevant to the issue of sexual assault on college campuses is the Clery Act, formerly known as the Crime Awareness and Campus Security Act.[70] The Clery Act requires colleges and universities to disclose information about crime on and around their campuses.[71] The Clery Act applies to most public and private higher education institutions because it is tied to federal student financial aid programs.[72] In 1992, Congress amended the Clery Act by adding the Campus Sexual Assault Victims' Bill of Rights.[73] The amendments require colleges and universities to afford certain rights to victims of sexual violence.[74] Congress then amended the law again in 1998 to broaden the reporting requirements and renamed the law the Jeanne Clery Disclosure of ***48** Campus Security Policy and Campus Crime Statistics Act.[75] The U.S. Department of Education monitors compliance with the Clery Act,[76] and institutions can incur financial penalties of $35,000 per violation[77] as well as suspension from federal student aid programs.[78]

The Clery Act requires higher education institutions to complete a number of steps related to disclosure of crime information. Institutions are required to create and publish an Annual Security Report every October 1st.[79] This Annual Security Report must document the previous three years of campus crime statistics.[80] It must also include information on security policies and procedures as well as information about the institution's policies and procedures for criminal incidents.[81] In addition, each institution must keep a public crime log that documents each crime within two business days of the incident.[82] Finally, colleges and universities must disclose crime statistics, including sexual offenses for incidents that occur on campus, on public areas adjacent to or running through campus, and at certain non-campus facilities, e.g., Greek housing.[83] The Act, however, does not require the reporting of off-campus sexual offenses, such as sexual violence that occurs in a student's private apartment.[84] Therefore, reporting required by the Clery Act provides only a glimpse into the prevalence of sexual assault.

D. Campus Sexual Violence Elimination Act

Originally enacted in 1994, the Violence Against Women Act ("VAWA") provides federal grants to state, local, and tribal law enforcement ***49** authorities to investigate and prosecute violent crimes against women.[85] VAWA was reauthorized in 2000 as part of the Victims of Trafficking and Violence Protection Act and then reauthorized again in 2005 when it created the Sexual Assault Services Program.[86] In March 2013, President Obama signed

into law the Violence Against Women Reauthorization Act ("VAWA 2013"), [87] which amended the Clery Act and imposed new obligations on colleges and universities, both public and private, under the Campus Sexual Violence Elimination Act ("Campus SaVE Act"). [88]

In general, the obligations under the Campus SaVE Act refine and clarify existing legal requirements and government agency enforcement statements. For example, the Campus SaVE Act amended Title IX by making institutions include domestic violence, dating violence, and stalking incidents in annual crime statistics reports [89] and by requiring schools to develop plans to prevent sexual assault violence. [90] Furthermore, the Campus SaVE Act requires schools to educate sexual assault victims on their rights and resources [91] and to specify the procedures that are undergone after a student makes a report of sexual assault. [92]

***50** More specifically, the Campus SaVE Act requires that programs primarily focus on sexual misconduct prevention and awareness for all incoming students and new employees. [93] Under the Act, the prevention and awareness programs must include the following information: (1) a statement that the institution prohibits those offenses; (2) the definition of those offenses in the applicable jurisdiction; (3) the definition of consent, with reference to sexual offenses, in the applicable jurisdiction; (4) "safe and positive" options for bystander intervention an individual may take to "prevent harm or intervene" in risky situations; (5) recognition of signs of abusive behavior and how to avoid potential attacks; and (6) ongoing prevention and awareness campaigns for students and faculty. [94]

Furthermore, in October 2014, the Department of Education clarified the application of the legal mandates of the Campus SaVE Act with the publication of the Final Regulations implementing the Act, which went into effect on July 1, 2015. [95] Yet, during the recent reauthorization of the Violence Against Women Act, the Department of Education's efforts to require all institutions of higher education to include a federal definition of consent in their codes for student conduct were not successful. [96] Therefore, under current federal law, colleges and universities must create their own definition of consent.

E. The Administration's Recent Efforts

The Obama Administration has taken initiative to combat the issue of sexual assault by calling on campus law enforcement to play a central role in the fight against sexual misconduct. [97] It has also given guidance to schools that receive federal funding on their obligations to prevent and respond to sexual assault. [98] In January 2014, President ***51** Obama and Vice President Biden established the White House Task Force on Protecting Students from Sexual Assault. [99] The Task Force has worked to assist colleges and universities in preventing sexual assault and to provide practical tools in preventing sexual violence.

The Administration unveiled a new public awareness and education campaign: "It's On Us." [100] The It's On Us [101] initiative is a critical part of the Administration's work to improve enforcement, transparency, and accountability. [102] The campaign was launched in partnership with the Center for American Progress' Generation Progress. [103] In addition, the student body leadership from more than 250 colleges and universities, [104] collegiate sports organizations, such as the NCAA, and private companies that have strong ties to the collegiate system, are participating in the It's On Us campaign. [105]

In 2014, to bring more attention to sexual assault "on college campuses, at bars, at parties, [and] even in high schools," the White House produced a short Public Service Announcement (PSA) to address ***52** the issue of acquaintance rape.[106] The PSA not only featured President Obama, but it also featured some Hollywood stars, including Seth Myers and Steve Carell.[107] In the PSA, one actor explains that "if she doesn't consent, or if she can't consent, it's rape."[108] The PSA also stresses the role of bystander intervention[109] and urges students to "help her" and to "be a part of the solution."[110]

Later that spring, the OCR clarified the mandated responses,[111] and the White House Task Force on Sexual Assault provided additional guidance through its "Not Alone" report.[112] The purpose of the Task Force's Not Alone[113] report is to help equip student and administrative ***53** bodies to more effectively tackle the issue of sexual violence on campus.[114] The report includes best practices, steps, and recommendations in four main areas: "(1) identifying the scope of the problem through campus climate surveys; (2) preventing campus sexual assault and engaging men; (3) helping schools respond effectively when a student is assaulted; [and] (4) improving, and making more transparent, the federal government's enforcement efforts."[115]

The Not Alone report stressed the importance of consent by declaring, once again, "if she doesn't consent--or can't consent, it's a crime."[116] The Administration also developed a Checklist for Sexual Misconduct Policies, and one recommendation is to clearly define all prohibited conduct as well as consent itself.[117] The checklist explains that consent must be affirmative, i.e., "voluntary agreement to engage in sexual activity," and "silence or absence of resistance does not imply consent."[118] As a result of this recommendation to define consent in campus sexual misconduct policies, many schools have developed affirmative consent provisions governing students' conduct.

F. Proposed Campus Accountablity and Safety Act

While the above legislation and administrative action illustrate how the issue of sexual assault has been addressed, additional steps are being taken to further the cause. In July 2014, Senator Claire McCaskill and bipartisan cosponsors introduced the Campus Accountability and Safety Act ("CASAct"),[119] and the bill was reintroduced in February 2015.[120] This bill represents another proactive step to address campus sexual assault and would provide even more accountability ***54** and transparency from higher education institutions.[121] Among other reforms, CASAct would: (1) require higher education institutions that receive federal financial assistance to designate confidential advisors to coordinate services for victims of sexual violence; (2) require training for campus personnel involved in sexual assault services; (3) require a standardized, online, annual survey of students regarding their experiences with sexual violence and harassment;[122] and (4) require the disclosure of additional information with respect to sex offences.[123] Other key provisions of the legislation require more fairness in the campus disciplinary process, require higher education institutions to enter into a memorandum of understanding with local law enforcement agencies, and impose new penalties for Title IX and Clery Act violations.[124] This proposed legislation ensures that the issue of sexual assault remains on the national radar.

II. The "Yes Means Yes" Affirmative Consent Standard

As previously mentioned, the White House's Checklist for Sexual Misconduct Policies recommended that colleges and universities expressly define affirmative consent.[125] The affirmative consent definition should explain that the participants must have a "voluntary agreement to engage in sexual activity" and that "silence or absence

of resistance does not imply consent." [126] The concept of affirmative consent, however, has been around for decades; for example, the Canadian ***55** government adopted affirmative consent as the country's legal standard in 1992. [127]

At educational institutions across the nation, the affirmative consent standard shifts the burden during a campus disciplinary board's investigation and adjudication of sexual misconduct allegations. [128] Instead of asking a sexual assault complainant if he or she said "no" during the sexual encounter, under an affirmative consent standard, the questioning is directed toward the accused and becomes a matter of whether the alleged victim actually expressed a "yes." [129] Yet, this affirmative consent standard [130] is not consistent with the legal definition of rape in the United States' criminal justice system. [131] In fact, ***56** although the Federal Bureau of Investigation changed the Uniform Crime Report's definition of sexual assault in 2013 to include the phrase "without the consent of the victim," [132] fewer than ten states include non-consensual sex in the legal definition of rape. [133] Despite this lack of reconciliation between campus affirmative consent policies and state rape law, the affirmative consent movement is continuing to gain attention on college campuses and in state legislatures.

A. Affirmative Consent Policies on College Campuses

The affirmative consent standard extends to college disciplinary boards that investigate allegations of sexual misconduct on campus. [134] In 1991, Antioch College [135] pioneered the concept of affirmative consent on college campuses when it implemented a Sexual Offense Prevention Policy. [136] According to this policy, a person consents by "verbally asking and verbally giving or denying consent for all levels of sexual behavior." [137] When the Antioch yes means yes approach was first introduced, it was widely mocked. [138] In a sketch on Saturday ***57** Night Live ("SNL") called "Is It Date Rape?," the approach was viewed as reducing a sexual encounter to a series of robotic yes and no questions. [139] In light of the current affirmative consent movement, that critique has been renewed, as have other critiques such as the role of alcohol in one's ability to give consent. [140]

Despite the critiques of the affirmative consent standard, according to the National Center for Higher Education Risk Management, [141] more than 800 colleges [142] have adopted a policy based on a consent-based model and have included a definition of affirmative consent in their sexual assault policies. [143] Furthermore, colleges and universities have embraced efforts to educate students and others about affirmative consent and sexual violence in general, whether through social ***58** media campaigns, [144] bystander intervention campaigns, [145] or other prevention programming. [146] Some schools are requiring prevention programs and affirmative consent education during freshman orientation, [147] while other schools are developing longer interventions to educate about sexual violence and affirmative consent. [148] Other ***59** programs have also been created to promote the affirmative consent movement, including new agreements by campus Greek organizations to provide comprehensive information about affirmative consent initiatives. [149] Of course, although these proactive steps are helping to address the problem of campus sexual assault, institutions of higher education should continue to be proactive. This entails reviewing and modifying policies and procedures for handling alleged sexual misconduct, and evaluating the effectiveness of the awareness and prevention programming. [150]

B. Mandating the Affirmative Consent Standard

Legislation is another way to bring legitimacy to the issue of sexual violence on colleges campuses.[151] In the past year, state legislatures have started taking steps to ensure that colleges and universities adopt a yes means yes affirmative consent standard. In September 2014, California became the first state to adopt yes means yes legislation to address sexual assault on college campuses.[152] The law seeks to improve how colleges and universities handle allegations of sexual violence ***60** and to clarify the standards by requiring affirmative consent during a sexual encounter.

Specifically, California Senate Bill 967 added language to section 67386 of the Education Code,[153] requiring the governing board of each community college district, the Trustees of the California State University, the Regents of the University of California, and the governing boards of independent postsecondary institutions to adopt policies governing sexual assault, domestic violence, dating violence, and stalking.[154] These policies must include an affirmative consent standard,[155] and consent must be defined as an affirmative, conscious, and voluntary agreement to engage in sexual activity.[156] Under this standard, each person involved in the sexual encounter is responsible for ensuring that he or she has the affirmative consent of all others.[157] Affirmative consent must also be ongoing and may be revoked at any time.[158] Furthermore, the adopted affirmative consent policies may not excuse an alleged lack of affirmative consent when "the accused's belief in affirmative consent arose from intoxication or recklessness of the accused."[159] In this regard, a person should take reasonable steps to ascertain affirmative consent under the circumstances.[160]

The bill's supporters praise the legislation as an important step in preventing sexual violence on college campuses and opine that the affirmative consent language will reduce the ambiguity that can lead to sexual assault encounters.[161] However, opposition to codifying the ***61** affirmative consent standard exists for several reasons. Critics of the affirmative consent legislation claim the standard constitutes a dangerous overreaching into college students' bedrooms,[162] will detract from the spontaneity of sexual encounters,[163] and is simply too ambiguous because nonverbal communication is too hard to interpret.[164] In ***62** addition, some critics argue that male students may start preemptively accusing women of sexual assault[165] and that ultimately the affirmative consent standard is a misguided policy that adds to the infringement on male students' civil rights.[166] Advocates of the affirmative consent standard dismiss these critiques and claim that the policy does not necessarily change the way most people already interact with each other.[167] Additionally, advocates believe it equalizes women and men because their sexual encounters should be based on mutual desire and enthusiasm.[168]

Admittedly, the circumstances that qualify as sexual assault may be hard to identify, but fundamentally, the affirmative consent standard encourages those in a sexual encounter to simply express their consent. As a result, the burden in campus disciplinary proceedings shifts to the accused to articulate how he or she obtained consent from the other person.[169]

Furthermore, under California's affirmative consent law, the governing boards must implement comprehensive prevention and outreach programs addressing sexual assault, domestic violence, dating violence, and stalking.[170] Institutions must include outreach efforts during every incoming student's orientation and must generally make ***63** students aware of the institution's sexual misconduct policies, including the affirmative consent standard.[171] Thus, this component of the law ensures that students will be educated about the affirmative consent standard.

Following California's lead, other states have begun addressing sexual assault by mandating the affirmative consent standard. In early 2015, New York Governor Andrew Cuomo announced that the sixty-four campuses of

the State University of New York will mandate an affirmative consent policy in the same way California does. [172] In July, he signed legislation that requires a uniform definition of consent for all of New York's public and private colleges. [173] Recently, a number of other states [174] have proposed legislation addressing the affirmative consent standard, including: Arizona, [175] Connecticut, [176] Hawaii, [177] ***64** Iowa, [178] Kansas, [179] Maryland, [180] Minnesota, [181] Missouri, [182] New Jersey, [183] North Carolina, [184] and West Virginia. [185] Therefore, it is apparent that state legislatures are increasingly attempting to require colleges and universities to adopt an affirmative consent standard.

III. High School Education on Affirmative Consent

The action taken by legislators, the Obama Administration, and colleges and universities in regard to the affirmative consent standard reinforces the importance of preventing sexual assault. Most efforts, however, have focused on awareness and prevention at the college level. [186] To establish effective prevention of sexual violence, educators should ensure that discussions about healthy relationships and affirmative consent are occurring before students attend freshmen orientation. [187] One proactive step in helping to establish boundaries of acceptable sexual behavior is to start education about affirmative consent during high school. [188]

***65** There are logical, compelling reasons to make instruction on the affirmative consent standard a part of the high school curriculum. Title IX applies to *all* educational institutions that receive federal funds, [189] so either state governments or the federal government should consider requiring school districts to take additional steps to prevent sexual harassment. [190] The White House Task Force that issued the college guidelines in 2014 is now considering how those recommendations apply to elementary and secondary schools. [191] Moreover, the concern about Title IX complaints being filed should “force” primary and secondary schools to consider how they are handling sexual assault education and protocol. [192] In addition, statistical evidence illustrates that young people start engaging in sexual activity before attending college; [193] therefore, their understanding of acceptable sexual behavior premised on affirmative consent is vital to promoting healthy relationships and preventing sexual violence on college campuses. [194]

Finally, the large majority of states already have a curriculum framework that supports the addition of instruction on the affirmative consent standard, [195] and one state has recently passed legislation to ***66** require such education. [196] Including instruction on affirmative consent during high school is a logical step toward preventing sexual assault on college campuses. Thus, further legislation may be necessary to guarantee that high schools implement educational programs that include instruction on affirmative consent.

A. Sexual Activity and Harassment Before College

The problem of sexual violence is not isolated to college campuses. As explained below, research shows that today's youth is engaged in sexual activity, and unfortunately, sexual violence also occurs at younger ages. Thus, while some opponents think that sexual assault and affirmative consent are not appropriate topics for high school students, [197] they should not ignore the reality of the sexual conduct students are engaged in during high school.

First, a person's approach to relationships and sexual behavior is typically established by the time he or she starts college. [198] A recent survey by the Division of Violence Prevention in the Centers for Disease Control and Prevention (“CDC”) indicates that more than forty-six percent of all high school students say they have had

sex. [199] Furthermore, fifteen percent of high school students have had sex with four or more partners during their lifetime. [200]

Second, research shows that sexual harassment starts occurring at a young age, and data has revealed a correlation between early sexual ***67** experiences and teen dating violence and abuse. [201] In a nationwide survey of students in grades eight through eleven, eighty-one percent reported experiencing sexual harassment during their school lives. [202] In another recent survey of students in grades seven through twelve, nearly half stated that they experienced some form of sexual harassment during the 2010-2011 school year. [203] In addition, a CDC study revealed that "nearly one in ten young adults [204] [have admitted] to committing some type of sexual violence, ranging from unwanted touching or kissing to rape." [205] The Justice Department also found that nearly twenty percent of girls between the ages of fourteen and seventeen have been victims of sexual assault or attempted sexual assault, [206] and that forty-two percent of all female rape victims were first assaulted before they turned eighteen. [207] Most recently, a study published in The Journal of the American Medical Association ("JAMA") Pediatric revealed that around six percent of girls and three percent of boys reported experiencing both physical and sexual dating violence in the last twelve months. [208] Taken together, this statistical evidence shows that the sexual assault problem starts before young people reach the college age.

***68** Furthermore, "[s]exual violence can have a negative impact on young people's lives moving forward, which further reinforces the idea that we do need to address the issue [of sexual assault] early on." [209] In fact, research shows that young students who reported both physical and sexual violence were more likely to engage in risky behavior, such as drug use, alcohol abuse, and risky sexual behaviors. [210] These students are also more likely to exhibit depressive symptoms and to report suicidal thoughts. [211] Thus, an appropriate course of action is to require education about sexual assault during high school, including education about the affirmative consent standard. This education will ensure that high school students will more fully understand acceptable sexual behavior. Furthermore, it may also increase the rate of reporting because early education can empower victims to report the sexual violence. [212]

B. Implementing Affirmative Consent Education

Many states already have a framework in place to implement affirmative consent education in the high school curriculum. [213] Accordingly, to have more comprehensive education, all secondary high schools should include mandatory education about the affirmative consent standard. This education can be included in either existing health curriculum or sex education curriculum that is set out in the state's Education Code, or in other awareness and prevention programming.

Sex education "is the process of acquiring information and forming attitudes and beliefs about sex, sexual identity, relationships and intimacy" and "is also about developing young people's skills so that they make informed choices about their behaviour . . . ." [214] As of November 1, 2015, twenty-two states and the District of Columbia require public schools to teach some form of sex education. [215] Indeed, public ***69** opinion polls consistently show that more than eighty percent of Americans support teaching comprehensive sex education in junior high and high schools. [216] Most school districts do, however, allow parents to opt their children out of sex education curriculum. [217]

Similarly, many states recommend or require students to receive health education.[218] In addition, in some states prevention initiatives for teen dating violence include early education about safe dating practices.[219] At least fourteen states have laws that encourage or require school boards to develop curriculum on teen dating violence.[220] Thus, another option for states is to require affirmative consent education as part of health education or as part of programming about safe teen dating practices.[221]

***70** As with the college affirmative consent law, California is leading the way in regard to high school education on the topic. Not all school districts in California require health education, but Senate Bill 695 mandates discussions of affirmative consent in those school districts that do require health education credits for graduation.[222] Building on the yes means yes campus sexual assault legislation, California State Senators Kevin De León and Hannah-Beth Jackson introduced Senate Bill 695 in early 2015,[223] and the legislation was approved by the Governor in October 2015.[224] This legislation transforms high school health curricula to include instruction on sexual assault and violence.[225] Specifically, Senate Bill 695 requires health courses, which are a condition of graduation at a majority of California high schools, to include information on sexual assault and the importance of developing healthy relationships.[226] The health course must provide instruction on the affirmative consent standard that is consistent with the affirmative consent law already passed for California colleges and universities.[227] As such, Section 51225.36 of the California Education Code was amended as follows:

> If the governing board of a school district requires a course in healtheducation for graduation from high school, the governing board of the school district shall include instruction in sexual harassment and violence, including but not limited to, information on the affirmative consent standard, as defined in paragraph (1) of subdivision (a) of Section 67386.[228] .

***71** Michigan is following California's lead, as legislation requiring high school education about affirmative consent was introduced in September 2015.[229] In addition, there is pending legislation in other states that would either authorize school districts to provide sexual violence awareness and prevention programs or mandate sexual violence education as part of the health education curricula.[230] Several states also have pending legislation to add some type of education about sexual violence in general.[231]

Under current federal law, health and sex education classes are not required to include any sexual assault prevention as part of the curriculum.[232] However, the Teach Safe Relationships Act, a federal bill introduced by Senators Claire McCaskill and Tim Kaine, would expand comprehensive health education and require schools to teach "safe relationship behavior" aimed at preventing sexual assault, domestic violence, and dating violence.[233] Under the Teach Safe Relationships ***72** Act, schools could develop specific curricula, and grants would be available to train teachers on sexual assault prevention.[234]

Of course, whether states choose to require sexual assault education that addresses the affirmative consent standard as part of health curriculum, sex education, or other awareness and prevention programming, states need to take action to help high school students gain an understanding of this issue. State legislators should propose legislation to implement the necessary curriculum requirements so our youth are prepared in advance for the affirmative consent standard prevalent on college campuses.

Conclusion

Sexual assault on college campuses has been receiving an unprecedented level of attention across the nation. The Obama Administration, legislators, and colleges and universities are all advancing the goal of preventing sexual violence [235] and encouraging a "Let's Talk About Sex" dialogue. One aspect of the conversation involves transitioning from a "no means no" approach to a "yes means yes" affirmative consent standard. Despite the criticisms of the affirmative consent standard, [236] the momentum of the concept has recently increased as colleges and universities continue to adopt affirmative consent policies. [237] In addition, following California's lead, state legislatures are also proposing affirmative consent laws. [238]

The shift in conversation regarding sexual communication and sexual assault hinges on effective awareness and prevention education. While institutions of higher education are implementing sexual assault awareness and prevention programming, [239] the high school environment is a key setting where students' sexual behaviors can be shaped. Thus, states should require effective high school education on the affirmative consent standard, whether as part of sex education, health education, or other prevention programming. [240] Indeed, instruction about the affirmative consent standard will enable young ***73** people to more fully understand their responsibilities during a sexual encounter. Admittedly, affirmative consent education during high school will not be sufficient alone to halt sexual assault on college campuses, but it is a step in the right direction.

Footnotes

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1 *Remarks by the President at "It's On Us" Campaign Rollout*, WHITE HOUSE (Sept. 19, 2014), https://www.whitehouse.gov/the-press-office/2014/09/19/remarks-president-its-us-campaign-rollout.

2 "Let's Talk About Sex" is a popular hip-hop song about safe sex and the AIDS epidemic. SALT-N-PEPA, LET'S TALK ABOUT SEX (Next Plateau 1991). The phrase "let's talk about sex" has also been connected with the discussion of the affirmative consent standard. AFFIRMATIVE CONSENT, http://affirmativeconsent.com/ (last visited Oct. 27, 2015); *see also* Katie McDonough, *Let's Talk About Sex (More): Education, Conversation is the Way to Help Prevent Sexual Assault*, SALON (Aug. 28, 2014, 6:43 AM), http://www.salon.com/2014/08/28/lets_talk_about_sex_more_education_conversation_is_the_way_to_help_prevent_sexual_assault/.

3 Emma Sulkowicz, *'My Rapist is Still on Campus,'* TIME (May 15, 2014), http://time.com/99780/campus-sexual-assault-emma-sulkowicz/. *But see* Cathy Young, *Columbia Student: I Didn't Rape Her*, DAILY BEAST (Feb. 4, 2015), *http://www*.thedailybeast.com/articles/2015/02/03/columbia-student-i-didn-t-rape-her.html (reporting that accused Columbia student Paul Nungesser, who was cleared of sexual misconduct allegations by the university, denies sexually assaulting Emma Sulkowicz).

4 Theresa Watanabe, *More College Men Are Fighting Back Against Sexual Assault Cases*, L.A. TIMES (June 7, 2014, 6:15 PM), http://www.latimes.com/local/la-me-sexual-assault-legal-20140608-story.html#page=1.

5 Tyler Kingkade, *Texas Tech Frat Loses Charter Following 'No Means Yes, Yes Means Anal' Display*, HUFFINGTON POST (Oct. 9, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/10/08/texas-tech-frat-no-means-yes_n_5953302.html; *see also* Marina Watson Peláez, *Yale Suspends Delta Kappa Epsilon Fraternity After Sexist Chants*, TIME (May 18, 2011), http://newsfeed.time.com/2011/05/18/yale-suspends-delta-kappa-epsilon-fraternity-after-sexist-chants/ (reporting that new members of a fraternity at Yale University allegedly chanted phrases

such as "No Means Yes! Yes Means Anal!" and other obscenities against women, and the fraternity was banned from recruiting students for five years).

6 Kristen Lombardi, *Sexual Assault on Campus: Flurry of New Legislation Targets Sexual Assault on Campus*, CTR. FOR PUB. INTEGRITY (Aug. 1, 2014, 1:23 PM), http://www.publicintegrity.org/2014/07/30/15185/flurry-new-legislation-targets-sexual-assault-campus (statement of Congresswoman Carolyn Maloney, D. NY) ("Sexual assault on our college campuses has reached epidemic proportions.").

7 Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, NCJRS (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (explaining that a variety of factors contribute to the danger of sexual assault on college campuses, including the large number of college social gatherings that involve alcohol or other substances); Rana Sampson, *Acquaintance Rape of College Students*, COPS 1, 13 (2002), http://www.popcenter.org/problems/pdfs/Acquaintance_Rape_of_College_Students.pdf (addressing the college environment that may lead to the high prevalence of sexual assault on college campuses, including the role of alcohol). Furthermore, women who frequently attend fraternity parties are more likely than others to be sexually assaulted. *See* Krebs, *supra* note 7, at 5-8; *see also* Sampson, *supra* note 7, at 14-15. And, multiple studies have found that students in fraternities were significantly more likely to have committed rape than non-Greek men. *E.g.*, *Greek Sexual Assault Prevention Initiative*, EMORY UNIV., http://studenthealth.emory.edu/hp/respect_program/greek_life.html (last visited Apr. 2, 2015) (reporting that the 2012-13 Title IX reports collected for Emory University revealed that 48% of all reported sexual assaults occurred in a fraternity house); *see also* Katie J.M. Baker, *The Accused*, BUZZFEED (Nov. 20, 2014, 9:20 PM), http://www.buzzfeed.com/katiejmbaker/accused-men-say-the-system-hurting-college-sexual-assault-su#.cd1qOxO7b (reporting that some studies show that fraternity members are three times more likely to commit rape than other men on campus).

8 While both men and women are sexually assaulted, the number of males who are sexually assaulted is significantly less than females. D. KELLY WEISBERG, DOMESTIC VIOLENCE: LEGAL AND SOCIAL REALITY 30 (2012); Sofi Sinozich & Lynn Langton, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females* , 1995- 2013, U.S. Dep't of Justice 1, 5 (2014), http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf. (finding that for the period of 1995-2013, the rate of rape and sexual assault victimization was lower for males ages eighteen to twenty-four than for females, as college-age male victims accounted for only 17% of rape and sexual assault victimizations). Therefore, this Article focuses more on the sexual assault of females.

9 Krebs, *supra* note 7, at 2-1; *see also* Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *The Sexual Victimization of College Women*, U.S. DEP'T OF JUSTICE 1, 10 (2000), http://www.ncjrs.gov/pdffiles1/nij/182369.pdf; *Sexual Violence: Facts at a Glance*, CDC (2012), http://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf; Dana Goldstein, *The Dueling Data on Campus Rape*, THE MARSHALL PROJECT (Dec. 11, 2014), https://www.themarshallproject.org/2014/12/11/the-dueling-data-on-campus-rape (reporting that the National Crime Victimization Survey in December 2014 found that a very small percentage of female students have been sexually assaulted and explaining the discrepancies in the sexual assault research based on variations in the definition of rape and sexual assault, the wording of survey questions, and the context in which the questions were asked and answered).

10 *See infra* Part III.A.

11 Krebs, *supra* note 7, at 5-15; *see also* Sinozich & Langton, *supra* note 8, at 7 (finding that for both college students and nonstudents, the offender was known to the victim in about 80% of rape and sexual assault victimizations); *see also* SUSAN ESTRICK, REAL RAPE 10-15 (1987) (discussing the legal system's disparate treatment of stranger rape, perceived as "real rape," and acquaintance rape, which constitutes the majority of sexual abuses).

12 Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 220 (2011) (addressing the public perceptions that an alleged rapist must be a complete stranger to the alleged victim); Emily Yoffe, *College Women: Stop Getting Drunk*, SLATE (Oct. 15, 2013, 11:55 PM), http://www.slate.com/articles/double_x/doublex/2013/10/sexual_assault_and_drinking_teach_women_the_connection.html (explaining that acquaintance rape is often considered to be a "he said, she said issue" and arguing that it may be an acceptable risk of drinking alcohol).

13 Joseph Shaprio, *Myths That Make It Hard To Stop Campus Rape*, NPR (Mar. 4, 2010, 12:00 AM), http://www.npr.org/templates/story/story.php?storyId=124272157; *see also* Jennifer Peebles & Kristin Lombardi, *Undetected Rapists on Campus: A Troubling Plague of Repeat Offenders*, CTR. FOR PUB. INTEGRITY (Feb. 26, 2010, 12:00 PM), http://www.publicintegrity.org/2010/02/26/4404/undetected-rapists-campus-troubling-plague-repeat-offenders; David Lisak & Paul Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 71, 73-84 (2002) (determining that the majority of rapists in college were admitted repeat offenders).

14 Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 150 (2013).

15 Fisher, Cullen & Turner, *supra* note 9, at 24 (finding that 95.2% of completed rapes and 95.8% of attempted rapes are not reported to law enforcement officials); *see also* W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 623 (2007); Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), http://time.com/2905637/campus-rape-assault-prosecution (reporting on a roundtable discussion by Senator Claire McCaskill about law enforcement involvement in campus sexual cases); Sinozich & Langton, *supra* note 8, at 9 (finding that in the age group eighteen to twenty-four, 80% of sexual assaults on campus were not reported to police); Amanda Marcotte, *Why Not Just Turn Campus Rape Allegations Over to the Police? Because They Don't Investigate*, SLATE (Sept. 15, 2014, 1:51 PM), http://www.slate.com/blogs/xx_factor/2014/09/15/new_york_times_on_the_laughable_tallahassee_police_response_to_sexual_assault.html; Tyler Kingkade, *Prosecutors Rarely Bring Charges in College Rape Cases*, HUFFINGTON POST (June 17, 2014, 7:31 AM), http://www.huffingtonpost.com/2014/06/17/college-rape-prosecutors-press-charges_n_5500432.html; *see generally* Karen Oehme, Nat Stern & Annelise Mennicke, *A Deficiency in Addressing Campus Sexual Assault: The Lack of Women Law Enforcement Officers*, 38 HARV. J.L. & GENDER 337 (2015) (positing that the chronically low rate of reporting to law enforcement officials is related to the lack of women's representation in campus police agencies).

16 *See* Justin Neidig, Note, *Sex, Booze, and Clarity: Defining Sexual Assault on a College Campus*, 16 WM. & MARY J. WOMEN & L. 179, 180 (2009).

17 *See* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 618-19 (2009).

18 Susan Milligan, *The Problem With California's 'Yes Means Yes' Law*, U.S. NEWS (Aug. 29, 2014, 1:30 PM), http://www.usnews.com/opinion/blogs/susan-milligan/2014/08/29/the-problem-with-californias-yes-means-yes-campus-sexual-assault-law (explaining that the problem is that sexual violence is wrongly dealt with by campus authorities instead of law enforcement because campus security is not equipped to handle such crimes and schools have a vested interest in keeping such crimes secret).

19 Tyler Kingkade, *Frats Push to Make Rape Victims Choose Between Police or School for Investigations*, HUFFINGTON POST (Mar. 31, 1015, 6:20 PM), http://www.huffingtonpost.com/2015/03/31/fraternities-sexual-assault_n_6978206.html (reporting that groups say they plan to push Congress to keep colleges from investigating and adjudicating allegations of sexual assault until after the completion of the criminal investigation and trial).

20 *See generally* 20 U.S.C. § 1681 (2014) (addressing the prohibition against discrimination under any education program or activity receiving federal financial assistance).

21 *See infra* Part II.A.

22 *Id.*

23 *See infra* Part II.

24 *See, e.g.*, CAL. EDUC. CODE § 67386(a) (West 2014).

25 Jake New, *The "Yes Means Yes" World*, SLATE (Oct. 17, 2014, 2:06 PM), http://www.slate.com/articles/life/inside_higher_ed/2014/10/affirmative_consent_what_will_yes_means_yes_mean_for_sex_on_college_campuses.html.

26 *See infra* Part I.

27 *See infra* Part II.

28 *See infra* Part II.B.

29 *See infra* Part III.

30 *See infra* Part III.

31 Pub. L. No. 89-329, 79 Stat. 1219 (1965) (codified as amended in various sections of 42 U.S.C.).

32 Title IX of the Civil Rights Act of 1964 did bind institutions from discriminating on the basis of race, color, or national origin. Kimberly A. Mango, Comment, *Students Versus Professors: Combating Sexual Harassment Under Title IX of the Education Amendments of 1972*, 23 CONN. L. REV. 355, 361-62, 366 (1991).

33 20 U.S.C. § 1681(a) (2014).

34 Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (explaining the purpose of Title IX of the Education Acts of 1972). Title IX is implemented through the Code of Federal Regulations and provides that "[a] recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 C.F.R. § 106.8(b) (2015); *see also* 28 C.F.R. § 54.135(b) (2015) (Department of Justice regulations); Lexie Kuznick & Megan Ryan, *Changing Social Norms? Title IX and Legal Activism Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 367, 373-74 (2008).

35 Mango, *supra* note 32, at 380 (explaining that "[i]n 1980, the National Advisory Council on Women's Educational Programs was commissioned to conduct a legal review of Title IX").

36 *Id.*

37 *Id.*

38 *Id.* at 381 (quoting Office for Civil Rights of the Department of Education Policy Memorandum from Antonio J. Califa, Director for Litigation, Enforcement and Policy Service, OCR, to Regional Civil Rights Directors, Title IX and Sexual Harassment Complaints, at 2 (Aug. 31, 1981)). This sexual harassment definition also applies to elementary and secondary education schools because they fall under the scope of Title IX's coverage. *See* 20 U.S.C. § 1681(c) (2014).

39 Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 76 (1992) (holding that monetary damages are available in an implied private action); *see also* Alexander v. Yale, 631 F.2d 178 (2d Cir. 1980). Earlier in *Gebser v. Lago Vista Independent School District*, the United States Supreme Court recognized that a recipient of federal educational funds intentionally violates Title IX and is subject to a private damages action, where the recipient is "deliberately indifferent" to known acts of teacher-student discrimination. 524 U.S. 274, 277 (1988). Then, in *Davis ex rel. LaShonda D. v. Monroe County Board of Education*, the United States Supreme Court extended the private damages actions recognized in *Gebser* to cases where the harasser is a student, rather than a teacher. 526 U.S. 629, 633 (1999). The Court in *Davis* held that a complainant may prevail in a private Title IX actions against a school district in cases of student-on-student harassment where the funding recipient is: (a) deliberately indifferent to sexual harassment of which the recipient has actual knowledge, and (b) the harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational benefits or opportunities provided by the school. *Id.* at 669-76. The Court noted that in certain circumstances a single sexual encounter by a student could be sufficient to create a hostile environment claim under Title IX. *Id.* at 652-53.

40 *See generally* 20 U.S.C. § 1682 (1972) (directing and authorizing federal administrative agencies, which provide financial assistance to educational programs, to issue rules and guidelines to achieve the objectives of Title IX).

41 Cannon v. Univ. of Chi., 441 U.S. 677, 717 (1979) (holding that an individual can bring suit against a higher education institution for failing to conform with the provisions of Title IX).

42 34 C.F.R. § 106.1 (2015).

43 Tyler Kingkade, *A Number of Colleges Are Under Scrutiny For Sexual Harassment, But You Wouldn't Know It*, HUFFINGTON POST (May 19, 2015, 9:59 AM), http://www.huffingtonpost.com/2015/05/19/colleges-sexual-harassment_n_7309444.html (reporting that as of May 13, 2015, there are 162 cases involving either sexual harassment or sexual assault and harassment under investigation at 143 postsecondary institutions); *see also* Tara Culp-Ressler, *These Are the Colleges and Universities Now Under Federal Investigation for Botching Rape Cases*, THINKPROGRESS (Jan. 13, 2015, 9:00 AM), http://thinkprogress.org/health/2015/01/13/3610865/title-ix-investigations/ (reporting that as of January 2015, the Department of Education was investigating ninety-five schools for possible Title IX violations).

44 Tyler Kingkade, *Harvard Law Gave More Rights To Accused Students In Sexual Harassment Cases, Feds Find*, HUFFINGTON POST (Dec. 30, 2014, 7:59 PM), http://www.huffingtonpost.com/2014/12/30/harvard-law-harassment-title-ix_n_6396350.html (reporting that the OCR officials determined Title IX violations in six cases and that the Harvard Law School agreed to overhaul the way it handles sexual harassment complaints among its students); *see also* Tyler Kingkade, *Probe Finds Princeton University Violated Title IX In Its Handling of Sexual Assault Cases*, HUFFINGTON POST (Nov. 5, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/11/05/princeton-title-ix-sexual-assault_n_6107756.html (reporting that Princeton University had to reimburse tuition costs for three sexual assault victims).

45 Some schools have settled the Title IX lawsuits filed against them. Jake New, *Major Sexual Assault Settlement*, INSIDE HIGHER ED (July 21, 2014), http://www.insidehighered.com/news/2014/07/21/u-connecticut-pay-13-million-settle-sexual-assault-lawsuitsthash.DYYNvyyU.dpbs (reporting that the University of Connecticut agreed to pay nearly $1.3 million to settle a federal lawsuit alleging the mishandling of students' sexual assault complaints).

46 *Columbia Comes Under Fire for Handling of Sexual Assault* Cases, NPR (Apr. 25, 2014); *see also Group Files Title IX and Other Complaints Against* Columbia, BWOG (Apr. 24, 2014, 11:13 AM), http://bwog.com/2014/04/24/group-files-title-ix-complaint-against-columbia/ (explaining that twenty-three students filed complaints against Columbia University for alleged violations of Title II, Title IX, and the Clery Act).

47 Soraya Nadia McDonald, *It's Hard to Ignore a Woman Toting a Mattress Everywhere She Goes, Which is Why Emma Sulkowicz is Still Doing It*, WASH. POST (Oct. 29, 2014), http://www.washingtonpost.com/news/morning-mix/wp/2014/10/29/its-hard-to-ignore-a-woman-toting-a-mattress-everywhere-she-goes-which-is-why-emma-sulkowicz-is-still-doing-it/ (explaining that after the university held a hearing and the student Sulkowicz accused was found not guilty, she appealed to Columbia's dean, and the school refused to expel her alleged assailant).

48 Charlotte Alter, *Columbia Activist Emma Sulkowicz is Going to the State of the Union*, TIME (Jan. 20, 2015), http://time.com/3674450/emma-sulkowicz-gillibrand-state-of-the-union/; *see also* Young, *supra* note 3; Naomi Schaeffer Riley, *Columbia Rape Case Is Not Justice - It's Shaming Without Proof*, N.Y. POST (Jan. 8, 2015 6:15 AM), http://nypost.com/2015/02/08/columbia-mattress-rape-case-is-not-justice-its-shaming-without-proof/.

49 Baker, *supra* note 7 (stating that since 2011 more than thirty men found responsible for sexual misconduct as a result of a campus disciplinary proceeding have filed lawsuits against their schools); Doe v. Wash. & Lee Univ., No. 6:14-cv-00052-NKM (W.D. Va. Dec. 13, 2014); Sterrett v. Cowan, No. 14-CV-11619, 2015 BL 28737 (E.D. Mich. Feb. 4, 2015) (holding that the plaintiff sufficiently alleged facts to state a due process claim that he was denied a “meaningful hearing” as part of the disciplinary adjudication procedure); *see also* Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), http://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?_r=0 (reporting that Columbia University recently became one of the few colleges to offer free legal help to both accusers and the accused).

50 Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12034 (Mar. 13, 1997), *available at* http://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf. First published in 1997, this document explained two types of sexual harassment conduct: quid pro quo harassment and hostile-environment harassment. *Id.* at 12038.

51 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 66 Fed. Reg. 5512 (Jan. 19, 2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter the 2001 Guidance Document].

52 2001 Guidance Document, *supra* note 51, at 13-15; *see also* 34 C.F.R. § 106.8(a) (2014) (requiring that an institution designate at least one employee to coordinate its efforts to comply with Title IX).

53 2001 Guidance Document, *supra* note 51, at 2, 14-21.

54 Chmielewski, *supra* note 14, at 163 (citing E.H. Schopler, Annotation, *Right of Student to Hearing on Charges Before Suspension or Expulsion from Educational Institution*, 58 A.L.R.2d 903 (1958)).

55 2001 Guidance Document, *supra* note 51, at 22.

56 *See, e.g.*, Board of Curators v. Horowitz, 435 U.S. 78, 88 (1978) ("A school is an academic institution, not a courtroom or administrative hearing room."); Granger v. Klein, 197 F. Supp. 2d 851, 874 n.11 (E.D. Mich. 2002) (citing Paredes v. Curtis, 864 F.2d 426 (6th Cir. 1988)) (holding that the opportunity to cross-examine an accuser is not part of the due process requirement in the academic setting)).

57 U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 1 (2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter "DEAR COLLEAGUE" LETTER] (addressing sexual violence as a form of sexual harassment under Title IX). While the "Dear Colleague" Letter authoritatively represents OCR enforcement policy, whether the OCR's position would withstand judicial review is an open question.

58 *Id.* at 1-14.

59 *Id.* at 14-18.

60 *Id.* at 6 (explaining that schools must adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints). Although, the grievance procedures do not need to be separate from other administrative disciplinary procedures. *Id.* at 8. Also, to be proactive, schools should also publish a notice of nondiscrimination. *Id.* at 6-7.

61 "DEAR COLLEAGUE" LETTER, *supra* note 57, at 6, 14.

62 *Id.* at 14.

63 *Id.* at 14-15.

64 *Id.* at 8-14.

65 *Id.* at 11.

66 Barclay Sutton Hendrix, Note, *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, 610-20 (2013) (arguing that: the steps taken by the OCR violate the procedural due process rights of accused students because the preponderance of the evidence standard is too low; discouraging schools from allowing accused students to cross-examine their accusers does not comport with basic fairness; and allowing an accuser to appeal borders on a "double jeopardy" violation).

67 Chmielewski, *supra* note 14, at 164-65 (defending the use of the preponderance of the evidence standard in school adjudications for sexual assault based on, among other things, the nature of the proceeding and the standard's equal consideration of the rights of complainants and respondents); Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1629-30 (2012) (arguing that the preponderance of the evidence standard is sufficient to ensure due process for students who have been accused of sexual violence); Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*,

62 DUKE L.J. 487, 516-19 (2012) (concluding that a preponderance of the evidence standard is appropriate under a *Matthews v. Eldridge* analysis).

68 CAL. EDUC. CODE § 67386(a)(3) (West 2014) ("A policy that the standard used in determining whether the elements of the complaint against the accused have been demonstrated is the preponderance of the evidence.").

69 U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

70 After the rape and murder of Jeanne Clery, a nineteen-year-old student at Lehigh University, Congress passed the Crime Awareness and Campus Security Act in 1990. *Our History*, CLERY CTR., http://clerycenter.org/our-history (last visited Nov. 2, 2015).

71 Student Right-to-Know and Campus Security Act, Pub. L. No. 101-542, 204 Stat. 2381 (1990) (codified as amended at 20 U.S.C. § 1092(f) (2012)), *available at* http://www.gpo.gov/fdsys/pkg/STATUTE-104/pdf/STATUTE-104-Pg2381.pdf.

72 *See* 20 U.S.C. § 1092(f)(8) (2012) (explaining that schools receiving federal funding are required to comply with the Clery Act); *Summary of the Jeanne Clery Act*, CLERY CTR., http://clerycenter.org/summary-jeanne-clery-act (last visited May 25, 2015) [hereinafter *Clery Act Summary*]. The Clery Act, however, does not require primary and secondary schools to disclose allegations of sexual assault.

73 Higher Education Amendments of 1992, Pub. L. No. 102-325, § 486(c)(2), 106 Stat. 448, 621-23 (1992).

74 *Id.*; *The Clery Act in Detail* , KNOWYOURIX.com, http://knowyourix.org/clery-act/the-clery-act-in-detail/ (last visited Mar. 29, 2015) (explaining the basic rights and report requirements included in the Act after the amendments). Among other things, under the Bill of Rights, schools must: (1) inform individuals reporting rape of their options to notify law enforcement, (2) notify the individual reporting sexual assault of available counseling services, and (3) give both the complainant and the accused the same opportunity to have others present at any proceedings. 20 U.S.C. § 1092(f)(8).

75 The Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(a), 112 Stat. 1581, 1745 (1998).

76 *Clery Act Summary*, *supra* note 72.

77 *Id.*

78 *Id.*

79 *Id.*

80 20 U.S.C. § 1092(f)(1)(F) (2012); *see also* Jennifer Steinhauer, *White House to Press Colleges to Do More to Combat Rape*, N.Y. TIMES (Apr. 28, 2014), http://www.nytimes.com/2014/04/29/us/tougher-battle-on-sex-assault-on-campus-urged.html (reporting that in 2013 The Department of Education fined Yale University $165,000 for failing to disclose four sexual offenses involving force, and Eastern Michigan University paid $350,000 in 2008 for failing to issue a campus alert after one of its students was sexually assaulted and killed).

81 20 U.S.C. §§ 1092(f)(1)(A), (f)(8).

82 20 U.S.C. § 1092(f)(4).

83 20 U.S.C. § 1092(f)(1)(F).

84 *See* Kristen Lombardi & Kristin Jones, *Campus Sexual Assault Statistics Don't Add Up*, CTR. FOR PUB. INTEGRITY (Dec. 2, 2009, 12:01 AM), http://www.publicintegrity.org/2009/12/02/9045/campus-sexual-assault-statistics-don-t-add.

85 *See, e.g.*, 42 U.S.C. § 3796gg (2005) (Services, Training, Officers, and Prosecutors Grant Program or "STOP" Grants).

86 Nat'l Network to End Domestic Violence, *The Violence Against Women Act of 2005: Summary of Provisions*, NAT'L NETWORK TO END DOMESTIC VIOLENCE, http://nnedv.org/downloads/Policy/VAWA2005FactSheet.pdf (last visited Apr. 8, 2015).

87 Violence Against Women Reauthorization Act of 2013, 42 U.S.C. § 14045(b)(3) (2013).

88 *See* S. Daniel Carter, *The Campus Sexual Violence Elimination Act*, CLEARYACT.INFO, http://www.cleryact.info/campus-save-act.html (last visited Oct. 27, 2015).

89 While the Clery Act requires annual reporting of statistics for various criminal offenses, a Campus SaVE Act provision adds domestic violence, dating violence, and stalking to the categories that, if the incident was reported to a campus security authority or local police agency, must be reported under Clery. 20 U.S.C. § 1092(f)(1)(F)(iiii) (2012). Thus, the Campus SaVE Act took effect with respect to the Annual Security Report that had to be issued by each institution no later than October 1, 2014.

90 Under VAWA, new students and new employees must be offered primary prevention and awareness programs that promote awareness of sexual misconduct, including rape and sexual assault. 20 U.S.C. § 1092(f)(8)(B)(i)(I). As a result, VAWA appears to be more prescriptive than the OCR "Dear Colleague" Letter in that the letter only recommended that institutions implement preventative education programs.

91 20 U.S.C. § 1092(f)(8)(C).

92 20 U.S.C. § 1092(f)(8)(A)(ii). The Clery Act required that institutions inform students of procedures victims should follow, e.g., to whom offenses should be reported, but the SaVE Act added that institutional policy must include information on (1) the victims' option to notify and seek assistance from law enforcement and campus authorities, and (2) victims' rights and institutional responsibilities regarding judicial no-contact, restraining, and protective orders. *See* 20 U.S.C. § 1092(f)(8)(B)(iii); *see also* S. Daniel Carter, *Campus Sexual Assault Victims' Bill of Rights*, http://www.cleryact.info/campus-sexual-assault-victims--bill-of-rights.html (last visited Nov. 2, 2015); Lauren P. Schroeder, Comment, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students From Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1227 (2014).

93 20 U.S.C. § 1092(f)(8)(B)(i)(I)-(II).

94 Carter, *supra* note 88.

95 *U.S. Department of Education Announces Final Rule to Help Colleges Keep Campuses Safe*, U.S. DEP'T OF EDUC. (Oct. 17, 2014), https://www.ed.gov/news/press-releases/us-department-education-announces-final-rule-help-colleges-keep-campuses-safe.

96 Violence Against Women Act, 79 Fed. Reg. 119 (June 20, 2014) (to be codified at 34 C.F.R. pt. 86), *available at* http://www.gpo.gov/fdsys/pkg/FR-2014-06-20/pdf/2014-14384.pdf.

97 *See Fact Sheet: Renewing the Call to End Rape and Sexual Assault*, WHITE HOUSE, http://whitehouse.gov/sites/default/files/docs/fact_sheet_sa_event.pdf (last visited Apr. 8, 2015) [hereinafter *Fact Sheet*].

98 Previous administrations have weighed in on aspects of the sexual assault epidemic; for example, in 1992, President George H.W. Bush signed the Federal Campus Sexual Assault Victim's Bills of Rights, which amended the Clery Act. *The Federal Campus Sexual Assault Victims' Bill of Rights*, CLERY CTR., http://clerycenter.org/federal-campus-sexual-assault-victims%E2%C80%99-bill-rights (last visited Mar. 27, 2015).

99 *See Fact Sheet*, *supra* note 97.

100 *Fact Sheet: Launch of the "It's On Us" Public Awareness Campaign to Help Prevent Campus Sexual Assault*, WHITE HOUSE (Sept. 19, 2014), https://www.whitehouse.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus- [hereinafter *Press Release*]

101 IT'S ON US, http://itsonus.org/ (last visited Apr. 2, 2015); Tanya Somanader, *President Obama Launches the "It's On Us" Campaign to End Sexual Assault on Campus*, WHITE HOUSE BLOG (Sept. 19, 2014, 2:40 PM), https://www.whitehouse.gov/blog/2014/09/19/president-obama-launches-its-us-campaign-end-sexual-assault-campus.

102 *See Fact Sheet*, *supra* note 97.

103 *Id.*

104 Walbert Castilo, Daniel Funke & Megan Raposa, *Don't Worry, Colleges and Universities Say 'It's On Us,'* USA TODAY. (Feb. 19, 2015, 1:13 PM), http://college.usatoday.com/2015/02/19/dont-worry-colleges-and-universities-say-its-on-us/ (reporting that the Illinois Student Senate and the Women's Resources Center at the University of Illinois at Urbana-Champaign hosted its first It's On Us Twitter town hall event in February 2015 and reporting that in November 2014, the University of Georgia's SGA hosted It's On Us week, which featured events such as self-defense classes and a resource fair); Samantha Biastre, *White House-led Initiative Comes to KU*, THE KEYSTONE NEWS (Feb. 25, 2015), http://thekeystonenews.com/2015/02/25/white-house-led-initiative-comes-to-ku/ (reporting that KU implemented the White House It's On Us initiative to create awareness on the issue of campus sexual violence); *"It's On Us" Action Week Targets Sexual Assault Awareness*, MSU TODAY (Nov. 12, 2014), http://msutoday.msu.edu/news/2014/its-on-us-action-week-targets-sexual-assault-awareness/ (reporting that students at Michigan State University and other students around the country raised awareness of sexual assault as part of the national It's On Us Week of Action, which occurred November 17-21, 2014).

105 *See Press Release*, *supra* note 100.

106 *1 Is 2 Many* , WHITE HOUSE, https://www.whitehouse.gov/1is2many (last visited Sept. 13, 2015) [hereinafter *PSA*].

107 Gael Fashingbauer Cooper, *Biden, Obama Join Hollywood Stars in Anti-Rape PSA*, TODAY (Apr. 30, 2014, 10:00 AM), http://www.today.com/entertainment/biden-obama-join-hollywood-statts-anti-rap-psa-2D79601776; Amanda Hess, *Daniel Craig, Seth Meyers and Steve Carell Would Like You to End Rape, Please*, SLATE (Apr. 30, 2014, 11:16 AM), http://www.slate.com/blogs/xx_factor/2014/04/30/obama_anti_rape_psa_daniel_craig_steve_carell_seth_meyers_and_benicio_del.html. Paula Mejia, *Obama Administration Launches Celebrity-Studded Campaign to End Campus Sexual Assault*, NEWSWEEK (Sept. 19, 2014, 3:08 PM), http://www.newsweek.com/obama-campaign-launches-celebrity-studded-campaign-end-sexual-assault-271829 (reporting that notable public figures who appeared in a video on the campaign's website, itsonus.org, include *Scandal's* Kerry Washington, *Mad Men*'s Jon Hamm, and musician Questlove, among others).

108 *PSA*, *supra* note 106.

109 *Id.*; *see also* Michael Winerip, *Stepping Up to Stop Sexual Assault*, N.Y. TIMES (Feb. 7, 2014), http://www.nytimes.com/2014/02/09/education/edlife/stepping-up-to-stop-sexual-assault.html (reporting on bystander intervention to help prevent sexual violence on campuses). *But see* Dana Bolger, *It's On Us to Go Beyond 'It's On Us,'* FEMINISTING (last visited Sept. 22, 2014), http://feministing.com/2014/09/22/its-on-us-to-go-beyond-its-on-us/ (criticizing the bystander intervention and contending that the new campaign de-politicizes and de-genders sexual assault, portraying it as an easy-to-avoid problem solely between individuals and making perpetrators out to be vague "someones" who do "something" to other "someones").

110 Nancy Cohen, *Training Men and Women on Campus to 'Speak Up' to Prevent Rape*, NPR (Apr. 30, 2014, 3:31 AM), http://www.npr.org/2014/04/30/308058438/training-men-and-women-on-campus-to-speak-up-to-prevent-rape.

111 *See supra* note 69.

112 *Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault*, NOTALONE.gov 2 (Apr. 2014), https://www.notalone.gov/assets/report.pdf [hereinafter *Not Alone Report*]; Nick Anderson & Katie Zezima, *White House Issues Report on Steps to Prevent Sexual Assaults on College Campuses*, WASH. POST (Apr. 29, 2014), https://www.washingtonpost.com/local/education/white-house-issues-report-on-steps-to-prevent-sexual-assault-at-college-campuses/2014/04/28/0ebf1e22-cf1f-11e3-b812-0c92213941f4_story.html.

113 The Task Force launched a dedicated website, notalone.gov, to make enforcement data public and to make resources accessible to students and higher education institutions. In addition, the American College Health Association ("ACHA") developed a "Shifting the Paradigm: Primary Prevention of Sexual Violence" toolkit to provide resources about the prevention of sexual violence. *Shifting the Paradigm: Primary Prevention of Sexual Violence*, AM. COLL. HEATH ASSOC. 1 (2008), http://www.acha.org/sexualviolence/docs/ACHA_PSV_toolkit.pdf. The emphasis of this toolkit is "to encourage prevention activities that take place before sexual violence has occurred and which create social change and shift the norms regarding sexual violence." *Id.* at 3.

114 *See Not Alone Report*, *supra* note 112.

115 *See Press Release*, *supra* note 100.

116 *Not Alone Report*, *supra* note 112, at 2, 10.

117 *Checklist for Campus Sexual Misconduct Policies*, NOTALONE.gov, 1, 4 (2008), https://www.notalone.gov/assets/checklist-for-campus-sexual-misconduct-policies.pdf.

118 *Id.* at 4-5.

119 S. 2692, 113th Cong. (2014); Senator Claire McCaskill, *The Bipartisan Campus Accountability and Safety Act*, MCCASKILL.SENATE.gov (July 30, 2014), http://www.mccaskill.senate.gov/imo/media/doc/CampusAccountabilityAndSafetyAct.pdf (addressing the standards of conduct and definitions of rape and sexual assault); Jennifer Steinhauer, *Senators Offer Bill to Curb Campus Sexual Assault*, N.Y. TIMES (July 30, 2014), http://www.nytimes.com/2014/07/31/us/college-sexual-assault-bill-in-senate.html?_r=0; Lombardi, *supra* note 6, at 2.

120 S. 590, 114th Cong. (2015).

121 *See Expanded Bipartisan Coalition Introduces Legislation to Prevent Sexual Assaults on College and University Campuses, Protect Students & Create Real Accountability*, GILlibrand.senate.gov (Feb. 26, 2015), http://www.gillibrand.senate.gov/newsroom/press/release/expanded-bipartisan-coalition-introduces-legislation-to-prevent-sexual-assaults-on-college-and-university-campuses-protect-students-and-create-real-accountability-; *see also* Mary Beth Marklein, *Bill Aims to Crack Down on Campus Sexual Assault*, USA TODAY (July 30, 2014, 8:56 PM), http://www.usatoday.com/story/news/nation/2014/07/30/sexual-assault-campus-mccaskill-colleges-universities/13328939/ (discussing "a survey of a national sample of 236 colleges and universities that found that 41% had conducted no investigations of alleged sexual assaults over the past five years, even though some of the schools had reported sexual violence incidents during that time to the Department of Education").

122 *See* S. 590, *supra* note 120, at 8-12, 20-29.

123 *See generally* S. 590, *supra* note 120 (requiring schools to publish statistics on their websites).

124 *See id.* at 2, 12-13. Non-compliance with certain requirements may result in a penalty of up to one percent of the institution's operating budget. Further, penalties for Clery Act violations would increase from $35,000 per violation to $150,000. *Id.* at 12, 14-15.

125 *Checklist for Campus Sexual Misconduct Policies*, *supra* note 117, at 4.

126 *Id.* at 4-5.

127 Jake New, *The "Yes Means Yes" World*, SLATE (Oct. 17, 2014, 2:06 PM), http://www.slate.com/articles/life/inside_higher_ed/2014/10/affirmative_consent_what_will_yes_means_yes_mean_for_sex_on_college_campuses.html; *see also* Tara Culp-Ressler, *The Growing Revolution To Change The Way We Approach* Sex, THINKPROGRESS (Oct. 10, 2014, 1:09 PM), http://thinkprogress.org/health/2014/10/10/3578502/yes-means-yes-consent/ (stating that an essay collection entitled "Yes Means Yes" in 2008 helped to popularize the notion of affirmative consent); JESSICA VALENTI & JACLYN FRIEDMAN, YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER & A WORLD WITHOUT RAPE (Perseus 2008).

128 New, *supra* note 127.

129 *Id.* Questions could be, for example, "What did she do to express that she wanted to have sex with you?" or "Did she agree to everything you two did?"

130 Martha Kempner, *Teaching About Affirmative Consent in High School Is A Good Place to Start*, RH REALITY CHECK (Mar. 24, 2015, 10:12 AM) http://rhrealitycheck.org/article/2015/03/24/teaching-affirmative-consent-high-school-good-place-start/ (explaining that the affirmative consent standard admittedly will not prevent all sexually violent scenarios from occurring, e.g., stranger rape, sexual assault that occurs after a person says no, and sexual assault that occurs because a person is too afraid to refuse or is coerced into saying yes); *see also* Jessica Valenti, *'Yes Means Yes' Laws Will Not Actually Reclassify All Sex at Universities as Rape*, THE GUARDIAN (Oct. 7, 2014), http://www.theguardian.com/commentisfree/2014/oct/07/yes-means-yes-sex-rape-universities; Kempner, *supra* note 130 ("Rape culture is deeply ingrained in our society, and many acts of sexual assault are not about sex at all but about violence.").

131 *See* Deborah Tuerkheimer, *Rape One and Off Campus*, 65 EMORY. L.J. 1 (2015) (discussing the disconnect between cultural norms around sex and the legal definition of rape and concluding that the criminal justice system's treatment of a non-stranger statutory force requirement, which is relied on in a majority of jurisdictions, is out of step with the ongoing efforts by universities, legislators, and the White House to reform the standard for sexual assault); Richard Klein, *An Analysis of Thirty-five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1004-11 (2008) (explaining that any consideration of an affirmative consent standard must analyze the dynamic between that doctrine and the concept of mens rea for the commission of the crime of rape, which is a fundamental aspect of the criminal justice system); Michal Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 156-58 (discussing how rape law reform to a consent-based standard has failed because most jurisdictions still do not criminalize nonconsensual sex as rape, as they require the need to establish the complainant's lack of consent as well as the defendant's use of force or threat); Stephen Schulhofer, *Rape in the Twilight Zone: When Sex is Unwanted but not Illegal*, 38 SUFFOLK U. L. REV. 415, 420 (2005) (explaining that in most states the force or threat requirement means that it is not necessarily illegal to have a sexual encounter without consent).

132 *Rape Addendum*, FBI, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final (last visited Nov. 22, 2015) (defining sexual assault as "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, *without the consent of the victim*") (emphasis added).

133 *See, e.g.*, CAL. PENAL CODE § 261.2 (West 2013) (defining consent as "positive cooperation in act or attitude pursuant to an exercise of free will"); IOWA CODE ANN. § 709.1 (2010) (stating that the elements "by force" and "against the will" are alternative rather than cumulative requirements); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2015) (defining consent as "actual words or conduct indicating [a] freely given agreement to have sexual intercourse"); WIS. STAT. ANN. § 940.225(4) (West 2013) (defining consent as "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact"); *see also* Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 977-79 (2008) (suggesting that there be lower degrees of sexual assault offenses that have very small penalties).

134 *See* "DEAR COLLEAGUE" LETTER, *supra* note 57, at 5.

135 Antioch College is a small liberal arts college in Ohio. ANTIOCH COLLEGE, http://antiochcollege.org/ (last visited March 13, 2015).

136 Arun Rath & Kristine Herman, *The History Behind Sexual Consent Policies*, NPR (Oct. 5, 2014), http://www.npr.org/2014/10/05/353922015/the-history-behind-sexual-consent-policies.

137 *Sexual Offense Prevention Policy (SOPP) & Title IX*, ANTIOCH COLL., http://antiochcollege.org/campus-life/residence-life/health-safety/sexual-offense-prevention-policy (last visited Apr. 4, 2015).

138 Tara Culp-Ressler, *The First College to Use Affirmative Consent was a Laughingstock. Now the Tide is Turning*, THINKPROGRESS (Oct. 30, 2014, 2:41 PM), http://thinkprogress.org/health/2014/10/30/3586548/antioch-affirmative-consent/.

139 SNL, *Is It Date Rape?*, N.Y. MAG. VIDEOS, *available at* http://videos.nymag.com/video/SNL-Is-It-Date-Rape#c=BB9NHV149LVRFTHZ&t=SNL (last visited Apr. 10, 2015) (explaining that the sketch was a parody game show that involved participants acting out scenarios found in the school's sexual offense policy).

140 Amanda Hess, *How Drunk Is Too Drunk to Have Sex?*, SLATE (Feb. 11, 2015), http://www.slate.com/articles/double_x/doublex/2015/02/drunk_sex_on_campus_universities_are_struggling_to_determine_when_intoxicated.html ("There is an ambiguous middle ground between clear-eyed sober and passed-out drunk where one or both parties may become too intoxicated to meaningfully consent to sex... it's simply not always clear when it's OK to have sex with people when you, or they, or both of you have been drinking."); James Taranto, *Drunkenness and Double Standards*, WALL ST. J. (Feb. 10, 2014), http://www.wsj.com/articles/SB10001424052702304558804579374844067975 (stating that sexual violence on college campuses is in part a problem of reckless alcohol consumption, and when two drunk college students have a sexual encounter, the male is almost always presumed to be at fault).

141 The National Center for Higher Education Risk Management is an organization that advises colleges on campus health and safety issues. THE NCHERM GROUP, LLC,https://www.ncherm.org/ (last visited Mar. 23, 2015).

142 Tyler Kingkade, *Colleges Are Rewriting What Consent Means to Address Sexual Assault*, HUFFINGTON POST (Sept. 1, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/09/08/college-consent-sexual-assault_n_5748218.html (reporting that over 800 colleges and universities have adopted an affirmative consent policy). In this regard, every Ivy League university, except Harvard University, has adopted an affirmative consent policy. *See* Matt Rocheleau, *Harvard Overhauls Handling of Sexual Assault Reports*, BOSTON GLOBE (July 2, 2014), https://www.bostonglobe.com/metro/2014/07/02/harvard-overhaul-way-handles-sexual-assault-reports/f9vQgdGeHTeg3vByODQ7jO/story.html (reporting that Harvard's new rules governing sexual assault do not include an affirmative consent standard). The university amended its sexual misconduct policy in July 2014, but it did not broaden the definition of consent, as the policy merely calls sexual misconduct "unwelcome conduct of sexual nature." *Id.*; *see also* New, *supra* note 127 (reporting that twenty-eight current and former Harvard law professors said the policy could deny accused students of their due process rights because the policy is too broad and vague).

143 New, *supra* note 127 ("According to the National Center for Higher Education Risk Management, more than 800 colleges and universities now use some type of affirmative consent definition in their sexual assault policies.").

144 *See* CONSENT IS SEXY, http://www.consentissexy.net/(last visited Mar. 18, 2015) (referring to the "Consent is Sexy" campaign that has been launched in various places around the world and explaining why asking for consent is not a mood killer, in order to show that social media campaigns are one type of social norm campaigns being used by the majority of college campuses).

145 *See Bystander-Focused Prevention of Sexual Violence*, NOTALONE.gov 1 (2008), https://www.notalone.gov/assets/bystander-summary.pdf (explaining that *Green Dot* and *Bringing in the Bystander* are two commonly used bystander programs on college campuses). Keith Hautala, *'Green Dot' Effective at Reducing Sexual Violence*, UK NOW (Sept. 9, 2014), http://uknow.uky.edu/print/38383 ("[A study at the University of Kentucky's Center for Research on Violence Against Women] found a greater than 50 percent reduction in the self-reported frequency of sexual violence perpetration by students at schools that received the Green Dot training... [and] also found a 40 percent reduction in a self-reported frequency of total violence perpetration.").

146 *See Grant Programs*, OFFICE OF VIOLENCE AGAINST WOMEN, U.S. DEP'T OF JUSTICE (Apr. 8, 2015), http://www.justice.gov/ovw/grant-programs (referring to the Department of Justice's Office on Violence Against Women (OVW) as one source of funding for campus prevention programming, having funded approximately 388 projects addressing domestic violence, dating violence, sexual assault, and stalking on college campuses since 1999, resulting in a contribution of more than $139 million)

147 Richard Pérez-Peña & Kate Taylor, *Fight Against Sexual Assault Holds Colleges to Account*, N.Y. TIMES (May 3, 2014) (reporting that a Columbia University student agreed that the school's former effort to educate students about affirmative consent in a fifty-minute session during freshman orientation was inadequate, and that the school planned to increase the consent education program to two hours and to add additional sessions throughout the year).

148 *See, e.g.*, Emanuella Grinberg, *Schools Preach 'Enthusiastic' Yes in Sex Consent Education*, CNN (Sept. 29, 2014, 5:40 PM), http://www.cnn.com/2014/09/03/living/affirmative-consent-school-policy/ (reporting that during one of the mandatory orientation sessions, freshmen at the University of California-Berkeley watch a 90-minute "Bear Pact" video, which covers the definition of sexual consent through three pillars: "knowing exactly what and how much I'm agreeing to; expressing my intent to participate deciding freely and voluntarily to participate," and some students would like to see consent education continue beyond orientation and into classrooms and academic curricula because one session is not sufficient to educate students); *NIU Releases Violence Against Women Act Task Force Report*, NIU TODAY (Dec. 3, 2014), http://www.niutoday.info/2014/12/03/niu-releases-violence-against-women-act-task-force-report/ (reporting that the Northern Illinois University Presidential Task Force on Violence Against Women Act recommended a prevention initiative to include VAWA-specific education included in a two-day orientation for students, student completion of online education modules, and inclusion of primary prevention, bystander intervention, and awareness programming in courses for student and new employee orientation); *see also* Linda A. Anderson & Susan C. Whiston, *Sexual Assault Education Programs: A Meta-Analytic Examination of Their Effectiveness*, 29 PSYCHOL. WOMEN Q. 374, 385 (2005) (finding that longer interventions are more effective than brief interventions in altering both rape attitudes and rape-related attitudes and suggesting that the content of the programming, type of presenter, gender of the audience, and type of audience may be associated with great program effectiveness); Abby Young-Powell, *Do Students Need Classes on Sexual Consent?*, THE GUARDIAN (June 5, 2014), http://www.theguardian.com/education/2014/jun/05/sexual-consent-classes-for-university-students (reporting that Cambridge University is considering making hour long sexual consent classes compulsory for both male and female students, in response to "swelling reports" of campus sexual violence and misogyny).

149 *See* AFFIRMATIVE CONSENT, http://www.affirmativeconsent.com (last visited Mar. 29, 2015) (reporting that Greek organizations around the nation are developing awareness and prevention programming); *see also* Emilee Danielson-Burke & Stephanie Erdice, *Anaconda: I Don't Want None Unless You Got Consent Hun - Creating a Culture of Consent Enthusiasts*, AFA ESSENTIALS 1 (2014), http://c.ymcdn.com/sites/www.afa1976.org/resource/collection/2E1016C2-80B5-49E2-B9BA-8C81C4C94FCD/Danielson_Erdice_October_2014_COLLABORATOR.pdf (explaining that to create a "culture of consent enthusiasts," consent education in the Greek community should be detailed and consistent); Schroeder, *supra* note 92, at 1238 (explaining that gender-specific programming may help because mixed-gender programs have shown uneven results in changing attitudes toward sexual assault).

150 Schroeder, *supra* note 92, at 1238.

151 Valenti,*supra*note 130 (explaining that although some commentators may have reservations about codifying affirmative consent into law, sexual communication has been codified into law through the current "no means no" model in the criminal justice system).

152 The affirmative consent standard had actually been a part of many California college campus sexual misconduct policies even prior to enactment of this legislation. *See* Christine Helwick, *Affirmative Consent, the New Standard*, INSIDE HIGHER ED (Oct. 23, 2014), https://www.insidehighered.com/views/2014/10/23/campuses-must-wrestle-affirmative-consent-standard-sexual-assault-essay ("Both the University of California and the California State University already had affirmative consent policies in place by the time the new law was passed.").

153 CAL. EDUC. CODE § 67386(a) (West 2014). In addition to setting forth the affirmative consent standard, the law requires "the governing boards, to the extent feasible, to enter into memoranda of understanding or other agreements or collaborative partnerships with on-campus and community-based organization to refer students for assistance or make services available to them." *Id.* § 67386(c).

154 *Id.* § 67386(a).

155 Senate Bill 967 bill initially included language that "relying solely on nonverbal communication can lead to misunderstanding." S.B. 967, 2013-14 Leg., Reg. Sess. (Ca. 2014) (introduced version), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967.

156 CAL. EDUC. CODE § 67386(a)(1).

157 *Id.* ("It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent.")

158 *Id.*

159 *Id.* § 67386(a)(2)(A).

160 *Id.* § 67386(a)(2)(B).

161 *See* Jenny Kutner, *Yes to 'Yes Means Yes': California's Affirmative Consent Law Is the First Step to Eradicating Campus Sexual Assault*, SALON (Sept. 29, 2014, 3:21 PM), http://www.salon.com/2014/09/29/yes_to_yes_means_yes_californias_affirmative_consent_law_is_the_first_step_to_eradicating_campus_sexual_assault/ (opining that the "law represents a groundbreaking change in state legislatures, which could increasingly come to be the entities that hold institutions of higher education accountable for their prevalent mishandling of sexual assault investigations"). Moreover, feminist writers support the affirmative consent standards. Amanda Hess, *"No Means No" Isn't Enough: We Need Affirmative Consent Laws to Curb Sexual Assault*, SLATE (June 16, 2014, 2:13 PM), http://www.slate.com/blogs/xx_factor/2014/06/16/affirmative_consent_california_weighs_a_bill_that_would_move_the_sexual.html (explaining how the law improves on the old "no means no" model); *see also* Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of An Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1324 (2005) ("The introduction of an affirmative consent standard would not only incentivize rational behavior on the part of both women and men in dating situations but that such a shift in the law would potentially shift public perceptions of women and their role in sexual relationships.").

162 *See* Editorial, *Sex and College Students: Should the Legislature Be in the Mix Too?*, L.A. TIMES (May 28, 2014, 4:25 PM), http://www.latimes.com/opinion/editorials/la-ed-affirmative-consent-20140525-story.html (arguing that the government should not be telling people what they must do when it comes to sex); Matt Pearce, *California's 'Yes Means Yes' Sexual Standard Has Liberals Divided*, L.A. TIMES (Oct. 26, 2014, 9:11 PM), http://www.latimes.com/local/california/la-me-10-27-what-they-are-saying-20141027-story.html ("Consider it a clash between those who believe the law is too instructive and those who believe intrusiveness is the entire point.").

163 *See* Tad Cronn, *California Proposes a License to Breed*, POLITICAL OUTCAST (June 5, 2014), http://politicaloutcast.com/2014/06/california-proposes-license-breed/ (criticizing the California bill on the basis that affirmative consent rules will detract from the spontaneity of sexual encounters); Cathy Young, *California's Absurd Intervention Over Dorm Room Sex*, REASON.com (June 22, 2014), http://reason.com/archives/2014/06/22/californias-absurd-intervention-over-dor (arguing that it would be difficult for anyone to feel sexy when applying the affirmative consent requirement); Shikha Dalmia, *California's Sexual Consent Law Will Ruin Good Sex for Women*, REASON.com (Oct. 7, 2014), http://reason.com/archives/2014/10/07/ruining-sex-in-california (reasoning that "[t] he obvious problem with the law... is that it assumes that sexual assault, already a crime under multiple laws, is the result of miscommunication... [b]ut the fact is: Most assaulters know exactly what they are doing").

164 *See* Emma Wolf, *Does California College Rape Bill Go Too Far in Regulating Sex?*, DAILY BEAST (June 23, 2014), http://www.thedailybeast.com/articles/2014/06/23/does-california-s-college-rape-bill-go-too-far-in-regulating-sex.html (questioning whether person can interpret "affirmative consent" signals during stages of a sexual encounter); Steven Nelson, *California 'Yes Means Yes' Law Worries Skeptics*, U.S. NEWS (Sept. 29, 2014, 5:54 PM), http://www.usnews.com/news/articles/2014/09/29/california-yes-means-yes-law-worries-skeptics (reporting a concern because the law does not specify how nonverbal consent could be communicated and that the consent requirement could apply to kissing or other behaviors legislators did not have in mind); Cathy Young, *Campus Rape:*

The Problem with 'Yes Means Yes,' TIME (Aug. 29, 2014) (arguing the bill is unlikely to deter sexual violence on campuses and "its effect will be to codify vague and capricious rules governing student conduct, to shift the burden of proof to (usually male) students accused of sexual offenses; and to create a disturbing precedent for government regulation of consensual sex"; and "nonverbal affirmative consent leaves campus tribunals in the position of trying to answer murky and confusing questions" and therefore, they are likely to treat only verbal consent as sufficient proof of affirmative consent).

165 *See* Ashe Schow, *'Yes Means Yes' Laws Also Hurt Women*, WASH. EXAM'R (Oct. 16, 2014, 10:33 AM), http://www.washingtonexaminer.com/yes-means-yes-laws-also-hurt-women/article/2554871 ("Proponents of the law, such as Vox's Ezra Klein, note that it is simply a rare scenario for an innocent man to be falsely accused, but believe such cases are 'necessary' for the law to ultimately work."); Ezra Klein, *'Yes Means Yes' is a Terrible Law, and I Completely Support It*, VOX (Oct. 13, 2014, 10:30 AM), http://www.vox.com/2014/10/13/6966847/yes-means-yes-is-a-terrible-bill-and-i-completely-support-it ("The Yes Means Yes law is a necessarily extreme solution to an extreme problem. Its overreach is precisely its value.").

166 *See* Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html (positing that the efforts to protect women from sexual violence on college campuses have led to misguided policies that infringe on male students' civil rights and concluding that affirmative consent policies should be struck); Calvin Wolf, Op-Ed, *Why California's 'Yes Means Yes' Law Is a No-No*, DIGITAL J. (Aug. 29, 2014), http://www.digitaljournal.com/news/politics/op-ed-why-california-s-yes-means-yes-law-is-a-no-no/article/400252 ("'Yes means yes' swings the pendulum too far against young men and subjects them to excessive liability in stereotypical college hookups.").

167 *See supra* note 162.

168 *See* Culp-Ressler, *supra* note 127.

169 *See* New, *supra* note 127.

170 CAL. EDUC. CODE § 67386(d) (West 2014).

171 *Id.* § 67386(d)-(e).

172 Amanda Marcotte, *Andrew Cuomo Proposes Affirmative Consent for New York Universities*, SLATE (Jan. 19, 2015, 9:11 PM), http://www.slate.com/blogs/xx_factor/2015/01/19/affirmative_consent_in_new_york_gov_andrew_cuomo_proposes_legislation.html.

173 *See* S.B. 5965, 2015-2016 Leg., Reg. Sess. (N.Y. 2015), *available at* http://open.nysenate.gov/legislation/bill/S5965-2015.

174 Some cities have even taken steps to require an affirmative consent standard. For example, Mayor Emanuel in Chicago, Illinois, previously announced an initiative to codify affirmative consent standards in city schools, although the ordinance ultimately failed to pass. Chicago, Ill., Ordinance to Amend Municipal Code Chapters 2-120 and 2-160 Regarding Sexual Assault Victims' Bill of Rights (Oct. 8, 2014), *available at* https://chicago.legistar.com/LegislationDetail.aspx?ID=1939413&GUID=DCC537F5-5DBC-405A-B1B0-3DFD10EA67B5&Options=Advanced&Search=; Rachel Comidas, *Mayor Proposes 'Bill of Rights' For College Sex Assault Victims*, REDEYE (Oct. 9, 2014, 2:33 PM), http://www.redeyechicago.com/news/local/redeye-ordinance-would-be-college-sex-assault-bill-of-rights-20141009-story.html (reporting that the city's proposed Bill of Rights would codify an affirmative consent model for local colleges); *Councilwoman: 'Yes Means Yes' for Philly Colleges*, CBS PHILLY (Dec. 11 2014, 3:08 PM), http://philadelphia.cbslocal.com/2014/12/11/councilwoman-yes-means-yes-for-philly-colleges/ (reporting that Councilwoman Blondell Reynolds Brown wants the city's colleges to adopt a "yes means yes" affirmative consent standard).

175 H.B. 2474, 52nd Leg., Reg. Sess. (Ariz. 2015); *see also* Ashe Schow, *'Yes Means Yes' Law Could be Coming to Arizona*, WASH. EXAM'R (Jan. 22, 2015, 12:59 PM), http://www.washingtonexaminer.com/yes-means-yes-law-could-be-coming-to-arizona/article/2559096.

176 S.B. 636, 2015 Leg., Reg. Sess. (Conn. 2015) (establishing affirmative consent as the threshold in sexual assault and intimate partner violence cases); *see also "Yes Means Yes" Bill Proposed for State's Colleges*, WTNH.com (Feb. 3, 2015, 11:59 AM), http://wtnh.com/2015/02/03/yes-means-yes-bill-proposed-for-states-colleges/; Stephanie Addenbrooke & Noah Daponte-Smith, *Legislators Push Affirmative Consent Policy*, YALE DAILY NEWS (Feb. 4, 2015), http://yaledailynews.com/blog/2015/02/04/legislators-push-affirmative-consent-policy/.

177 H.B. 451, 28th Leg., Reg. Sess. (Haw. 2015) (requiring the University of Hawaii to establish and enforce an affirmative consent standard for all policies and protocols relating to sexual assault, domestic violence, dating violence, and stalking as a condition of receiving state funds). Although H.B. 451 is still pending, the recent passage of another bill, S.B. 387, showed some progress on Hawaii's part with the affirmative consent movement. Senate Bill 387 "[e]stablishes an affirmative consent task force to review and made recommendations on the University of Hawaii's executive policy on domestic violence, sexual assault, and stalking." S.B. 387, 28th Leg., Reg. Sess. (Haw. 2015).

178 S. File 79, 86th Gen. Assemb., Reg. Sess. (Iowa 2015); H. File 390, 86th Gen. Assemb., Reg. Sess. (Iowa 2015).

179 H.B. 2266, 2015-2016 Leg., Reg. Sess. (Kan. 2015).

180 H.B. 138, 2015 Leg., Reg. Sess. (Md. 2015); H.B. 667, 2015 Leg., Reg. Sess. (Md. 2015); H.B. 839, 2015 Leg., Reg. Sess. (Md. 2015).

181 H. File 1689, 89th Leg., Reg. Sess. (Minn. 2015).

182 H.B. 412, 98th Gen. Assemb., Reg. Sess. (Mo. 2015) (requiring the governing boards of institutions of higher education to adopt policies concerning sexual assault, domestic violence, dating violence, and stalking in order to receive state funds for student aid).

183 S.B. 2478, 216th Leg., Reg. Sess. (N.J. 2015); Assemb. B. 3947, 216th Leg., Reg. Sess. (N.J. 2015); Zach Noble, *New Jersey Could Be the Next State to Enforce a 'Yes Means Yes' Sexual Consent Standard on Colleges*, THE BLAZE (Nov. 23, 2014, 3:00 PM), http://www.theblaze.com/stories/2014/11/23/new-jersey-could-be-the-next-state-to-enforce-a-yes-means-yes-sexual-consent-standard-on-colleges/.

184 S.B. 474, 2015 Leg., Reg. Sess. (N.C. 2015).

185 H.B. 2690, 82nd Leg., Reg. Sess. (W. Va. 2015) (requiring state institutions of higher education and certain other postsecondary schools or training facilities to adopt policies and procedures relating to campus sexual violence, domestic violence, dating violence, and stalking).

186 *See supra* Part II.

187 While all high school students will not attend college, arguably all students should receive education on the affirmative consent standard as well as the jurisdiction's rape law.

188 While arguably age-appropriate education could begin before high school, this Article is limited to the discussion of requiring affirmative consent education during high school.

189 20 U.S.C. § 1681 (2012); *see also* Tierney Sneed, *High Schools and Middle Schools Are Failing Victims of Sexual Assault*, U.S. NEWS (Mar. 5, 2015, 12:01 AM), http://www.usnews.com/news/articles/2015/03/05/high-schools-and-middle-schools-are-failing-victims-of-sexual-assault (reporting that public primary and secondary schools are covered under Title IX, but many parents and even some school administrators are unaware that it applies.).

190 *See* Sneed, *supra* note 189 (reporting that the Department of Education's Office for Civil Rights has thirty-three sexual violence investigations open in thirty-two school districts); *see also* Hill v. Cundiff, 797 F.3d 948 (11th Cir. 2015) (reversing in part due to fact issues that precluded summary judgment on plaintiff's Title IX claim as well as three of

plaintiff's § 1983 equal protection claims). This case involves a fourteen-year-old girl who was raped by a fifteen-year-old boy in the bathroom staff at school; plaintiff alleges that the defendants did not properly respond to a long pattern of sexual harassment by a male student). *Id*. at 955-62.

191 *Not Alone Report*, *supra* note 112, at 20 (explaining the Task Force is working to identify how its recommendations apply to K-12 schools); *see also* Davis v. Monroe Cnty Bd. Of Educ., 526 U.S. 629, 649 (1999) (explaining that what constitutes a reasonable response in a primary or secondary school may not be the same as in a college setting).

192 Sneed, *supra* note 189 (reporting that unlike the college environment, mandatory reporting laws require K-12 teachers and administrators to report to police any sexual allegations).

193 *See infra* Part III.A.

194 *See* Quinn Cummings, *The Most Game-Changing Part of the 'Affirmative Consent' Law*, TIME (Oct. 1, 2014) (positing that the standard, "lack of protest or resistance does not mean consent, nor does silence mean consent," should be a part of the conversation at the high school freshmen level); Kempner, *supra* note 130.

195 *See infra* Part III.B.

196 S.B. 695, 2015-2016 Leg., Reg. Sess. (Cal. 2015).

197 States that take an "abstinence only" approach to sex education can still address sexual assault and the affirmative consent standard in the context of health education, teen dating, personal responsibility programming, or other awareness and prevention programming. *See infra* Part III.B. Moreover, there is no evidence to date that abstinence-only-until-marriage education delays teen sexual activity. *See* Heather Boonstra, *Sex Education: Another Big Step Forward--and a Step Back*, THE GUTTMACHER POLICY REVIEW, 13(2):27-28 (2010), https://www.guttmacher.org/pubs/gpr/13/2/gpr130227.html.

198 Paul R. Abramson & Leif Dautch, Op-Ed, *Waiting Until College to Teach About Affirmative Consent Is Too Late*, L.A. TIMES, (Nov. 23, 2014, 4:00 PM) ("With dating and sexual activity increasingly starting in junior high or high school, ameliorative measures at the college level might come years too late."); *see also* Lisa T. McElroy, *Sex on the Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex*, 34 N.Y.U. REV. L. & SOC. CHANGE 708, 716 (2011) (explaining that "sexual activity in adolescence has become normal behavior, and adolescents tend to make decisions about whether to engage in intercourse-at least first intercourse-based on their personal attitudes and peer norms regarding sex or abstinence").

199 Laura Kann et al., *Youth Risk Behavior Surveillance-- United States, 2013*, 63 MMWR SURVEILLANCE STUDIES 1 (2014), http://www.cdc.gov/mmwr/pdf/ss/ss6304.pdf [hereinafter *CDC Survey*].

200 *CDC Survey*, *supra* note 199.

201 *Tween and Teen Dating Violence and Abuse Study*, TRU 1 (2008), *available at* http://www.loveisrespect.org/wp-content/uploads/2008/07/tru-tween-teen-study-feb-081.pdf.

202 *Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School*, AAUW EDUC. FOUND. 1, 4 (2001), http://history.aauw.org/files/2013/01/hostilehallways.pdf.

203 Catherine Hill & Holly Kearl, *Crossing the Line: Sexual Harassment at School*, AAUW 1, 2 (2011), http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf.

204 Kelsey Sheehy, *Teen Sexual Assaults Highlight Need for Prevention Programs*, U.S. News (Oct. 21, 2013, 8:00 AM), http://www.usnews.com/education/blogs/high-school-notes/2013/10/21/teen-sexual-assaults-highlight-need-for-prevention-programs; Michele L. Ybarra & Kimberly J. Mitchell, *Prevalence Rates of Male and Female Sexual Violence Perpetrators in a National Sample of Adolescents*, 167 JAMA PEDIATRICS 1125, 1127 (2013), *available at* http://archpedi.jamanetwork.com/article.aspx?articleid=1748355#Methods.

205 *CDC Survey*, *supra* note 199. And, while federally funded colleges are required to report sexual assault statistics under the Clery Act, there is no data collection requirement for high schools.

206 Sneed, *supra* note 189.

207 *Sexual Violence: Facts at a Glance*, CDC (2012), *available at* http://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf.

208 Kevin Vagi et al., *Teen Dating Violence (Physical and Sexual) Among U.S. High School Students: Findings From the 2013 National Youth Risk Behavior Survey*, 169 JAMA Pediatrics 474 (May 2015), *available at* http://archpedi.jamanetwork.com/article.aspx?articleid=2173573 (indicating that 20.9% of female students and 10.4% of males students reported experiencing some form of teen dating violence during the twelve months before the survey); *see also* Sheehy, *supra* note 204 (reporting that offenders started young, with most first committing an act of sexual violence at age sixteen).

209 Kempner, *supra* note 130.

210 Vagi, *supra* note 208.

211 Kempner, *supra* note 130.

212 Abramson & Dautch, *supra* note 198.

213 *Cf.* Sneed, *supra* note 189 (explaining that the primary and secondary education system is decentralized, meaning that preventative education measures and protocols vary state to state and school district by school district).

214 AVERT, http://www.avert.org/sex-education-works.htm (last visited Mar. 29, 2015).

215 *State Policies on Sex Education in Schools*, GUTTMACHER INSTITUTE 1 (2015), http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf [hereinafter *State Policies*]. The issue of sex education, however, is often a point of contention for conservatives, who continue to push for abstinence-only education, despite evidence that indicates its ineffectiveness. *See* Kohler et al., *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 J. OF ADOLESCENT HEALTH 344, 344-351 (2008) (determining the impact of sexuality education on youth sexual risk-taking for young people ages fifteen to nineteen and finding that teens who received comprehensive sex education were fifty percent less likely to get pregnant than those who received abstinence-only education).

216 NPR, Kaiser Family Found. & Kennedy School of Gov't, *Sex Education in America: General*, NPR 1 (2004), http://www.npr.org/programs/morning/features/2004/jan/kaiserpoll/publicfinal.pdf; Darryl L. Figueroa,*Poll: Public Support for Sexuality Education Reaches Highest Level*, COMMON DREAMS (June 2, 1999), http://www.commondreams.org/pressreleases/june99/060299b.htm.

217 Thirty-five states and the District of Columbia allow parents to remove their children from sex education, HIV education, or both. *State Policies*, *supra* note 215, at 1.

218 STATE SCHOOL HEALTH POLICY DATABASE, http://www.nasbe.org/healthy_schools/hs/bytopics.php?topicid=1100 (last visited Apr. 6, 2015) (listing out health education mandates by state).

219 While the effectiveness of prevention strategies is outside the scope of this Article, effective "principles of prevention" programs tend to be comprehensive, appropriately timed in development, of sufficient dose, administered by well-trained staff, socio-culturally relevant, theory-driven, provide opportunities for positive relationships, and utilize varied teaching methods. Maury Nation et al., *What Works in Prevention: Principles of Effective Prevention Programs*, 58 AM. PSYCHOLOGIST, 449-56 (2003).

220 *Teen Dating Violence*, NCSL, http://www.ncsl.org/research/health/teen-dating-violence.aspx (lasted visited Nov. 3, 2015). *E.g.*, DEL. CODE ANN. tit. 14 § 4112E (West 2014) (requiring school districts and charter schools to establish a policy on responding to teen dating violence and sexual assault and also requiring them to add comprehensive

programming on healthy relationships as part of the curriculum in health classes); GA. CODE ANN. § 20-2-314 (West 2015) (requiring the State Board of Education to develop rape prevention and personal safety education program and a program for preventing teen dating for grades eight through twelve); TENN. CODE ANN. § 49-1-220 (West 2014) (urging the Department of Education to develop sexual violence and teen dating awareness curriculum for presentation at least once in grades seven and eight and at least once, preferably twice, in grades nine through twelve, including rape prevention strategies).

221 The CDC recently completed a systematic review of 140 studies examining the effectiveness of primary prevention strategies for sexual violence perpetration, and only two programs have rigorous evidence of effectiveness for preventing sexual violence: *Safe Dates* and the building-level intervention of *Shifting Boundaries*. Sarah DeGue et al., *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 19 AGGRESSION & VIOLENT BEH. 346, 346-62 (2014). Both were developed with middle/high school students, but may provide useful models for the development of college prevention strategies.

222 S.B. 695, 2015-2016 Leg., Reg. Sess. (Cal. 2015).

223 Lenin Silva, *Senators Introduce Bill to Require Sexual Assault Education in High School*, DAILY CALIFORNIAN (Mar. 5, 2015), http://www.dailycal.org/2015/03/05/senators-introduce-bill-require-sexual-assault-education-high-school/; *Affirmative Consent Education for High School Students - Sexual Assault & Violence Prevention Legislation Announced*, SD24.SENATE.CA.gov (Mar. 3, 2015), http://sd24.senate.ca.gov/news/2015-03-03-release-affirmative-consent-education-high-school-students-sexual-assault-violence ("[A college student] who testified in support of [the legislation] said, 'Consent education in high school health classes is monumental because sexual violence doesn't start on college campuses, it's something that's socialized much earlier. The earlier you start consent education, the easier it will be to create a culture of consent and support, not just on our college campuses but in our larger communities. This legislation is a huge step in helping prevent sexual violence."')

224 *California to Teach Affirmative Consent/Sexual Assault Prevention in High School*, SD24.SENATE.CA.gov (Oct. 1, 2015), http://sd24.senate.ca.gov/news/2015-10-01-california-teach-affirmative-consentsexual-assault-prevention-high-school.

225 S.B. 695.

226 *Id.*

227 *Id.*

228 CAL. EDUC. CODE § 51225.36 (West 2016).

229 H.B. 4903, 2015 Leg., Reg. Sess. (Mich. 2015).

230 H.B. 1507, 55th Leg., Reg. Sess. (Okla. 2015), *available at* http://webserver1.lsb.state.ok.us/cf_pdf/2015-16%20INT/hB/HB1507%20INT.pdf (authorizing school districts to provide programs for sexual violence awareness and prevention, which will include education about affirmative consent); H.R. 1037, 2015-2016 Reg. Sess. (N.Y. 2015), *available at* http://assembly.state.ny.us/leg/?default_fld=&bn=A01037&term=2015&Summary=Y&Actions=Y&Text=Y&Votes=Y (amending existing law to add prevention of sexual abuse and assault to health education in all public schools); S.B. 5506, 2015 Leg., Reg. Sess. (Wash. 2015) (adding information on sexual assault and violence prevention and understanding consent to existing health education requirement); *see also* H.B. 13-1081, 69th Gen. Assemb., Reg. Sess. (Colo. 2013), *available at* http://tornado.state.co.us/gov_dir/leg_dir/olls/sl2013a/sl_303.htm (requiring human sexuality education programs to include instruction regarding the prevention of sexual violence in dating and teaching young people how to recognize and respond safely and effectively in situations where sexual violence may be occurring).

231 *See, e.g.*, H.B. 406, 2015-2016 Leg., Reg. Sess. (Ga. 2015), *available at* http://www.legis.ga.gov/Legislation/20152016/148509.pdf (providing age-appropriate education in kindergarten through twelfth grade on sexual abuse and assault awareness and prevention); H.B. 595, 28th Leg., Reg. Sess. (Haw. 2015), *available at* http://www.capitol.hawaii.gov/session2015/bills/HB595_.pdf (amending existing sexuality health education law to specify

additional requirements for information that helps students form healthy relationships); H.B. 459, 28th Leg., Reg. Sess. (Haw. 2015); S.B. 61, 98th Gen. Assemb., Reg. Sess. (Mo. 2015), *available at* http://www.senate.mo.gov/15info/BTS_Web/Bill.aspx?SessionType=R&BillID=54 (creating the Teen Dating Violence Prevention Education Act to provide students with information to prevent and respond to teen dating violence as part of sexual health and health education programs in seventh through twelfth grade).

232 Sneed, *supra* note 189; *see also State Policies on Sex Education in Schools*, NCSL (Feb. 13, 2015), http://www.ncsl.org/research/health/state-policies-on-sex-education-in-schools.aspx.

233 S. 355, 114th Cong. (2015). Senator Kaine stated that "[w]ith the alarming statistics on the prevalence of sexual assault on college campuses and in communities across the county, secondary schools should play a role in promoting safe relationship behavior and teaching students about sexual assault and dating violence." Tim Kaine, *Claire McCaskill Bill Would Require Sexual Assault Education in Public High Schools*, HUFFINGTON POST (Feb. 4, 2015, 12:59 PM), http://www.huffingtonpost.com/2015/02/03/sexual-assault-education-bill_n_6608354.html.

234 *Id.*

235 *See supra* Part II.

236 *See supra* Part III.A-B.

237 *See supra* Part III.A.

238 *See supra* Part III.B.

239 *See supra* Part III.A.

240 *See supra* Part IV.A-B.

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EQUALITY, PROCESS, AND CAMPUS SEXUAL ASSAULT [a1]

Julie Novkov [aa1]

By the end of the College Bowl Series playoff game, Heisman-winning quarterback Jameis Winston was having a very bad day. His Florida State Seminoles had been trounced by the Oregon Ducks in a game featuring multiple miscues and turnovers by the offense and by Winston himself. At the end of the game, as Winston was leaving the field, a handful of jubilant Duck players initiated a taunt to the tune of the Seminoles' "tomahawk chop" chant: "No means no!" [1]

The chant, which provoked delighted support, predictable outrage, charges of hypocrisy, and threats of punishment from the head coach, referred to a simmering allegation against Winston dating back to December 2012 that he had raped a fellow student. [2] On the night of December 6, Winston's accuser, a nineteen-year-old female freshman, allegedly shared at least five mixed drinks with him at a bar and departed in a taxi with three Florida State football players. She claimed that her memory then became hazy, but recalls returning to consciousness in an apartment where she was subjected to sexual assault after indicating her lack of consent. Her assailant then dressed her and returned her on his scooter to an intersection near her dormitory. She posted an online plea for help, and two friends intervened. One finally convinced her to contact the police and placed a 911 call on her behalf at 3:22 AM on the night of the alleged assault. Because she called from her dorm room, the call was routed to the campus police, and a campus police officer drove her to the hospital. At the hospital, she indicated her belief that the assault had taken place off campus, so the Tallahassee ***591** City police interviewed her both at the hospital that night and the following morning when she returned to complete her statement. [3]

Labeling the course of events afterward "the comedy of errors" would channel Shakespeare's darker side. [4] The Tallahassee police officer in charge of the investigation made no serious attempts to identify a man at the apartment whom the victim heard referred to as Chris (he later turned out to be Winston's roommate), nor did he request footage from the squadron of surveillance cameras scattered throughout the bar. [5] He made a lackadaisical call to the cab company to try to identify the driver of the cab that the woman had shared with the three football players, but failed to follow up. By the time he filed his first report--more than two months after the alleged assault--memories had faded and evidence, including the videotapes in the bar, was irretrievably lost. The biggest break in the case came from the victim herself, who contacted the police on January 10 to inform them that she had discovered the name of her assailant after recognizing him in a class. The investigation limped along--at one point, Winston successfully evaded an interview with the police because he had to be at baseball practice. Ultimately, the investigation was suspended, allegedly because the victim did not cooperate with the police, despite the fact that she continued to contact the police to inquire about the progress of the investigation. [6]

The following fall, however, the case reappeared when the *Tampa Bay Times* requested documents from the police under open records laws. [7] State prosecutor Willie Meggs opened an investigation of the case, and as she attempted to reconstruct a narrative of the night, the fall progressed toward winter and the Seminoles marched toward a national championship under Winston's leadership. Ultimately, Winston would win the Heisman trophy, the Seminoles would win the national title, and the prosecutor would decline to move forward with criminal charges, explaining in a press conference shortly before the Heisman selection that he simply did not have enough evidence to arbitrate between the accuser's claim that Winston assaulted her and Winston's response that they engaged in consensual sex. [8]

Had the case not happened at a university and involved two students, it might merely be another exemplar of police misconduct regarding sexual assault, of the prevalence of rape culture, or of women's propensity to blame men for drunken sex, depending on one's political orientation. But the university was implicated, and had clearly been drawn in at a fairly early ***592** point, as Tallahassee police records indicate that the athletic department had called the Tallahassee police regarding the allegations against their then-freshman hotshot quarterback in January of 2013. Under Title IX, the athletic department was obliged to inform school officials of the allegation; however, no one seems to know whether this obligation was fulfilled. Either way, Florida State did not open an investigation in January of 2013. Officials allegedly approached Winston's accuser in October of 2013 to ask if she wished them to investigate her allegations, but Florida State was, if anything, even less invested in the investigation than the police. [9] This lack of action ultimately prompted Winston's accuser to complain to the Department of Education's Office for Civil Rights about Florida State, triggering a Title IX investigation against the university. [10] Florida State's investigation led to a student conduct hearing for Winston, over which a former Florida Supreme Court Justice, Major Harding, presided, ultimately clearing Winston of any wrongdoing under a preponderance of the evidence standard. [11]

The controversy over Winston illustrates much of what can go wrong in the aftermath of a sexual assault on campus - a claim of wrongdoing not adequately investigated, a police department considering the campus status of the accused, and concerns raised by both the complainant and the accused about due process and fairness. Accusations begin as private disputes between students, but if the victim of an assault seeks resolution on campus, the claim enters a maze of layered institutions that are accountable to protect the interests of complainants and accused, and also accountable to the campus community and federal law. Untangling the layers helps to explain why the issue is so controversial, but does not provide a clear path forward to handle such disputes.

In this Paper, I suggest thinking about assault accusations as community wrongs rather than individual wrongs, and I propose developing an approach that focuses on structures rather than on individual-level analysis of consent and intent. Cultural struggles over sexual assault and consent seem primed to continue. So, then, will the controversy over the proper handling of sexual assault cases, including concern over the proper framing and assignment of responsibility and the appropriate exercise of due process. The ***593** shift to community and structural analysis, however, would be better suited than the current framework to navigate through the conflicts and discontinuities produced by the layering of frameworks of women's equality, the rights of the accused, and university accountability, as well as to protect the rights and interests of individual students. This new analysis also facilitates looking at structures and practices that make assault both more likely to occur and less subject to mitigation through ascribing individual accountability to offenders.

I. THE NEW WORLD OF SEXUAL ASSAULT POLICIES ON CAMPUS

Florida State's failure to proceed against Winston comes in the context of a national furor over a cultural clash. Sexual assault victims and their advocates have advocated strongly for reform in how colleges and universities

address private student-on-student crime, seeking to sweep these reforms directly into higher educational institutions' obligation to provide gender equity.

In 1972, President Nixon signed Title IX into law. [12] The law, a small part of the Higher Education Amendments of 1972, was deceptively short, stating simply: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." [13] Its primary purpose was to encourage educational institutions to eliminate sex discrimination by denying the expenditure of federal funds that supported it. Like the major anti-discrimination measure covering employment, Title VII, Title IX provided individual citizens with remedies against violations. [14] The statute's bare language has led institutions to seek guidance on compliance from the Department of Education, which has implemented its general command for more than four decades. [15] When Title IX was passed, the fundamental issues it addressed included women's lack of access to higher education and large inequities in the resources provided to women in all levels of education and across multiple areas, including athletics.

***594** Individuals who believe that an institution has violated their right to freedom from discrimination may file a claim with the Office for Civil Rights ("OCR") within 180 days of the event to seek resolution. [16] The OCR will then seek resolution, often encouraging settlements between institutions and aggrieved individuals. [17] The Department of Education and the OCR are thus the primary federal institutions involved in the administrative interpretation and implementation of Title IX's mandate. Aggrieved individuals may also opt to pursue independent private litigation directly under Title IX, but the standard for establishing a violation is more difficult to achieve. [18]

In 1990 and 1992, Congress passed and amended the Crime Awareness and Campus Security Act, popularly known as the Clery Act, as a supplement to Title IX. This legislation explicitly required campuses to address sexual violence: "schools must inform individuals reporting rape of their options to notify law enforcement, grant both the accuser and accused the same opportunity to have others present at any proceedings, inform both parties of the outcome of any disciplinary proceeding, and notify the individual reporting rape of available counseling services and options to change academic and living situations." [19] The Clery Act also mandates annual public reporting of crimes and official responses to them on campuses. [20] As with Title IX, implementation lies in the Department of Education, and students may bring allegations of violations directly to the Department of Education to seek resolution.

While Title IX and the Clery Act could be understood to work in conjunction to frame campus sexual assault as a remediable form of gender discrimination and provide access to remedies, some advocates for sexual assault victims argued that the two Acts were still insufficient. [21] Taken together, the two Acts provided for significant monetary penalties for non-compliance, but in the view of at least one commentator, could not effectively address countervailing pressures to maintain institutions' public images ***595** and reputations. [22] Response to these concerns came in two forms: administrative guidance from the Department of Education in the form of a letter, and statutory reform both passed in Congress in 2013 and proposed for the future.

Advocates for reform achieved a significant victory with the Department of Education, convincing the OCR to produce a policy memorandum in 2011 that has transformed how higher educational institutions address allegations of sexual assault. [23] The "Letter to Colleagues" clarifies the OCR's interest in and intent to increase its enforcement efforts with regard to sexual violence, which it identified as a form of sex discrimination under Title IX. The letter defines sexual violence as "physical sexual acts perpetrated against a person's will or where

a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability." [24] The letter places responsibility on schools and colleges to take "immediate and effective steps to end sexual violence and sexual harassment." [25] The letter makes it clear that campuses may not simply rely on their existing policies or cede responsibility for dealing with sexual violence to local law enforcement. Yet the letter also contemplates local law enforcement continuing to play a role, ideally in concert with campus authorities, though campus proceedings have different burdens of proof and procedural standards.

In addition to the changes initiated by the "Letter to Colleagues," Congress enacted the Campus Sexual Violence Act ("CSVA") in 2013 as Section 304 of the reauthorization of the Violence Against Women Act of 1994. [26] Senators Claire McCaskill (D-MO) and Kirsten Gillibrand (D-NY) cosponsored this legislation introduced by Senator Patrick Leahy (D-VT), which sought "to close the gap in current laws by requiring colleges and universities to clearly explain their policies on sexual assault, stalking, dating violence, and domestic violence." [27] The provision, which updates reporting requirements contained in the Clery Act, operates by requiring higher educational institutions receiving federal funding to include in their ***596** reports additional information about the prevalence of sexual violence on campus and detailed policies the campus has developed to address such violence. The policies must lay out educational programs promoting awareness about sexual violence and explain the procedures that the institutions will follow to address incidences of "domestic violence, dating violence, sexual assault, or stalking . . . including a statement of the standard of evidence that will be used during any institutional conduct proceeding arising from such a report." [28]

CSVA requires schools to inform victims about how to file a claim, but also to lay out the possibilities for pursuing remedies through the criminal justice system and to solicit their institutions' assistance in doing so. [29] It does not establish a prescribed evidentiary standard for adjudicating claims, but does require that policies identify a standard, and demands that both accused and accuser have the same rights to have advisors, including an attorney, accompany them in hearings. [30] Under any standard, there is substantial public and federal investment in determining how institutions address these individual private wrongs.

Finally, the measure lays the groundwork for continuing reform by requiring the Secretary of Education to "seek the advice and counsel of the Attorney General of the United States concerning the development, and dissemination to institutions of higher education, of best practices information about campus safety and emergency . . . [and] about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking." [31]

The 2011 OCR letter is only administrative policy and could easily be subject to reversal by the next presidential administration, especially if a Republican is elected, and CSVA does not completely codify these policies. [32] Senators Claire McCaskill (D-MO) and Kirsten Gillebrand (D-NY) are seeking further legislative reform through their Campus Accountability ***597** and Safety Act ("CASA"). [33] CASA, if passed, would codify more of the changes introduced by the 2011 Letter and make it possible for OCR to fine institutions progressively rather than having only the all-or-nothing (and therefore almost never imposed) sanction of withholding federal funds. [34] In addition, CASA would require data sharing and coordination between institutions of higher education and local law enforcement officials in dealing with sexual violence, far more stringent provisions concerning the provision of information about victim services and other available resources, the establishment of uniform processes for handling such cases (including rapid written notice to both accuser and accused of outcomes in investigations), the conduct of biannual climate surveys with public releases of results, public identification of institutions under investigation for poor handling of assaults, and the adoption of uniform and standard systems for handling accusations (primarily intended to strip athletics departments of the ability to maintain jurisdiction over student

athletes accused of sexual assault). [35] The OCR also recently reminded institutions of their legal obligation under Title IX to hire or identify a full-time Title IX coordinator, who will be responsible for overseeing the implementation of and compliance with Title IX standards, including those regarding adjudication of sexual assault allegations. [36]

While CSVA and other proposed legislative reforms are ambitious, its effectiveness will depend upon implementation, as Schroeder notes. [37] Moreover, while the hope behind the laws and regulations targeting sexual assault on campus is that institutions will prioritize working to eliminate sexual assault and other forms of sexual violence, institutions will necessarily and rationally privilege preventing liability from private suits pursued under these frameworks or loss of federal funding from administrative action ***598** triggered by findings of non-compliance. The 2011 letter and recent implementation efforts (which include the adoption of affirmative consent standards) have produced controversy over how sexual assault allegations are handled in campus proceedings. Sexual assault is a criminal act, and perpetrators can be subjected to criminal sanctions by the state. A campus hearing for sexual assault, however, can proceed under a "preponderance of the evidence" standard, which is significantly weaker than the criminal "reasonable doubt" threshold. [38] A complainant in a campus hearing need only show that it is more likely than not that a perpetrator committed the alleged act in order for consequences to be imposed. [39] This triggers a whole host of due process concerns on the part of those accused of sexual violence. Longstanding doctrine has held that people have tangible interests in their ongoing educational opportunities, and therefore that they are entitled to due process before their opportunities are curtailed or cut off through internal investigative processes. [40] In these investigations, the state becomes involved in two ways: (1) any college or university accepting federal funding must comply with Title IX standards and practices articulated from the Office for Civil Rights, and (2) if the university involved is itself a state institution, then it acts as a public entity when it establishes and conducts hearing processes.

Nationally, colleges and universities have responded to the 2011 OCR letter by strengthening their commitment to investigating alleged sexual assaults and, in many cases, by changing the standard of proof required if it was more stringent than preponderance of the evidence. [41] Universities' objective in making these changes is to avoid becoming the target of a Title IX investigation. In May 2014, the OCR turned up the heat by providing for the first time ever a public list of colleges and universities under investigation for violating civil rights laws in their handling of sexual violence cases. [42] The fifty-five colleges and universities listed ran the gamut geographically ***599** and size-wise, and the list included both public and private institutions. Harvard Law School was named, as was the West Virginia School of Osteopathic Medicine. [43] Many seemed concerned about the public relations damage--and the possible impact on student recruitment efforts-- of making the list and have scrambled to address the issues by changing standards and procedures. [44]

The changes have generated hostility and criticism from advocates for (mostly) men accused in campus proceedings. [45] When Harvard Law School settled with OCR, it agreed to a number of changes in its administrative, investigative, and adjudicative processes. [46] It also agreed to review sexual harassment complaints dating back to 2012 to determine whether the complaints had been investigated and remedied properly. [47] Twenty-eight members of the faculty responded to the agreement with a highly critical open letter published in the *Boston Globe*, which condemned the new standards as going far beyond what Title IX demands. [48] Among other concerns, the faculty members criticized the lack of opportunity for discovery, witness confrontation, and open testimony by the accused in hearings; the lodging of investigative, prosecutorial, fact-finding, and appellate reviewing processes in the Title IX compliance office; and the failure to ensure representation for the accused in hearings. [49] They also scolded the school for expanding the definition of sexual harassment and failing to account for the

complexities involved when intoxicated or impaired students engage in sexual contact. [50] Signatories on the letter, besides feminist professor Elizabeth Bartholet, included Charles Ogletree, Janet Halley, and Lucie White, ***600** individuals not generally recognized for their reflexive support for white patriarchy. [51]

Colleges and universities are scrambling to change their policies with regard to sexual assault cases and hire new administrative staff both in response to the 2011 OCR letter and to address the new legislation, but states themselves are becoming involved as well. In September, California's legislature adopted a measure mandating an affirmative consent standard for sexual intimacy, which requires individuals accused of sexual assault in campus relationships to show that they had secured active consent from their partners. [52] In response to pressure from Governor Andrew Cuomo, the State University of New York's ("SUNY") Board of Trustees took the same step in December 2014. [53] Hearing systems must now figure out how to incorporate these rules and, for some institutions, new personnel into their extant practices. [54]

II. LAYERED FRAMEWORKS FOR DISPUTE RESOLUTION

Prior to the OCR letter and CSVA, on most campuses the hearing processes used to adjudicate claims of sexual assault were not unique to sexual assault. Rather, until the recent wave of institutional reform, most universities simply swept sexual assault claims into the same system that governs all alleged violations of university codes of conduct. The procedural rules and limitations, the evidentiary guidelines, the students' ability to have a lawyer represent them or not--in general, it works the same way whether a student is accused of forcible rape, ripping off a term paper from the internet, smoking marijuana in the dorms, or stealing from her roommate.

The 2011 OCR letter and CSVA establish expectations and guidelines about standards of proof and the conduct of hearings, but they do not specify that a separate dispute resolution system must be established. Thus, as long as the procedural and evidentiary standards are met, these hearings can still take place within the context of the universities' broader, already established systems that handle other accusations of wrongdoing against students. ***601** Recently adopted and strongly advanced reforms, however, press for more direct involvement and oversight by universities' offices charged with ensuring Title IX compliance. Over time, this is likely to divert more sexual assault and violence cases to universities' Title IX coordinators for resolution.

These systems are themselves the product of a tension around how to conceive of student wrongdoing. Since the establishment of the modern university, students have been doing things that universities have wanted to thwart or control. At the same time, though, universities until the 1960s viewed their undergraduate charges from a standpoint of *loco parentis*, framing their disciplinary function largely as a teaching one. [55] This mindset had an impact on how dispute resolution systems were established and evolved.

As shifts in thinking about rights took place in the late 1960s and early 1970s, two important things happened with respect to higher education and dispute resolution. First, students began to think of their interest in a college degree in a more vested, almost property-like sense. [56] Being kicked out of school was no longer a misfortune but rather a deprivation, requiring at least minimal due process. [57] Colleges responded by creating clearer and more regularized processes with fact-finding capacity, just as welfare offices responded to the Supreme Court's ruling in *Goldberg v. Kelley* [58] by creating pre-termination hearing processes. [59] No longer would it be a simple matter to cut off a student's continued access to education, either temporarily or permanently.

Second, colleges and universities distanced themselves from the loco parentis role, at least in formal terms. No longer would they place themselves in the position of parents trying to inculcate moral values and protect vulnerable children from the consequences of mistakes. Rather, students would be viewed as youthful adults

who could bear responsibility for their own decisions and the consequences of them--particularly when it came to sexual intimacy. Rules strictly limiting opportunities for intimate heterosexual encounters were relaxed, and students began to engage the university from the standpoint of consumers as much as wards. [60]

***602** However, these developments layered over the pre-existing structure in which universities continued to play a role of facilitating learning and development, a role particularly manifest in dispute resolution. A university may be technically either public or private space, but it has been and continues to be a learning community and wrongdoing and disputes can be understood in part as opportunities for growth on the part of students.

Thus, the flowering of offices of conflict resolution and student hearing boards. The structure and operation of dispute resolution mechanisms exhibits an almost bewildering diversity in the details, but most institutions have some administrative structure that allows either the university or a private individual to raise a claim against a student for wrongdoing that some type of university board will adjudicate. These boards hold the power to impose sanctions ranging up all the way up to dismissal from the university. Many of these boards function a bit like courts--a panel of decisionmakers hears and weighs evidence, determines the facts of a dispute, and decides whether a student will be sanctioned--but the resemblance is superficial. As a general rule, the boards operate in far more informal ways, have broad or not really articulated rules of evidence, have the authority to create equitable solutions to disputes, and often do not allow expert representation for a student accused of wrongdoing.

Nonetheless, their power is real. Disciplinary hearings can result in the deprivation of educational opportunities in which students have vested interests, and thus are subject to legally enforceable due process standards. While public institutions maintain significant latitude in exercising judgment about students' academic standing, a long line of state and lower federal cases culminated in *Goss v. Lopez* [61] in 1975, which held that students subjected to serious disciplinary outcomes at state institutions had the right to a formal hearing prior to the imposition of the sanction. [62] With disciplinary sanctions, case law generally "provides more procedural protection, such as an administrative hearing, than the academic-sanction cases, although not entitling the student to the full-blown safeguards of adversarial civil proceedings." [63] Perry Zirkel's study, which collected legal challenges brought by students facing serious sanctions from private colleges and universities, shows that legal resistance to sanctions based on due process claims has risen sharply since the 1970s. [64] Both on the private and public ***603** side, this resistance has encouraged the provision of hearings for all manner of disciplinary violations and academic failings. [65]

However, with respect to some kinds of wrongs, other interests are present. Federal equal opportunity law is a backdrop to educational contexts and provides an additional set of concerns and constraints. Title IX, as explained above, guarantees equal access and opportunity to women, and enables individuals who believe that dispute resolution processes have led to denial of their access or opportunity to challenge the processes and their outcomes. [66] This presents a countervailing set of incentives for universities to establish investigative and disciplinary systems that will limit their exposure to legal challenges from that angle. While it should be obvious, it is worth noting that a university's interest in avoiding private liability or censure from the federal government does not necessarily align with the interests of either alleged victims or perpetrators of sexual assault. As Thomas Keck has illustrated with respect to equal opportunity law, the creation of institutional liability for wrongs creates incentives for the shift of administrative agendas toward litigation avoidance. Offices with the stated responsibility for fulfilling legally enforceable commitments to provide equal opportunity in the workplace quickly fall into the practice of primarily ensuring that the institution behaves in ways that will protect it from liability. [67]

Finally, with respect to some wrongs, universities are dealing with allegations of criminal offenses. This has become an increasingly relevant layer in regulation, as most universities of any significant geographic and

demographic size have their own police departments, which look and act very much like the police departments that serve the communities that encompass the university. As the Jameis Winston case illustrates, a report of potentially criminal behavior to either the local police or the campus police can entangle both the complainant and the accused in a fluid and Byzantine network of overlapping investigatory responsibilities and jurisdiction, depending on the student status of the individuals, the circumstances, and the location of alleged incidents. [68]

*604 III. PRIVATE DISPUTES, CULTURAL STRUGGLES, AND QUASI-PUBLIC RESOLUTIONS

Much could be (and has been) written about this network and how it operates across a variety of accusations against students by other students, faculty, or university staff. [69] Let us set aside the kinds of disputes where the university is in an unproblematic adversarial standpoint with a student-- situations where a university seeks to punish or dismiss a student because of academic underperformance (which, as noted above, falls into a different category for legal review anyway) and those where a student is accused of a transgression against the university itself. This would include accusations of academic dishonesty and similar offenses, as well as concerns about damage or theft of university property. My concern is situations where two individual students are involved in a dispute with each other and one claims that the other student should be sanctioned for violating the student code of conduct.

Within this framework, even serious conflicts with potential criminal implications, including claims of sexual assault, begin as private disputes between students. They come into the university's purview when one student seeks a resolution that encompasses the membership of both the aggrieved party and the alleged aggressor within the university community. In presenting a claim against another student to the university, the complainant in effect brings the university in as an aggrieved party by framing the claim as a violation of the university's code of conduct, which articulates community standards for behavior on campus (and at times off campus as well).

Yet the accused student is also a member of the university community and has rights and interests attached to this membership. Of course, it is this membership that confers the university's jurisdiction over the student--but it also presents the university with the dilemma of having to safeguard the accused student against unwarranted or even improper uses of the conduct code against him or her. [70] The university is simultaneously responsible ***605** for managing the student's discipline and protecting the student against improper uses of disciplinary proceedings against her or him. This is generally a difficult circumstance for an institution, but the difficulty is compounded in sexual assault cases because of the layering of competing rights frameworks--alongside the university's system for dispute resolution and the procedural rights it conveys to the participants within the closed world of the university, complainants can also claim that unsatisfactory resolutions constitute a violation of gender equity rights under Title IX, and the accused have procedural due process avenues that advocates are increasingly pressing them to pursue. [71]

These crosscutting pressures reveal the fundamental incompatibility of the university's commitments. To the complainant, the university owes a resolution of her claim and a safe university environment, but also protection of her (or his) rights to gender equality. To the accused, the university also owes an equitable resolution of the complaint, but, in addition, it must respect his (or her) procedural due process rights. And in the background lurks the university's responsibility to its own communal aims. At the same time, once the campus police or local police become involved, a parallel but not necessarily separate process may be launched within the criminal justice system that unfolds with different standards of evidence, procedures for collecting evidence, and legal protections and pitfalls for the complainant and the accused. While universities have no obligation to assist students in navigating legal woes, many maintain offices that offer such legal assistance as a vestige of loco parentis--but may rule out providing counsel if a potential case could have students structurally aligned against each other. [72] Universities must also comply with external investigatory processes, often doing so when criminal activity is alleged, by relying on the relationships between the university police and local police.

Universities have constructed institutions that can conduct investigations and resolve disputes. At times, the issue is that there are too many institutions rather than too few. Suppose a student accuses another student of assault in a dorm setting. At some institutions, the complainant could conceivably proceed through Residential Life (with its jurisdiction over the dorms); through a peer-to-peer student mediation group; through a formal complaint to the university's disciplinary body (possibly lodged in Academic ***606** Affairs or distinct from Residential Life, in an Office for Student Success); through Diversity/Inclusion (if a component of the assault arguably touched on the complainant's membership in a protected class); through the university police; or through the local police (though in some instances they might refer the case to the university police because of the location of the incident in dispute). At many institutions, a student would not be barred from pursuing several of these alternatives simultaneously, and the accused student could seek, in effect, to change venues from one to another of these institutions. This scenario could be even further complicated if the accused student retaliates by launching her or his own set of charges against the complainant.

Added to this complexity can be the active intervention of external interested parties in the currently politicized climate regarding sexual assault. One such individual is attorney and advocate Brett Sokolow, who played a key advisory role in the development of the 2011 OCR Dear Colleague letter and who has a very lucrative consulting business that helps to provide safe harbor defenses for institutions trying to avoid Title IX liability. [73] While he was an early supporter of the broader use of Title IX to address sexual assault; of late he has been championing accused assailants' rights. [74] An article published in *New York Magazine* portrays him and his business in a somewhat favorable light, [75] but these pieces and others illustrate how politically complex and acrimonious the issues are. Likewise, attorney and adjunct law professor Wendy Murphy has participated in or brought numerous Title IX suits against institutions on behalf of victims of sexual assault. [76] Murphy was the prime mover behind the complaint to the OCR that ***607** resulted in the finding that Harvard Law School was in violation of Title IX. [77]

Beyond individuals vested in working with and against institutions, the controversy occurs against the backdrop of feminist attempts to change the cultural framing of sex and consent. Feminists have struggled over the relationship between sexuality and patriarchy, fighting bitterly between and among themselves since the 1980s. [78] This struggle has reignited, moving on from the largely successful efforts to define “date rape” as a real form of rape. The cultural problem feminists are currently working to address is bridging the tensions between critiques of slut shaming (working to legitimate a stronger sense of women's agency in sexual appearance and activities) and efforts to reframe non-consensual sex as any sex that takes place when one party has not actively asserted (usually) her willingness to participate. Sexual assault on campus is a good place to open a front in this cultural struggle because the issue is acute there: many campuses have concentrations of invested feminists who want to tackle the problem, and scenarios involving coerced or pressured sex or sex between impaired participants are distressingly common phenomena.

Further complicating matters is increasingly visible anti-feminist concern and activism. The men's rights movement has taken on the issue, claiming that greater attention to and tougher standards for sexual assault prevention facilitate or encourage female students to lodge false claims against men, either out of vindictiveness or regret for unwise sexual encounters. [79] Websites such as *A Voice for Men* and *Men Going Their Own Way* highlight cases in which men were found not to be responsible for sexual assault on campus or when women withdrew accusations, further promoting the idea that false accusations of sexual assault are commonplace. [80]

The result is a welter of interests held by the individuals involved, the university, and the State that, particularly in cases of sexual assault, cut across lines dividing public and private; university and community; criminal and noncriminal; and federal, state and local. The 2011 Dear Colleague OCR letter and CSVA were intended to

impose more order, logic, and consistency, and to establish clearer standards that protect the rights and interests of private victims of sexual assault.[81] These changes acknowledge that Title IX does not really address sexual assault and seek to reconfigure it so ***608** that it can do so. They also seek to transform sexual assault from an individual and personal wrong into a group-oriented form of animus-based violence. However, because these changes are layered on top of an already existing system serving crosscutting and contradictory interests, this institutional innovation seems unlikely to resolve the controversy over how to handle sexual assault on campus. Also, despite the group animus frame that animates Title IX, the investigatory process and remedies also remain highly individual-oriented. While multiple layers of interests exist in other contexts involving campus wrongs, this location has become a hot spot because of the cultural struggle over the broader issues of sexual assault and the meaning of consent.

IV. POLICY AS A DRIVER FOR CULTURAL CHANGE

Along with a host of other law and society and institutional legal scholars, I have written about how cultural change plays out in legal terrain, illustrating how litigation helps to translate cultural shifts into the concepts and language of the State.[82] Those of us who do this work recognize that legal change can shape the directions that future cultural shifts take, but we have tended to focus on cultural change as the prime mover in this process. This focus then concentrates analysis on how the legal process translates shifting cultural norms to enable their assimilation into and implementation through state practices.

It strikes me that something different is going on here. Activists are pressing for changes in university policies, using Title IX and its system of oversight as the lever, in the hopes that these policy changes will achieve, or at least advance the pace of cultural change. In this regard, the current efforts probably look most like Catharine MacKinnon's ultimately successful struggle to redefine, under law, unwanted sexual advances or the sexualization of the workplace as sexual harassment, which led to a shift culturally redefining such behavior as wrong and condemnable.[83] While determining “where culture is” in order to ascertain the level of correspondence between legal standards and cultural norms is an overwhelming empirical task if one does not simply want to use public opinion as a proxy, a few observations may be difficult to contest.

***609** First, while there is cultural conflict over what constitutes rape and under what conditions sex not accompanied by forcible physical restriction can be considered rape, sexual encounters that do not involve clear verbal resistance are less readily framed as rape than those that do. This is a testament, in part, to the significant headway that the frame of “no means no” has made--headway that led, in part, to the reconfiguration of legal understandings of consent to move away from earlier “utmost resistance” standards now widely viewed as sexist.[84]

Second, we mostly agree that sex occurring between impaired parties, or at least when one of the parties is significantly impaired, raises thorny questions about consent. This cultural phenomenon leads to some interesting legal distinctions. Take, for instance, New York's law governing rape. Third degree rape is defined as “[e]ngag[ing] in sexual intercourse with another person who is incapable of consent by reason of some factor other than . . . incapacity to consent,”[85] meaning (among other things) forcible compulsion or circumstances under which, at the time of the act of intercourse [[or deviate sexual intercourse], the victim clearly expressed that he or she did not consent to engage in such act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances.[86]

Second degree rape includes individuals who “engage[] in sexual intercourse with another person who is incapable of consent by reason of being mentally disabled or mentally incapacitated.”[87] And first degree rape includes

engaging in sexual intercourse with another person "[b]y forcible compulsion; or [w]ho is incapable of consent by reason of being physically helpless." [88] The victim of sexual assault who clearly says no in a way that a reasonable person would understand may thus find his attacker convicted of third-degree rape, while the victim who is mentally incapacitated by alcohol could find an attacker convicted of second-degree rape, and the victim who is so drunk that she is physically helpless might see an attacker convicted of first-degree rape.

Many feminist campus activists are pressing for a unified principle that active consent should be required across the board. The idea appears to have first bubbled up in a policy setting in 1991, in Antioch College's widely ***610** ridiculed sexual consent policy, which required clear verbal consent for all sexual activities and the reiteration of such consent as sexual intimacy escalated. [89] The policy operated quietly for a few years and then attracted a storm of negative and dismissive media attention, including becoming the butt of a Saturday Night Live sketch. [90] After its widespread cultural dismissal, it reappeared in the 2011 OCR Dear Colleague letter and burst into national visibility and controversy with California's adoption of a law imposing affirmative consent as a standard at all publicly funded colleges and universities. [91] California's action has been followed by other institutions and systems, the most prominent of which is SUNY, following Governor Andrew Cuomo's instruction to the Board of Trustees to take action on the issue. [92]

The move to affirmative consent has taken place primarily in the policy sphere and seeks to reframe cultural conceptions of what constitutes consensual sex and how to identify non-consensual sex. It is probably still a bridge too far to claim a cultural toehold on the position that any sex not accompanied by affirmative consent is rape, but the policy change seeks to redefine the game and prepare the ground for these conversations. As cases play out concretely through these new standards, however, the theory is that the questions around instances of alleged sexual assault will shift, which will begin the process of shifting our cultural thinking about what constitutes rape, which could then lead both to different individual outcomes and to additional policy changes. Advocates for transformation might hope for an outcome similar to that of sexual harassment, for which legal and policy change helped to shift the cultural ground toward more widespread consensus that unwanted sexual advances and the sexualization of the workplace are inappropriate, unacceptable, and worthy of condemnation and punishment. [93]

*611 V. WORKING THROUGH WHAT TO DO: PRIVATE ACTS, PUBLIC RESPONSIBILITY

Given the layering problem addressed above and the shifting cultural terrain that has not yet caught up with policy (and, it should be noted, may never need to catch up with policy if a future presidential administration backpedals on the 2011 OCR Dear Colleague letter), one suggestion endorsed by some advocates, including state legislators in Virginia, New Jersey, and Rhode Island, is that universities simply get out of the business of trying to adjudicate sexual assault cases. [94] This path would reformulate policies and practices so that if a crime is alleged, it must go through local law enforcement, or at the least, local authorities must be informed about all such allegations, so that their own mandatory processing policies can spring into operation. The legal process would therefore manage the protection of the rights of the accused and the State's interest in preventing crime can bolster victims' personal interests in seeking justice.

As a practical matter, though, this cannot be the solution. In *DeShaney v. Winnebago County Department of Social Services*, [95] the Supreme Court ruled that even if a state engaged in negligent neglect of wrongs, it could not be held liable even if its inactions led to serious loss of liberty, like the tragic and permanently disabling beating that Joshua DeShaney suffered at the hands of his father. [96] Because his assailant was private, the child had no recourse against the state that failed to protect him, even though there was ample evidence that he was in danger. [97] As a result of this ruling, states cannot be sued if they fail to prevent private insults to life, liberty,

or property because their inaction, even if negligent, does not trigger the Fourteenth Amendment's protection of citizens against wrongful *action* on the part of the state. However, Title IX's and now CVSA's standards impose an affirmative obligation upon universities that places them in a very different position than the state. In general, the state cannot be held liable for failures to act, but universities that fail to prevent gender-based wrongs, including sexual assault, can be held accountable under Title IX and CSVA. [98] State legislators' proposals to slash through the maze by requiring assault claims to go through the criminal justice system has been strongly criticized by NASPA, ***612** an organization of student affairs administrators, which argues that universities, even if directed to do so by the state, cannot evade their federally imposed responsibilities. [99] Universities must work within the Title IX and CSVA framework, which complicates the already entangled lines of responsibility by deeply involving compliance officers in the processes and prioritizing administrative management of these disputes.

No institutional solution can resolve the tension between the interests of individuals experiencing sexual assault and individuals defending themselves against such accusations. The responsible university owes a duty of protection and education to both, and a broader duty to its own community to prevent a culture of sexual violence, to educate its denizens about responsible and healthy sexual relationships if irresponsible or unhealthy relationships are damaging the campus culture, to ensure that campus institutions such as athletic teams and student groups reject sexual assault, and to protect the interests of all students in fair process and equitable dispute resolution.

The result could be institutional paralysis, but universities are pressed by both sides to act and to change. All too often, the universities' responses to these pressures focus on prevention of damage to the university, particularly in the form of liability. One interesting example that reflects this reality is Harvard's new policy, which removes sexual assault cases from the ordinary process of dispute resolution and rehouses them entirely within the Title IX compliance office, a shift that the proposed CASA would also endorse. Feminist law professor Nancy Gertner argues that this placement creates a structural bias in favor of complainants, because a finding against any wrongdoing could trigger consequences (ironically under Title IX itself) if a complainant can establish that the university process did not resolve the case to protect her equality rights. [100] It also presses the university to take some kind of documentable action in its own protective interests, regardless of whether any action it takes is in the best interest of a complainant or even desired. As concerns have grown from both sides, an industry of consultancy best exemplified by Brett Sokolow's National Center for Higher Education Risk Management (“NCHERM”) is reaping the benefits ***613** of this anxiety, offering services to review and design policies that will leave the universities off the hook. [101]

This new industry somewhat resembles the army of diversity consultants who help employers to design policies and practices to prevent Title VII liability, and its representatives have encouraged institutions to reconfigure processes to foreclose liability--but not necessarily to try to resolve underlying cultural issues and practices that contribute to sexual assault on campus, nor to grapple honestly with the conflicting interests of the alleged victims and perpetrators. [102] As Daniel Lipson's work reveals, with respect to affirmative action, university administrators may genuinely embrace the ideological goals that drove legal and policy changes and this investment may reflect more than just the capture of administrative machinery by interested parties. [103] Yet administrators remain aware that their primary measure of success is in how well they shield the university from controversy and challenge.

What follows is speculative, an uncertain testing out of a path through this treacherous marsh. Policy change and cultural change can build upon each other productively, and this seems to be a potential way to move things forward toward a world in which sexual assault on campus is exceptionally rare, perpetrators are held accountable, and processes ensure that accountability is not based upon false reports. But it should be emphasized that eliminating sexual assault is not even the point of the aspirational hope. Rather, it is eliminating or radically changing the cultural frames that so readily produce these incidents, which individuals currently experience and frame as

individually violative and damaging sexual acts or alternatively cannot understand as problematic acts at all. [104] These frames are tightly wrapped around the role of individual consent in the inquiry.

Consent alone is an insufficient tool to understand good and bad sexual encounters because it is entirely individualized and subjective on both sides. Further, as Joseph Fischel has argued persuasively, framing the inquiry

***614** around consent in many cases focuses the inquiry on the complainant and (usually) her capacity. [105] When a dispute arises regarding sexual encounters between drunk or otherwise impaired participants, the consent inquiry leaves but two possibilities: the complainant was not significantly impaired and therefore the sex was legitimate, or the complainant was so significantly impaired as to have no agency, and therefore the sex was an assault. The complainant in this situation either must have said yes or could not say no, which translates into an externally attributed no. The debate then centers around whether individual lack of consent was communicated or understood, and efforts to achieve cultural shift focus on redefining consent on the individual level. I argue that a broader community perspective is necessary, one that brings into the analysis the context of the situation. What structural elements were present? Was the situation one in which coercive sex was significantly more likely? What kind of damage to the community as well as to individuals does allowing these kinds of situations create?

Changing the rules about burdens of proof and the level of procedural rigor demanded for cases of sexual assault is simply not a strong enough lever to shift something this weighty. Nor is creating new institutions (or empowering existing ones) that have significant responsibility for defending against the potential for university liability. However, reconsidering the way that hearings play out, and the framing of the wrongs they address, may be a means of beginning the work of transforming our thinking about sexual assault.

I observe here that, thus far, we have been thinking of campus sexual assault as a private and individualized criminal or quasi-criminal wrong in which campus authorities become involved because of the need to resolve disputes between and among students. The focus from beginning to end is on individual agency, responsibility, and culpability. In the criminal justice system, when the state exercises symbolic and/or actual violence against criminal wrongdoers, its primary interest is in redressing wrongs against individuals. It is sometimes difficult for the machinery of the criminal justice system to proceed effectively if a person on the receiving end of a wrong does not want to proceed in that direction, and prosecutors will often respect these preferences, even in cases of fairly serious crimes (in part because of the difficulty of securing a conviction if a key witness is anticipated to be uncooperative). The focus on consent renders sexual assault cases particularly vulnerable to problems, as questions about consent can center around capacity, which focuses the inquiry on the complainant.

***615** But what if an *allegation* of sexual assault is taken not simply as a possible individual wrong being brought to the university for resolution, but rather as a broader *problem* for the university community? The core organizing question in the current regime is whether an individual has committed a wrongful private act against another individual such that the university must offer redress to the aggrieved party by sanctioning the wrongdoer. This raises subsidiary questions about what institution should adjudicate the individual-level dispute between parties, how to implement procedural fairness on both sides, what kinds of sanctions are appropriate if wrongdoing is found to lie, and how a university can situate itself so that it is not vulnerable to legal claims from either individual arising from the handling of the dispute. But we could reconsider how we think about these events: what if allegations of sexual assault are something more or different than complaints that private individual wrongdoing has occurred? When a sexual encounter results in a claim of sexual assault, the damage is most directly to the complainant, but he or she is not the only victim. The alleged perpetrator may experience damage and a diminishing of his (or more rarely, her) self-understanding as a sexually ethical individual, especially if he (or she) did not understand at the time of the encounter that the experience for his or her partner could be one of assault. The university community also suffers an injury as the result of these incidents that cannot easily be encapsulated or resolved in an individualized adversarial framework; the circle of damage may expand to incorporate friends and acquaintances of both parties and highly public or controversial cases may make many in the university

environment feel threatened, unwelcome, disrespected, or distrusted. These broader conceptions of wrong and injury shift our attention from the individuals to the context and conditions under which sexual assaults happen.

One model for this shift derives from work by advocates for restorative justice. As Koss, Wilgus, and Williamson note, the current model for dispute resolution provides only a single option, that of a quasi-criminal justice approach, to deal with the "wide range of behavior that taken as a whole is incapable of being addressed appropriately by a one-size-fits-all resolution process." [106] The guidelines provided in the 2011 OCR Dear Colleague letter forbid the use of mediation to address claims of sexual assault but do not mention restorative justice, which is premised on the acceptance ***616** of responsibility as a precondition for participation. [107] Koss, Wilgus, and Williamson present a restorative justice model that would draw the accuser and accused into a process that would first ask the accuser to select restorative justice and the accused to accept responsibility and forego an adversarial fact-finding process. [108] This model, which they outline in detail and link to core principles of restorative justice, deviates most sharply from a quasi-criminal process in the final stage of repair, which:

> includes activities to (a) achieve validation and reparation for the harm caused to direct and indirect victims; (b) initiate counseling for the responsible person to address behavior that raises the risks for perpetrating sexual misconduct such as substance abuse, anger, impulse control, hostility to women, deviant arousal patterns, and unwisely selected peer groups; and (c) activities to reinforce antisexual violence norms in the campus community. [109]

While their suggestion is but one example of how this could work, it provides a detailed description of how a broader understanding of harm, accountability, and responsibility can provide opportunities to move forward positively from an incident that is currently open to a more structural form of analysis. While such a system would not displace an independent proceeding in the criminal justice system if warranted, it would provide resolution beyond simply determining individual culpability or lack thereof, helping to turn attention to the circumstances that gave rise to the incident in the first place.

The table below illustrates how the current frame differs from a more community-oriented frame. As the comparison reveals, the shift would refocus the inquiry around the incident, pressing for a deeper analysis of context and structures, and promoting a broader process of resolution involving more parties.

***617** Table 1: Current Frame (individual and adversarial) Compared to Community-Based Frame

	CURRENT FRAME	COMMUNITY FRAME
FOCUS	Consent and legibility of state of mind of complainant (either she is capable of consent or infantilized literally). Intentions of the accused.	What structural elements were present? Was the situation one in which coercive sex was significantly more likely? What kind of damage to the community as well as to individuals does allowing these kinds of situations create?
SCOPE OF INJURY	Complainant.	Complainant, community, and alleged perpetrator.
DRIVER OF RESOLUTION PROCESS	Title IX office with its incentives to protect the institution (note that this potentially cuts students out entirely).	Centers on complainant but the larger community and its wellbeing plays a role, and community members should bear a role in resolution.

SCOPE OF WRONGDOING	Focuses on alleged assailant--was s/he the perpetrator and did s/he do wrong?	Focuses on the context and structure--and especially focuses on cultural institutions that promote greater risk of these kinds of harms.
RESPONSIBILITY	Assailant, if found responsible in the institutional process.	Consideration beyond individual responsibility, also addressing dangerous institutions like fraternities and some sports teams.
RESOLUTION	Finding of culpability and individual sanction; finding of non-culpability and determination that no sanction will be applied. As a distant secondary consideration, possible culpability of institutions (i.e., a fraternity or "rogue" athletic official).	Wide range of possibilities, focusing on restoration for the complainant, responsibility for a culpable assailant, and central consideration of institutions and contextual circumstances in need of reform.

***618** Framing sexual assault as a community problem greatly leverages our capacity to look at the structural factors that contribute to it. Rather than focusing solely on the individuals, their intentions, and their capacity, we might note, for instance, that fraternities are often in the background of these events. As a 2007 article summarized the research on fraternities:

> Among men on college campuses, fraternity men are more likely to commit rape than other college men. Thus, rape prevention efforts often target fraternity men. Compared to their peers on college campuses, fraternity men are more likely to believe that women enjoy being physically "roughed up," that women pretend not to want sex but want to be forced into sex, that men should be controllers of relationships, that sexually liberated women are promiscuous and will probably have sex with anyone, and that women secretly desire to be raped. Beyond the aforementioned quantitative findings, qualitative research suggests that fraternity culture includes group norms that reinforce within-group attitudes perpetuating sexual coercion against women. [110]

This research certainly has the potential to turn up the temperature on debates over campus assault, but that is not my intent in noting it. Rather, an instance of sexual assault in the context of a fraternity event should trigger conversations about how to intervene--and how to hold national offices accountable, rather than continuing to allow them so easily to sever their relationships with and responsibility for the young men who create communities under their auspices. [111] Likewise, universities must attend much more closely to how accusations against student athletes are handled and what kinds of formal and informal resources athletes competing in marquee sports receive when something goes wrong. [112] If support for student athletes contributes to lack of accountability and responsibility for wrongdoing, or, as Lavigne reports, the fostering of a culture of intimidation against ***619** individuals accusing athletes of wrongdoing, these practices must be reconsidered and reformed. [113]

The new legislation, coupled with the federal reinterpretation of Title IX, contemplates shifting dispute resolution to university offices managing Title IX administration rather than maintaining it in more general venues for dispute resolution. [114] Universities would be well advised to ensure that this shift does not take things backwards by removing broader community perspectives from the process and diminishing the capacity to incorporate the needs and interests of the community into dispute resolution. Rather, if new processes are contemplated under Title IX jurisdiction, this might be an opportunity to integrate more community perspectives and to think about ways to create more positive sexual cultures.

Nonetheless, as noted above, the real issue is not so much the location of dispute resolution, even though institutional locations may affect the courses that dispute resolution takes. I am not recommending adding yet another layer of institutional structure to dispute resolution mechanisms, but rather bringing the interests of the community more to the fore and stepping back from an individualized quasi-criminal dispute resolution frame in favor of a more justice-oriented analysis. This might also imply working out ways to give students more agency as a community to engage cultural struggle directly and develop standards that can not only right individual wrongs but can create incentives for reconstructing sexual conversations and the contexts in which sex happens. Whether this happens through Title IX or through another institutional structure, it is an essential step toward building a campus environment that will encourage individual development toward healthy and egalitarian sexual relationships and build communities that facilitate this development.

Footnotes

a1 Continued from the 2015 Maryland Constitutional Law Schmooze featured in 75 MD. LAW REV. (2015).

aa1 University at Albany, SUNY. My profuse thanks to the United Union Professionals' Women's Concerns Committee for raising concerns about changes in rules regarding how to handle sexual assault on campus, and to Patty Strach and Virginia Eubanks for helping me to think through these issues more deeply. Thanks too to Libby Sharrow for her guidance on Title IX issues. They should not be blamed for the conclusions I have reached in this Paper.

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

3 *Id.*

4 WILLIAM SHAKESPEARE, THE COMEDY OF ERRORS.

5 Bogdanich, *supra* note 2 .

6 *Id.*

7 *Id.*

8 *Id.*

9 Kevin Vaughn, *Documents: Police, FSU Hampered Jameis Winston Investigation*, FOX SPORTS (Oct. 10, 2014), http://www.foxsports.com/college-football/story/jameis-winston-florida-state-tallahassee-police-hindered-investigation-documents-101014?vid=340426819547.

10 Rachel Axon, *Florida State Investigating Jameis Winston, Attorney Says*, USA TODAY (Sept. 4, 2014), http://www.usatoday.com/story/sports/ncaaf/2014/09/04/jameis-winston-florida-state-investigation-sexual-assault-allegations/15080921/.

11 Tom Spousta, *Jameis Winston Is Cleared in Hearing over Student's Rape Accusation*, N.Y. TIMES (Dec. 21, 2014), http://www.nytimes.com/2014/12/22/sports/ncaafootball/jameis-winston-is-cleared-in-florida-state-hearing.html.

12 20 U.S.C. §§ 1681-1688 (2012); *see also*, DEP'T OF JUSTICE, *Overview of Title IX of the Education Amendments of 1972, 20 U.S.C.A § 1681 et. seq.,* http://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq (last visited Dec.9, 2015).

13 20 U.S.C. § 1681.

14 *Breaking Down Barriers: A Legal Guide to Title IX and Athletic Opportunities (*May 12, 2007), NATIONAL WOMEN'S LAW CENTER, http://www.nwlc.org/resource/breaking-down-barriers-chapter-1-introduction.

15 Lauren Schroeder, *Cracks in the Ivory Tower: How the Campus Sexual Violence Elimination Act Can Protect Students from Sexual Assault*, 45 LOY. U. CHI. L.J. 1195, 1202 (2013).

16 *Id.* at 1207.

17 *Id.*

18 Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 225 (2011). The Supreme Court declined to allow private liability through Title IX under a theory of *respondeat superior* or constructive notice for individual employees' wrongdoings in *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998) and in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) established a stringent standard beyond deliberate indifference for private Title IX suits seeking liability for student-to-student harassment.

19 Schroeder, *supra* note 15, at 1212.

20 *Id.* at 1213.

21 *See, e.g.*, Bonnie Fisher, et al., *Making Campuses Safer for Students: The Clery Act as Symbolic Legal Reform*, 32 STETSON L. REV. 61 (2003).

22 Cantalupo, *supra* note 18, at 226.

23 *See* U.S. DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

24 *Id.*

25 *Id.*

26 Violence Against Women Act Reauthorization of 2013, tit. III, § 304, 127 Stat. 54, 89-92 (2013) (to be codified at 20 U.S.C. § 1092). This Act, referred to by its congressional proponents as the Campus Sexual Violence Act, incorporated some, but not all, of the provisions recommended by victims' advocates under the umbrella of the Campus SaVE Act. *See, e.g.*, KNOW YOUR IX, *Understanding the Campus SaVE Act*, http://knowyourix.org/understanding-the-campus-save-act/.

27 Schroeder, *supra* note 15, at 1225; KNOW YOUR IX, *supra* note 26.

28 Violence Against Women Act Reauthorization of 2013, tit. III, § 304.

29 *Id.*

30 Michael Stratford, *Standards of Evidence*, INSIDE HIGHER ED (Feb. 25, 2014), https://www.insidehighered.com/news/2014/02/25/federal-campus-safety-rules-reignite-debate-over-standard-evidence. A major difference between CSVA and the 2011 letter is in how CSVA addresses internal investigative processes. Some advocates believe that it does not go far enough because it does not mandate that these processes use the lower "preponderance of the evidence" standard rather than the "clear and convincing" standard in order to impose penalties against alleged perpetrators. *See* WHITE HOUSE TASK FORCE *infra* note 36.

31 *Id.*

32 Many Republicans opposed expanding campus sexual assault protections under the Violence Against Women Act. *See, e.g.*, *House Republicans Introduce Partisan VAWA That Fails to Protect All Victims*, NAT'L TASK FORCE TO END SEXUAL AND DOMESTIC VIOLENCE AGAINST WOMEN (Feb. 26, 2013), http://4vawa.org/4vawa/house-republicans-introduce-partisan-vawa-tha.

33 Campus Accountability and Safety Act, S. 590, 114th Cong. (2015). This bill incorporates many of the remaining ideas promoted by advocates for the Campus Sexual Violence Elimination Act (SaVE). *See, e.g.*, CLEARYCENTER.ORG, THE CAMPUS SEXUAL VIOLENCE ELIMINATION ACT (SAVE), http://clerycenter.org/campus-sexual-violence-elimination-save-act.

34 *See* Michael Stratford, *Sex Assault Bill Unveiled*, INSIDE HIGHER ED (July 31, 2014), https://www.insidehighered.com/news/2014/07/31/us-senators-announce-campus-sexual-assault-legislation.

35 CONGRESSIONAL RESEARCH SERVICE, S.590--CAMPUS ACCOUNTABILITY AND SAFETY ACT, https://www.congress.gov/bill/114th-congress/senate-bill/590. *See also* S. Daniel Carter, *The Campus Sexual Violence Elimination Act*, JEANNE CLERY ACT INFO, http://www.cleryact.info/campus-save-act.html.

36 *See* U.S DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (Apr. 24, 2015), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf. *See also* WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, OFF. OF VICE PRESIDENT, NOT ALONE, THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (Apr. 2014), https://www.notalone.gov/assets/report.pdf.

37 *See* text accompanying Schroeder, *supra* note 15, at 1225.

38 The three most commonly used standards are: “preponderance of the evidence,” which means that it is more likely than not that one side's interpretation is correct; “clear and convincing,” which requires a higher level of certainty on the part of the fact finders; and “beyond a reasonable doubt,” which is the very high standard that is required for criminal convictions.

39 *See* U.S. DEP'T OF EDUCATION OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html; Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 53 (2013).

40 *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975).

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44 See, e.g., newly created websites for the University of California (http://sexualviolence.universityofcalifornia.ed/) and the State University of New York (http://system.suny.edu/sexual-violence-prevention-workgroup/policies/).

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48 Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html#.

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50 *Id.*

51 *Id.*; *see, e.g.*, OGLETREE, CHARLES J. ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF-CENTURY OF *BROWN V. BOARD OF EDUCATION* (2004); Janet E. Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 MELBOURNE J. INT'L L. 78 (2008); Lucie E. White, *On Guarding the Borders*, 33 HARV. C.R.-C.L. L. REV. 183 (1998).

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54 *See infra* Part II.

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62 *Id.* at 583-84.

63 Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private--as Compare with Public--Institutions of Higher Education: A Glaring Gap?*, 83 MISS. L.J. 863, 868 (2014) (footnote omitted).

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65 *Id.*

66 *See supra* Part I.

67 Thomas Keck, *From* Bakke *to* Grutter *: The Rise of Rights-Based Conservatism*, *in* THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT 415-16 (Ronald Kahn & Ken Kersch eds., 2006).

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69 *See, e.g.*, Fernand N. Dutile, *Students and Due Process in Higher Education*, 2 FLA. COASTAL L.J., 243 (2001); Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 BYU Educ. & L.J. 1 (2003); Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487 (2012).

70 As a brief aside, university police forces have silently gained significant authority over even wrongs committed by non-university individuals in recent years. A personal anecdote to illustrate: when my wallet and keys were stolen from my office last spring, I was surprised to find as the investigation unfolded that it continued to be managed by the UAlbany Police Department, even after a suspect was identified who had no affiliation with the university whatsoever. She was eventually arrested by the Colonie Police Department on another charge, and the UAlbany police collaborated with the Colonie police in presenting information to the local DA to press charges.

71 *See, e.g.*, Rebecca Everett, *Lawsuit Against Amherst College from Expelled Student Offers Window into Sexual Misconduct Investigation and Hearing Process*, N.H. GAZETTE (Aug. 7, 2015), http://www.gazettenet.com/news/townbytown/amherst/17179365-95/lawsuit-against-amherst-college-from-expelled-student-offers-window-into-sexual-misconduct-investiga.

72 *See, e.g.*, UNIVERSITY AT ALBANY, SUNY'S STUDENT LEGAL SERVICES, http://www.albany.edu/studentassociation/legalservices.shtml (last visited Nov. 18, 2015); UNIVERSITY OF VERMONT'S STUDENT LEGAL SERVICES, http://www.uvm.edu/~sls/ (last visited Nov. 18, 2015).

73 Brett A. Sokolow, *About Brett Sokolow*, THE NCHERM GROUP, LLC (June 9, 2015), https://www.ncherm.org/consultants/brett-sokolow/.

74 *Compare* Brett A. Sokolow, *A Model Campus Sexual Misconduct Response Protocol*, NAT'L CENTER FOR HIGHER EDUC. RISK MGMT. (2004), https://www.ncherm.org/pdfs/MODEL_CAMPUS_SEXUAL_ASSAULT_RESPONSE_PROTOCOL_2004.pdf, *with* Nick Anderson, *Catholic U. Student Recounts Her Struggles After Reporting a Sexual Assault*, WASH. POST (June 29, 2014), http://www.washingtonpost.com/local/education/catholic-u-student-recounts-her-struggles-after-reporting-a-sex-assault/2014/06/29/9ed3b4f0-e694-11e3-afc6-a1dd9407abcf_story.html; Bob McGovern, *Full Court Press: Sexual Harassment Has Colleges Walking Fine Line*, BOSTON HERALD (May 30, 2015), http://www.bostonherald.com/news_opinion/local_coverage/2015/05/full_court_press_sexual_harassment_has_colleges_walking_fine.

75 Sarah Miller, *Meet the Man Telling Colleges How to Solve Their Rape Problem*, N.Y. MAG. (Oct. 21, 2014), http://nymag.com/thecut/2014/10/meet-the-man-telling-colleges-how-to-solve-rape.html.

76 *See* WENDY MURPHY, JD, http://www.wendymurphylaw.com/ (last visited Nov. 18, 2015).

77 Caroline McKay, *Law School Challenged Under Title IX*, HARV. CRIMSON (Apr. 22, 2011), http://www.thecrimson.com/article/2011/4/22/Harvard-law-school-title-ix-wendy-murphy/.

78 ANN BROOKS, POSTFEMINISMS: FEMINISM, CULTURAL THEORY, AND CULTURAL FORMS 205-06 (1997).

79 Matchar, *supra* note 45.

80 *Id.*

81 *See supra* Part I .

82 JULIE NOVKOV, CONSTITUTING WORKERS, PROTECTING WOMEN: GENDER, LAW, AND LABOR IN THE PROGRESSIVE ERA AND THE NEW DEAL YEARS (2001); JULIE NOVKOV, RACIAL UNION: LAW, INTIMACY, AND THE WHITE STATE IN ALABAMA, 1865-1954 (2008).

83 MacKinnon worked with feminist lawyers in the 1970s to define the creation of a sexualized hostile environment as a form of sexual harassment; ultimately these activists convinced the Equal Employment Opportunity Commission to add this behavior to its guidelines as a form of sexual harassment, and the Supreme Court validated this interpretation in *Meritor Savings Bank v. Vinson*, 447 U.S. 57 (1986); *see* Reva Siegel, *Introduction: A Short History of Sexual Harassment*, *in* DIRECTIONS IN SEXUAL HARASSMENT LAW (Catharine MacKinnon & Reva Siegel eds., 2003).

84 Joshua Mark Fried, *Forcing the Issue: An Analysis of the Various Standards of Forcible Compulsion in Rape*, 23 PEPP. L. REV. 1277, 1279-83 (1996).

85 N.Y. PENAL LAW § 135.25 (McKinney 2001).

86 N.Y. PENAL LAW § 130.05 (McKinney 2001).

87 N.Y. PENAL LAW § 130.30 (McKinney 2001).

88 N.Y. PENAL LAW § 130.35 (McKinney 2001). Two additional situations qualify as first degree rape under § 130.35: when a person engages in sexual intercourse with a person "who is less than eleven years old; or who is less than thirteen years old and the actor is eighteen years old or more."

89 Arun Rath, *The History Behind Sexual Consent Policies*, NPR (Oct. 5, 2014), http://www.npr.org/2014/10/05/353922015/the-history-behind-sexual-consent-policies.

90 *Id.*

91 Jake New, *First Do No Harm*, INSIDE HIGHER ED. (Feb. 19, 2015), https://www.insidehighered.com/news/2015/02/19/open-letter-calls-legislators-reconsider-campus-sexual-assault-bills.

92 *See supra* Part I.

93 This is not to say that the advent of sexual harassment law has resulted in the complete abatement of these behaviors, nor has it created full equality for women in the workplace. However, behavior that would have been readily dismissed as merely annoying or barely notable prior to MacKinnon's efforts is now much more likely to trigger negative reporting and active intervention, up to and including dismissal for cause.

94 New, *supra* note 91.

95 489 U.S. 189 (1989).

96 *Id.* at 191-93.

97 *Id.* at 195-97.

98 At least one commentator views this tension as problematic, executing an end run around the Supreme Court's ruling in *United States v. Morrison*, 529 U.S. 598 (2000), disallowing direct suits against the state through the Violence Against Women Act for failing to prevent violence against women. *See* Henrick, *supra* note 39, at 74.

99 An open letter signed by the president and several other members of the organization notes that such legislation would put universities at odds with federal law and policy requirements for campus handling of such allegations. *See* Kevin Kruger et al., *An Open Letter to the Elected Leaders of the 50 United States*, NASPA (Feb . 19, 2015), http://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf.

100 Nancy Gertner, *Sex, Lies and Justice: Can We Reconcile the Belated Attention to Rape on Campus with Due Process?*, AM. PROSPECT (Winter 2015), http://prospect.org/article/sex-lies-and-justice.

101 WELCOME TO THE NCHERM GROUP, LLC, https://www.ncherm.org/ (last visited Nov. 18, 2015).

102 For but a few examples of such consultants, see THE HUMAN EQUATION, http://www.thehumanequation.com/ and EMPLOYMENT PRACTICES SOLUTION, http://www.epspros.com/Home.

103 Daniel Lipson, *Embracing Diversity: The Institutionalization of Affirmative Action as Diversity Management at UC-Berkeley, UT-Austin, and UW-Madison*, 32 LAW & SOC. INQUIRY 985 (2007).

104 I must insert a caveat here. I am not endorsing a full blown sex positive perspective. I disagree vehemently with analyses that rely heavily on individual sexual autonomy and choice as the front line means of addressing sexual violence and coercion, because these approaches ignore both the structural reality of patriarchy and the cultural frames it produces

and reproduces. Turning a “no” into a “yes” in one's own head is not an answer, and rape need not be understood as a purely intersubjective crime.

105 Joseph Fischel, Sex and Harm in the Age of Consent (2011) (unpublished Ph.D. dissertation, Univ. of Chicago) (on file with author).

106 Mary P. Koss et al., *Campus Sexual Misconduct: Restorative Justice Approaches to Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE, & ABUSE 242, 245 (2014). Restorative justice focuses on the broader circle of responsibility and relationships around damaging behavior by individuals. Dispute resolution based in restorative justice focuses on identifying and repairing the harms of wrongful acts and building foundations for future positive community relations. *See, e.g.*, Artika R. Tyner, *A New Addition to the Alternative Dispute Resolution Practitioner's Toolkit: The Exploration of Restorative Justice and Practical Implementation*, 6 LAW TRENDS & NEWS PRACTICE AREA J. (2009).

107 *Id.* at 246.

108 *Id.* at 249-51.

109 *Id.* at 252.

110 Foubert et al., *Behavior Differences Seven Months Later: Effects of a Rape Prevention Program*, 44 J. STUDENT AFF. RES. & PRAC. 728, 730 (2007) (internal citations omitted).

111 It is beyond the scope of this Paper, but a 2014 article in *The Atlantic* outlines the many ways that fraternities have manipulated the legal system and the charter arrangements with their members to be able to evade legal liability for a whole host of wrongs by stripping members of their associational protections at the first sign of trouble. Caitlin Flanagan, *The Dark Power of Fraternities*, ATLANTIC (Mar. 2014), http://www.theatlantic.com/features/archive/2014/02/the-dark-power-of-fraternities/357580/.

112 A recent investigation conducted by ESPN revealed shocking evidence of Florida State's and other athletic departments' preferential treatment for, provision of private legal resources to, and inappropriate influencing of police on behalf of the male athletes accused of committing crimes. Paula Lavinge, *Lawyers, Status, Public Backlash Aid College Athletes Accused of Crimes*, ESPN (June 14, 2015), http://espn.go.com/espn/otl/story/_/id/13065247/college-athletes-major-programs-benefit-confluence-factors-somes-avoid-criminal-charges.

113 *Id.*

114 *See supra* Part II .

62 Duke L.J. 487

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Note

SEXUAL ASSAULT ON COLLEGE CAMPUSES: SEEKING THE APPROPRIATE BALANCE BETWEEN DUE PROCESS AND VICTIM PROTECTION

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Abstract

Peer sexual assault is a significant problem on American college and university campuses. On April 4, 2011, the Office for Civil Rights of the Department of Education sought to address this problem by issuing a new "Dear Colleague Letter" that provided enhanced guidance on how educational institutions should adjudicate such incidents. The letter has the perverse effect of complicating matters further by blurring the already fine line between victim protection and due process for the accused, and it exposes a potential liability trap for educational institutions. This Note explains why the law surrounding victim protection and due process is difficult for institutions to apply and argues that the Department of Education should produce a model judicial policy so that institutions, victims, and accused students will have more certainty in this complicated arena. In furtherance of such a policy, this Note offers specific due-process protections for accused students that should be embraced by educational institutions and the Department of Education alike.

Introduction

Student-on-student sexual assault is a significant problem on college and university campuses, [1] as demonstrated by several highly ***488** publicized episodes at well-known institutions of higher education. [2] As colleges and universities pursue effective means of targeting this problem, many schools have themselves become targets of legal action. Both sexual-assault victims as well as alleged perpetrators have sued their schools for failing to provide sufficient investigative and judicial proceedings when responding to accusations of assault. [3] Some of these cases have resulted in significant judgments against universities. [4]

On April 4, 2011, the Office for Civil Rights (OCR) of the Department of Education (DOE) addressed the issue of campus sexual assault by issuing a new "Dear Colleague Letter" [5] that ***489** outlined the procedures that institutions should follow to remain in compliance with Title IX, [6] the federal statute that prohibits sex discrimination in education. [7] Many colleges and universities responded to the April 4, 2011 Dear Colleague Letter ("Dear Colleague Letter") by amending their procedures for adjudicating allegations of sexual assault. [8] Meanwhile, the letter itself has sparked a debate about the appropriate balance between protecting victims of assault and ensuring adequate due process for the accused in the context of campus adjudications. [9] Scholars such as Professor Peter Berkowitz of Stanford University criticized the letter as an affront to ***490** male students' due-process rights. [10] Others, however, lauded the letter for ushering in an era of clarity in the world of Title IX compliance. [11]

In the midst of this debate, this Note argues that the Dear Colleague Letter suffers from a fatally inadequate discussion of the appropriate balance between victim protection and due process. Specifically, the document has raised more questions than it has answered, leaving the interests of both victims and accused students in flux. Because institutions simultaneously face statutory duties to respond properly to victims' claims of assault and constitutional or contractual obligations to provide due process to the accused, better-defined policies--such as those advanced in this Note--are needed. Without such guidance, institutions are left with a choice. They may closely follow the OCR's guidelines on victim protection, thereby risking possible due-process claims from alleged perpetrators, or they may independently attempt to balance victim-protection and due-process interests and risk Title IX violations for inadequate victim protection. Under either approach, institutions face potential liability, [12] and both victims and alleged perpetrators may be insufficiently protected.

This Note begins by outlining the legal forces at play in peer sexual-assault cases. Part I summarizes the campus disciplinary process and discusses Title IX, due process, and the Federal Educational Rights and Privacy Act (FERPA). [13] This analysis reveals that a lack of guidance on how these various processes and laws interact has produced confusion about how institutions should ***491** balance due-process rights and victim protection. In Part II, this Note closely examines the Dear Colleague Letter and explains how the letter's guidelines have failed to address the confusion. Part III outlines a new approach to adjudicating peer sexual assault that includes universal standards on the burden of proof, cross-examination, discovery, evidentiary matters, and access to counsel.

This Note embraces several normative views that should be noted at the outset. First, students in the aggregate should be entitled to consistent due-process protections. Because most students lack information about available due process when selecting their future alma mater, they need a baseline of protection. [14] Second, this Note assumes that both institutions and victims would benefit from a uniform framework. Only by enabling institutions to confidently respond to reports of violence--without fear of liability for violating an alleged perpetrator's due-process rights--will assault victims be protected fully. Third, despite recent inflammatory comments to the contrary, [15] victim protection and due process for the accused are not mutually exclusive. Institutions, given appropriate guidance, can balance these two interests. Therefore, this Note advocates for certain due-process protections, not at the expense of victim protection, but so that institutions will have clarity on how to adjudicate sexual-assault reports and so that the interests of both victims and the accused are adequately protected.

I. The Legal Landscape: A Complicated Web of Statutory, Constitutional, Contractual, and Judicial Forces

When college students report to college or university officials that they have been sexually assaulted [16] by a peer, they immediately ***492** trigger a host of legal obligations for the institution. This Part provides an overview of the campus adjudicatory system and explains how that system must work in tandem with federal and applicable state laws. Section A summarizes the basic campus adjudicatory system. Section B provides an overview of the applicable federal laws and principles. Section C explains how and why these systems have created confusion and tension for college and university administrators.

A. The Campus Adjudicatory System

At the outset, distinguishing between the campus adjudicatory system and the criminal-justice system is important. The Dear Colleague Letter addresses only campus adjudicatory procedures at colleges and universities throughout the United States. [17] The criminal-justice system, on the other hand, is concerned with criminal prosecution. Although the same conduct might be adjudicated in both systems, the systems themselves and their attendant levels of victim protection and due process are distinct. [18]

The methods and procedures of campus adjudicatory systems differ across institutions. The procedures can also vary within an institution depending on the type of misconduct at issue. Generally, however, the institution will have an adjudicatory process that is managed by an office of student affairs. [19] In addition, all institutions are bound by their own policies and procedures vis-à-vis the accused and by constitutional due-process mandates, state contract law, federal education laws, and the oversight and guidance of the OCR. [20]

In a typical sexual-assault adjudication, the accused student first receives notice of the charge from the student-affairs office and is ***493** asked to respond, either in writing or in person. [21] Next, the accused student and the alleged victim appear before a misconduct panel, which is akin to a jury and is comprised of a blend of students, faculty, or staff. [22] This panel hears arguments, makes a factual finding, and, if appropriate, assigns a sanction. [23] An appellate review is also generally available, consisting of faculty members or administrators who evaluate a written appeal. [24] This appellate review is typically the last stage within the institution, though some institutions may allow the student or the student's parents to petition senior officers for relief. Students who are dissatisfied with the outcome of the institution's adjudication must resort to the state or federal court system. [25]

B. Applicable Laws and Constitutional Principles

Throughout the campus adjudicatory system, two major bodies of law interact to ensure that all parties are represented properly. First, Title IX prohibits sex discrimination in higher education. [26] Second, either contractual [27] or constitutional due-process rights ***494** require that certain procedures be followed before a student is disciplined. [28] But these considerations are only the beginning of the analysis. Other laws, including FERPA, create additional complications in the relationship between Title IX and due process. [29]

1. Title IX: Federally Mandated Victim Protection. Enacted as part of the Education Amendments of 1972, [30] Title IX [31] is one of the most important federal statutes in higher education. Along with Title VI of the Civil Rights Act of 1964 [32] and the Supreme Court's precedent on discrimination generally, Title IX protects college and university students from sex-based discrimination by conditioning the receipt of federal funds on compliance with the statute. [33] In relevant part, the statute states, "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." [34] Subsequent legislation expanded the scope of the statute to include the entire educational institution whenever a single program or school within the institution receives federal funding. [35] Because virtually every higher-education ***495** institution benefits from federal assistance, the law applies universally. [36]

When it enacted Title IX, Congress sought to prohibit the "use of federal resources to support discriminatory practices and to provide individual citizens with effective protection against such practices." [37] Although little legislative history exists regarding the statute's intended purpose and scope, [38] the law's structure suggests that it was meant to play a similar role as Title VI of the Civil Rights Act of 1964, except with a specific focus on sex and the school environment. [39] Accordingly, the statute applies to a host of activities and programs within higher education, including admissions and financial aid, [40] sexual harassment, [41] and athletics. [42]

Title IX is enforced and administered by the OCR, [43] and the OCR has accordingly promulgated official regulations that interpret ***496** and expound upon the statute itself. [44] In addition, the OCR and the DOE issue dear colleague letters and other

publications that provide clarification to administrators on complicated and timely compliance issues. [45] These documents offer important guidance on the enforcement strategies of the OCR and the DOE, and courts give Chevron deference to reasonable interpretations of Title IX found in dear colleague letters. [46]

Although the statute itself contains no reference to student-on-student sexual assault, courts have applied Title IX to such gender violence by defining sexual assault as a type of sex discrimination. [47] Courts have also considered institutional liability in the presence of deliberate indifference to student-on-student sexual assault. [48] To establish deliberate indifference and to trigger institutional liability, the victim must show that a relevant institutional official had actual notice of the assault and refused to take appropriate action. [49] The possibility of liability incentivizes higher-education institutions to be proactive in addressing accusations of sexual assault. Yet despite ***497** rigorous institutional mechanisms to avoid liability, colleges and universities are confronted with Title IX sexual-assault litigation somewhat regularly. [50] Therefore, the risk of liability for educational institutions is real. This risk encourages institutions to be vigilant, and potentially even overly zealous, in adjudicating accusations of sexual assault. [51]

2. Due Process: Constitutional and Contractual Protections for the Accused. Although Title IX creates an incentive for institutions to act expeditiously in response to accusations of sexual assault, due-process concerns provide an equally important incentive for institutions to take a deliberate and careful approach to addressing such matters. Due process is a foundational component of the American legal system, ensuring that accused individuals are able to take full advantage of the crucible of litigation before they are held responsible for a crime or impropriety. [52] In the criminal-justice system, due-process rights provide a vast shield of protective affirmative rights and presumptions. Some notable examples of affirmative rights include the rights to consult counsel, to be tried by a ***498** jury of one's peers, to subpoena witnesses, and to cross-examine witnesses. [53] Individuals accused of crimes also benefit from a presumption of innocence and the highest standard of proof in the American legal system, the beyond-a-reasonable-doubt standard. [54] In the higher-education context, however, students have never been afforded such expansive rights. [55] In fact, the Supreme Court squarely held that students have no constitutionally protected substantive due-process rights to their education. [56] Instead, courts have recognized that college students at public universities possess only limited procedural due-process rights. [57] Students at private institutions, on the other hand, are protected by the Constitution only when procedures are fundamentally unfair. [58] Otherwise, due-process rights exist only in the institution's student handbook provisions, which are enforceable through breach-of-contract claims. [59] Because courts have defined due process differently for public- and private-school students, this Note discusses those rights separately.

a. Due-Process Rights for Public-School Students. Students enrolled at public colleges and universities have constitutionally protected due-process rights, although courts disagree as to the exact parameters of those rights. The first case to recognize that a public-college student should be afforded procedural due-process rights under the Fourteenth Amendment was ***499** Dixon v. Alabama State Board of Education, [60] in which students alleged that their due-process rights had been violated when they were expelled without a hearing from Alabama State College after participating in civil-rights protests. [61] The Fifth Circuit held that even though the Constitution does not afford any substantive right to an education, "it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process." [62] Accordingly, Dixon held that public-college students had private interests at stake in remaining enrolled at the public university of their choice and therefore were entitled to due process under the Fourteenth Amendment when those interests were in jeopardy. [63] Since Dixon, courts have accepted that public-college students should be afforded due-process protections in serious disciplinary hearings. [64] In fact, in Goss v. Lopez, [65] the Supreme Court ***500** hailed Dixon as a "landmark" decision and used Dixon's reasoning to support the Court's conclusion that public elementary-school students have due-process rights in

certain circumstances.[66] Modern courts have refined the Dixon reasoning to hold that students' procedural due-process rights arise from liberty interests in their reputations and academic good standing.[67]

Although courts have consistently observed that procedural due-process rights exist for public-college students who have been accused of serious infractions, they have been less consistent on the scope of those due-process rights.[68] Instead, courts prefer ex post, case-by-case determinations of the rights to which students are entitled.[69] Such an approach is characteristic of the American judicial system generally, but educational institutions--who owe fiduciary and contractual obligations to all their students, including the accused and the ***501** victim[70] --need further guidance to be equipped to act ex ante, before the interests of either party have been compromised.

The need for more specific guidance is exposed by comparing similar cases from different courts. For example, in Donohue v. Baker,[71] the court held that the accused had a right to cross-examine his accuser in a campus adjudication, particularly because the "case [was] one of credibility" dealing with his testimony against that of an alleged sexual-assault victim.[72] In reaching this conclusion, the court acknowledged that the interests in protecting the victim from embarrassment and further harassment were substantial but reasoned that such concerns were outweighed by the accused student's right to confront his accuser.[73]

Donohue stands as an outlier, however, and most other courts have held that students in disciplinary hearings have no right to cross-examination.[74] A Connecticut state court held that a student who was accused of sexually intimidating a classmate was not denied due process when he was prevented from cross-examining the alleged victim.[75] Similarly, another court explained that "the right to unlimited cross-examination has not been deemed an essential requirement of due process."[76] Despite the fact that the weight of authority is against the right of cross-examination, educational ***502** administrators still fear that they may be held liable if the Donohue reasoning spreads to other jurisdictions.[77]

Courts also disagree about whether due process requires that students have access to legal counsel. For instance, in Donohue, the court found no due-process violation when the accused student was denied access to nonstudent legal counsel.[78] Likewise, in Danso v. University of Connecticut,[79] a student's due-process rights were not infringed when he was denied access to the student advocate of his choice.[80] By contrast, in Furey v. Temple University,[81] the Eastern District of Pennsylvania held that a student who was facing expulsion should have been granted access to legal counsel.[82]

As these cases demonstrate, the judicial approach to defining due-process rights for public-college students has been inconsistent. Moreover, courts have not addressed some pressing questions about due-process rights, such as whether the accused has the right to subpoena witnesses or compel discovery. Greater certainty is needed.

b. Due-Process Rights for Private-School Students. Courts have declined to extend the reasoning of Dixon to private universities and, as a result, students at private institutions face even greater variability in terms of their due-process rights.[83] Because students at such institutions lack constitutional due-process rights, they must derive any due-process rights from state contract law as it relates to student disciplinary policies and from other agreements between the student and the institution.[84] The only way in which the Constitution could be ***503** implicated is if the student can show that the institution's procedures were not "fundamentally fair."[85]

Therefore, private-college students are less protected than their public-school peers. For example, in Cloud v. Trustees of Boston University,[86] the court emphasized that

"[i]f school officials act in good faith and on reasonable grounds . . . their decision to suspend or expel a student will not be subject to successful challenge in the courts." This deferential standard of review applies when . . . there is no contractual right to a hearing. Where, as here, the university specifically provides for a disciplinary hearing before expulsion, [[the court] review[s] the procedures followed to ensure that they fall within the range of reasonable expectations . . . . [The court] also examine[s] the hearing to ensure that it was conducted with basic fairness. [87]

Under this deferential standard, the court found no contractual due-process violations, even though the student's ability to cross-examine witnesses had been curtailed by one witness who had refused to state her identity, the student's past criminal proceedings had been introduced as prejudicial character evidence, the university had failed to produce relevant employee witnesses, and the committee was possibly biased. [88] The court made its determination even though the relevant student handbook provisions stated that students who faced disciplinary action by the institution would be provided "the right to have the case decided by an impartial judicial body," "the right to confront and cross examine any witness," and "the right to call witnesses and introduce evidence." [89]

Likewise, in Jansen v. Emory University, [90] a court was unwilling to engage in a substantive analysis of the student's contractual due-process claims and instead summarily rejected the claims as falling outside the realm of the court's expertise. The court reasoned that institutions should be afforded autonomy in adjudicating academic infractions--as opposed to disciplinary infractions, which trigger only ***504** limited judicial oversight. [91] Although the Supreme Court has supported the distinction between academic and disciplinary matters for due-process purposes, [92] in Jansen the student's poor academic record resulted from two failing grades that were administered for purely disciplinary reasons. [93] Nevertheless, the court refused to substantively examine the student's contract claims. [94]

Even when courts have recognized contractual due-process causes of action, the results have been inconsistent. For example, the Eighth Circuit in Corso v. Creighton University, [95] facing facts nearly identical to Jansen, reached an opposite conclusion. In Corso, the court declined to give deference to an institution's adjudication of academic infractions and instead found that the institution had breached its contractual promise of due process. [96] Thus, in the due- ***505** process context, courts have been inconsistent, with variations existing from court to court. [97] Likewise, as students move from the public- to the private-school context, their constitutional due-process rights change dramatically. This lack of consistency between courts and across the public- and private-school divide is concerning.

3. FERPA: Mandated Limits on Available Information. Although FERPA is not a primary regulator of student sexual-assault proceedings, it does complicate sexual-assault proceedings by curtailing the amount of information that can be made available in the adjudicatory process. The law protects as confidential any document that is classified as an "education record[]." [98] This phrase has a broad and general definition and includes "information directly related to a student" that is "maintained by an educational agency or institution or by a person acting for such agency or institution." [99] In sexual-assault cases, highly pertinent information relating to the events in question or to one party's past may be protected. Although the statute provides some limited exceptions to allow for disclosure, no such exception exists for campus adjudicatory proceedings. [100] Therefore, as the Dear Colleague Letter acknowledges, FERPA curtails the amount of information available in campus adjudicatory hearings. [101] In fact, educators have long expressed confusion about how the law should operate in sexual-assault proceedings. [102] For related reasons, commentators have criticized the law for stymieing campus-safety efforts. [103]

*506 C. Cause for Confusion

Faced with these competing legal considerations, college and university administrators struggle to balance their obligations to victims of sexual assault with their corresponding duties to provide due-process protections to accused students. Title IX creates a firm obligation for institutions to respond vigilantly to reports of assault. [104] But courts enforcing due-process rights--enforceable under either constitutional or contract law-- mandate that institutions provide some level of process, though these institutions have received limited and contradictory guidance about what process is actually due. This uncertainty and variability produces a liability trap for educators who are unsure of how to proceed. [105] FERPA further complicates matters by restricting the information that can be considered in sexual-assault proceedings. [106] As a result, students are subjected to fundamentally different processes depending on the institution they attend. [107] In response to this inconsistency, the OCR published its Dear Colleague Letter.

*507 II. The Dear Colleague Letter

The April 4, 2011, Dear Colleague Letter, released amid much fanfare, [108] frames its guidance by emphasizing the OCR's concern with high rates of sexual violence on school campuses. [109] It then proceeds to discuss the obligations of schools receiving federal funds to respond to such violence, particularly focusing on procedural requirements. [110] The letter concludes with recommendations for preventing assault. [111]

As a guidance document, the Dear Colleague Letter effectively conveys the OCR's expectations. It builds on the OCR's earlier guidelines [112] by focusing almost exclusively on the victim's interests [113] and articulates at least five substantive points that raise due-process concerns for the accused. [114] Ultimately, the letter fails to address this key underlying issue: how Title IX should interact with applicable due-process requirements for the accused.

A. Analyzing the Dear Colleague Letter's Substantive Points

First, and perhaps most controversially, the Dear Colleague Letter recommends a specific standard of proof for judicial *508 proceedings involving accusations of peer sexual assault. [115] The letter prescribes a preponderance-of-the-evidence standard, noting that "[t]he 'clear and convincing' standard . . . currently used by some schools, is a higher [and improper] standard of proof." [116] It goes on to explain that campus adjudicatory proceedings are wholly distinct from criminal proceedings and that neither proceeding's outcome should affect the other. [117] This standard-of-proof portion of the Dear Colleague Letter has engendered the most criticism from commentators. [118] DOE Assistant Secretary for Civil Rights Russlynn Ali has noted that, notwithstanding this vociferous criticism, this portion of the Dear Colleague Letter is critically important. [119] Referencing the clear-and-convincing standard of proof, she has elaborated that "[t]he guidance answers a longstanding question that we have heard from many general counsels about, and that is what the standard of proof is. . . . Far too often universities use that higher standard when it comes to Title IX." [120]

Second, the Dear Colleague Letter outlines a discovery process that is curtailed by FERPA. [121] Although both the alleged victim and perpetrator must have "similar and timely access to any information that will be used at the [judicial] hearing," this access is severely limited in situations in which FERPA mandates a right to privacy. [122] The Dear Colleague Letter does not detail the specific FERPA provisions that are triggered during the institution's judicial process, but it does note that "the alleged

perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history." [123] After the institution's judicial process concludes, FERPA is triggered again ***509** and shapes the way in which the institution may handle an announcement of guilt or innocence. [124] The institution may inform the victim of the result of the hearing and any subsequent sanctions or penalties against the perpetrator and may also disclose this information to the general public. [125] But according to the OCR, FERPA prohibits the institution from disclosing any other information relating to the student's education record, such as whether the student was punished for conduct not relating to the harassed student. [126]

The Dear Colleague Letter also addresses privacy issues from the victim's perspective. [127] Before an investigation can begin, the complainant must consent. [128] In addition, the complainant retains the power to request confidentiality, in which case the institution must take appropriate steps to prevent the accused from learning of the accuser's identity. [129] In the presence of certain factors, however, the institution may be entitled to disclose the victim's identity. [130] The institution must weigh the complainant's request for confidentiality against "the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an 'education record' under [FERPA]." [131]

Third, the Dear Colleague Letter gives the institution complete discretion to determine whether the parties are permitted to have counsel. [132] The letter takes no position on whether counsel should or should not be allowed but notes that both parties must be treated equally in this regard. [133] Fourth, the letter takes a strong position on the question of cross-examination, noting that "OCR strongly discourages schools from allowing the parties personally to question ***510** or cross-examine each other." [134] Fifth, the Dear Colleague Letter mandates that an appeals process be made available to both parties. [135]

In addition to these substantive points, the Dear Colleague Letter clarifies other important issues to help institutions better recognize and prevent prohibited conduct. For instance, it defines sexual harassment as "unwelcome conduct of a sexual nature," which "includes sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." [136]

Finally, although the letter focuses almost exclusively on the interests of the victim, it contains two important sentences that discuss the rights of the accused. Specifically, "[p]ublic and state-sponsored schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due-process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant." [137]

B. Unaddressed Questions

Despite the Dear Colleague Letter's specific guidance, it fails to address fundamental questions about how the complex web of higher-education regulations pertaining to sexual assault and due process should interact to form one seamless umbrella of guidelines. Instead, tension remains between the requirements of Title IX, constitutionally and contractually mandated due process, and the rules of confidentiality and disclosure under FERPA. For example, an institution trying to comply simultaneously with Donohue and the Dear Colleague Letter might reach an impasse because Donohue requires cross-examination as a matter of right in cases where the main issue is witness credibility, [138] whereas the letter cautions against the practice. Perhaps more worrisome, however, is the reality that wide variance continues to exist across institutions and among sexual-assault adjudication policies. [139]

*511 III. Moving Forward: Confronting the Need for Clarity

To resolve the continued uncertainty, the OCR should issue further guidance in the form of a model judicial policy that must be adopted by institutions and implemented uniformly. Such a document would ensure consistency and enable institutions to balance more appropriately the competing interests of protecting victims of sexual assault while also providing adequate due process for the accused. Admittedly, the OCR is tasked with enforcing Title IX, [140] not with ensuring that students accused of sexual assault are provided appropriate due process. But because public institutions must also ensure that students' due-process rights are constitutionally protected, Title IX must operate within constitutional limits and may not mandate a more expeditious proceeding than the Constitution would require. [141] Without affirmative guidance on how to balance these competing obligations, the OCR's views on Title IX will remain ineffectual, thereby endangering victims, increasing the probability of liability on the part of the institution for denial of due process, and jeopardizing the accused student's due-process rights. [142]

In the spirit of this recommendation, the remainder of this Note advocates for the adoption of specific due-process provisions that should be incorporated by institutions of higher education. Admittedly, these recommendations are framed in constitutional due-process principles and are, therefore, more applicable to public institutions. In the interest of uniformity, however, both public and private institutions should embrace these suggestions. The Note begins in Section A by outlining the relevant interests at stake and explaining why campus sexual assault requires its own, particularized due-process standard. Section B offers recommendations regarding ***512** the standard of proof, cross-examination, discovery, and access to counsel.

A. Peer Sexual Assault Is a Distinct Circumstance That Warrants Specialized Due-Process Protections

Before devising an approach to campus sexual assault that incorporates both Title IX and procedural due-process requirements, understanding the particular interests at stake in the context of peer sexual assault is important. These interests should trigger a specific and limited standard that is applied only in this special context. The need for such special treatment is demonstrated by applying the Supreme Court's precedent for determining applicable due-process requirements. [143] In Mathews v. Eldridge, [144] the Court directed lower courts to weigh three factors when determining the proper scope of constitutionally protected due-process rights in a particular situation or context:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [145]

This Section analyzes each of these factors in the context of sexual-assault campus adjudicatory proceedings. First, accused students have liberty interests in preserving their good names and reputations. [146] This interest in protecting one's reputation from false accusations and preserving one's unblemished scholastic record is vitally important, particularly in the modern era, because false accusations can have lasting implications. In fact, compared to the effects of other types of infractions such as academic dishonesty, the implications of being found responsible for sexual assault by a judicial panel can endure throughout one's lifetime. Some of the more ***513** extreme cases, including the Duke lacrosse scandal [147] and the University of the Pacific gang-rape case, [148] demonstrate how college sexual-assault proceedings have resonance with the national media. Although

not every sexual-assault case will garner such far-reaching publicity, many offenses do attract local media coverage and can provoke significant discussion and controversy among the student body. [149]

Second, the risk of erroneous deprivation of the accused student's liberty interest is substantial, particularly in the cases in which the evidentiary record consists only of the accuser's testimony. In Mathews, the Court distinguished between two types of scenarios: those in which the dispute involves competing expert interpretations of agreed-upon facts and those in which the facts themselves are in question and are subject to the veracity of the witnesses. [150] In the latter situation, when witness credibility is essential, oral evidence and cross-examination are very important because, without such evidence, the risk of erroneous deprivation of liberty is high. [151] Most campus sexual-assault cases fall into this area of disputed facts. A verdict will often turn on the disciplinary panel's view of witness credibility, rather than on debates between experts. Therefore, the second Mathews factor points in favor of providing as much evidentiary process as possible so that the disciplinary panel is deciding cases with more rather than less evidence before it.

On the other side of the scale is the third Mathews factor--the cost that increased process would impose on the adjudicatory system. In Mathews, these costs were divided into two categories: the costs of implementing the procedural requirements and the costs of allowing the beneficiary of the process to remain in possession of his or her ***514** interests until a decision had been reached. [152] In the higher-education context, both sets of costs may be significant.

The first group of costs--those of actually implementing the due-process procedures at the hearing--can be substantial. Courts have generally avoided imposing far-reaching due-process burdens in the education context for fear that such burdens would detract from the educational environment and displace the autonomy of the institution's educational mission. [153] Expansive due-process requirements are expensive, time-consuming, and generally beyond the expertise of the educational context. For example, the right of the accused to subpoena witnesses or to conduct discovery might easily tax a student-affairs office's limited resources. More importantly, the prospect of an expensive, embarrassing, and prolonged adjudicatory process could decrease a victim's willingness to report incidents of assault. This chilling effect is itself a type of cost that is borne by the institution, both in the form of an eroded feeling of academic unity on campus as well as in the form of potential Title IX liability for insufficient protections against assault. [154]

Notwithstanding the fact that a full trial-like process would impose tangible costs on educational institutions, there are some mitigating factors unique to the higher-education context that may limit the costs. For example, campus adjudicatory proceedings are often at least partially staffed by student members who are not paid for their services. [155] The use of such student judicial officers does not completely eliminate the institutional burden or the potential for undue embarrassment for the victim, [156] but student participation does mitigate the expense of the proceeding. On a more theoretical level, ***515** due process is valued as a part of the broader educational mission of the institution. A survey of the mission statements and objectives of the top twenty-five colleges and universities in the United States [157] reveals that, with near uniformity, institutions of higher education value the quest for knowledge and truth in a complex world. [158] Therefore, the institution itself has often demonstrated a commitment to the discovery of truth in all aspects of the educational environment, and this mission would be furthered by implementing additional process requirements. [159] Rather than an ancillary distraction, therefore, due process can be viewed as an investment in the institution's core academic mission--a consideration which may partially offset the magnitude of the cost.

The second group of costs--those of allowing the accused student to remain enrolled at the institution--can also be significant. For an educational institution, sexual-assault scandals are concerning for at least two reasons. First, they threaten to subvert the learning environment by detracting from the student body's focus on education. Second, they can potentially produce a culture of fear among students on campus. Particularly on a residential campus, where the institution desires to foster a community in

which students can feel free to learn and explore, lingering safety concerns can be catastrophic to the educational mission. In an effort to address these concerns, institutions may incur additional costs. For example, the ***516** institution may decide to rearrange the victim's student's course schedule to avoid any contact with the victim. [160]

On balance, these three Mathews factors point toward a special due-process standard that applies specifically to peer sexual assault. Students who have been accused of sexual assault face serious consequences if they are found guilty or even accused of such infractions, which, unlike many other types of campus infractions, are particularly attention-grabbing and lasting in their implications. [161] The third Mathews factor, however, requires an important cost-benefit analysis that protects institutions from having to provide overly burdensome protections. Finally, the dual pressures facing institutions are heightened in this context where Title IX and FERPA apply, evincing a need for a special approach. Such external pressures simply do not apply in other common campus disciplinary matters such as academic-honesty violations.

B. Specific Recommendations: Standard of Proof, Evidentiary Issues, and Access to Counsel

In light of the Mathews calculus, this portion of the Note outlines specific due-process protections that should be embraced by institutions and the OCR in a model judicial policy. Specifically, this Section provides recommendations regarding (1) the standard of proof; (2) cross-examination procedures; (3) the discovery process; and (4) access to counsel.

1. A Preponderance Standard of Proof Is Most Appropriate. The most controversial aspect of the Dear Colleague Letter has been its recommendation for a new standard of proof in campus adjudicatory hearings. [162] The OCR's call for a universal preponderance-of-the-evidence standard has left many crying foul and accusing the OCR of openly targeting male students. [163] Notwithstanding this criticism, a preponderance standard is appropriate under Mathews and is actually not even the most pressing due-process issue implicated by the Dear Colleague Letter. ***517** The OCR justifies its call for a preponderance-of-the-evidence standard by analogizing to the administrative law context, in which a preponderance standard is the norm. [164] Putting aside any arguments about the persuasiveness of this analogy, a preponderance standard is appropriate under Mathews because it is the fairest allocation of power in the special context of sexual assault. A preponderance standard recognizes that the campus adjudicatory system is distinct from the criminal-law context [165] and acknowledges that the institution has competing obligations to the victim and to the accused. [166] As between these interests, setting the scale either below or above the midline of certainty skews the balance too far in the favor of the advantaged party.

Likewise, the special nature of sexual-assault hearings must be kept in mind. In many sexual-assault proceedings, the entire factual record will consist of testimony from the alleged victim and the alleged assailant. [167] In this proverbial “he said, she said” environment, the standard of proof should be lower, not higher. [168] When combined with a presumption of innocence in favor of the accused, any standard above a preponderance would produce an insurmountable obstacle for victims with meritorious claims, thereby implicating Title IX liability [169] and exposing the institution to added costs. Therefore, a preponderance standard is appropriate because it satisfies the first two Mathews factors by adequately protecting against wrongful findings while also protecting the institution from the costs of Title IX liability by not eliminating the possibility of victory for the victim. [170]

Moreover, from a theoretical perspective, the Supreme Court has emphasized that
[t]he function of a standard of proof . . . is to “instruct the factfinder concerning the degree of confidence our society thinks he should ***518** have in the correctness of factual conclusions for a particular type of adjudication.” . . . In a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment. [171]

For this reason, the criminal-justice system utilizes the beyond-a-reasonable-doubt standard.[172] A "less commonly used" standard is that of clear and convincing evidence,[173] which is what many institutions employed before the Dear Colleague Letter.[174] The Court has cautioned, however, that this standard is appropriate only when "particularly important individual interests or rights are at stake"[175] such as in "cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[176] By contrast, the preponderance standard is generally appropriate in the civil context because it allows "[t]he litigants [to] share the risk of error in roughly equal fashion."[177]

Applying these guidelines to the higher-education context demonstrates that a clear-and-convincing or beyond-a-reasonable-doubt standard is inappropriate. It should be recalled that, although an allegation of sexual assault may have criminal implications, the campus adjudicatory proceeding is distinct from that process and does not implicate the same liberty interests.[178] In the criminal-justice system, the accused is entitled to the beyond-a-reasonable-doubt standard,[179] but such a standard is inappropriate in the context of campus adjudicatory proceedings. Though the interests of the accused in not being wrongfully disciplined for sexual misconduct are substantial, the Supreme Court has not held that they reach such a level as to require a clear-and-convincing standard. For instance, one ***519** of the classic cases in which a clear-and-convincing standard applies is in the context of immigration hearings.[180] In those situations, the interests of the accused in remaining in the United States are sufficiently weighty to trigger the clear-and-convincing standard.[181] By contrast, the interests of a college student in protecting his or her good name and remaining enrolled in her or his school of choice do not rise to the level of significance of a deportation hearing. Such interests, though important, will generally pale in comparison to one's interest in a lawful immigration status. Rather, the accused student's interests are more like those in a hearing for involuntary discharge from the military, in which a preponderance standard is used.[182] Like members of the military who have selected and committed to a particular military branch, students have voluntarily enrolled in their school of choice and have an interest in remaining at that school and in protecting their good name.[183]

Finally, the third Mathews factor--that of the administrative burden-- does not outweigh the need for a preponderance standard. Relative to the clear-and-convincing standard that critics of the Dear Colleague Letter have advocated,[184] a preponderance standard imposes fewer burdens upon an institution providing adjudication. Moreover, a higher burden might also expose the institution to Title IX liability by stifling victims' abilities to seek institutional remedies, thereby imposing additional cost considerations. Therefore, institutions should adopt a preponderance standard because that standard advances Title IX's goals without infringing on due process for the accused.

***520** 2. Cross-Examination Should Be Embraced as an Affirmative Right of the Accused. Without any footnotes or citations to legal authority, the Dear Colleague Letter states that the "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing."[185] Whether the OCR would deem cross-examination conducted by the accused student's counsel to be more appropriate is unclear. What is clear, however, is that this policy potentially places many institutions in a direct conflict with their duty to provide due process to the accused.[186] As explained in Part I, one federal district court has recognized that students in disciplinary hearings must be afforded the right to confront their accuser.[187] Particularly in the context of accusations of sexual assault, witness credibility may be the determinative factor; a student's legal defense--and academic and professional future--may turn on the ability to cross-examine the accuser.[188] For administrators who are concerned that other courts might adopt the Donohue reasoning,[189] the OCR's guidelines pose a direct conflict between competing obligations.

The OCR should amend its views on cross-examination or should at least provide a legal basis for its conclusions. Otherwise, institutions are left uncertain as to whether they should allow direct cross-examination, and a false step in either direction could produce liability. [190] The preferable approach would be for the OCR to declare cross-examination permissible, though most courts that have decided this issue have declined to disturb the institution's discretionary decision to allow or disallow cross-examination. [191] Much of this reluctance has centered on concerns that cross-examination would overly burden the campus adjudicatory process [192] or affirmatively ***521** harm the victim. [193] These are weighty concerns, but Mathews requires that institutions also consider the accused's need to meaningfully confront the accuser and the charges that have been asserted, [194] factors that will generally outweigh the added time investment required to permit cross-examination.

Moreover, cross-examination can be structured in such a way that the victim is protected from embarrassment. In Donohue, for instance, the court merely held that the accused student should be afforded the opportunity "to direct questions to his accuser through the panel." [195] This method of cross-examination would prevent the victim from being directly questioned by the accused assailant. Institutions have found many creative ways of permitting cross-examination that enable the accused student to have the opportunity to confront the witness, while also protecting the victim from suffering psychological harm. For instance, institutions have allowed cross-examination to take place through video [196] or while the witness was shielded from the view of the accused and the accused's counsel. [197] Although these methods may increase the administrative burden on the institution, thus implicating the third Mathews factor, they are already in common use and are an appropriate compromise between exposing the victim to unbridled stress and not allowing the accused to confront his accuser.

Further, the unique context of student sexual-assault proceedings necessitates the right to cross-examination, which may be the only opportunity that the accused student has to make a meaningful argument of fact. In analogous contexts, such as in the Administrative Procedure Act [198] and in hearings for involuntary military discharge, ***522** both of which implicate similar liberty interests, cross-examination is permitted. [199] In fact, the Federal Circuit has held that cross-examination is required in military-discharge proceedings in situations that are potentially destructive for the victim. [200]

The same factors and considerations as those in military-discharge hearings are at play in the context of college disciplinary hearings for allegations of sexual assault. The institution should have some leeway to conduct procedures as it sees fit, but accused students must be given the opportunity to cross-examine their accusers because in this special context the entire proceeding often turns on witness credibility. Further, the testimony of unavailable witnesses will often be presented as hearsay evidence, [201] which creates an even greater interest in allowing the cross-examination of those witnesses who are present. By this reasoning, the accused's interest in avoiding wrongful deprivation of rights and the need to uncover the truth--the first and second Mathews factors--point toward allowing cross-examination. Likewise, the ability to utilize innovative cross-examination methods satisfies the cost concerns captured in the third Mathews factor. Accordingly, the OCR should amend its views on cross-examination to allow institutions to ensure that adequate due process is provided to accused students.

***523** 3. Crafting an Innovative Discovery Process. The Dear Colleague Letter implicates, but unfortunately does not address, other evidentiary issues, creating further confusion for institutions, victims, and accused students. For instance, one problem that has emerged in many campus hearings has been the inability of the accused student to access relevant evidence to build an effective defense. [202] The OCR, however, has not commented on whether an open discovery process is permissible.

Generally speaking, the accused student should not have the power to compel testimony or to conduct mandatory pretrial depositions. These powers are inappropriate for the higher-education sexual-assault context because they would impose significant costs on the institution and serve to delay the process and undermine the institution's need for discretion and

inconspicuousness.[203] Additionally, in the sexual-assault context, compelled testimony may be traumatizing to the students who are forced to testify, particularly if relationships with either the victim or the accused are damaged as a result.[204] These costs are not outweighed by either the first or second Mathews factor. The accused student's liberty interest does not require an ability to drag unwilling witnesses to a disciplinary hearing or a deposition room, particularly in an administrative proceeding in which criminal punishment is not at stake. Although facts will vary from case to case, student-on-student sexual assault is often a witnessless crime, which means that depriving accused students of the subpoena or deposition powers will rarely jeopardize their ability to present a defense. Furthermore, FERPA's requirements protect the victim's academic record from being subjected to trial-like scrutiny,[205] making compelled discovery tools impractical. Accordingly, courts have recognized that far-reaching discovery techniques are inappropriate in the higher-education context.[206]

Though certain discovery tools are inappropriate, some modicum of discovery is essential for due process. As Justice Brennan explained, discovery is important because it "helps develop a full ***524** account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case."[207] An innovative approach is necessary. At the very minimum--and as recognized by the Dear Colleague Letter[208]--the accused must have access to the evidence that will be presented at the hearing. This requirement finds support in all the Mathews factors.[209] Moreover, this approach facilitates compliance with FERPA because it mandates that institutions turn over only the information that has been selected as admissible at the hearing, which presumably is also FERPA compliant.

Additionally, other, more innovative discovery techniques could easily be adopted that would enrich due process without overly burdening the institution or the victim. First, although subpoenas are inappropriate, institutions should formally encourage witnesses to attend hearings by excusing them from class or scheduling hearings when school is in session, if timely. Second, nonstudent employees should be required to testify when requested because institutional employees must further the institution's truth-seeking duty and, accordingly, being compelled to testify should be viewed as falling within the scope of employment.

Second, the accused should be permitted to use optional written interrogatories when witnesses are unavailable or unwilling to participate in the hearing. Likewise, institutional officers should be willing to act on the accused student's behalf to contact potential witnesses and ask questions for the purpose of reporting the contents of these conversations to the judicial panel. Such evidence might be hearsay, but hearsay evidence is permissible in this context.[210] Some institutions already act on the accused student's behalf during cross-examination in campus adjudications,[211] and this approach could ***525** produce similar beneficial results during discovery. More importantly, by coordinating discovery from within the student-affairs office, the institution will be able to more carefully manage contact between the accused student and the alleged victim, hopefully preventing any antagonistic behavior by either party.[212] Further, conducting discovery via the student-affairs office would be another way for the institution to ensure that the accused student is not seeking FERPA-protected information or harassing the victim. These techniques would supplement the institution's own investigation into the accusation of sexual assault and would increase the amount of information that can be submitted to the disciplinary panel. Therefore, this innovative approach to discovery provides a way for the institution to balance its obligations to both the victim and the accused.

4. Equal Treatment in Accessing Counsel. The OCR has chosen to defer to the institution on the issue of whether counsel should be permitted at disciplinary hearings.[213] Although this approach is better than simply issuing a directive without legal support--as the OCR did on the issue of cross-examination[214]--a more consistent standard is needed to ensure adequate protection of both the victim's and the accused student's interests. With this goal in mind, institutions should generally provide both the accused and the victim with the option, but not the right, to obtain legal counsel. For students who elect not to obtain legal counsel, a student or administrative advocate should be offered as an alternative. Such a regime is supported by Mathews because it comports with the magnitude of the interests at stake in the sexual-assault context and ensures that the students' respective rights

are meaningfully advanced. [215] Further, allowing counsel does not pose a prohibitive burden under the third Mathews factor. In fact, many institutions already allow counsel for the accused. [216] Others provide ***526** student advocates. [217] These solutions are adequate and provide the accused student the opportunity to consult with an adviser before mounting a defense.

Although the parties should have the right to access counsel, this right should work in tandem with the ability of the counterparty to access counsel. In other words, when the accused can afford counsel but the victim cannot, then neither party should have counsel. [218] In that situation, the institution should offer to each student the services of a competent student or administrative advocate of the parties' choosing. Notably, this equal-representation approach would go further in protecting the victim than the OCR's own policy, which mandates only equal formal access to counsel. [219] By contrast, the equal-representation approach will ensure that neither party has a competitive advantage because of one party's ability or willingness to pay. Admittedly, this approach steps outside the Mathews calculus by considering issues of fairness to the victim rather than focusing solely on the accused student's due-process rights. This focus is appropriate, however, so long as the accused student is provided some form of representation. Beyond this baseline, fairness between the parties should be a relevant factor.

Conclusion

Despite the OCR's attempts to provide specific guidance to institutions of higher education on how to respond to accusations of peer sexual assault, numerous questions and conflicts remain. The basis for such confusion rests largely on the fact that Title IX must work in tandem with constitutionally or contractually defined due-process rights, yet to date the OCR has not issued specific guidance on how these two bodies of law should interact. Other laws such as FERPA come into play at the margins and make matters even more complicated. This uncertainty is unacceptable, particularly given the weight of the interests involved. Therefore, the OCR should issue further guidance in the form of a model judicial policy that more ***527** carefully outlines how due process and victim protection should interact. Ideally, such guidelines would spur Congress to provide corresponding legislative enactments that recognize the interplay between Title IX and due-process rights.

In light of these interests, this Note argues for the implementation of a special due-process regime for sexual-assault adjudication on college and university campuses. These recommendations should be embraced by institutions, as they comply with the Mathews calculus and should be explicitly ratified by the OCR. Specifically, institutions should (1) adopt a preponderance-of-the-evidence standard, as already recommended by the OCR; (2) provide accused students with the right to cross-examine all witnesses, subject to specific limits to protect the victim from undue embarrassment or stress; (3) implement a limited and innovative discovery process, in which the institution provides assistance to the accused while also permitting timely access to available factual evidence, subject to FERPA's limitations; and (4) give both the accused and the victim the option, but not the right, to obtain legal counsel, but ensure that both parties have equal types of representation.

By articulating and approving a regime of due-process rights for students accused of sexual assault--such as the type of regime proposed in this Note--the OCR would enable institutions to balance their obligations to both victims and accused students more carefully, thereby providing more adequate and far-reaching protection for both parties.

Footnotes

d1 Duke University School of Law, J.D. expected 2013; Wake Forest University, B.A. 2009. I am grateful to Dr. Jill Tiefenthaler and Jermyn Davis for introducing me to this topic, to Professor Jane Wettach for her guidance throughout the writing process, and to Graham Cronogue for his helpful advice. Sincerest thanks, as well, go to the entire Duke Law Journal staff, and in particular to Paige

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1 See Christopher P. Krebs, Christine H. Lindquist, Tara D. Warner, Bonnie S. Fisher & Sandra L. Martin, The Campus Sexual Assault (CSA) Study: Final Report, at xviii (2007), available at http:// www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (finding that one in five women are victims of sexual assault while in college).

2 See, e.g., Grayson Sang Walker, The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault, 45 Harv. C.R.-C.L. L. Rev. 95, 95-98 (2010) (discussing the well-publicized Tiffany Williams case at the University of Georgia); Ben Eisen, A Rape Case That's Not Going Away, Inside Higher Ed (June 19, 2009, 3:00 AM), http://insidehighered.com/news/2009/06/19/assault (describing an alleged gang rape at the University of the Pacific).

3 See, e.g., Christina Huffington, Yale Students File Title IX Complaint Against University, Yale Herald, Mar. 31, 2011, http:// yaleherald.com/topstory/breaking-news-yale-students-file-title-ix-suit-against-school ("The Department of Education's Office for Civil Rights...announced ... it will open an investigation to review Yale's policies for dealing with sexual harassment and sexual assault."); Elyse Ashburn, Education Dept. Tells 2 Colleges To Revamp Sexual-Harassment Policies, Chron. Higher Educ. (Dec. 10, 2010), http://chronicle.com/article/Education-Dept-Tells-2/125704 (discussing settlements between the Department of Education (DOE) and Eastern Michigan University and Notre Dame College in which the institutions would revamp their efforts to comply with Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (2006), to avoid further investigations); Allie Grasgreen, Wrong People on Trial?, Inside Higher Ed (June 7, 2011, 3:00 AM), http://www.insidehighered.com/ news/2011/06/07/women_raise_questions_about_ university_judicial_hearings_under_title_ix (discussing victims' lawsuits against educational institutions).

4 See, e.g., Found. for Individual Rights in Educ., In Verdict Against Sewanee, Federal Jury Sends Important Message About Proper Handling of Sexual Assault Cases, Moral Liberal (Sept. 6, 2011), http:// www.themoralliberal.com/2011/09/06/in-verdict-against-sewanee-federal-jury-sends-important-message-about-proper-handling-of-sexual-assault-cases ("In a decision that should send some rumblings through the world of higher education ... the jury awarded $26,500 in compensatory damages to the former student for [the institution's] negligence in mishandling his disciplinary hearing [for an alleged sexual assault]."); see also Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007) (permitting a rape victim's Title IX suit for damages against her former university to proceed).

5 Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), available at http:// www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Dear colleague letters are guidance documents written to educational administrators that explain the OCR's legal positions and enforcement priorities. The letters lack the force of congressionally made law, but courts pay them great attention due to deference prescribed by Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984). See, e.g., Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 93 (D. Conn. 2010) ("[T]here seems to be little question that this court should defer to [the OCR letters] insofar as they represent OCR's interpretation of its own regulations.").

6 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1686 (2006).

7 See id. § 1681 ("No person in the United States shall, on the basis of sex, be...subjected to discrimination under any education program or activity receiving Federal financial assistance ....").

8 See, e.g., Luc Cohen, U. Redefines Sexual Misconduct, Daily Princetonian, Sept. 27, 2011, at 1 (discussing changes to the term "sexual assault" in Princeton University's sexual-misconduct policies); Michelle Davis, U.Va. Alters Rules for Sexual Misconduct, Cavalier Daily (Univ. of Va.), Aug. 20, 2011, at A1 ("The University [of Virginia] redefined the circumstances under which a student can raise sexual assault charges in July, altering its policy from one of 'clear and convincing evidence' to a broader standard in which an incident of sexual misconduct more likely than not occurred."); Michael Goodrich, Op-Ed., Justice in the Academy, Chronicle (Duke Univ.), Sept. 7, 2011, at 11 ("[A]lleged violations of university policy that fall under Title IX ... will now be resolved using the preponderance of evidence standard ...." (quoting Stephen Bryan, Associate Dean of Students at Duke University) (internal quotation marks omitted)); Lee Shearer, UGA Toughens Sexual Harassment Policy, OnlineAthens (Sept. 16,

2011), http:// www.onlineathens.com/stories/091611/uga_886443218.shtml ("The University of Georgia has adopted a new, tougher sexual harassment policy that for the first time explicitly defines sexual violence as a violation of UGA policy.").

9 See, e.g., Peter Berkowitz, College Rape Accusations and the Presumption of Male Guilt, Wall St. J., Aug. 20, 2011, at A13 ("Most egregiously, OCR requires universities to render judgment using 'a preponderance of the evidence' standard." (quoting Letter from Russlynn Ali, supra note 5, at 11)); Rick Hills, What Constitutes "Due Process" for the Accused in Universities' Hearings Dealing with Campus Rape?, PrawfsBlawg (Aug. 21, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/08/what-constitutes-due-process-in-universities-campus-rape-adjudications.html ("But Peter [[Berkowitz] cannot be serious that all of the rights appropriate for a criminal case ... ought to be imported into an administrative hearing ...."); see also Criticisms of the Department of Education's April 4, 2011 "Dear Colleague Letter", False Rape Soc'y, http:// falserapearchives.blogspot.com/2011/09/writings-demonstrating-error-and.html (last visited Sept. 25, 2012) (maintaining a list of links to documents that have disclaimed the Dear Colleague Letter).

10 Berkowitz, supra note 9; see also Anonymous, An Open Letter to OCR, Inside Higher Ed (Oct. 28, 2011), http:// www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students (telling the OCR that the Dear Colleague Letter went "too far").

11 E.g., NCHERM Partners, NCHERM Reaction to the OCR Title IX Dear Colleague Letter on Campus Sexual Assault, Riskmablog (Apr. 6, 2011), http:// riskmablog.blogspot.com/2011/04/ncherm-reaction-to-ocr-title-ix-dear.html; see also, e.g., Donna Bickford, Brenda Betham, Michelle Issadore & Michelle Kroner, Open Letter to Anonymous, Inside Higher Ed (Nov. 8, 2011), http:// www.insidehighered.com/views/2011/11/08/essay-defending-ocr-letter-colleges-and-sexual-assault ("We would argue that the OCR guidelines, while not perfect, instead provide valuable guidance to campuses looking to support all their students equitably."); Erin Buzuvis, OCR "Dear Colleague" Letter Addresses Sexual Harassment in Schools, Title IX Blog (Apr. 6, 2011), http:// title-ix.blogspot.com/2011/04/ocr-dear-colleague-letter-addresses.html (describing the Dear Colleague Letter as a "much-needed reminder" of Title IX's requirements).

12 See supra note 4 and accompanying text; see also infra Part I.B.

13 Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2006 & Supp. IV 2011).

14 The Supreme Court recognizes a special interest in protecting consumers when information about their desired product is not readily available. See, e.g., Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal." (citation omitted)); In re R.M.J., 455 U.S. 191, 202 (1981) ("The public's comparative lack of knowledge ... renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.").

15 See supra note 9 and accompanying text.

16 Although the term "sexual assault" captures a range of behavior, this Note focuses on standards for the severest forms of assault, such as completed or attempted rape, in which the parties' interests are greatest. The term "sexual assault" is used throughout this Note to reference such conduct.

17 See Letter from Russlynn Ali, supra note 5, at 2 ("This letter ... discuss[es] the proactive efforts schools can take to prevent sexual harassment and violence ...." (emphasis added)).

18 See id. at 9-10 ("Police investigations may be useful for fact gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.").

19 See, e.g., Disciplinary Procedures, Office of Student Life, Davidson Coll., http://www3.davidson.edu/cms/x8912.xml (last visited Sept. 25, 2012) (outlining the student disciplinary process, as enforced by the Dean of Students); Overview of Process, Ctr. for Student Conduct, Univ. of Cal., Berkeley, http://campuslife.berkeley.edu/conduct/process (last visited Sept. 25, 2012) (summarizing the process "used to determine if a student...engaged in behavior that violates the Code of Student Conduct," as administered by the Dean of Students).

20 See infra Part I.B.

21 See, e.g., Disciplinary Matters, Admin. Bd., Harvard Coll., http:// www.adboard.fas.harvard.edu/icb/icb.do? keyword=k62415&tabgroupid=icb.tabgroup88722 (last visited Sept. 25, 2012) ("As a first step in the Board review process students will be informed of the allegations by the Secretary of the Board ...."); Disciplinary Procedures, supra note 19 ("[The formal statement of charges] is to be served on the person charged promptly ...."); Overview of Process, supra note 19 ("[W]e inform the student of [a report of misconduct] and ask the student to schedule a meeting to discuss the incident.").

22 See, e.g., Disciplinary Procedures, supra note 19 (stating that the Secretary of the Honor Council schedules disciplinary hearings); Overview of Process, supra note 19 ("If the student ... prefers to have a hearing ... the case will be forwarded to a hearing."). But see Disciplinary Matters: Responding to an Allegation Made Against You in a Peer Dispute Case, Admin. Bd., Harvard Coll., http:// isites.harvard.edu/icb/icb.do? keyword=k62415&pageid=icb.page290403 (last visited Sept. 25, 2012) (discussing an adjudication process that is conducted via written reports).

23 See Disciplinary Procedures, supra note 19 ("The [Sexual Misconduct] Board's purpose is to hear cases which include allegations of Sexual Misconduct. The Board is charged with determining whether the Accused is responsible or not responsible for the alleged conduct and determining appropriate sanctions.").

24 E.g., id.; see also, e.g., Overview of Process, supra note 19 ("Appeals may be made in writing to the Vice Chancellor for Student Affairs and must be based on new information not available at the time of the hearing, significant procedural error, or other good cause."); Reconsideration and Appeals Process, Admin. Bd., Harvard Coll., http:// isites.harvard.edu/fs/docs/icb.topic601968.files/ Reconsideration%20Appeals% 20Flowchart.pdf (last visited Sept. 25, 2012) (outlining the appeals process).

25 See infra Part I.B.2.

26 See supra note 7.

27 Goodman v. President & Trs. of Bowdoin Coll., 135 F. Supp. 2d 40, 54, 58 (D. Me. 2001) ("[A] number of opinions by the Court of Appeals for the First Circuit and other courts within this circuit have endorsed the existence of a contractual relationship between students and colleges .... [T]he Court holds that [the student] Plaintiff's contractual relationship with Bowdoin includes the Handbook term promising that Bowdoin would abide by certain procedures to ensure impartial proceedings and fundamental fairness.").

28 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157-59 (5th Cir. 1961) (holding that college students at public universities have due-process rights in disciplinary proceedings).

29 See infra Part I.B.3. In addition to these laws, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f) (2006 & Supp. IV 2011), is implicated by peer sexual assault and requires institutions to maintain and report aggregate assault data. This Note does not address the Clery Act, because it does not alter the way in which individual judicial proceedings are governed.

30 Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of 7, 12, 20, 29, and 42 U.S.C. (2006 & Supp. IV 2011)).

31 Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681-1686 (2006)).

32 Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 2252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a (2006)) (prohibiting discrimination by institutions that receive federal funds).

33 See generally Klinton W. Alexander & Kern Alexander, Higher Education Law: Policy and Perspectives 484-503 (2011) (explaining the importance of Title IX and other laws in the context of federal prohibitions on sex discrimination in higher education).

34 20 U.S.C. § 1681(a) (2006).

35 See Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 3(a), § 908, 102 Stat. 28, 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2006)) ("For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of ... a college, university, or other postsecondary institution ....").

36 David S. Cohen, Title IX: Beyond Equal Protection, 28 Harv. J.L. & Gender 217, 243 (2005); see also, e.g., Cohen v. Brown Univ., 101 F.3d 155, 187-88 (1st Cir. 1996) (applying Title IX's requirements to a private university's athletics program).

37 Alexander & Alexander, supra note 33, at 501.

38 See North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527-28 (1982) (explaining that Title IX "originated as a floor amendment, [and that] no committee report discusses the provisions"); Diane Heckman, Women & Athletics: A Twenty Year Retrospective on Title IX, 9 U. Miami Ent. & Sports L. Rev. 1, 9 n.30 (1992) ("Title IX was adopted without formal hearings ....").

39 See North Haven Bd. of Ed., 456 U.S. at 528 (explaining that Title IX was seen by some as a "cut and paste job" of Title VI (quoting Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Labor, 94th Cong. 409 (1975) (statement of Rep. James G. O'Hara, Chairman, Subcomm. on Postsecondary Education))).

40 See 34 C.F.R. §§ 106.21-106.23, 106.37 (2012) (regulating sex discrimination in college admissions, recruitment, and financial aid). But see David S. Cohen, The Stubborn Persistence of Sex Segregation, 20 Colum. J. Gender & L. 51, 89-90 (2011) (outlining exceptions to Title IX's prohibition on sex discrimination in educational admissions).

41 Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

42 See generally Equity in Athletics, Inc. v. U.S. Dep't of Educ., 291 Fed. App'x. 517 (4th Cir. 2008) (discussing the promulgation of regulations by the Secretary of Health, Education, and Welfare that extend the applicability of Title IX to intercollegiate athletic activities); Favia v. Ind. Univ. of Pa., 7 F.3d 332 (3d Cir. 1993) (affirming a preliminary injunction that compelled a university to reinstate athletics programs that had been cut in violation of Title IX); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (applying regulations that implement the intercollegiate athletics provisions of Title IX to a suit brought by members of women's sports teams that had been dropped to intercollegiate club status).

43 Title IX and Sex Discrimination, Office for Civil Rights, U.S. Dep't of Educ., http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated June 18, 2012); see also 34 C.F.R. § 106.3(a) (2012) ("If the Assistant Secretary [for Civil Rights] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

44 See generally 34 C.F.R. §§ 106.1-106.71 (regulating sex discrimination in higher education pursuant to Title IX).

45 See Reading Room, Office for Civil Rights, U.S. Dep't of Educ., http://www2.ed.gov/about/offices/list/ocr/publications.html#General (last visited Sept. 25, 2012) (listing and providing electronic access to dear colleague letters and other official documents promulgated by the OCR).

46 See, e.g., Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 92 (D. Conn. 2010) (explaining that courts are "bound to defer to OCR's interpretation of Title IX" in a dear colleague letter and that OCR regulations are "owed 'particularly high deference' under the doctrine of Chevron" (quoting McCormick ex rel. McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004))).

47 See, e.g., Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) (concluding that "deliberate indifference to known acts of harassment ... amounts to an intentional violation of Title IX").

48 See e.g., Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290-91 (1998) ("[W]e hold that a damages remedy will not lie under Title IX unless an official who ... has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination ... and fails adequately to respond. We think, moreover, that the response must amount to deliberate indifference to discrimination."); see also Simpson v. Univ. of Colo., 371 F. Supp. 2d 1229 (D. Colo. 2005) (granting summary judgment for the defendant university in a claim for money damages and injunctive relief brought by two students who alleged being sexually assaulted by the members and recruits of the university's football team), rev'd, 500 F.3d 1170

(10th Cir. 2007); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007) (reversing the lower court's grant of summary judgment based in part upon the deliberate-indifference theory).

49 Gebser, 524 U.S. at 290.

50 See, e.g., Simpson, 500 F.3d at 1173 (permitting female university students to proceed in their Title IX claims); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007) (permitting a rape victim's Title IX suit for damages against her former university to proceed); see also Doe v. Univ. of the Pac., No. CIV. S-09-764 FCD/JKN, 2010 WL 5135360, at *18 (E.D. Cal. Dec. 8, 2010) (granting summary judgment for the defendant university in a lawsuit brought by a female student, an assault victim who alleged that the university violated Title IX and created a hostile environment, even though it employed various tools to protect her interests).

51 In addition, the implications of Title IX liability are substantial and may extend beyond the courtroom. In Williams v. Board of Regents of the University System of Georgia, 477 F.3d 1282 (11th Cir. 2007), a female student alleged that the institution had violated Title IX by failing to respond adequately to her report that she was gang raped by three student athletes, id. at 1288-90. The Eleventh Circuit held that the victim had presented an actionable complaint when she demonstrated that the institution recruited the ringleader of the assault with knowledge of his history of sexual violence, failed to supervise the ringleader properly while he was living in student-housing facilities, waited approximately eleven months after the event to conduct a disciplinary hearing, and failed to take precautions that would prevent future attacks. Id. at 1296-97. The suit received significant press coverage, which depicted the university in a negative light, and contributed to the early termination of the university's men's basketball season in 2003. Appeals Court Partly Revives Sex-Harassment Claim Against U. of Georgia, Chron. Higher Educ. (Feb. 12, 2007), http://chronicle.com/article/Appeals-Court-Partly-Revive/38209.

52 See Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) (“As early as Magna Carta, procedure was regarded as a valuable means for the protection of the rights of litigants.... Few principles of law, applicable as well to the administrative process, are as fundamental or well established ....”).

53 U.S. Const. amend. VI.

54 See Addington v. Texas, 441 U.S. 418, 423-24 (1979) (“In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of the accused beyond a reasonable doubt.”).

55 See, e.g., Valente v. Univ. of Dayton Sch. of Law, No. 3:07-cv-473, 2008 WL 343112 (S.D. Ohio Feb. 6, 2008) (rejecting the plaintiff's desired due-process requirements for an honor-code proceeding, such as a voir dire process and the right to a unanimous jury finding, and explaining that such rights were unique to the criminal context).

56 See San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (“Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.”).

57 See Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 156-57 (5th Cir. 1961) (noting that public universities cannot arbitrarily take action that would negatively impact the private interests of students and instead must have clear processes and procedures).

58 See Psi Upsilon of Phila. v. Univ. of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991) (“The only caveat applied to this principle [that students at private institutions are protected by contractual provisions] is that the disciplinary procedures established by the institution must be fundamentally fair.”).

59 See infra notes 84-85 and accompanying text. This Note refers to such claims as “contractual due-process claims.”

60 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

61 Id. at 150-55.

62 Id. at 156. The court elaborated:

It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." That argument was emphatically answered by the Supreme Court in [Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886 (1961)], when it said that the question of whether "... summarily denying [plaintiff] access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment ... cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."'
Dixon, 294 F.2d at 156 (second and fourth alterations in original) (citations omitted) (quoting Dixon v. Ala. State Bd. of Educ., 186 F. Supp. 945, 950 (M.D. Ala. 1960), rev'd, 294 F.2d 150 (5th Cir. 1961); and Cafeteria Workers, 367 U.S. at 894).

63 Dixon, 294 F.2d at 156-57.

64 Courts, including the Supreme Court, have viewed Dixon as establishing that students enrolled at public institutions of higher education have constitutionally protected procedural due-process rights that must be observed before they may be suspended or expelled. See, e.g., Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975) ("Since the landmark decision of the Court of Appeals for the Fifth Circuit in Dixon v. Alabama State Board of Education, the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." (citations omitted)); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("[A] student facing expulsion or suspension from a public educational institution is entitled to the protections of due process." (citing Dixon, 294 F.2d at 157)); Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) ("In Dixon v. Alabama State Board of Education, we broadly defined the notice and hearing required in cases of student expulsion from college ...." (citations omitted)). In Goss v. Lopez, 419 U.S. 565 (1975), however, the Supreme Court held that public elementary-school students facing suspensions of ten days were entitled to procedural due-process protections because the state of Ohio had statutorily granted a right to such education, id. at 573-74. Therefore, the Court relied on the fact that the state had granted a right, rather than a privilege, as the basis for holding that such a right deserved due-process protections. Id. Notwithstanding this important distinction, since Dixon and Goss, courts have been comfortable with the premise that students at public colleges are generally entitled to due process in disciplinary procedures. See, e.g., Terrell v. Del. State Univ., No. 09-464 (GMS), 2010 WL 2952221, at *4 (D. Del. 2010) (discussing both Goss and Dixon as the basis of procedural due process for accused students in college adjudicatory settings); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1247-49 (E.D. Mich. 1984) (same); Donohue v. Baker, 976 F. Supp. 136, 145 (N.D.N.Y. 1997) (discussing Goss and explaining that public-college students are entitled to procedural due-process protections).

65 Goss v. Lopez, 419 U.S. 565 (1975).

66 Id. at 576 n.8. The Court drew an important distinction three years later, however, in Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978). There, the Court explained that "[t]he need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." Id. at 86. Therefore, "because the academic process is not adversarial, dismissals for academic reasons do not require a formal notice and hearing." Furey v. Temple Univ., 730 F. Supp. 2d 380, 393 (E.D. Pa. 2010) (citing Horowitz, 435 U.S. at 86).

67 See, e.g., Danso v. Univ. of Conn., 919 A.2d 1100, 1106 (Conn. Super. Ct. 2007) ("It is doubtful that a college student attending a state university has a valid property interest in staying in school.... [H]owever, [[such] a student ... has a liberty interest in continuing that education.").

68 See, e.g., Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

69 See Goss, 419 U.S. at 577-78 ("We turn to that question [of what process is due], fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable ...."' (first alteration in original) (citations omitted) (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961))).

70 See Alexander & Alexander, supra note 33, at 155-57 (explaining that the student-university legal relationship has been interpreted using five different frameworks, including that of a contractual relationship and a fiduciary relationship); see also Alvin L. Goldman, The University and the Liberty of Its Students--A Fiduciary Theory, 54 Ky. L.J. 643, 674 (1966) ("[T] he university, like any fiduciary, ... should have the burden of demonstrating that any disciplinary action: (a) was reasonably imposed for cause consistent with its function of maintaining an open-minded atmosphere ... for freely inquiring into and exploring ideas; and (b) was imposed in a manner consistent with scholarly integrity and process.").

71 Donohue v. Baker, 976 F. Supp. 136 (N.D.N.Y. 1997).

72 Id. at 145-47.

73 See id. at 147 ("Regardless of how 'sensitive' the proceeding was deemed to be, the defendants remained bound to observe the plaintiff's constitutional rights.").

74 See, e.g., Thomas R. Baker, Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy, 142 Educ. L. Rep. 11, 11 (2000) ("Prior to 1997, no federal judge had reinstated a post-secondary student ... solely because the university[[] ... did not permit the student to cross-examine witnesses.").

75 Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007) ("Due process...does not require that a student ... be afforded a right to cross-examine witnesses....").

76 Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988) (explaining that unspecified limitations on an accused student's ability to conduct cross-examination were insufficient to create due-process concerns, in part because the ability to conduct expansive cross-examination has not been deemed a right for accused students).

77 See Baker, supra note 74, at 11 ("Although only a district court ruling, the significance of Donohue for practitioners was considerable.").

78 Donohue, 976 F. Supp. at 146.

79 Danso v. Univ. of Conn., 919 A.2d 1100 (Conn. Super. Ct. 2007).

80 Id. at 1110.

81 Furey v. Temple Univ., 730 F. Supp. 2d 380 (E.D. Pa. 2010).

82 Id. at 397-98.

83 In fact, Dixon explained that "the well-settled rule that the relations between a student and a private university are a matter of contract." Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); see also, Psi Upsilon of Phila. v. Univ. of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991) ("In the university context due process is defined according to whether the institution is public or private.... The law ... at private [[institutions] ... is not so well settled.... [S]tudents who are being disciplined are entitled only to those procedural safeguards which the school specifically provides." (emphasis omitted) (quoting Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 579 (Pa. Super. Ct. 1990))).

84 See, e.g., Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 724 (1st Cir. 1983) ("Since [the student's] claim is based on his contract with the university, [state] law governs ...."); Goodman v. President & Trs. of Bowdoin Coll., 135 F. Supp. 2d 40, 45 (D. Me. 2001) ("Plaintiff alleges breach of contract against Defendant Bowdoin College on the grounds that the college breached the promises set forth in its Student Handbook ....").

85 Psi Upsilon, 591 A.2d at 758.

86 Cloud v. Trs. of Bos. Univ., 720 F.2d 721 (1st Cir. 1983).

87 Id. at 724-25 (first and second alterations in original) (quoting Coveney v. President & Trs. of Holy Cross Coll., 445 N.E.2d 136, 139 (Mass. 1983)).

88 Id. at 723-26.

89 Id. at 723 (quoting the student handbook).

90 Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977).

91 Id. at 1063 ("Courts ... should not lightly undercut the 'compelling need and very strong policy consideration in favor of giving ... school officials the widest possible latitude in the management of school affairs.' Plaintiff is correct in observing that the traditional rule of nonintervention in academic matters does not apply to review of disciplinary actions by educational institutions.... The mere fact that some of his grades were based on Honor Council violations does not render suspect or reviewable the decision of the faculty [to dismiss him from the program]." (second alteration in original) (citations omitted) (quoting Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973))). Jansen involved a dental student at Emory University who was dismissed from the program for poor academic performance after he received two failing grades for disciplinary problems. Id. at 1061, 1063. Despite a provision in the student handbook that provided that "no student will be dismissed without due process," the student was dismissed at a faculty meeting to which the student was not invited. Id. at 1062.

92 See supra note 66.

93 Jansen, 440 F. Supp. at 1061, 1063.

94 Id.

95 Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984).

96 Id. at 533. In both Jansen and Corso, students faced sanctions for cheating. In Jansen, the court refused to address the student's due-process concerns because it viewed the sanctions as "academic" rather than "disciplinary." Jansen, 440 F. Supp. at 1063. But in Corso, the court found the institution liable, implicitly refusing to apply the distinction between academic and disciplinary matters. Corso, 731 F.2d at 533. Numerous other examples of such inconsistencies exist. For example, compare the approach to contractual interpretation in Psi Upsilon of Philadelphia v. University of Pennsylvania, 591 A.2d 755 (Pa. Super. Ct. 1991), with Goodman v. President and Trustees of Bowdoin College, 135 F. Supp. 2d 40 (D. Me. 2001). In Psi Upsilon, the Superior Court of Pennsylvania held that a fraternity's contract with the university, in which the fraternity agreed "[t]o accept collective responsibility for the activities of the individual members," was neither overbroad nor vague. Psi Upsilon, 591 A.2d at 759 (emphasis omitted) (quoting university policies and procedures). In Goodman, however, the court was more willing to engage in loose contractual interpretation. In that case, the plaintiff alleged that he had been denied contractual due-process rights when he was prevented from obtaining access to medical records and contacting a witness to an alleged fight. Goodman, 135 F. Supp. 2d at 44. The student handbook stated that the institution reserved "the right to make changes in...procedures, and charges," but the court limited this provision and prevented a change in policy during the procedures. Id. at 57 (quoting Bowdoin's 1998-1999 Student Handbook) (internal quotation marks omitted).

97 See supra notes 71-77 and accompanying text.

98 20 U.S.C. § 1232g(a) (2006); see also Katrina Chapman, Note, A Preventable Tragedy at Virginia Tech: Why Confusion over FERPA's Provisions Prevents Schools from Addressing Student Violence, 18 B.U. Pub. Int. L.J. 349, 353-54 (2009) ("FERPA requires that student records be kept confidential. It provides access ... only with the consent of parents ....").

99 20 U.S.C. § 1232g(a)(4)(A)(1).

100 Id. § 1232g(b)(1) (2006 & Supp. IV 2011).

101 Letter from Russlynn Ali, supra note 5, at 11 n.29.

102 Office for Civil Rights, U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at vi-vii (2001), available at http:// www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("[C]ommenters raised concerns about the interrelation of [FERPA] and Title IX. The concerns relate to two issues: (1) the harassed student's right to information about the outcome of a sexual harassment complaint and (2) the due process rights of individuals...accused of sexual harassment ....").

103 See, e.g., Chapman, supra note 98, at 352 ("FERPA still does not adequately define when an emergency exists ...."); Stephanie Humphries, Note, Institutions of Higher Education, Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law, 35 J.C. & U.L. 145, 149 (2008) ("[B]oth FERPA and the common law contain internal tensions regarding safety and privacy that neither Congress nor the courts have adequately reconciled ....").

104 See supra Part I.B.1.

105 See, e.g., Doe v. Univ. of the South, No. 4:09-cv-62, 2011 WL 1258104, at *22 (E.D. Tenn. Mar. 31, 2011) (allowing a student's breach-of-contract claim to proceed under the theory that the university deprived him of due process). The jury eventually awarded the student over $20,000 in compensatory damages. Collin Eaton, Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges, Chron. Higher Educ. (Sept. 2, 2011), http:// chronicle.com/article/Jury-Verdict-in-Sex-Assault/128884; see also Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1294-99 (11th Cir. 2007) (holding that an adequate Title IX claim had been mounted against the University of Georgia by a former student and rape victim).

106 See supra Part I.B.3.

107 For example, the standard of proof in student disciplinary hearings has historically varied wildly across institutions. Compare Margaret Fosmoe, ND To Change Sex Assault Response, South Bend Trib., July 2, 2011, at A1 ("Notre Dame agreed to make clear that it will use a 'preponderance of evidence' standard to evaluate sexual harassment allegations."), with Rebecca D. Robbins, Harvard Will Not Alter Its Sexual Assault Policies in Response to Yale, Harvard Crimson (June 27, 2012), http://www.thecrimson.com/article/2012/6/27/sexual-assault-no-response (detailing differing standards of proof at different Harvard schools), and Davis, supra note 8 (explaining that the University of Virginia altered "its policy from one of 'clear and convincing evidence"' to a preponderance standard).

108 In fact, Vice President Joseph Biden and Education Secretary Arne Duncan took the unusual step of publically announcing the Dear Colleague Letter's release at a media event at the University of New Hampshire. Lauren Sieben, Education Dept. Issues New Guidance for Sexual-Assault Investigations, Chron. Higher Educ., Apr. 4, 2011, at A20. The Dear Colleague Letter's author, DOE Assistant Secretary for Civil Rights Russlynn Ali, described the letter as "historic," emphasizing that it is not an attempt to alter the law, but rather serves as a "clarification" of existing law. Allie Grasgreen, Call to Action on Sexual Harassment, Inside Higher Ed (Apr. 4, 2011, 3:00 AM), http:// www.insidehighered.com/news/2011/04/04/education_department_civil_rights_office_clarifies_colleges_sexual_harassment_obligations_title_ix (quoting Ali) (internal quotation marks omitted).

109 Letter from Russlynn Ali, supra note 5, at 1-3.

110 Id. at 3-14.

111 Id. at 14-19.

112 See id. at 2 ("This letter supplements the 2001 Guidance,[[Office for Civil Rights, supra note 102,] by providing additional guidance ... regarding the Title IX requirements as they relate to sexual violence."); see also Office for Civil Rights, supra note 102, at 1 ("[W]e intend th[is] revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.").

113 This is not to suggest that the OCR should not be concerned with protecting victims of assault. Rather, the OCR should more effectively address both students' interests. For institutions to be able to provide maximum protections against peer sexual assault,

institutions must first know the limits of due-process requirements. Therefore, the OCR should provide more guidance as a means of enabling institutions to fully comply with Title IX.

114 Letter from Russlynn Ali, supra note 5, at 8-14.

115 Id. at 11.

116 Id.

117 Id. at 10.

118 See, e.g., Berkowitz, supra note 9 ("Most egregiously, OCR requires universities to render judgment using 'a preponderance of the evidence' standard."). But see Stacy Malone, Victim Rights Law Center Responds to Wall Street Journal Editorial, Victim Rights Law Ctr. (Aug. 31, 2011), http:// www.victimrights.org/sexual-assault-happens-college-campuses-stop-blaming-victims-and-hold-perpetrators-accountable ("Mr. Berkowitz ... confuses the civil and criminal laws when he criticizes the burden of proof ....").

119 See Grasgreen, supra note 108 ("In the press call, Ali stressed the importance of clarifying the standard of proof for sexual harassment.").

120 Id.

121 Letter from Russlynn Ali, supra note 5, at 13.

122 Id. at 11 & n.29.

123 Id. at 11 n.29.

124 Id. at 13-14.

125 Id.

126 Id. at 13.

127 Id. at 5.

128 Id.

129 Id.

130 Id.

131 Id. (quoting 20 U.S.C. § 1232g (2006 & Supp. IV 2011)).

132 Id. at 12.

133 Id.

134 Id.

135 Id.

136 Id. at 3.

137 Id. at 12.

138 See supra note 72 and accompanying text.

139 For example, despite the consistency advocated by the OCR's insistence on a uniform standard of proof, some institutions are refusing to follow suit. E.g., Robbins, supra note 107. Other variations also persist. For instance, Davidson College dispatches an independent, neutral investigator to conduct an initial investigation of all claims of assault, Disciplinary Procedures, supra note 19, while the University of California at Berkeley employs no such preliminary investigations and merely directs an initial meeting with the accused to discuss the charges, see Overview of Process, supra note 19.

140 See 34 C.F.R. § 106.3(a) (2012) ("If the Assistant Secretary [[for Civil Rights] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

141 See Letter from Russlynn Ali, supra note 5, at 12 ("Public and state-sponsored schools must provide due process to the alleged perpetrator."); see also Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975) (explaining that, since Dixon, due process is required before a student may be disciplined by a public-education institution).

142 Although empowering the OCR to craft a model policy would admittedly increase the DOE's role, such a role is warranted due to the interest of balancing due process with victim protection and the need for greater consistency and clarity.

143 Mathews v. Eldridge, 424 U.S. 319 (1976) (involving a dispute regarding the constitutionality of administrative proceedings under the Due Process Clause).

144 Mathews v. Eldridge, 424 U.S. 319 (1976).

145 Id. at 335.

146 Danso v. Univ. of Conn., 919 A.2d 1100, 1106 (Conn. Super. Ct. 2007).

147 See, e.g., Byron Calame, Revisiting The Times's Coverage of the Duke Rape Case, N.Y. Times, Apr. 22, 2007, at C12 (analyzing the extensive media scrutiny surrounding the Duke lacrosse scandal).

148 Doe v. Univ. of the Pac., No. 4:09-cv-62, 2010 WL 5135360 (E.D. Cal. Mar. 31, 2010); see also Eisen, supra note 2 (describing the alleged University of the Pacific gang rape).

149 E.g., Georgina Gustin, Rape of Student at Blackburn Rattles Campus, St. Louis Post-Dispatch, Sept. 24, 2004, at B06 ("A sexual assault on the quiet campus of Blackburn College in Carlinville last week has rattled students ...."); Sexual Assault Workshop, Wash. Post, June 30, 1991, at D11A ("[The College of William and Mary] was embroiled in controversy this school year after a freshman complained she was the victim of date rape.").

150 Mathews, 424 U.S. at 343-44.

151 Id. at 341.

152 Id. at 347-48.

153 See, e.g., Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) ("This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out.").

154 See, e.g., Baker, supra note 74, at 23 ("[I]n this setting, the opportunity to cross-examine the alleged offender is not likely to encourage prospective complainants to undertake the personal risks associated with filing a formal complaint, and the traumatic side-effects of cross-examination ordinarily impact the alleged victims much more negatively than the alleged offenders.").

155 See, e.g., Disciplinary Procedures, supra note 19 ("The Honor Council is composed of thirty students ... elected at large from the student body.").

156 Indeed, in some instances, the use of student judicial officers may actually exacerbate the concern of undue embarrassment for the victim, insofar as students will be hesitant to subject themselves to an investigative proceeding in front of their peers and classmates.

157 For a list of these institutions, as measured in 2012 by the U.S. News and World Report, see National University Rankings, U.S. News & World Rep., http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities (last visited Sept. 25, 2012).

158 See, e.g., Mission Statement, Univ. of Cal., http:// www.universityofcalifornia.edu/aboutuc/missionstatement.html (last updated Jan. 26, 2004) ("The distinctive mission of the University is to serve society as a center of higher learning, providing long-term societal benefits through transmitting advanced knowledge, discovering new knowledge, and functioning as an active working repository of organized knowledge." (quoting the 1974-78 University of California Academic Plan) (internal quotation mark omitted)); University Mission Statement, Yale Univ., http:// www.yale.edu/about/mission.html (last visited Sept. 25, 2012) ("Like all great research universities, Yale has a tripartite mission: to create, preserve, and disseminate knowledge.").

159 See Goldman, supra note 70, at 674 ("[T]he university, like any fiduciary, ... should have the burden of demonstrating that any disciplinary action: (a) was reasonably imposed for cause consistent with its function of maintaining an open-minded atmosphere conducive to the acquisition and use of tools for freely inquiring into and exploring ideas; and (b) was imposed in a manner consistent with scholarly integrity and process.").

160 See, e.g., Rice Univ., Student Handbook--Sexual Assault/Misconduct, http://www.students.rice.edu/students/sexual_AssaultMisconduct.asp (last visited Sept. 25, 2012) ("The University will assist students who request assistance in rearranging their classes or living arrangement because of an alleged sexual assault.").

161 See supra notes 147-149 and accompanying text.

162 See supra note 9 and accompanying text.

163 See supra note 9 and accompanying text.

164 See Letter from Russlynn Ali, supra note 5, at 11 n.28.

165 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Letter from Russlynn Ali, supra note 5, at 9-10.

166 Alexander & Alexander, supra note 33, at 155-57.

167 Robert Smith, On Sexual Harassment and Title IX, Real Clear Politics (Aug. 30, 2011), http:// www.realclearpolitics.com/articles/2011/08/30/on_sexual_harassment_and_title_ ix_111065.html.

168 It should be recalled, of course, that this lower standard of proof is appropriate only within the institutional disciplinary process. Any criminal proceeding would involve the familiar beyond-a-reasonable-doubt standard. See supra Part I.A.

169 See supra notes 48-50 and accompanying text.

170 See supra notes 145-151 and accompanying text.

171 Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting In re Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

172 Id. at 424.

173 Id.

174 See supra notes 8, 107 and accompanying text.

175 Grogan v. Garner, 498 U.S. 279, 286 (1991) (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 389-90 (1983)).

176 Addington, 441 U.S. at 424 (emphasis added).

177 Id. at 423.

178 See supra notes 17-18 and accompanying text.

179 See, e.g., Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) (explaining in the context of a rape case that a criminal defendant is presumed innocent at trial and is entitled to the beyond-a-reasonable-doubt standard).

180 See, e.g., Woodby v. INS, 385 U.S. 276, 285-86 (1966) ("To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case....In denaturalization cases the court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence." (citation omitted)); Chaunt v. United States, 364 U.S. 350, 353 (1960) ("[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside--the evidence must indeed be 'clear, unequivocal, and convincing....'" (quoting Schneiderman v. United States, 320 U.S. 118, 125 (1943))).

181 Woodby, 385 U.S. at 285-86.

182 See, e.g., Hodges v. United States, 35 Fed. Cl. 68, 78 (1996) (explaining that an administrative board employs a preponderance standard in a military-discharge case).

183 See supra note 67 and accompanying text.

184 See supra note 9.

185 Letter from Russlynn Ali, supra note 5, at 12.

186 See, e.g., Donohue v. Baker, 976 F. Supp. 136, 139-40 (N.D.N.Y. 1997) ("At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser ....").

187 Id. at 146-47; see also supra notes 71-74 and accompanying text.

188 Donohue, 976 F. Supp. at 146-47.

189 See supra note 77 and accompanying text.

190 See supra note 4 and accompanying text.

191 Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007); Baker, supra note 74, at 13-14 .

192 See supra note 153.

193 See Baker, supra note 74, at 23 ("Due to the highly personal nature of a rape charge and the emotional toll it exacts on the victim, no procedural design issue generates more administrative angst than cross-examination.").

194 See supra notes 150-151 and accompanying text.

195 Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (emphasis added). It is unclear whether OCR's ban on direct cross-examination, see supra note 134 and accompanying text, also prohibits this indirect cross-examination.

196 See, e.g., Doe v. Univ. of the Pac., No. Civ. S-09-764 FCD/KJN, 2010 WL 5135360, at *4 (E.D. Cal. Dec. 8, 2010) ("As an accommodation to [the victim], the University arranged for [her] to provide her testimony to the Board in a building across campus from where [the perpetrators] testified.").

197 See, e.g., Cloud v. Trs. of Bos. Univ., 720 F.2d 721 (1st Cir. 1983) (involving a judicial hearing in which the witness was shielded from the view of the accused student); Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117, 129-30 (D. Me. 2004) (involving a hearing in which the witness was placed behind a screen and cross-examined out of view).

198 Administrative Procedure Act, 5 U.S.C. §§ 551-559, 701-706 (2006).

199 See id. § 556(d) ("A party is entitled to present his case or defense ... and to conduct such cross-examination as may be required for a full and true disclosure of the facts."); infra note 200.

200 In Doe v. United States, 132 F.3d 1430 (1997), the court reversed the decision of a military board to discharge an Air Force officer amid allegations that he had sexually molested his daughter, id. at 1437. The evidence against the officer consisted solely of recorded statements that his daughter had made to a third party, and the officer was unable to cross-examine this important witness. Id. at 1435-36. The court noted:
Sexual molestation of a child, especially if committed by a child's own parent, is indeed heinous. But like other person-to-person offenses, whether the act in fact occurred, when there is no corroborating evidence, depends very much on the believability of the complaining witness. And though an administrative discharge proceeding is not held to the same high standard of proof as a criminal hearing, and hearsay evidence is not as tightly controlled as it is in civil court proceedings, nevertheless there remains a minimum level of proof that must be found in the record.... The greatest engine for truth, it has been written, is the opportunity to confront one's accusers and to cross-examine them. In administrative proceedings such as this, the rules are modified to permit agency processes that are less formal than those of a law court. But that does not authorize a gross departure from basic principles as has occurred in this case. Id. at 1436-37 (citations omitted).

201 See Richardson v. Perales, 402 U.S. 389, 402 (1971) (explaining the admissibility of hearsay in administrative hearings).

202 See, e.g., Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 726 (1st Cir. 1983) (addressing the accused's complaints that he was not afforded access to relevant witnesses).

203 See, e.g., Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Super. Ct. Conn. 2007) ("Due process ... does not require that a student at a disciplinary hearing be afforded a right to...compel testimony.").

204 See supra notes 154, 200 and accompanying text.

205 See supra Part I.B.3.

206 Danso, 919 A.2d at 1108.

207 Taylor v. Illinois, 484 U.S. 400, 425 (1988) (Brennan, J., dissenting).

208 Letter from Russlynn Ali, supra note 5, at 11 n.29.

209 This point should be somewhat axiomatic. First, the liberty interest at stake in disciplinary hearings is sufficient to warrant prior access to the facts. Second, without access to the factual evidence, the accused will be unable to mount an effective defense, dramatically increasing the risk of erroneous deprivation of liberty. Third, providing timely access to the accused will impose only minimal costs. This final point finds support in the Dear Colleague Letter itself. Id.

210 See Richardson v. Perales, 402 U.S. 389, 402 (1971) (explaining that hearsay evidence may be admissible in the administrative hearing context).

211 See, e.g., Donohue v. Baker, 975 F. Supp. 136, 147 (N.D.N.Y. 1991) (requiring cross-examination to be conducted through the institution's judicial panel); Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 725 (1st Cir. 1983) (involving cross-examination conducted with the victim shielded from view).

212 Institutions already try carefully to manage future interactions between the alleged victim and the accused. See supra note 160. Not only are such efforts important for the prevention of future trauma to the alleged victim, but in some instances, the institution might

even be legally obligated to ensure that the parties refrain from future conduct so as to avoid a "hostile environment." Letter from Russlynn Ali, supra note 5, at 4, 13 n.33.

213 See supra note 132 and accompanying text.

214 See supra Part III.B.2.

215 See supra Part III.A.

216 See, e.g., Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117 (D. Me. 2004) (involving a student represented by counsel).

217 See Donohue v. Baker, 976 F. Supp. 136, 145-47 (N.D.N.Y. 1997) (discussing a campus disciplinary proceeding in which the accused student was provided access to a student advocate); Danso v. Univ. of Conn., 919 A.2d 1100, 1109 (Conn. Super. Ct. 2007) (same).

218 Determining a party's ability to afford legal counsel will be a fact-based assessment made by a student-affairs office. Such a decision may require the student or his or her guardian to authorize the relevant official to consult the student's financial-aid profile.

219 Letter from Russlynn Ali, supra note 5, at 12.

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Ghosts of rape past: Can a survivor find solace in return to the crime scene?

By Moni Basu, CNN

Photos by Lexey Swall for CNN

Updated 12:31 PM ET, Mon November 16, 2015

Tallahassee, Florida (CNN)—On game day, 70,000 football fans pack Doak Campbell Stadium to watch Florida State roar to victory. I wait for the post-party quiet of the following morning to wander through campus with Maria, knowing that a return to this place could be risky.

At the main entrance to the university, we run into two high school students from Tampa posing for a photo in garnet and gold Seminole jerseys. They want to enroll at FSU one day soon, they say, their cherubic faces lighting up.

This narrative of a gang rape on the campus of Florida State University in 1988 was pieced together through hundreds of pages of documents and more than a dozen interviews.

CNN reporter Moni Basu contacted the survivor of the rape through her former attorney, Dean LeBoeuf. Then Basu began a series of conversations with her that culminated in the survivor's return to the FSU campus in Tallahassee for the first time since the attack 27 years ago.

Basu interviewed the district attorney who oversaw the case and an assistant district attorney who prosecuted it; the attorney for defendant Daniel Oltarsh, a Pi Kappa Alpha fraternity member who served time for the rape; FSU professors; the lead police investigator; and the victim's counselor. Basu requested an interview with Oltarsh but his lawyer did not respond to follow-up calls. She also reached out to a fraternity brother who cooperated with the police in exchange for immunity and to two other fraternity members who were indicted. The attempts to reach them were not successful.

Basu also examined hundreds of pages of case files at the Leon County Courthouse in Tallahassee, including the grand jury report and the rape survivor's deposition, as well as archival material at FSU's Strozier Library.

over the globe. In the fall of 1987, her mother dropped her off in this very spot, in front of the administrative offices housed in Westcott Building.

But college turned out to be a dark adventure.

Before she could finish her second semester, Maria was gang-raped on campus. Her assault made national headlines partly because the details read like sleazy fiction and partly because it involved one of the most prestigious fraternities on a football powerhouse campus.

It was a case I became intimately aware of as a journalist in Tallahassee at the time and one that I sympathized with as a former FSU student and campus rape survivor.

I expect the return to FSU to be a difficult journey -- for both Maria and me. It is the first trip back to campus for us since our departures from Tallahassee. In the years since, many things have changed at America's institutions of higher learning. Sadly, some have not.

Rape on college campuses was a serious problem then and remains one now. One in five college women said they were sexually assaulted, according to a Washington Post-Kaiser Family Foundation poll released last June.

It's a problem highlighted in the film "The Hunting Ground," which aired on CNN on November 22. The film delves into a connection between alcohol and sexual assault and explores a campus culture that protects perpetrators.

It also focuses on the stories of survivors who became activists and took the issue all the way to the White House and prompted a federal investigation of the handling of sexual violence complaints on campuses.

As the film demonstrates, the Internet and social media made it possible for rape survivors to connect with one another and find a modicum of comfort. Even power. When Maria and I were in college, that was not the case. We felt, and were, very much alone.

We both chose to keep silent about what happened, except in Maria's case, the crime was so heinous that despite her unwillingness, the state pursued charges against her rapists.

Maria felt a thousand eyes on her. She bore the brunt of unkind comments. She came back to her dorm room one day to find this message on the white board on her door: Whore. She withdrew, rarely spoke about the incident and even tried to kill herself. She survived through the years, but only barely.

the right. It was the first time I'd met Maria in person, though I had spoken with her once on the phone a few weeks after her rape.

Amid Spanish moss-draped oaks on FSU's campus, Maria took stock of her painful history as a young student on this campus

She watched the movie intently. I could see tears gathering behind her glasses and her hands trembling. A few weeks later, she agreed to go back with me to the scene of her attack. After 27 years, she was ready, she said, to come to terms with the incident that altered her life's trajectory.

I understood all too well the significance of her decision. I, too, had only recently gone public about my rape after a reporting trip to my native India to find a woman named Mathura, a rape survivor who was at the heart of a groundbreaking case.

I regretted that the newspaper stories I edited about Maria's rape had never given her voice. Throughout her ordeal and the months of court proceedings, she chose to remain anonymous. She was never named publicly and granted only a handful of interviews. The court records were sealed to protect her identity.

She agreed to speak with me on the condition that CNN not reveal her real name. She wanted to share her ordeal with other young women who have suffered rape or might be assaulted before they graduate.

"Maybe my story can help them in some way," she said.

On this Sunday morning in October, a warm sun illuminates her golden hair as we meander down asphalt paths that connect FSU's signature red brick buildings. I respect the courage it takes for her to stand with me

Maria sighs. She came here, she tells me, to face the ghosts that haunt her. She wants to take her 18-year-old self by the hand, lead her through the places that were dark and let her know: "It's going to be alright. You are safe."

A slideshow of chilling images

From the main entrance of the university, we walk to a campus hangout where both Maria and I spent hours studying, the Sweet Shop.

We take a break on Landis Green, the Central Park of FSU. Maria sits on a bench before live oaks laden with lacy Spanish moss that falls from the branches like tears. She hides her eyes behind Jackie O. sunglasses and takes slow drags of her Marlboro Menthol 100; I sense her anxiety as memories flood her mind.

We decide to retrace the steps Maria took on a damp spring night in 1988, past the blocks that once housed a newspaper office where I worked and a JR market that sold Texas taters and $1.99 six-packs of Schaefer beer. We stand before an all-new Dorman Hall, tonier than the version where Maria lived. From her room, she could see a row of sorority houses that included Chi Omega, where a few years before Maria arrived at FSU serial killer Ted Bundy murdered two young women.

We look the other way down Jefferson Street and recognize a motel-style apartment building with jalousie windows and air-conditioning units overworked even this far into autumn. We laugh that the ugliest building of all survived the bulldozers.

Around the corner is the place where Maria went on her last night of normal.

The Pi Kappa Alpha mansion with the stately white columns is no longer there, but Maria can picture it clearly in her mind. She points to the spot where she was tossed like a piece of trash, badly bruised and unconscious, just one drink away from death.

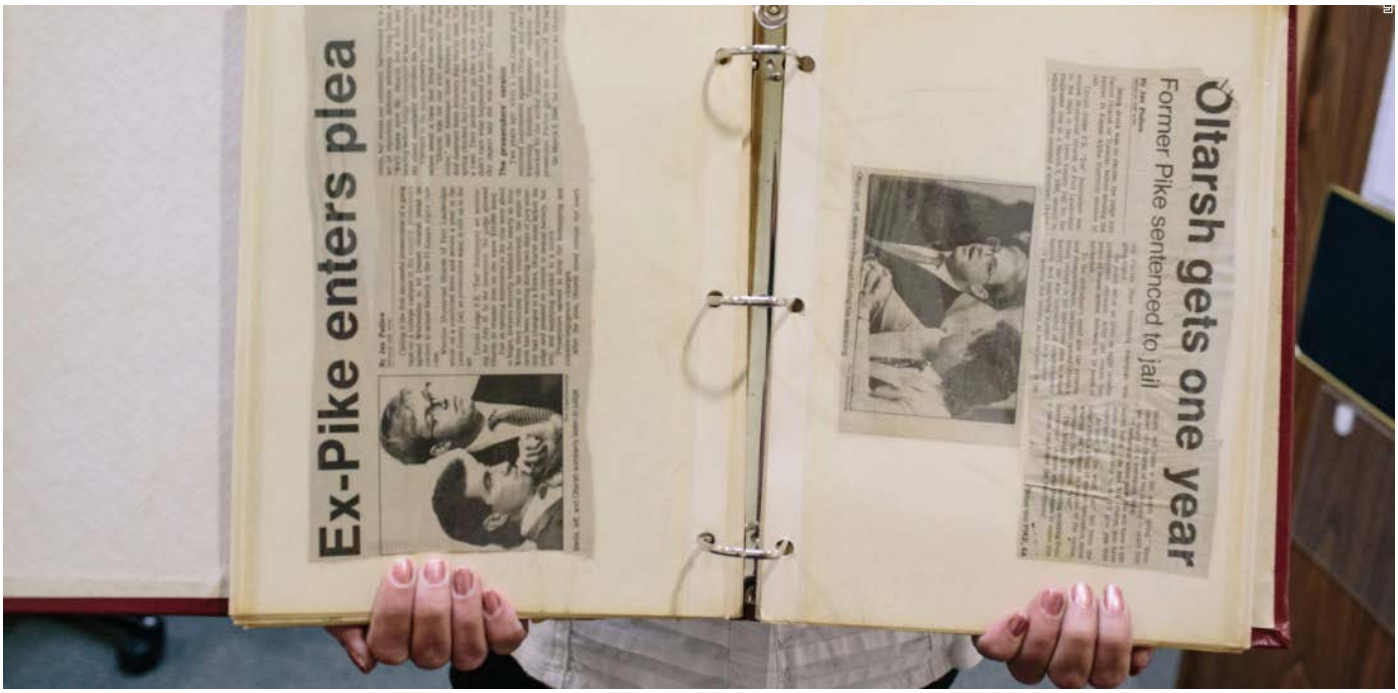
There's no clear storyline in her mind -- there wasn't then and there isn't now. She sees a slideshow of chilling images, blurry and yet so vivid at times that she can feel it all again.

Wine, a blue room, cold tiles, running water, flesh. And force. So much force.

Maria liked to drink and dance at an after-hours bottle club called the Late Night Library. On the evening of March 4, 1988, she was there with her friend Sandra. It was Friday, and the indie bar was hopping.

Maria arrived at FSU shy and introverted. Her mother was an alcoholic, and Maria had started drinking in her senior year at a girls-only Catholic high school in Louisiana. At FSU, she rebelled. She thought alcohol helped her feel more comfortable, and she developed a penchant for partying and a reputation for being promiscuous. She had already had many beers by the time she ran into Daniel Oltarsh, a political science and economics major she'd met at a pig roast several months before.

Oltarsh was handsome in a bookish way with blond curly locks and trendy round glasses that framed his blue eyes. Most of all, he was a Pike.



At the time, Maria could not bear to look at the headlines about her rape. But friends saved newspaper clips for her to see later.

Many of the men of Pi Kappa Alpha were well-heeled sons of prominent fathers. They wore starched Oxford shirts, double-breasted blue blazers and Rolex watches. Around campus, many considered them the kings of FSU's Greek system, admired and reviled all at once.

Maria felt honored that someone like Oltarsh would talk to her. So when he invited her to a party that night at the Pike mansion, she was beside herself. She walked back to her dorm, changed into a three-quarter sleeve sweater and black pencil skirt and poured herself a tumbler of tequila. She took the drink with her on the short walk to the fraternity house at 218 S. Wildwood Drive.

Oltarsh was waiting for her on the columned porch. They went upstairs to his room. He managed to get a bottle of white wine and Maria drank more. It was past 3 in the morning.

"Where is the party?" Maria asked.

There was none.

The details of what happened next are culled from court files, including police interviews with Pi Kappa Alpha members and a grand jury report indicting 23-year-old Oltarsh and two other fraternity members: Byron Stewart, then 21, and Jason McPharlin, 18, who was visiting from Auburn University.

A fourth fraternity brother was given immunity in exchange for his cooperation with the investigation. The documents include his version of what happened as well as a statement from McPharlin.

Maria was so drunk she could barely stand up. She told police Oltarsh got "aggressive" with her in his room and forced her to have sex. He then took her to the shared bathroom. He let other frat brothers know there was a girl available for sex. It was called "pulling a train."

Smoking helps calm Maria, who is recovering from years of post-traumatic stress, eating disorders and alcoholism.

The fraternity brother who was given immunity told police that Oltarsh was fondling Maria in the shower and that he joined them there. He and Oltarsh took turns having sex with her in the shower.

At some point, McPharlin went into the shower. He told prosecutors that he took his boxers off, got in the shower with Maria but did not have sexual intercourse with her. He got up and left after he saw Stewart, who he was not acquainted with at the time, come into the bathroom.

Fraternity brothers who spoke to police said Stewart, a former high school football player from Orlando, could not get an erection and bragged about using a Colgate toothpaste tube to violate Maria.

They called her obscene names and repeatedly told her she was in a house belonging to Sigma Chi, a rival fraternity. When they were done, they took her back to Oltarsh's room and dressed her. Oltarsh used a ballpoint pen to write the words "Hatchet Wound," crude slang for a woman's genitals, on Maria's right thigh. On the other, he scrawled the Greek letters of another fraternity, Sigma Phi Epsilon.

Oltarsh and McPharlin carried her by the arms and legs to the Theta Chi fraternity house next door and left her limp body in the hallway, according to the fraternity brother who cooperated with the police. They left her there with her legs spread, her skirt pulled up and her underwear down.

They then walked to the convenience store, the one that sold Texas taters, and Oltarsh used a pay phone to call the FSU police. He returned to his room on the third floor of the Pike house and watched from a window along with his accomplices as police officers and paramedics arrived at 5:30 in the morning. An ambulance sped Maria to Tallahassee Memorial Hospital.

Her blood alcohol level was recorded at .349, three times the legal limit in Florida and one 4-ounce drink away from alcohol concentration that could have proved fatal.

her body.

Later that day, she returned to Dorman Hall and stood in the shower, wanting desperately for the hot water to wash everything away.

She just wanted to forget it ever happened. Only 20% of campus victims from the ages of 18 to 24 report their assaults to their institutions or law enforcement agencies, according to the Department of Justice.

Maria did not want to press charges but District Attorney Willie Meggs did.

The grand jury concluded Maria was physically helpless and was unable to resist and on May 18, 1988, Oltarsh and Stewart were indicted on a sexual battery charge. Oltarsh and McPharlin were charged with culpable negligence and kidnapping in connection with moving Maria. In addition, Oltarsh faced charges related to writing on Maria's thighs and giving her alcohol as a minor. McPharlin was charged with possession of alcohol by a minor.

The three maintained their innocence, saying that Maria was a willing participant.

But Meggs felt Pi Kappa Alpha was covering up a crime.

The indictments were largely based on the testimony of the fraternity brother who was given immunity and not charged in exchange. It was believed to be the first time members of a fraternity on a major university campus faced prosecution in a gang rape.

Meggs understood the concept of fraternal loyalty from his service in the Marine Corps and years spent pounding Tallahassee pavements in his first beat as a cop. But he despised how the Pikes closed ranks around their own and had to be subpoenaed to answer questions.

Maria crossed this intersection on the south side of campus on her way to the Pi Kappa Alpha house in 1988. She thought she would be attending a party. She was wrong.

Even after all these years, Meggs gets emotional talking about Maria's case.

"Their conduct was so egregious," he tells me. "It was unconscionable."

"I was really disappointed that there wasn't one red-blooded American in this fraternity who said: 'Stop it.' That not one young man asked: 'What if that was my sister?' "

It didn't matter to Meggs, his assistant state attorneys who argued the case or the investigating police officers that Maria drank too much. Or that she was known as a party girl. She was not conscious enough to have consented that night.

Even "a prostitute can be raped," he says, if the sex act is not consensual. And in Maria's case, he says, she "was in such a state that she could not say 'no.'"

The state built its felony case against Oltarsh, who it determined was the instigator and ring leader. Photographs show the 23-year-old college junior appearing in court wearing jail garb and a smug smile.

As the legal proceedings began, deep divisions surfaced on campus. I was editor of an independent newspaper called the Florida Flambeau that broke the news of Maria's rape and covered every turn of the story. I understood her need for privacy but was bothered that we never heard her version of events. Letters to the editor attacked Maria as a liar, or someone who deserved what she got. Some called her unpatriotic for smearing the reputations of FSU's upstanding young men.

Maria couldn't bear to watch television or read the newspapers. The women in her dorm stopped talking to her. She was afraid to walk out the door.

wake up to the sweet smell. She was the only person in her family to whom Maria confided what had happened.

In the fall of 1988, Maria returned to FSU.

She had a nose job, dyed her hair and exchanged her black clothes for pastels so she wouldn't be instantly recognizable. She thought she could sit in her classes again as a sophomore. She thought she could reinvent herself.

But when she came across the word "whore" scrawled on her memo board, everything went dark again. She popped over-the-counter sleeping pills, one after another. Luckily, she vomited them before they could kill her.

Her parents arrived from Louisiana, packed up her belongings and took her home. She quit FSU and ended up in a halfway house in Texas, battling post-traumatic stress, depression, alcoholism and eating disorders -- typical of many college rape survivors.

The rape set Maria on a downward spiral of shame, self-loathing, fear, anger. And more shame.

In May 1990 Oltarsh's lawyer, Craig Stella, served her a subpoena to return to Tallahassee for a deposition before a widely publicized trial.

Tallahassee attorney Dean LeBoeuf sought to protect Maria during the legal proceedings. The case was groundbreaking, he says; a judge ruled defense lawyers could not interrogate Maria about her sexual history.

She sat in Room 314-E at the Leon County Courthouse, clutched a cushion to her chest and answered difficult questions. But prosecutors succeeded in persuading the judge to apply Florida's rape shield law, then fairly new, to her deposition. The judge ruled defense lawyers could not use Maria's sexual history against her.

Attorney Dean LeBoeuf, who represented Maria throughout her ordeal, says as far as he knows, it was the first time the rape shield law was utilized in pre-trial testimony.

Pi Kappa Alpha brothers in blue blazers packed the courtroom for Oltarsh's trial. On the other side of the aisle sat a group of women who had decided they would appear there every day to support Maria. They were professors, students and women who worked in rape crisis centers; they wore little red ribbons to show solidarity. Many had written letters to Maria on the eve of her deposition. Patricia Martin, a professor of social work at FSU, was one of them.

"We are here for you," Martin wrote. "I admire you -- only a person with strength and courage could hang in there, like you have done and are doing."

The women's letters were Maria's "lifeline" and became rare treasures from that era. They were the closest thing she received to the kinds of messages of support women and girls can get these days when social media sites like Facebook, Twitter or Snapchat are used for the good.

Maria's therapist, who spoke to me with Maria's permission, feels certain that Maria would not have felt as ostracized had her rape happened today.

"We have advanced tremendously in the last 30 years," says Dr. Tina Goodin. "A lot of what was in the closet then is out today. And social media, when it is used well, changes things a lot. We see a sense of compassion and women asserting themselves."

What rape survivors want, says Goodin, is to be validated in their experience; to know that what happened to them did not occur because they are crazy. In Maria's case, the only comfort came from those letters she received from Martin and others.

"I knew she did not have any support," Martin says. "Her so-called friends were siding with the boys."

Martin is now retired but remains a researcher on campus rape. She published a widely-cited paper in 1989 on fraternities and sexual assault based on Maria's case.

"I thought I was aware but I was so shocked by this case," Martin says. "It was so unsavory -- every last bit of it."

Campus safety had become a hot topic in the 1980s, but Martin says attention to the problem waned in the 1990s. "Maybe we thought things were fixed."

They aren't. "Alcohol, fraternities, an adoration for athletes," she says, "are all important factors."

In the end, Maria was spared the experience of having to look Oltarsh in the eye. Facing a life prison sentence, he accepted an 11th-hour plea deal.

McPharlin pleaded no contest, had the charges reduced and was placed on probation for a year. Stewart got five years probation on his no-contest plea to sexual battery. Both were spared felony records. Oltarsh received a tougher sentence of 364 days in jail and 20 years of probation.

After his release, Oltarsh violated the terms of his probation by possessing a firearm and failing to tell his

After his initial sentencing, Oltarsh told reporters that he was convinced he would have been acquitted had all the evidence been laid out in court. He has never spoken publicly about Maria. Nor did he respond to a recent request for an interview made through Stella, his lawyer.

Stella says his client took the plea deal unwillingly; Oltarsh does not believe he did anything wrong.

District Attorney Willie Meggs pulled out boxes of files from the case against Daniel Oltarsh, the Pi Kappa Alpha fraternity member who faced life in prison in Maria's rape case.

"I was charged with defending a young man who very much wanted to put this behind him (and not) risk spending 20 years of his life in a penitentiary," Stella says. "I do believe the facts of the case warranted a not guilty verdict. I thought that then and I believe that now.

"Was it incredibly poor taste?" Stella asks. "Yes, but not necessarily criminal."

Oltarsh's probationary period ended this year. He lives in Fort Lauderdale and can be found on the Florida sex offender registry.

'I felt robbed'

Maria had never seen her deposition until I took her to the Leon County Courthouse to meet with Meggs. I'd caught up with him a few days earlier in his fourth-floor office, surrounded by boxes of files he had pulled for us from a documents warehouse. He told me he liked to reconnect with crime victims in cases he

helped a lot of people in the long run. You were courageous."

It is only in the last decade, after three failed marriages and the deaths of her mother and sister -- both alcohol related -- that Maria has begun to heal.

She returned to college in Texas and in 2002 completed a master's degree in psychology.

"I went back to school because I felt robbed. Robbed of my education, robbed of my typical student life, robbed of my aspirations, robbed of success," she says. "Those guys took all that away from me. I showed them wrong."

FSU took the significant step of suspending Pi Kappa Alpha as the investigation unfolded. The fraternity was banned from campus until its reinstatement in 2000. The Pikes own a new house about a mile east of their previous location. Last year, the fraternity was suspended again during another sexual battery investigation but the members were cleared.

Maria knows she will never get an apology -- from her attackers or others who revictimized her with their actions.

But she can get off the rollercoaster ride of recovery and relapses that has dominated her life. She has recovered from an anorexic weight of 91 pounds and has not touched alcohol in two years.

"For several years, I blocked it as though it happened to someone else just so I could move forward with my life," she says. "I was trying to make myself disappear."

Her words resonate. They are the same words I heard on the other side of the world, when I arrived at a remote village in India to speak with Mathura, a woman who was raped as a teenager by two police officers. They are the same words I use to describe my actions after being raped by a classmate.

At the courthouse, we obtain a copy of Maria's deposition and other case files. She gasps as she reads her own words all these years later.

She tells me she is proud of 18-year-old Maria's fortitude.

Maria walked through the FSU campus clutching an amethyst geode. She hoped to find a sense of peace after revisiting the scene of the crime.

Rape is 'not the sum of me'

For years, the old Pike house stood like an eye sore, boarded up and crumbling. For many, it was hard to drive by it without thinking about the rape.

Maria and I stand on the street where the fraternity's mansion once soared. In its place are new dorms built to match the Old English style of most other buildings on campus and nestled amid trees. It's an idyllic setting, but Maria sees different images.

They can't be unseen.

Maria is 46 now and works as a manager in an agency that oversees programs for people with disabilities. She couldn't have stood again on this corner of the FSU campus any earlier in her life. She was not ready to face the past, she says, until now.

She sees herself in all the young women who walk past us. It's a different world with smart phones and emergency blue lights every few feet. But in many ways, it feels the same.

"I feel nervous for them," she says.

She acknowledges that in most of her life, she turned to alcohol to cope with conflict, to numb her pain. And that it has taken all this time for her to shed her shame and say out loud that what happened to her on this street was not her fault. "I didn't deserve it."

I look at Maria, her fingers wrapped around a Marlboro, and feel I have known her for a lifetime. I understand how the women in "The Hunting Ground" were able to connect in such profound ways.

There is solace in shared experiences, I think to myself, even rape. It is as though I don't have to say my thoughts out loud.

We climb into my Mini Cooper in silence and drive down Jefferson Street, away from campus. Maria, I know, is finally leaving FSU.

"The Hunting Ground" aired on CNN on Sunday, November 22, at 8 p.m. ET. The film was immediately followed by a special hosted by CNN's Alisyn Camerota. Subjects of the film and critics alike discussed the issues the documentary raised and controversy surrounding sexual abuse allegations on college campuses across America.

On December 1, 2015, "The Hunting Ground" was shortlisted for an Academy Award for Best Feature Documentary. For a full list of shortlisted films please click this link.

The documentary is currently available on VOD including iTunes.

The New York Times Magazine | http://nyti.ms/1SHnEfT

Magazine

Have We Learned Anything From the Columbia Rape Case?

By EMILY BAZELON MAY 29, 2015

Last week, one of the messiest campus sexual-assault cases in recent memory came to an equally messy conclusion when Emma Sulkowicz, aided by four friends, carried a 50-pound mattress onto the stage at a Columbia University graduation ceremony. In a much-publicized art-performance-slash-protest, Sulkowicz had carried the mattress everywhere she went on campus since the beginning of her senior year last fall, vowing to continue to do so until she graduated — or until Columbia expelled a classmate she accused of rape in April 2013. More than seven months earlier, she says, Paul Nungesser, a friend at the time, raped her during what had until that point been a consensual encounter at the start of their sophomore year.

Columbia investigated, held a hearing and cleared Nungesser of responsibility. But the university also gave Sulkowicz academic credit and logistical support for “Mattress Performance (Carry That Weight),” which doubled as her senior thesis project. For the survivor movement, Sulkowicz’s art — with its powerful image of a woman publicly shouldering the burden of a violation she felt in her bedroom — has been a kind of triumph.

For Nungesser, it has been a nightmare. Though he has not been found at fault, he was called a rapist on a list anonymously scrawled in campus bathrooms. Columbia’s undergraduate newspaper published his name when Sulkowicz went to the police. (Sulkowicz later stopped talking to investigators because, she says, the police were visiting her apartment unexpectedly. Nungesser met with prosecutors of his own accord. No charges were brought.) Nungesser’s friends fell away. He found

himself shunned on campus. In April, he sued Columbia for gender discrimination, arguing that the university supported a campaign to bully and harass him and that the administration would never have let a male student target a female student in the same way he had been targeted.

Last week's graduation exemplified the way in which Columbia has been caught between two students in an increasingly bitter fight over truth and narrative. Columbia officials asked Sulkowicz not to carry the mattress onstage, but in the end let her go ahead. Then Lee C. Bollinger, the university president, turned away as Sulkowicz approached him, not shaking her hand as he did those of the other graduates. (The university later said it was because the mattress got in the way; here's the video if you want to judge for yourself.) The next day, the campus woke up to nasty posters in the neighborhood, with a picture of Sulkowicz and her mattress and the words "Pretty Little Liar" and "#RAPEHOAX." The trolling has since continued online.

Nungesser's parents, meanwhile, wrote in an email to me that "graduation was devastating." They were especially upset by an exhibition at a university gallery, preceding graduation, that included Sulkowicz's prints of a naked man with an obscenity and of a couple having sex, inked over a copy of a Times article about Nungesser. "We cannot imagine a more humiliating experience," Andreas Probosch, Nungesser's father, told me via email after going to the exhibition. Sulkowicz wrote in an email that the images are cartoons. "What are the functions of cartoons?" she asked. "Do they depict the people themselves (a feat which, if you've done enough reading on art theory, you will realize is impossible), or do they illustrate the *stories* that have circulated about a person?"

Sulkowicz and Nungesser's case is unusual in the exhausting intensity of the media circus that has attended it. But the swirl of accusations and counteraccusations, and the reaction to them, reflects the current moment — a transitional period in the evolution of how universities handle sexual assault. The Obama administration has demanded that institutions do more to investigate and adjudicate complaints of sexual assault and harassment, but it's not clear that they have shown that their disciplinary processes have the requisite legitimacy. It is a moment in which, as the tumult at Columbia shows, we can't afford to stay for long.

As universities scramble to improve their disciplinary processes, it's hard to know how much things are changing on the ground; the cases remain shrouded in secrecy. There are good reasons to protect student privacy, not to mention a federal law requiring institutions to do so. But the utter lack of transparency also imposes a cost. The smattering of cases that blow up in the press may well present a distorted view, lowering public confidence. (This is what administrators and lawyers who see these cases up close say.) And beyond generalities, universities usually can't respond to criticism about specific cases.

As a result, even the procedural disputes between Sulkowicz and Nungesser are lost in the land of she-said-he-said. Sulkowicz has accused university administrators of a litany of failures, including asking ignorant and insensitive questions about the physical positions that she and Nungesser had engaged in during sex. (She says that one panelist remarked, "I don't know how it's possible to have anal sex without lubrication first.")

Does this reflect a bias that definitively disadvantaged Sulkowicz in pleading her case? Or was it a mistake in a mostly reasonable effort to ask Sulkowicz the kind of probing if grueling questions that are necessary to determine the truth in a rape case like this one? There is no publicly available tape or transcript of the hearing, and so no way to prove whether it was fair or unfair.

Columbia hasn't defended its handling of the case, or the outcome, beyond rejecting Sulkowicz's appeal. To Nungesser, *that*'s what is unfair. "They have a process in place, which I followed to the letter," he told me. "I had everything to lose in it. And it's been worth nothing. Absolutely nothing." Columbia officials think that declining to comment about publicized cases is necessary to encourage other students to go to rape counselors or through the disciplinary process. "Students should be confident that the university is not going to talk about these cases in any respect," said Suzanne B. Goldberg, a Columbia law professor who is the executive vice president for university life.

Nungesser says that he prevailed despite Columbia's refusal to consider his best evidence: Facebook messages that he and Sulkowicz sent to each other before and after the alleged rape. The messages sound friendly: "I feel like we need to have some

real time where we can talk about life and thingz/because we still haven't really had a paul-emma chill sesh since summmmerrrr," Sulkowicz wrote a few days after the night in question. After The Daily Beast published the exchanges, Sulkowicz explained them to the website Jezebel, recalling, "I'm being irrational, thinking that talking with him would help me."

Sulkowicz says some of the Facebook messages *were* admitted as evidence. Her recollection is at odds with that of a graduate student who attended the hearings with Nungesser, as his designated "supporter," and said the messages were not included. In court, the Facebook messages surrounding the night of the alleged rape would probably be admitted in a criminal case as relevant, according to Deborah Tuerkheimer, a Northwestern University law professor, and the alleged victim would also have the chance to explain them. (This is also what Columbia's policy now appears to provide, though the rule was somewhat different at the time of the hearing.)

Deciding which evidence to admit is a minefield that universities have to pick their way through. For example, Columbia says it does not allow "prior conduct violations" into evidence unless the alleged assailant has been found "responsible" for them. (That's the word universities use instead of "guilty.") State courts would usually exclude evidence of prior sexual misconduct in a criminal sexual assault case, Tuerkheimer says, though federal courts may admit it.

The distinction is the subject of another dispute over process between Nungesser and Sulkowicz. At the time Sulkowicz came forward, two other women accused Nungesser of different forms of sexual misconduct. He was found not responsible. She says the panel at her hearing did not consider the other allegations against him. Nungesser's father said the allegations were mixed together. (To briefly summarize them, Nungesser's girlfriend from freshman year said their monthslong relationship was abusive and included nonconsensual sex; the case was dropped after she stopped answering Columbia's emails over the summer. A second woman, who lived at the same literary society as Nungesser, said he grabbed her in an empty room during a party there. A third accusation against Nungesser, brought in 2014, was dismissed earlier this month.)

Nungesser denies all the allegations. He was initially found responsible in the party incident, but he was granted an appeal, and the finding against him was overturned. The appeal raises another issue with the rules. At the time it took place, the university said that a supporter at a hearing had to be a current Columbia faculty member, administrator or student. The woman who said Nungesser grabbed her at the party had graduated, and so had the close friends she would have chosen as supporters, she told me. The lack of emotional support was one reason she didn't want to go through a rehearing.

This is an issue Columbia has tried to address. Last summer, the university announced significant changes to its sexual assault and harassment procedures. Students are now permitted to bring a lawyer to their hearings, and if they can't afford an attorney, the university will provide one. The university also hired new investigators and other staff members and gave training on how to hear cases to the administrators who serve as panelists. Columbia also started a "sexual respect initiative" aimed at prevention.

Maybe the changes will help prevent another case from going awry in the way Sulkowicz and Nungesser's did. Both feel that they are victims. Sulkowicz has concluded that "the system is broken because it is so much based on proof that a lot of rape survivors don't have." She sees it this way: "Even if you have physical evidence, you can prove that violence occurred but not that someone didn't want the sex to be violent." Nungesser, of course, sees a different kind of failing. "Some part of me will never move on from this," he said. "It will forever change how I walk into a room. I had immense trust in people and institutions, perhaps naïvely, and that trust is very much gone."

Their reactions, natural but also unrealistic in their expectations of this or any other justice system, underscore an old truth: Rape is extremely difficult to prosecute both effectively and fairly. Should universities be handling these cases at all? Plenty of people are asking that question. And yet, in the eyes of the government, universities have this responsibility because of an important principle rooted in the federal law, Title IX: If a rape prevents a victim from taking full advantage of her education, then it is a civil rights violation as well as a crime. Often victims want the kind of relief — counseling, or academic accommodations, or the assurance that their

alleged assailants won't contact them — that the criminal justice system isn't set up to provide. And the university's obligations don't just extend to investigating and hearing cases. Institutions also have to help students figure out how to prevent sexual assault, so fewer victims face this barrier to education to begin with.

The demands now being made of universities are still relatively new. It's not surprising that it's taking time to meet them. The problem is that it's hard to be patient.

Emily Bazelon is a staff writer for the magazine and the Truman Capote Fellow at Yale Law School.

Rolling Stone and UVA: The Columbia University Graduate School of Journalism Report

An anatomy of a journalistic failure

BY SHEILA CORONEL, STEVE COLL, DEREK KRAVITZ April 5, 2015

A NOTE FROM THE EDITOR: Last November, we published a story, 'A Rape on Campus' [RS 1223], that centered around a University of Virginia student's horrifying account of her alleged gang rape at a campus fraternity house. Within days, commentators started to question the

veracity of our narrative. Then, when The Washington Post *uncovered details suggesting that the assault could not have taken place the way we described it, the truth of the story became a subject of national controversy.*

As we asked ourselves how we could have gotten the story wrong, we decided the only responsible and credible thing to do was to ask someone from outside the magazine to investigate any lapses in reporting, editing and fact-checking behind the story. We reached out to Steve Coll, dean of the Columbia School of Journalism, and a Pulitzer Prize-winning reporter himself, who accepted our offer. We agreed that we would cooperate fully, that he and his team could take as much time as they needed and write whatever they wanted. They would receive no payment, and we promised to publish their report in full. (A condensed version of the report will appear in the next issue of the magazine, out April 8th.)

This report was painful reading, to me personally and to all of us at Rolling Stone*. It is also, in its own way, a fascinating document — a piece of journalism, as Coll describes it, about a failure of journalism. With its*

publication, we are officially retracting 'A Rape on Campus.' We are also committing ourselves to a series of recommendations about journalistic practices that are spelled out in the report. We would like to apologize to our readers and to all of those who were damaged by our story and the ensuing fallout, including members of the Phi Kappa Psi fraternity and UVA administrators and students. Sexual assault is a serious problem on college campuses, and it is important that rape victims feel comfortable stepping forward. It saddens us to think that their willingness to do so might be diminished by our failings.

Will Dana, Managing Editor

Last July 8, Sabrina Rubin Erdely, a writer for *Rolling Stone*, telephoned Emily Renda, a rape survivor working on sexual assault issues as a staff member at the University of Virginia. Erdely said she was searching for a single, emblematic college rape case that would show "what it's like to be on campus now ... where not only is rape so prevalent but also that there's this pervasive culture of sexual harassment/rape culture," according to Erdely's notes of the conversation.[1]

Renda told Erdely that many assaults

Wiz Khalifa Explains How He And Kanye West Squashed Their Beef

The 2016 Grammys Just Gave You A Free Ticket To See 'Hamilton'

take place during parties where "the goal is to get everyone blackout drunk." She continued, "There may be a much darker side of this" at some fraternities. "One girl I worked with closely alleged she was gang-raped in the fall, before rush, and the men who perpetrated it were young guys who were not yet members of the fraternity, and she remembers one of them saying to another ... 'C'mon man, don't you want to be a brother?'"

Renda added, "And obviously, maybe her memory of it isn't perfect."

Erdely's notes set down her reply: "I tell her that it's totally plausible."

Renda put the writer in touch with a rising junior at UVA who would soon be known to millions of *Rolling Stone* readers as "Jackie," a shortened version of her true first name. Erdely said later that when she first encountered Jackie, she felt the student "had this stamp of credibility" because a university employee had connected them. Earlier that summer, Renda had even appeared before a Senate committee and had made reference to Jackie's allegations during her testimony – another apparent sign of the case's seriousness.

"I'd definitely be interested in sharing my story," Jackie wrote in an email a few days later.

On July 14, Erdely phoned her. Jackie launched into a vivid account of a monstrous crime. She said, according to Erdely's notes, that in September 2012, early in her freshman year, a third-year student she knew as a fellow lifeguard at the university's aquatic center had invited her to "my first fraternity party ever." After midnight, her date took her upstairs to a darkened bedroom. "I remember looking at the clock and it was 12:52 when we got into the room," she told Erdely. Her date shut the door behind them. Jackie continued, according to the writer's notes:

My eyes were adjusting to the dark. And I said his name and turned around. ... I heard voices and I started to scream and someone pummeled into me and told me to shut up. And that's when I tripped and fell against the coffee table and it smashed underneath me and this other boy, who was throwing his weight on top of me. Then one of them grabbed my shoulders. ... One of them put his hand over my mouth and I bit him – and he straight-up punched me in the face. ... One of them said, 'Grab its motherfucking leg.' As soon

as they said it, I knew they were going to rape me.

The rest of Jackie's account was equally precise and horrifying. The lifeguard coached seven boys as they raped her one by one. Erdely hung up the phone "sickened and shaken," she said. She remembered being "a bit incredulous" about the vividness of some of the details Jackie offered, such as the broken glass from the smashed table. Yet Jackie had been "confident, she was consistent." (Jackie declined to respond to questions for this report. Her lawyer said it "is in her best interest to remain silent at this time." The quotations attributed to Jackie here come from notes Erdely said she typed contemporaneously or from recorded interviews.)[2]

Between July and October 2014, Erdely said, she interviewed Jackie seven more times. The writer was based in Philadelphia and had been reporting for *Rolling Stone* since 2008. She specialized in true-crime stories like "The Gangster Princess of Beverly Hills," about a high-living Korean model and self-styled Samsung heiress accused of transporting 7,000 pounds of marijuana. She had written about pedophile priests and sexual assault in

the military. Will Dana, the magazine's managing editor, considered her "a very thorough and persnickety reporter who's able to navigate extremely difficult stories with a lot of different points of view."

Jackie proved to be a challenging source. At times, she did not respond to Erdely's calls, texts and emails. At two points, the reporter feared Jackie might withdraw her cooperation. Also, Jackie refused to provide Erdely the name of the lifeguard who had organized the attack on her. She said she was still afraid of him. That led to tense exchanges between Erdely and Jackie, but the confrontation ended when *Rolling Stone*'s editors decided to go ahead without knowing the lifeguard's name or verifying his existence. After that concession, Jackie cooperated fully until publication.

Erdely believed firmly that Jackie's account was reliable. So did her editors and the story's fact-checker, who spent more than four hours on the telephone with Jackie, reviewing every detail of her experience. "She wasn't just answering, 'Yes, yes, yes,' she was correcting me," the checker said. "She was describing the scene for me in a very vivid way. ... I did not have doubt." (*Rolling Stone* requested

that the checker not be named because she did not have decision-making authority.)

Rolling Stone published "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" on Nov. 19, 2014. It caused a great sensation. "I was shocked to have a story that was going to go viral in this way," Erdely said. "My phone was ringing off the hook." The online story ultimately attracted more than 2.7 million views, more than any other feature not about a celebrity that the magazine had ever published.

A week after publication, on the day before Thanksgiving, Erdely spoke with Jackie by phone. "She thanked me many times," Erdely said. Jackie seemed "adrenaline-charged ... feeling really good."

Erdely chose this moment to revisit the mystery of the lifeguard who had lured Jackie and overseen her assault. Jackie's unwillingness to name him continued to bother Erdely. Apparently, the man was still dangerous and at large. "This is not going to be published," the writer said, as she recalled. "Can you just tell me?"

Jackie gave Erdely a name. But as the reporter typed, her fingers stopped.

Jackie was unsure how to spell the lifeguard's last name. Jackie speculated aloud about possible variations.

"An alarm bell went off in my head," Erdely said. How could Jackie not know the exact name of someone she said had carried out such a terrible crime against her – a man she professed to fear deeply?

Over the next few days, worried about the integrity of her story, the reporter investigated the name Jackie had provided, but she was unable to confirm that he worked at the pool, was a member of the fraternity Jackie had identified or had other connections to Jackie or her description of her assault. She discussed her concerns with her editors. Her work faced new pressures. The writer Richard Bradley had published early if speculative doubts about the plausibility of Jackie's account. Writers at Slate had challenged Erdely's reporting during a podcast interview. She also learned that T. Rees Shapiro, a Washington Post reporter, was preparing a story based on interviews at the University of Virginia that would raise serious doubts about *Rolling Stone*'s reporting.

Late on Dec. 4, Jackie texted Erdely, and the writer called back. It was by now after midnight. ″We proceeded to have a conversation that led me to have serious doubts,″ Erdely said.

She telephoned her principal editor on the story, Sean Woods, and said she had now lost confidence in the accuracy of her published description of Jackie′s assault. Woods, who had been an editor at *Rolling Stone* since 2004, ″was just stunned,″ he said. He ″raced into the office″ to help decide what to do next. Later that day, the magazine published an editor′s note that effectively retracted *Rolling Stone*′s reporting on Jackie′s allegations of gang rape at the University of Virginia. ″It was the worst day of my professional life,″ Woods said.

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Failure and Its Consequences

Rolling Stone′s repudiation of the main narrative in ″A Rape on Campus″ is a story of journalistic failure that was avoidable. The failure encompassed reporting, editing, editorial supervision and fact-checking. The magazine set aside or rationalized as unnecessary essential practices of reporting that, if

pursued, would likely have led the magazine's editors to reconsider publishing Jackie's narrative so prominently, if at all. The published story glossed over the gaps in the magazine's reporting by using pseudonyms and by failing to state where important information had come from.

In late March, after a four-month investigation, the Charlottesville, Va., police department said that it had "exhausted all investigative leads" and had concluded, "There is no substantive basis to support the account alleged in the *Rolling Stone* article."[3]

The story's blowup comes as another shock to journalism's credibility amid head-swiveling change in the media industry. The particulars of *Rolling Stone*'s failure make clear the need for a revitalized consensus in newsrooms old and new about what best journalistic practices entail, at an operating-manual-level of detail.

As at other once-robust print magazines and newspapers, *Rolling Stone*'s editorial staff has shrunk in recent years as print advertising revenue has fallen and shifted online. The magazine's full-time editorial ranks, not including art or photo staff,

have contracted by about 25 percent since 2008. Yet *Rolling Stone* continues to invest in professional fact-checkers and to fund time-consuming investigations like Erdely's. The magazine's records and interviews with participants show that the failure of "A Rape on Campus" was not due to a lack of resources. The problem was methodology, compounded by an environment where several journalists with decades of collective experience failed to surface and debate problems about their reporting or to heed the questions they did receive from a fact-checking colleague.

Erdely and her editors had hoped their investigation would sound an alarm about campus sexual assault and would challenge Virginia and other universities to do better. Instead, the magazine's failure may have spread the idea that many women invent rape allegations. (Social scientists analyzing crime records report that the rate of false rape allegations is 2 to 8 percent.) At the University of Virginia, "It's going to be more difficult now to engage some people ... because they have a preconceived notion that women lie about sexual assault," said Alex Pinkleton, a UVA student and rape survivor who was one of Erdely's

sources.

There has been other collateral damage. ″It′s completely tarnished our reputation,″ said Stephen Scipione, the chapter president of Phi Kappa Psi, the fraternity Jackie named as the site of her alleged assault. ″It′s completely destroyed a semester of our lives, specifically mine. It′s put us in the worst position possible in our community here, in front of our peers and in the classroom.″

The university has also suffered. *Rolling Stone*′s account linked UVA′s fraternity culture to a horrendous crime and portrayed the administration as neglectful. Some UVA administrators whose actions in and around Jackie′s case were described in the story were depicted unflatteringly and, they say, falsely. Allen W. Groves, the University dean of students, and Nicole Eramo, an assistant dean of students, separately wrote to the authors of this report that the story′s account of their actions was inaccurate.[4]

In retrospect, Dana, the managing editor, who has worked at *Rolling Stone* since 1996, said the story′s breakdown reflected both an ″individual failure″ and ″procedural failure, an institutional failure. ...

Every single person at every level of this thing had opportunities to pull the strings a little harder, to question things a little more deeply, and that was not done."

Yet the editors and Erdely have concluded that their main fault was to be too accommodating of Jackie because she described herself as the survivor of a terrible sexual assault. Social scientists, psychologists and trauma specialists who support rape survivors have impressed upon journalists the need to respect the autonomy of victims, to avoid re-traumatizing them and to understand that rape survivors are as reliable in their testimony as other crime victims. These insights clearly influenced Erdely, Woods and Dana. "Ultimately, we were too deferential to our rape victim; we honored too many of her requests in our reporting," Woods said. "We should have been much tougher, and in not doing that, we maybe did her a disservice."

Erdely added: "If this story was going to be about Jackie, I can't think of many things that we would have been able to do differently. ... Maybe the discussion should not have been so much about how to accommodate her but should have been about whether

she would be in this story at all." Erdely's reporting led her to other, adjudicated cases of rape at the university that could have illustrated her narrative, although none was as shocking and dramatic as Jackie's.

Yet the explanation that *Rolling Stone* failed because it deferred to a victim cannot adequately account for what went wrong. Erdely's reporting records and interviews with participants make clear that the magazine did not pursue important reporting paths even when Jackie had made no request that they refrain. The editors made judgments about attribution, fact-checking and verification that greatly increased their risks of error but had little or nothing to do with protecting Jackie's position.

It would be unfortunate if *Rolling Stone*'s failure were to deter journalists from taking on high-risk investigations of rape in which powerful individuals or institutions may wish to avoid scrutiny but where the facts may be underdeveloped. There is clearly a need for a more considered understanding and debate among journalists and others about the best practices for reporting on rape survivors, as well as on sexual assault allegations that have not been

adjudicated. This report will suggest ways forward. It will also seek to clarify, however, why *Rolling Stone*'s failure with "A Rape on Campus" need not have happened, even accounting for the magazine's sensitivity to Jackie's position. That is mainly a story about reporting and editing.

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'How Else Do You Suggest I Find It Out?'

By the time *Rolling Stone*'s editors assigned an article on campus sexual assault to Erdely in the spring of 2014, high-profile rape cases at Yale, Harvard, Columbia, Vanderbilt and Florida State had been in the headlines for months. The Office of Civil Rights at the federal Department of Education was leaning on colleges to reassess and improve their policies. Across the country, college administrators had to adjust to stricter federal oversight as well as to a new generation of student activists, including women who declared openly that they had been raped at school and had not received justice.

There were numerous reports of campus assault that had been mishandled by universities. At Columbia, an aggrieved student

dragged a mattress around campus to call attention to her account of assault and injustice. The facts in these cases were sometimes disputed, but they had generated a wave of campus activism. "My original idea," Dana said, was "to look at one of these cases and have the story be more about the process of what happens when an assault is reported and the sort of issues it brings up."

Jackie's story seemed a powerful candidate for such a narrative. Yet once she heard the story, Erdely struggled to decide how much she could independently verify the details Jackie provided without jeopardizing Jackie's cooperation. In the end, the reporter relied heavily on Jackie for help in getting access to corroborating evidence and interviews. Erdely asked Jackie for introductions to friends and family. She asked for text messages to confirm parts of Jackie's account, for records from Jackie's employment at the aquatic center and for health records. She even asked to examine the bloodstained red dress Jackie said she had worn on the night she said she was attacked.

Jackie gave the reporter some help. She provided emails from a pool supervisor as evidence of her employment there. She introduced

Erdely to Rachel Soltis, a freshman-year suitemate. Soltis confirmed that in January 2013, four months after the alleged attack, Jackie had told her that she had been gang-raped.

Yet Jackie could also be hard to pin down. Other interviews Jackie said she would facilitate never materialized. ″I felt frustrated, but I didn′t think she didn′t want to produce″ corroboration, Erdely said. Eventually, Jackie told Erdely that her mother had thrown away the red dress. She also said that her mother would be willing to talk to Erdely, but the reporter said that when she called and left messages several times, the mother did not respond.

There were a number of ways that Erdely might have reported further, on her own, to verify what Jackie had told her. Jackie told the writer that one of her rapists had been part of a small discussion group in her anthropology class. Erdely might have tried to verify independently that there was such a group and to identify the young man Jackie described. She might have examined Phi Kappa Psi′s social media for members she could interview and for evidence of a party on the night Jackie described. Erdely might have looked for students who

worked at the aquatic center and sought out clues about the lifeguard Jackie had described. Any one of these and other similar reporting paths might have led to discoveries that would have caused *Rolling Stone* to reconsider its plans. But three failures of reporting effort stand out. They involve basic, even routine journalistic practice – not special investigative effort. And if these reporting pathways had been followed, *Rolling Stone* very likely would have avoided trouble.

Three friends and a 'shit show'

During their first interview, Jackie told Erdely that after she escaped the fraternity where seven men, egged on by her date, had raped her, she called three friends for help.

She described the two young men and one woman – now former friends, she told Erdely – as Ryan, Alex and Kathryn. She gave first names only, according to Erdely's notes. She said they met her in the early hours of Sept. 29, 2012, on the campus grounds. Jackie said she was "crying and crying" at first and that all she could communicate was that "something bad" had happened. She said her friends understood that she had been sexually assaulted. (In

interviews for this report, Ryan and Alex said that Jackie told them that she had been forced to perform oral sex on multiple men.) In Jackie's account to Erdely, Ryan urged her to go to the university women's center or a hospital for treatment. But Alex and Kathryn worried that if she reported a rape, their social lives would be affected. "She's going to be the girl who cried 'rape' and we'll never be allowed into any frat party again," Jackie recalled Kathryn saying.

Jackie spoke of Ryan sympathetically, but the scene she painted for *Rolling Stone*'s writer was unflattering to all three former friends. Journalistic practice – and basic fairness – require that if a reporter intends to publish derogatory information about anyone, he or she should seek that person's side of the story.

Erdely said that while visiting UVA, she did ask Alex Pinkleton, a student and assault survivor, for help in identifying or contacting the three. (Pinkleton was not the "Alex" to whom Jackie referred in her account.) But Pinkleton said she would need to ask Jackie for permission to assist the writer. Erdely did not follow up with her. It should have been possible for Erdely to identify the trio independently. Facebook friend

listings might have shown the names. Or, Erdely could have asked other current students, besides Pinkleton, to help.

Instead, Erdely relied on Jackie. On July 29, she asked Jackie for help in speaking to Ryan, "about corroborating that night, just a second voice?" Jackie answered, according to the writer's notes, that while "Ryan may be awkward, I don't understand why he wouldn't." But Jackie did not respond to follow-up messages Erdely left.

On Sept. 11, Erdely traveled to Charlottesville and met Jackie in person for the first time, at a restaurant near the UVA campus. With her digital recorder running, the reporter again asked about speaking to Ryan. "I did talk to Ryan," Jackie disclosed. She said she had bumped into him and had asked if he would be interested in talking to *Rolling Stone*. Jackie went on to quote Ryan's incredulous reaction: "No! ... I'm in a fraternity here, Jackie, I don't want the Greek system to go down, and it seems like that's what you want to happen. ... I don't want to be a part of whatever little shit show you're running."

"Ryan is obviously out," Erdely told

Jackie a little later.

Yet Jackie never requested – then or later – that *Rolling Stone* refrain from contacting Ryan, Kathryn or Alex independently. ″I wouldn't say it was an obligation″ to Jackie, Erdely said later. She worried, instead, that if ″I work round Jackie, am I going to drive her from the process?″ Jackie could be hard to get hold of, which made Erdely worry that her cooperation remained tentative. Yet Jackie never said that she would withdraw if Erdely sought out Ryan or conducted other independent reporting.

″They were always on my list of people″ to track down, Erdely said of the three. However, she grew busy reporting on UVA's response to Jackie's case, she said. She doesn't remember having a distinct conversation about this issue with Woods, her editor. ″We just kind of agreed. ... We just gotta leave it alone.″ Woods, however, recalled more than one conversation with Erdely about this. When Erdely said she had exhausted all the avenues for finding the friends, he said he agreed to let it go.

If Erdely had reached Ryan Duffin – his true name – he would have said that he had never told Jackie that he

would not participate in *Rolling Stone*'s "shit show," Duffin said in an interview for this report. The entire conversation with Ryan that Jackie described to Erdely "never happened," he said. Jackie had never tried to contact him about cooperating with *Rolling Stone*. He hadn't seen Jackie or communicated with her since the previous April, he said.

If Erdely had learned Ryan's account that Jackie had fabricated their conversation, she would have changed course immediately, to research other UVA rape cases free of such contradictions, she said later.

If Erdely had called Kathryn Hendley and Alex Stock – their true names – to check their sides of Jackie's account of Sept. 28 and 29, they would have denied saying any of the words Jackie attributed to them (as Ryan would have as well). They would have described for Erdely a history of communications with Jackie that would have left the reporter with many new questions. For example, the friends said that Jackie told them that her date on Sept. 28 was not a lifeguard but a student in her chemistry class named Haven Monahan. (The Charlottesville police said in March they could not identify a UVA student or any other person

named Haven Monahan.) All three friends would have spoken to Erdely, they said, if they had been contacted.

The episode reaffirms a truism of reporting: Checking derogatory information with subjects is a matter of fairness, but it can also produce surprising new facts.

'Can you comment?'

Throughout her reporting, Erdely told Jackie and others that she wanted to publish the name of the fraternity where Jackie said she had been raped. Erdely felt Jackie "was secure" about the name of the fraternity: Phi Kappa Psi.

Last October, as she was finishing her story, Erdely emailed Stephen Scipione, Phi Kappa Psi's local chapter president. "I've become aware of allegations of gang rape that have been made against the UVA chapter of Phi Kappa Psi," Erdely wrote. "Can you comment on those allegations?"

It was a decidedly truncated version of the facts that Erdely believed she had in hand. She did not reveal Jackie's account of the date of the attack. She did not reveal that Jackie said Phi Kappa Psi had hosted a "date function" that night, that prospective

pledges were present or that the man who allegedly orchestrated the attack was a Phi Kappa Psi member who was also a lifeguard at the university aquatic center. Jackie had made no request that she refrain from providing such details to the fraternity.

The university's administration had recently informed Phi Kappa Psi that it had received an account of a sexual assault at the fraternity that had reportedly taken place in September 2012. Erdely knew that the fraternity had received a briefing from UVA but did not know its specific contents. In fact, in this briefing, Scipione said in a recent interview, UVA provided a mid-September date as the night of the assault – not Sept. 28. And the briefing did not contain the details that Jackie had provided Erdely. The university said only that according to the account it had received, a freshman woman had been drinking at a party, had gone upstairs and had been forced to have oral sex with multiple men.

On Oct. 15, Scipione replied to Erdely's request for comment. He had learned, he wrote to her by email, "that an individual who remains unidentified had supposedly reported to someone who supposedly reported

to the University that during a party there was a sexual assault." He added, "Even though this allegation is fourth hand and there are no details and no named accuser, the leadership and fraternity as a whole have taken this very seriously."

Erdely next telephoned Shawn Collinsworth, then Phi Kappa Psi's national executive director. Collinsworth volunteered a summary of what UVA had passed on to the fraternity's leaders: that there were allegations of "gang rape during Phi Psi parties" and that one assault "took place in September 2012."

Erdely asked him, according to her notes, "Can you comment?"

If Erdely had provided Scipione and Collinsworth the full details she possessed instead of asking simply for "comment," the fraternity might have investigated the facts she presented. After *Rolling Stone* published, Phi Kappa Psi said it did just that. Scipione said in an interview that a review of the fraternity's social media archives and bank records showed that the fraternity had held no date function or other party on the night Jackie said she was raped. A comparison of fraternity membership rolls with aquatic center employment

records showed that it had no members who worked as lifeguards, Scipione added.

Erdely said Scipione had seemed "really vague," so she focused on getting a reply from Collinsworth. "I felt that I gave him a full opportunity to respond," she said. "I felt very strongly that he already knew what the allegations were because they'd been told by UVA." As it turned out, however, the version of the attack provided to Phi Kappa Psi was quite different from and less detailed than the one Jackie had provided to Erdely.

Scipione said that *Rolling Stone* did not provide the detailed information the fraternity required to respond properly to the allegations. "It was complete bullshit," he said. "They weren't telling me what they were going to write about. They weren't telling me any dates or details." Collinsworth said that he was also not provided the details of the attack that ultimately appeared in *Rolling Stone*.

There are cases where reporters may choose to withhold some details of what they plan to write while seeking verification for fear that the subject might "front run" by rushing out a favorably spun version pre-emptively. There are sophisticated journalistic

subjects in politics and business that sometimes burn reporters in this way. Even so, it is risky for a journalist to withhold detailed derogatory information from any subject before publication. Here, there was no apparent need to fear "front-running" by Phi Kappa Psi.

Even if *Rolling Stone* did not trust Phi Kappa Psi's motivations, if it had given the fraternity a chance to review the allegations in detail, the factual discrepancies the fraternity would likely have reported might have led Erdely and her editors to try to verify Jackie's account more thoroughly.

The mystery of "Drew"

In her interviews, Jackie freely used a first name – but no last name – of the lifeguard she said had orchestrated her rape. On Sept. 16, for the first time, Erdely raised the possibility of tracking this man down.

"Any idea what he's up to now?" Erdely asked, according to her notes.

"No, I just know he's graduated. I've blocked him on Facebook," Jackie replied. "One of my friends looked him up – she wanted to see him so she could recognize and kill him," Jackie said, laughing. "I couldn't even look at

his Facebook page."

"How would you feel if I reached out to him for a comment?" Erdely asked, the notes record.

"I'm not sure I would be comfortable with that."

That exchange inaugurated a six-week struggle between Erdely and Jackie. For a while, it seemed to Erdely as if the stalemate might lead Jackie to withdraw from cooperation altogether.

On Oct. 20, Erdely asked again for the man's last name. "I'm not going to use his name in the article, but I have to do my due diligence anyway," Erdely told Jackie, according to the writer's notes. "I imagine he's going to say nothing, but it's something I need to do."

"I don't want to give his last name," Jackie replied. "I don't even want to get him involved in this. ... He completely terrifies me. I've never been so scared of a person in my entire life, and I've never wanted to tell anybody his last name. ... I guess part of me was thinking that he'd never even know about the article."

"Of course he's going to know about the article," Erdely said. "He's going to read it. He probably knows about the article already."

Jackie sounded shocked, according to Erdely's notes. "I don't want to be the one to give you the name," Jackie said.

"How else do you suggest I find it out?"

"I guess you could ask Phi Psi for their list," Jackie suggested.

After this conversation, Jackie stopped responding to Erdely's calls and messages. "There was a point in which she disappeared for about two weeks," Erdely said, "and we became very concerned" about Jackie's well-being. "Her behavior seemed consistent with a victim of trauma."

Yet Jackie made no demand that *Rolling Stone* not try to identify the lifeguard independently. She even suggested a way to do so – by checking the fraternity's roster. Nor did she condition her participation in the story on Erdely agreeing not to try to identify the lifeguard.

Erdely did try to identify the man on her own. She asked Jackie's friends if

they could help. They demurred. She searched online to see if the clues she had would produce a full name. This turned up nothing definitive. ″She was very aggressive about contacting″ the lifeguard, said Pinkleton, one of the students Erdely asked for assistance.

With the benefit of hindsight, to succeed, Erdely probably would have had to persuade students to access the aquatic center′s employment records, to find possible name matches. That might have taken time and luck.

By October′s end, with the story scheduled for closing in just two weeks, Jackie was still refusing to answer Erdely′s texts and voicemails. Finally, on Nov. 3, after consulting with her editors, Erdely left a message for Jackie proposing to her a ″solution″ that would allow *Rolling Stone* to avoid contacting the lifeguard after all. The magazine would use a pseudonym; ″Drew″ was eventually chosen.

After Erdely left this capitulating voicemail, Jackie called back quickly. According to Erdely, she now chatted freely about the lifeguard, still without using his last name. From that point on, through the story′s publication, Jackie cooperated.

In December, Jackie told The Washington Post in an interview that after several interviews with Erdely, she had asked to be removed from the story, but that Erdely had refused. Jackie told the Post she later agreed to participate on condition that she be allowed to fact-check parts of her story. Erdely said in an interview for this report that she was completely surprised by Jackie's statements to the Post and that Jackie never told her she wanted to withdraw from the story. There is no evidence of such an exchange between Jackie and Erdely in the materials Erdely submitted to *Rolling Stone*.

There was, in fact, an aquatic center lifeguard who had worked at the pool at the same time as Jackie and had the first name she had used freely with Erdely. He was not a member of Phi Kappa Psi, however. The police interviewed him and examined his personal records. They found no evidence to link him to Jackie's assault.

If *Rolling Stone* had located him and heard his response to Jackie's allegations, including the verifiable fact that he did not belong to Phi Kappa Psi, this might have led Erdely to reconsider her focus on that case. In any event, *Rolling Stone* stopped

looking for him.

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'What Are They Hiding?'

"A Rape on Campus" had ambitions beyond recounting one woman's assault. It was intended as an investigation of how colleges deal with sexual violence. The assignment was timely. The systems colleges have put in place to deal with sexual misconduct have come under intense scrutiny. These systems are works in progress, entangled in changing and sometimes contradictory federal rules that seek at once to keep students safe, hold perpetrators to account and protect every student's privacy.

The legal issues date to 1977, when five female students sued Yale University, arguing that they had been sexually harassed. The students invoked Title IX of the Education Amendments of 1972, a federal law that bans gender discrimination in education. They lost their case, but their argument – that sexual harassment and violence on campus threatened women's access to education – prevailed over time. By the mid-1980s, hundreds of colleges had adopted procedures to manage sexual misconduct, from stalking to

rape. If universities failed to do so adequately, they could lose federal funding.

In late 2009, the Center for Public Integrity began to publish a series of articles that helped inspire even stricter federal guidelines. The articles bared problems with the first generation of campus response: botched investigations by untrained staff members; adjudication processes shrouded in secrecy; and sanctions so lacking that they sometimes allowed rapists, including repeat offenders, to remain on campus while their victims fled school.

The Obama administration took up the cause. It pressured colleges to adopt more rigorous systems, and it required a lower threshold of guilt to convict a student before school tribunals. The new pressure caused confusion, however, and, in some cases, charges of injustice. Last October, a group of Harvard Law School professors wrote that its university's revised sexual misconduct policy was "jettisoning balance and fairness in the rush to appease certain federal administrative officials."

Erdely's choice of the University of Virginia as a case study was well timed. The week she visited campus,

an 18-year-old UVA sophomore went missing and was later found to have been abducted and killed. The university had by then endured a number of highly visible sexual assault cases. The Department of Education's Office of Civil Rights had placed the school, along with 54 others, under a broad compliance review.

"The overarching point of the article," Erdely wrote in response to questions from The Washington Post last December, was not Jackie, but "the culture that greeted her and so many other UVA women I interviewed, who came forward with allegations, only to be met with indifference."

Erdely saw her reporting about UVA as an examination, she said in an interview for this report, of "the way colleges handle these types of things." Jackie "was just the most dramatic example."

'A chilling effect'

After she heard Jackie's shocking story, Erdely zeroed in on the obligation of universities under federal law to issue timely warnings when there is a "serious or continuing" threat to student safety. Erdely understood from Jackie that eight months after the alleged assault,

she had reported to UVA about being gang-raped at the Phi Kappa Psi house on campus grounds, in what appeared to be a hazing ritual. The university, *Rolling Stone* reported in its published story, was remiss in not warning its students about this apparently predatory fraternity.

According to the Charlottesville police, Jackie did meet with assistant dean of students Nicole Eramo on May 20, 2013. During that meeting, Jackie described her assault differently than she did later for Erdely, the police said, declining to provide details. According to members of the UVA community knowledgeable about the case, who asked not to be identified in order to speak about confidential university matters, Jackie recounted to Eramo the same story she had told her friends on the night of Sept. 28: She was forced to have oral sex with several men while at a fraternity party. Jackie did not name the fraternity where the assault occurred or provide names or details about her attackers, the sources said. No mention was made of hazing. (Citing student privacy and ongoing investigations, the UVA administration, through its communications office, declined to answer questions about the case.)

Over the years, the Department of Education has issued guidelines that stress victim confidentiality and autonomy. This means survivors decide whether to report and what assistance they would like. "If she did not identify any individual or Greek organization by name, the university was very, very limited in what it can do," said S. Daniel Carter, a campus safety advocate and director of the nonprofit 32 National Campus Safety Initiative.

As *Rolling Stone* reported, at their May 2013 meeting, Eramo presented Jackie her options: reporting the assault to the police or to the university's Sexual Misconduct Board. The dean also offered counseling and other services. She checked with Jackie in succeeding weeks to see whether she wanted to take action. She introduced Jackie to One Less, a student group made up of sexual assault survivors and their advocates.

The university did not issue a warning at this point because Jackie did not file a formal complaint and her account did not include the names of assailants or a specific fraternity, according to the UVA sources. It also made no mention of hazing.

Between that time and April 2014, the

university received no further information about Jackie's case, according to the police and UVA sources.

On April 21, 2014, Jackie again met with Eramo, according to the police. She told the dean that she was now coming under pressure for her visible activism on campus with assault prevention groups such as Take Back the Night, according to the UVA sources. Three weeks earlier, she said, she had been hit in the face by a bottle thrown by hecklers outside a Charlottesville bar. She also added a new piece of information to her earlier account of the gang rape she had endured. She named Phi Kappa Psi as the fraternity where the assault had taken place, the police said later. Moreover, she mentioned to Eramo two other students who she said had been raped at that fraternity. But she did not reveal the names of these women or any details about their assaults.

When there is credible information about multiple acts of sexual violence by the same perpetrator that may put students at risk, Department of Education guidelines indicate the university should take action even when no formal complaint has been filed. The school should also consider

whether to issue a public safety warning. Once more, the University of Virginia did not issue a warning. Whether the administration should have done so, given the information it then possessed, is a question under review by the University of Virginia's governing Board of Visitors, aided by fact-finding and analysis by the law firm O'Melveny & Myers. (On March 30, UVA updated its sexual assault policy to include more clearly defined procedures for assessing threats and issuing timely warnings.)

The day after her meeting with the dean, Jackie met with Charlottesville and UVA police in a meeting arranged by Eramo. Jackie reported both the bottle-throwing incident and her assault at the Phi Kappa Psi house. The police later said that she declined to provide details about the gang rape because "[s]he feared retaliation from the fraternity if she followed through with a criminal investigation." The police also said they found significant discrepancies in Jackie's account of the day she said she was struck by the bottle.

That summer, Erdely began interviewing multiple UVA assault survivors. University officials still hoped that Jackie and the two other victims she had mentioned would file

formal charges, the UVA sources said. Erdely knew this: On July 14, Emily Renda, who had graduated in May and taken a job in the university's student affairs office, told the reporter that it might be unwise for *Rolling Stone* to name Phi Kappa Psi in its story because "there are two other women who have not come forward fully yet, and we are trying to persuade them to get punitive action against the fraternity." Renda wrote later in an email for this report that she had tried to dissuade the writer "because of due process concerns and the way in which publicly accusing a fraternity might both prevent any future justice, but also infringe on their rights." Renda's warning to Erdely – a notice from a UVA employee that Phi Kappa Psi was under university scrutiny over allegations made by Jackie and two others – added to the impression that UVA regarded Jackie's narrative as reliable.

As it turned out, however, all of the information that the reporter, Renda and UVA possessed about the two other reported victims, in addition to Jackie, came only from Jackie. One of the women filed an anonymous report through the UVA online system – Jackie told Erdely she was there when the student pressed the "send" button – but neither of the women has been

heard from since.

'I'm afraid it may look like we're trying to hide something'

In early September, Erdely asked to interview Eramo. The request created a dilemma for UVA. Universities must comply with a scaffold of federal laws that limit what they can make public about their students. The most important of these is the Family Educational Rights and Privacy Act, or FERPA, which protects student privacy and can make it difficult for university staff members to release records or answer questions about any enrollee.

Eramo was willing to talk if she wasn't asked about specific cases, but about hypothetical situations, as Erdely had cleverly suggested as a way around student privacy limitations.

"Since [Erdely] was referred to me by the students she interviewed, I'm afraid it may look like we are trying to hide something for me not to speak with her," Eramo said in an email to the UVA communications staff, recently released in response to a Freedom of Information Act request.

The communications office endorsed the interview, but Vice President for

Student Life Patricia Lampkin vetoed the idea. ″This is not reflective of Nicole,″ she wrote in an email, ″but of the issue and how reporters turn the issue.″ Asked to clarify that statement for this review, Lampkin said she felt that given FERPA restrictions, there was nothing Eramo could say in an interview that would give Erdely ″a full and balanced view of the situation.″

The distrust was mutual. ″I had actually gone to campus thinking that they were going to be very helpful,″ Erdely said. Now she felt she was being stonewalled. Among other things, she said Jackie and Alex Pinkleton told her that after *Rolling Stone* started asking questions on campus, UVA administrators contacted Phi Kappa Psi for the first time about the allegations of sexual assault at the fraternity house.

To Erdely, UVA looked as if it was in damage control mode. ″So I think that instead of being skeptical of Jackie,″ she said, ″I became skeptical of UVA. ... What are they hiding and why are they acting this way?″

It is true that UVA did not get in touch with Phi Kappa Psi until Erdely showed up on campus. University sources offered an explanation. They

said that administrators had contemplated suspending the fraternity's charter, but that would mean no university oversight over Phi Kappa Psi. They had also put off contacting the fraternity in the summer in the hope that Jackie and the other alleged victims would file charges. That hadn't happened, so they decided to act, even before Erdely started asking questions, these sources said. (At the time of the writing of this report, the university had released no documentary evidence to support the decision-making sequence these sources described.) In any event, there was reason for *Rolling Stone* to be skeptical. UVA's history of managing sexual misconduct is checkered, as Erdely illustrated in other cases she reported on.

On Oct. 2, Erdely interviewed UVA President Teresa Sullivan. The reporter asked probing questions that revealed the gap between the number of assault cases that the university reported publicly and the cases that had been brought to the university's attention internally. Erdely described the light sanctions imposed on students found guilty of sexual misconduct. She asked about allegations of gang rapes at Phi Kappa Psi. Sullivan said that a fraternity was

under investigation but declined to comment further about specific cases.

Following the recent announcement by the Charlottesville police that they could find no basis for *Rolling Stone*'s account of Jackie's assault, Sullivan issued a statement. "The investigation confirms what federal privacy law prohibited the university from sharing last fall: That the university provided support and care to a student in need, including assistance in reporting potential criminal conduct to law enforcement," she said.

Erdely concluded that UVA had not done enough. "Having presumably judged there to be no threat," she wrote in her published story, UVA "took no action to warn the campus that an allegation of gang rape had been made against an active fraternity." Overall, she wrote, "rapes are kept quiet" at UVA in part because of "an administration that critics say is less concerned with protecting students than it is with protecting its own reputation from scandal."

During the six months she worked on the story, Erdely concentrated her reporting on the perspectives of victims of sexual violence at the University of Virginia and other campuses. She was moved by their

experiences and their diverse frustrations. Her access to the perspectives of UVA administrators was much more limited, in part because some of them were not permitted to speak with her but also because Erdely came to see them as obstacles to her reporting.

In the view of some of Erdely's sources, the portrait she created was unfair and mistaken. "The university's response is not, 'We don't care,' " said Pinkleton, Jackie's confidante and a member of One Less. "When I reported my own assault, they immediately started giving me resources."

For her part, Eramo rejects the article's suggestion that UVA places its own reputation above protecting students. In an email provided by her lawyers, the dean wrote that the article falsely attributes to her statements she never made (to Jackie or otherwise) and that it "trivializes the complexities of providing trauma-informed support to survivors and the real difficulties inherent in balancing respect for the wishes of survivors while also providing for the safety of our communities."

"UVA does have plenty of room to grow in regard to prevention and

response, as most if not all, colleges do," said Sara Surface, a junior who co-chairs UVA's Sexual Violence Prevention Coalition. She added, "The administrators and staff that work directly with and advocate for survivors are not more interested in the college's reputation over the well-being of its students."

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The Editing: 'I Wish Somebody Had Pushed Me Harder'

Sean Woods, Erdely's primary editor, might have prevented the effective retraction of Jackie's account by pressing his writer to close the gaps in her reporting. He started his career in music journalism but had been editing complex reported features at *Rolling Stone* for years. Investigative reporters working on difficult, emotive or contentious stories often have blind spots. It is up to their editors to insist on more phone calls, more travel, more time, until the reporting is complete. Woods did not do enough.

Rolling Stone publisher Jann Wenner said he typically reads about half of the stories in each issue before publication. He read a draft of Erdely's narrative and found Jackie's

case "extremely strong, powerful, provocative. ... I thought we had something really good there." But Wenner leaves the detailed editorial supervision to managing editor Will Dana, who has been at the magazine for almost two decades. Dana might have looked more deeply into the story drafts he read, spotted the reporting gaps and insisted that they be fixed. He did not. "It's on me," Dana said. "I'm responsible."

In hindsight, the most consequential decision *Rolling Stone* made was to accept that Erdely had not contacted the three friends who spoke with Jackie on the night she said she was raped. That was the reporting path, if taken, that would have almost certainly led the magazine's editors to change plans.

Erdely said that as she was preparing to write her first draft, she talked with Woods about the three friends. "Sean advised me that for now we should just put this aside," she said. "He actually suggested that I change their names for now." Woods said that he intended this decision to be temporary, pending further reporting and review.

Erdely used pseudonyms in her first draft: "Randall," "Cindy" and

"Andrew." She relied solely on Jackie's information and wrote vividly about how the three friends had reacted after finding Jackie shaken and weeping in the first hours of Sept. 29:

The group looked at each other in a panic. They all knew about Jackie's date that evening at Phi Kappa Psi, the house looming behind them. "We have got to get her to the hospital," Randall declared. The other two friends, however, weren't convinced. "Is that such a good idea?" countered Cindy. ... "Her reputation will be shot *for the next four years." Andrew seconded the opinion. The three friends launched into a heated discussion about the social price of reporting Jackie's rape, while Jackie stood behind them, mute in her bloody dress.*

Erdely inserted a note in her draft, in bold type: "she says – all her POV" – to indicate to her editors that the dialogue had come only from Jackie.

"In retrospect, I wish somebody had pushed me harder" about reaching out to the three for their versions, Erdely said. "I guess maybe I was surprised that nobody said, 'Why haven't you called them?' But nobody did, and I wasn't going to press that issue." Of course, just because an editor does

not ask a reporter to check derogatory information with a subject, that does not absolve the reporter of responsibility.

Woods remembered the sequence differently. After he read the first draft, he said, ″I asked Sabrina to go reach″ the three friends. ″She said she couldn′t. ... I did repeatedly ask, ′Can we reach these people? Can we?′ And I was told no.″ He accepted this because ″I felt we had enough.″ The documentary evidence provided by *Rolling Stone* sheds no light on whose recollection -- Erdely′s or Wood′s – is correct.

Woods said he ultimately approved pseudonyms because he didn′t want to embarrass the three students by having Jackie′s account of their self-involved patter out there for all their friends and classmates to see. ″I wanted to protect them,″ he said.

For his part, Dana said he did not recall talking with Woods or Erdely about the three friends at all.

′We need to verify this′

None of the editors discussed with Erdely whether Phi Kappa Psi or UVA, while being asked for ″comment,″ had been given enough detail about

Jackie's narrative to point out holes or contradictions. Erdely never raised the subject with her editors.

As to "Drew," the lifeguard, Dana said he was not even aware that *Rolling Stone* did not know the man's full name and had not confirmed his existence. Nor was he told that "we'd made any kind of agreement with Jackie to not try to track this person down."

As noted, there was no such explicit compact between Erdely and Jackie, according to Erdely's records. Jackie requested Erdely not to contact the lifeguard, but there was no agreement.

"Can you call the pool? Can you call the frat? Can you look at yearbooks?" Woods recalled asking Erdely after he read the first draft. "If you've got to go around Jackie, fine, but we need to verify this," meaning Drew's identity. He remembered having this discussion "at least three times."

But when Jackie became unresponsive to Erdely in late October, Woods and Dana gave in. They authorized Erdely to tell Jackie they would stop trying to find the lifeguard. Woods resolved the issue as he had done earlier with the three friends: by using a pseudonym in the story.

'I had a faith'

It is not possible in journalism to reach every source a reporter or editor might wish. A solution is to be transparent with readers about what is known or unknown at the time of publication.

There is a tension in magazine and narrative editing between crafting a readable story – a story that flows – and providing clear attribution of quotations and facts. It can be clunky and disruptive to write "she said" over and over. There should be room in magazine journalism for diverse narrative voicing – if the underlying reporting is solid. But the most egregious failures of transparency in "A Rape on Campus" cannot be chalked up to writing style. They obfuscated important problems with the story's reporting.

-- *Rolling Stone*'s editors did not make clear to readers that Erdely and her editors did not know "Drew's" true name, had not talked to him and had been unable to verify that he existed. That was fundamental to readers' understanding. In one draft of the story, Erdely did include a disclosure. She wrote that Jackie "refuses to divulge [Drew's] full name to RS," because she is "gripped by

fears she can barely articulate." Woods cut that passage as he was editing. He "debated adding it back in" but "ultimately chose not to."

-- Woods allowed the "shit show" quote from "Randall" into the story without making it clear that Erdely had not gotten it from him but from Jackie. "I made that call," Woods said. Not only did this mislead readers about the quote's origins, it also compounded the false impression that *Rolling Stone* knew who "Randall" was and had sought his and the other friends' side of the story.

The editors invested *Rolling Stone*'s reputation in a single source. "Sabrina's a writer I've worked with for so long, have so much faith in, that I really trusted her judgment in finding Jackie credible," Woods said. "I asked her a lot about that, and she always said she found her completely credible."

Woods and Erdely knew Jackie had spoken about her assault with other activists on campus, with at least one suitemate and to UVA. They could not imagine that Jackie would invent such a story. Woods said he and Erdely "both came to the decision that this person was telling the truth." They saw her as a "whistle blower" who was

fighting indifference and inertia at the university.

The problem of confirmation bias – the tendency of people to be trapped by pre-existing assumptions and to select facts that support their own views while overlooking contradictory ones – is a well-established finding of social science. It seems to have been a factor here. Erdely believed the university was obstructing justice. She felt she had been blocked. Like many other universities, UVA had a flawed record of managing sexual assault cases. Jackie's experience seemed to confirm this larger pattern. Her story seemed well established on campus, repeated and accepted.

"If I had been informed ahead of time of one problem or discrepancy with her overall story, we would have acted upon that very aggressively," Dana said. "There were plenty of other stories we could have told in this piece." If anyone had raised doubts about how verifiable Jackie's narrative was, her case could have been summarized "in a paragraph deep in the story."

No such doubts came to his attention, he said. As to the apparent gaps in reporting, attribution and verification that had accumulated in the story's

drafts, Dana said, "I had a faith that as it went through the fact-checking that all this was going to be straightened out."

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Fact-Checking: 'Above My Pay Grade'

At *Rolling Stone*, every story is assigned to a fact-checker. At newspapers, wire services and in broadcast newsrooms, there is no job description quite like that of a magazine fact-checker. At newspapers, frontline reporters and editors are responsible for stories' accuracy and completeness. Magazine fact-checking departments typically employ younger reporters or college graduates. Their job is to review a writer's story after it has been drafted, to double-check details like dates and physical descriptions. They also look at issues such as attribution and whether story subjects who have been depicted unfavorably have had their say. Typically, checkers will speak with the writer's sources, sometimes including confidential sources, to verify facts within quotations and other details. To be effective, checkers must be empowered to challenge the decisions of writers and editors who may be much more senior and experienced.

In this case, the fact-checker assigned to ″A Rape on Campus″ had been checking stories as a freelancer for about three years, and had been on staff for one and a half years. She relied heavily on Jackie, as Erdely had done. She said she was ″also aware of the fact that UVA believed this story to be true.″ That was a misunderstanding. What *Rolling Stone* knew at the time of publication was that Jackie had given a version of her account to UVA and other student activists. A university employee, Renda, had made reference to that account in congressional testimony. UVA had placed Phi Kappa Psi under scrutiny. None of this meant that the university had reached a conclusion about Jackie's narrative. The checker did not provide the school with the details of Jackie's account to Erdely of her assault at Phi Kappa Psi.

The checker did try to improve the story's reporting and attribution of quotations concerning the three friends. She marked on a draft that Ryan – ″Randall″ under pseudonym – had not been interviewed, and that his ″shit show″ quote had originated with Jackie. ″Put this on Jackie?″ the checker wrote. ″Any way we can confirm with him?″ She said she talked about this problem of clarity with Woods and Erdely. ″I pushed. ...

They came to the conclusion that they were comfortable" with not making it clear to readers that they had never contacted Ryan.

She did not raise her concerns with her boss, Coco McPherson, who heads the checking department. "I have instructed members of my staff to come to me when they have problems or are concerned or feel that they need some muscle," McPherson said. "That did not happen." Asked if there was anything she should have been notified about, McPherson answered: "The obvious answers are the three friends. These decisions not to reach out to these people were made by editors above my pay grade."

McPherson read the final draft. This was a provocative, complex story heavily reliant on a single source. She said later that she had faith in everyone involved and didn't see the need to raise any issues with the editors. She was the department head ultimately responsible for fact-checking.

Natalie Krodel, an in-house lawyer for Wenner Media, conducted a legal review of the story before publication. Krodel had been on staff for several years and typically handled about half of *Rolling Stone*'s pre-publication

reviews, sharing the work with general counsel Dana Rosen.[5] It is not clear what questions the lawyer may have raised about the draft. Erdely and the editors involved declined to answer questions about the specifics of the legal review, citing instructions from the magazine's outside counsel, Elizabeth McNamara, a partner at Davis Wright Tremaine. McNamara said *Rolling Stone* would not answer questions about the legal review of "A Rape on Campus" in order to protect attorney-client privilege.

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The Editor's Note: 'I Was Pretty Freaked Out'

On Dec. 5, following Erdely's early-morning declaration that she had lost confidence in her sourcing, *Rolling Stone* posted an editor's note on its website that effectively withdrew the magazine's reporting on Jackie's case.

The note was composed and published hastily. The editors had heard that The Washington Post intended to publish a story that same day calling the magazine's reporting into question. They had also heard that Phi Kappa Psi would release a statement disputing some of *Rolling Stone*'s account. Dana said there was

no time to conduct a ″forensic investigation″ into the story′s issues. He wrote the editor′s note ″very quickly″ and ″under a lot of pressure.″

He posted it at about noon, under his signature. ″In the face of new information, there now appear to be discrepancies in Jackie′s account, and we have come to the conclusion that our trust in her was misplaced,″ it read. That language deflected blame from the magazine to its subject and it attracted yet more criticism. Dana said he rued his initial wording. ″I was pretty freaked out,″ he said. ″I regretted using that phrase pretty quickly.″ Early that evening, he changed course in a series of tweets. ″That failure is on us – not on her,″ he wrote. A revised editor′s note, using similar language, appeared the next day.

Yet the final version still strained to defend *Rolling Stone*′s performance. It said that Jackie′s friends and student activists at UVA ″strongly supported her account.″ That implied that these friends had direct knowledge of the reported rape. In fact, the students supported Jackie as a survivor, friend and fellow campus reformer. They had heard her story, but they could not independently

confirm it.

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Looking Forward

For Rolling Stone: An Exceptional Lapse or a Failure of Policy?

The collapse of "A Rape on Campus" does not involve the kinds of fabrication by reporters that have occurred in some other infamous cases of journalistic meltdown. In 2003, the New York Times reporter Jayson Blair resigned after editors concluded that he had invented stories from whole cloth. In February, NBC News suspended anchor Brian Williams after he admitted that he told tall tales about his wartime reporting in Iraq. There is no evidence in Erdely's materials or from interviews with her subjects that she invented facts; the problem was that she relied on what Jackie told her without vetting its accuracy.

"It's been an extraordinarily painful and humbling experience," Woods said. "I've learned that even the most trusted and experienced people – including, and maybe especially, myself – can make grave errors in judgment."

Yet *Rolling Stone*'s senior editors are unanimous in the belief that the story's failure does not require them to change their editorial systems. "It's not like I think we need to overhaul our process, and I don't think we need to necessarily institute a lot of new ways of doing things," Dana said. "We just have to do what we've always done and just make sure we don't make this mistake again." Coco McPherson, the fact-checking chief, said, "I one hundred percent do not think that the policies that we have in place failed. I think decisions were made around those because of the subject matter."

Yet better and clearer policies about reporting practices, pseudonyms and attribution might well have prevented the magazine's errors. The checking department should have been more assertive about questioning editorial decisions that the story's checker justifiably doubted. Dana said he was not told of reporting holes like the failure to contact the three friends or the decision to use misleading attributions to obscure that fact.

Stronger policy and clearer staff understanding in at least three areas might have changed the final outcome:

Pseudonyms. Dana, Woods and McPherson said using pseudonyms at *Rolling Stone* is a "case by case" issue that requires no special convening or review. Pseudonyms are inherently undesirable in journalism. They introduce fiction and ask readers to trust that this is the only instance in which a publication is inventing details at its discretion. Their use in this case was a crutch – it allowed the magazine to evade coming to terms with reporting gaps. *Rolling Stone* should consider banning them. If its editors believe pseudonyms are an indispensable tool for its forms of narrative writing, the magazine should consider using them much more rarely and only after robust discussion about alternatives, with dissent encouraged.

Checking Derogatory Information. Erdely and Woods made the fateful agreement not to check with the three friends. If the fact-checking department had understood that such a practice was unacceptable, the outcome would almost certainly have changed.

Confronting Subjects With Details. When Erdely sought "comment," she missed the opportunity to hear challenging, detailed rebuttals from Phi Kappa Psi before publication. The

fact-checker relied only on Erdely's communications with the fraternity and did not independently confirm with Phi Kappa Psi the account *Rolling Stone* intended to publish about Jackie's assault. If both the reporter and checker had understood that by policy they should routinely share specific, derogatory details with the subjects of their reporting, *Rolling Stone* might have veered in a different direction.

For Journalists: Reporting on Campus Rape

Rolling Stone is not the first news organization to be sharply criticized for its reporting on rape. Of all crimes, rape is perhaps the toughest to cover. The common difficulties that reporters confront – including scarce evidence and conflicting accounts – can be magnified in a college setting. Reporting on a case that has not been investigated and adjudicated, as *Rolling Stone* did, can be even more challenging.

There are several areas that require care and should be the subject of continuing deliberation among journalists:

Balancing sensitivity to victims and the demands of verification. Over the

years, trauma counselors and survivor support groups have helped journalists understand the shame attached to rape and the powerlessness and self-blame that can overwhelm victims, particularly young ones. Because questioning a victim's account can be traumatic, counselors have cautioned journalists to allow survivors some control over their own stories. This is good advice. Yet it does survivors no good if reporters documenting their cases avoid rigorous practices of verification. That may only subject the victim to greater scrutiny and skepticism.

Problems arise when the terms of the compact between survivor and journalist are not spelled out. Kristen Lombardi, who spent a year and a half reporting the Center for Public Integrity's series on campus sexual assault, said she made it explicit to the women she interviewed that the reporting process required her to obtain documents, collect evidence and talk to as many people involved in the case as possible, including the accused. She prefaced her interviews by assuring the women that she believed in them but that it was in their best interest to make sure there were no questions about the veracity of their accounts. She also allowed victims some control, including

determining the time, place and pace of their interviews.

If a woman was not ready for such a process, Lombardi said, she was prepared to walk away.

Corroborating survivor accounts. Walt Bogdanich, a Pulitzer Prize-winning investigative reporter for The New York Times who has spent the past two years reporting on campus rape, said he tries to track down every available shred of corroborating evidence – hospital records, 911 calls, text messages or emails that have been sent immediately after the assault. In some cases, it can be possible to obtain video, either from security cameras or from cellphones.

Many assaults take place or begin in semipublic places such as bars, parties or fraternity houses. ″Campus sexual violence probably has more witnesses, bystanders, etc. than violence in other contexts,″ said Elana Newman, a University of Tulsa psychology professor who has advised journalists on trauma. ″It might be useful for journalists to think about all the early signals and signs″ and people who saw or ignored them early on, she said.

Every rape case has multiple narratives, Newman said. ″If there are

inconsistencies, explain those inconsistencies." Reporters should also bear in mind that trauma can impair a victim's memory and that this can be a cause of fragmentary and contradictory accounts.

Victims often interact with administrators, counselors and residence hall staff members. "I've always found that the people most willing to talk are these front-line staff," said Lombardi, who said she phoned or visited potential sources at home and talked to them on background because of their concerns about student privacy.

FERPA restrictions are severe, yet the law allows students to access their own school records. Students at public universities can also sign privacy waivers that would allow reporters to obtain their records, including case files and reports.

Moreover, there's a FERPA exception: In sexual assault cases that have reached final disposition and a student has been found responsible, campus authorities can release the name of the student, the violation committed and any sanction imposed. (The Student Press Law Center provides good advice on navigating FERPA.)

Holding institutions to account. Given the difficulties, journalists are rarely in a position to prove guilt or innocence in rape. "The real value of what we do as journalists is analyzing the response of the institutions to the accusation," Bogdanich said. This approach can also make it easier to persuade both victims and perpetrators to talk. Lombardi said the women she interviewed were willing to help because the story was about how the system worked or didn't work. The accused, on the other hand, was often open to talking about perceived failings of the adjudication process.

To succeed at such reporting, it is necessary to gain a deep understanding of the tangle of rules and guidelines on campus sexual assault. There's Title IX, the Clery Act and the Violence Against Women Act. There are directives from the Office of Civil Rights and recommendations from the White House. Congress and state legislatures are proposing new laws.

The responsibilities that universities have in preventing campus sexual assault – and the standards of performance they should be held to – are important matters of public interest. *Rolling Stone* was right to

take them on. The pattern of its failure draws a map of how to do better.

NOTES:

1. This report is intended as a work of journalism about a failure of journalism. Last November, *Rolling Stone* published "A Rape on Campus" by Sabrina Rubin Erdely. Its principal narrative recounted a horrible gang rape at a University of Virginia fraternity. Early in December, *Rolling Stone* effectively retracted that narrative. Several weeks later, the magazine contacted the Columbia University Graduate School of Journalism about conducting an investigation of what had gone wrong. *Rolling Stone* provided access to Erdely's reporting records as well as drafts of the story. The authors enjoyed the freedom to investigate and write about any subject related to "A Rape on Campus" that they judged to be germane and in the public interest. The magazine agreed to publish Columbia's review in full on its website, after a legal review, but without editing. *Rolling Stone* also pledged to publish mutually agreed excerpts in its print magazine.

Over several months, the authors conducted interviews and

investigations that ranged widely in scope. Yet the final report is not intended to be encyclopedic. The report has several intended purposes. One is to illuminate the key reasons *Rolling Stone*'s failure was avoidable and to draw lessons. In that respect, the report focuses on several of *Rolling Stone*'s failures of reporting, editing and supervision but not on every single misstep that might be inventoried. Another purpose of the report is to assess independently and through fresh reporting some of the subjects *Rolling Stone* covered in the story, beyond Jackie's account of sexual assault – particularly the timeline of how UVA handled Jackie's information. The report also addresses how *Rolling Stone*'s editorial policies might be reconsidered to prevent future failure. And it evaluates how journalists might begin to define best practices when reporting about rape cases on campus or elsewhere.

Rolling Stone's staff cooperated fully during the review. Coll and Coronel agreed to *Rolling Stone*'s request not to name the story's fact-checker in its report on the grounds that she was a junior employee without ultimate decision-making authority. Several participants from the magazine did decline to answer certain questions

that they said invaded attorney-client privilege. Neither Columbia nor the authors individually received compensation for the work. *Rolling Stone* agreed to reimburse expenses.

Sheila Coronel is dean of academic affairs at the Graduate School of Journalism at Columbia University. Steve Coll is dean of the school and the author of seven nonfiction books. Derek Kravitz is a postgraduate research scholar at Columbia.

2. *Rolling Stone* provided a 405-page record of Erdely's interviews and research notes as well as access to original audio recordings. Erdely turned this record over to *Rolling Stone* before she or the magazine believed there were any problems with the story. Erdely said she typed notes contemporaneously on a laptop during phone and in-person interviews. In some cases, she taped interviews and meetings and transcribed them later. We compared transcripts Erdely submitted of her recorded interviews with Jackie with the audio files and found the transcripts to be accurate. Erdely's typed notes of interviews contain her own questions or remarks, sometimes placed in brackets, as well as those of her interview subject. Erdely said that she sometimes typed her own

questions or remarks contemporaneously but that other times she typed them after the interview was over, summarizing the questions she had asked or the comments she had made.

3. *Rolling Stone*'s retraction of its reporting about Jackie concerned the story it printed. The retraction cannot be understood as evidence about what actually happened to Jackie on the night of Sept. 28, 2012. If Jackie was attacked and, if so, by whom, cannot be established definitively from the evidence available.

Jackie's phone records from September 2012 would provide strong evidence about what might have befallen her. But the Charlottesville police said the company they asked to produce Jackie's phone records no longer had her records from 2012. After interviewing about 70 people and obtaining access to some university and fraternity records, the Charlottesville police could say only that they found no evidence of the gang rape *Rolling Stone* described. This finding, said Police Chief Timothy Longo, "doesn't mean that something terrible didn't happen to Jackie" that night.

4. In a letter, Groves objected to

Rolling Stone's portrayal of his actions during a University of Virginia Board of Visitors meeting last September. A video of the meeting is available on a UVA website. Groves wrote that Erdely "did not disclose the significant details that I had offered into the scope" of a Department of Education compliance review of UVA. Groves's full letter is here.

In the email sent through her lawyer, Eramo wrote, *Rolling Stone* "made numerous false statements and misleading implications about the manner in which I conducted my job as the Chair of University of Virginia's Sexual Misconduct Board, including allegations about specific student cases. Although the law prohibits me from commenting on those specific cases in order to protect the privacy of the students who I counsel, I can say that the account of my actions in *Rolling Stone* is false and misleading. The article trivializes the complexities of providing trauma-informed support to survivors and the real difficulties inherent in balancing respect for the wishes of survivors while also providing for the safety of our communities. As a general matter, I do not — and have never — allowed the possibility of a media story to influence the way I have counseled students or the decisions I have made

in my position. And contrary to the quote attributed to me in *Rolling Stone*, I have never called the University of Virginia "the rape school," nor have I ever suggested — either professionally or privately — that parents would not "want to send their daughter" to UVA. As a UVA alumna, and as someone who has lived in the Charlottesville community for over 20 years, I have a deep and profound love for this University and the students who study here."

5. Last December, Rosen left Wenner Media for ALM Media, where she is general counsel. Rosen said her departure had no connection with "A Rape on Campus" and that she had played no part in reviewing the story before publication. She said she began talking with ALM in September, before Erdely's story was filed, about the position she ultimately accepted.

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Everything We Know About the UVA Rape Case [Updated]

By **Margaret Hartmann**

Photo: Steve Helber/AP/Corbis

In November *Rolling Stone* published a 9,000-word article that described the horrific 2012 gang rape of a University of Virginia freshman, and how the school mishandled the incident. For a few days, it seemed to be serving its purpose: The article sparked a conversation about sexual assault on campus and how schools nationwide often respond to brutal crimes with indifference. Then, as questions were raised about why the author, Sabrina Rubin Erdely, either failed to contact the alleged rapists or never even tried, the story morphed into a flashpoint in various other debates, from how we treat rape victims (http://www.vogue.com/5790835/bill-cosby-uva-rape-campus-assault/) to journalism ethics (http://nymag.com/daily/intelligencer/2014/12/how-the-washington-post-got-rape-reporting-right.html) to the nature of memory (http://www.vox.com/2014/12/9/7356809/uva-rape-memory) . *Rolling Stone* eventually retracted (http://nymag.com/daily/intelligencer/2015/04/rolling-stone-retracts-uva-rape-story.html) its report, and now managing editor Will Dana is leaving the magazine (http://nymag.com/daily/intelligencer/2015/07/rolling-stone-sued-for-rape-story-editor-leaves.html) . Here's a look at how the story unraveled.

November 19, 2014: *Rolling Stone* publishes (http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119) "A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA" *Rolling Stone* contributing editor (http://www.rollingstone.com/contributor/sabrina-rubin-erdely) Sabrina Rubin Erdely begins her piece on the UVA's ineffective handling of rape cases by introducing Jackie, a woman who says she was gang-raped in a UVA frat house on September 28, 2012, a few weeks after she arrived on campus.

Jackie, who was 18 at the time, says she was asked out by "Drew" (a pseudonym used in the article), an attractive junior she met while they were both working as lifeguards at the university pool. Drew invited her to dinner and a "date function" at his fraternity, Phi Kappa Psi. During the party, Drew asks Jackie if she wants to go upstairs. She follows him into a pitch-black room and screams when she suddenly realizes they're not alone:

> "Shut *up,*" [Jackie] heard a man's voice say as a body barreled into her, tripping her backward and sending them both crashing through a low glass table. There was a heavy person on top of her, spreading open her thighs, and another person kneeling on her hair, hands pinning down her arms, sharp shards digging into her back, and excited male voices rising all around her. When yet another hand clamped over her mouth, Jackie bit it, and the hand became a fist that punched her in the face. The men surrounding her began to laugh. For a hopeful moment Jackie wondered if this wasn't some collegiate prank. Perhaps at any second someone would flick on the lights and they'd return to the party.

> "Grab its motherfucking leg," she heard a voice say. And that's when Jackie knew she was going to be raped.

Jackie says that for the next three hours, seven men took turns raping her as Drew and another man looked on. She says one of the men, whom she recognized from her anthropology discussion group, was encouraged by the others to penetrate her with a beer bottle. "Don't you want to be a brother?" the others tell him. "We all had to do it, so you do, too."

She comes to after 3 a.m. and runs from the house shoeless, with her "face beaten" and her dress "spattered with blood." Realizing that she's lost, she calls a friend, screaming, "Something bad happened. I need you to come and find me!" Her three friends, two boys and a girl, find her outside the Phi Kappa Psi house shaking and crying. (All of their names are changed in the article.) Randall suggests going to the hospital, but the others shoot down the idea and weigh the social implications of their next move:

> "Is that such a good idea?" [Jackie] recalls Cindy asking. "Her reputation will be *shot* for the next four years." Andy seconded the opinion, adding that since he and Randall both planned to rush fraternities, they ought to think this through. The three friends launched into a heated discussion about the social price of reporting Jackie's rape, while Jackie stood beside them, mute in her bloody dress, wishing only to go back to her dorm room and fall into a deep, forgetful sleep. Detached, Jackie listened as Cindy prevailed over the group: "She's gonna be the girl who cried 'rape,' and we'll never be allowed into any frat party again."

Ultimately, they decide not to seek help. Two weeks later, Jackie sees Drew at the pool. "I wanted to thank you for the other night," he says. "I had a great time."

After withdrawing from her school work and social life and buying rope to hang herself, at the end of the semester Jackie calls her mother and asks to go home. She returns to school, and toward the end of her freshman year she reports the rape to Dean Nicole Eramo, head of UVA's Sexual Misconduct Board. She is given three options: file a criminal complaint with the police, file a complaint with the school, or face her attackers with Eramo present to tell them how she feels. (There's more information here (http://www.washingtonpost.com/local/education/u-va-and-sexual-assault-the-scrutiny-will-continue/2014/12/05/e19b74ee-7ca8-11e4-84d4-7c896b90abdc_story.html?Post+generic=%3Ftid%3Dsm_twitter_washingtonpost) about the federal investigation into UVA's handling of sexual violence, which began in June 2011.)

Jackie is now a junior, and she's become active in UVA's sexual-assault education organization. In May 2014, with Drew about to graduate, she still didn't feel ready to file a complaint, but "she badly wants to muster the courage to file criminal charges or even a civil case." The article notes that Jackie is no longer friends with Randall, who "citing his loyalty to his own frat, declined to be interviewed" by *Rolling Stone*.

November 22, 2014: The Initial Response

People were outraged by the events described in the article, particularly at UVA. Facing pressure from the campus community, UVA president Teresa Sullivan suspended (http://www.washingtonpost.com/local/education/u-va-president-suspends-fraternities-until-jan-9-in-wake-of-rape-allegations/2014/11/22/023d3688-7272-11e4-8808-afaa1e3a33ef_story.html) all campus fraternities, sororities, and Greek organizations until January 9. She also asked the Charlottesville Police Department to investigate Jackie's rape, and urged students, faculty, and alumni to weigh in as the school reforms how it handles sexual assault.

Phi Kappa Psi suspended the activities of its UVA chapter the day after the article was published, and its national leadership said they would cooperate in the police investigation and launch their own internal investigation.

November 24, 2014: Questions Emerge

Richard Bradley, a former *George* magazine editor who was duped by Stephen Glass, writes an essay (http://www.richardbradley.net/shotsinthedark/2014/11/24/is-the-rolling-stone-story-true/) questioning the

story. He says the Glass incident taught him that you should be "critical, in the best sense of that word," about stories that just confirm your own biases. He says that as a former editor, "something about this story doesn't feel right," noting that it relies entirely on one unnamed source. The friends who came to Jackie's aid weren't interviewed, and Erdely apparently made no effort to contact the alleged rapists.

Others begin to question Jackie's account and how it was reported. Reason's Robby Soave wonders if the story could be a "gigantic hoax (http://reason.com/blog/2014/12/01/is-the-uva-rape-story-a-gigantic-hoax) ." L.A. *Times* columnist Jonah Goldberg compares (http://www.latimes.com/opinion/op-ed/la-oe-goldberg-uva-rape-rolling-stone-20141202-column.html) it to two notorious rape accusations that were proven false, saying "the media also uncritically reported Tawana Brawley's stories and those of the accusers of the Duke lacrosse team — until the rest of the media started doing their jobs."

November 28, 2014: Erdely Describes Her Reporting Methods

In an interview (http://www.washingtonpost.com/lifestyle/style/sabrina-rubin-erdely-woman-behind-rolling-stones-explosive-u-va-alleged-rape-story/2014/11/28/89f322c2-7731-11e4-bd1b-03009bd3e984_story.html) with the Washington *Post*, Erdely says that after deciding to write about sexual assault on campus, she spent six weeks talking to students across the country and eventually settled on UVA. She says she was introduced to Jackie by Emily Renda, a leader in UVA's sexual-assault group. "She was absolutely bursting to tell this story," Erdely says. "I could not believe how it poured out of her in one long narrative. She spoke so fast, I hardly had a chance to ask her a question. She was dying to share it."

Erdely says she spent weeks corroborating Jackie's account and finds her "completely credible," but the *Post* presses her on why she didn't speak to other sources:

> Some elements of the story, however, are apparently too delicate for Erdely to talk about now. She won't say, for example, whether she knows the names of Jackie's alleged attackers or whether in her reporting she approached "Drew," the alleged ringleader, for comment. She is bound to silence about those details, she said, by an agreement with Jackie, who "is very fearful of these men, in particular Drew. . . . She now considers herself an empty shell. So when it comes down to identifying them, she has a very hard time with that."

Erdely is similarly evasive when asked on Slate's Double X podcast (http://www.slate.com/articles/podcasts/doublex_gabfest/2014/11/the_double_x_gabfest_on_uva_frats_and_rape_in_rolling_stone_husbands_hurting.html) if she knows the alleged attackers identities or tried to contact them:

> I reached out to them in multiple ways. They were kind of hard to get in touch with because [the fraternity's] contact page was pretty outdated. But I wound up speaking ... I wound up getting in touch with their local president, who sent me an email, and then I talked with their sort of, their national guy, who's kind of their national crisis manager. They were both helpful in their own way, I guess.

December 1, 2014: *Rolling Stone* Confirms That It Did Not Speak to the Men

When asked about the alleged assailants, Sean Woods, who edited the *Rolling Stone* piece, tells (http://www.washingtonpost.com/lifestyle/style/author-of-rolling-stone-story-on-alleged-u-va-rape-didnt-talk-to-accused-perpetrators/2014/12/01/e4c19408-7999-11e4-84d4-7c896b90abdc_story.html) the Washington *Post*, "We did not talk to them. We could not reach them." However, he says they "verified their existence" by talking to Jackie's friends. "I'm satisfied that these guys exist and are real. We knew who they were."

December 2, 2014: The Magazine Stands by Jackie, and Its Own Reporting

In a follow-up to their podcast, Slate's Allison Benedikt and Hanna Rosin explore (http://www.slate.com/articles/double_x/doublex/2014/12/sabrina_rubin_erdely_uva_why_didn_t_a_rolling_stone_writer_talk_to_the_alleged.2.html) why Erdely

didn't include a response from Jackie's alleged attackers. Woods tells them he's "done talking about the story" and adds this statement from the magazine: "Through our extensive reporting and fact-checking, we found Jackie to be entirely credible and courageous and we are proud to have given her disturbing story the attention it deserves."

Benedikt and Rosin say they also reached out to Jackie's friends. They report that she got upset when Erdely wanted to know more about her attackers, and reconsidered going public.

December 5, 2014: The Story Begins to Unravel

A Washington *Post* report (http://www.washingtonpost.com/local/education/u-va-fraternity-to-rebut-claims-of-gang-rape-in-rolling-stone/2014/12/05/5fa5f7d2-7c91-11e4-84d4-7c896b90abdc_story.html) raises major questions about the narrative presented in *Rolling Stone*.

- Phi Kappa Psi says in a statement that it "did not have a date function or a social event during the weekend of September 28th, 2012," and none of its members worked at the pool during that time. While the article suggests the gang rape was part of an initiation ritual, the fraternity does not have pledges in the fall.
- Jackie's friends tell the *Post* that they're beginning to doubt her account. They say in the past week, she identified one of her alleged attackers for the first time. They discovered the student belongs to a different fraternity, and no one by that name was ever in Phi Kappa Psi.
- A man with that name tells the *Post* he worked at the pool and knew Jackie's name, but had never met her in person. He was never a member of Phi Kappa Psi.
- The student identified as "Andy" in the *Rolling Stone* article confirms that Jackie called and said "something bad happened" in the fall of 2012. He and two other friends ran to meet her about a mile from the fraternity houses. He says she was "really upset, really shaken up" but did not appear to be physically injured. He claims Jackie told them she had been forced to have oral sex with a group of men. He says they offered to get her help, but she said she just wanted to go back to the dorm. She asked them to spend the night with her, and they did. Andy denies that Jackie's dress was bloody, that she named a specific frat, or that they debated the social price of her next move.
- Emily Renda says she met Jackie in fall of 2013 and they instantly bonded because they had both been raped at a fraternity party. She claims Jackie initially told her she was attacked by five men, then changed the number to seven months later.
- Rachel Soltis, Jackie's former roommate, says she noticed emotional and physical changes in her during the fall of 2012. "She was withdrawn, depressed and couldn't wake up in the mornings," says Soltis, adding that she's convinced Jackie was sexually assaulted.
- Jackie says she asked Erdely to be taken out of the article at one point, but she refused and said the article was going forward. She says she agreed to participate as long as she could fact-check her parts in the story.
- Jackie tells the *Post* she doesn't know if her attacker was a member of Phi Kappa Psi, but she knows the attack took place in that house because a year later, "my friend pointed out the building to me and said that's where it happened." "I never asked for this" attention, she adds. "What bothers me is that so many people act like it didn't happen. It's my life. I have had to live with the fact that it happened — every day for the last two years."

December 5, 2014: *Rolling Stone* Releases a Statement, Gets in Even More Trouble

Rolling Stone managing editor Will Dana releases a lengthy statement (https://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205) , which concludes, "In the face of new information, there now appear to be discrepancies in Jackie's account, and we have come to the conclusion that our trust in her was misplaced." Following claims that the magazine was blaming a rape victim for its own shoddy reporting, the final paragraph is revised (http://nymag.com/daily/intelligencer/2014/12/rolling-stone-clarifies-rape-story-apology.html) to say:

> We published the article with the firm belief that it was accurate. Given all of these reports, however, we have come to the conclusion that we were mistaken in honoring Jackie's request to not contact the alleged

> assaulters to get their account. In trying to be sensitive to the unfair shame and humiliation many women feel after a sexual assault, we made a judgment – the kind of judgment reporters and editors make every day. We should have not made this agreement with Jackie and we should have worked harder to convince her that the truth would have been better served by getting the other side of the story. These mistakes are on *Rolling Stone*, not on Jackie. We apologize to anyone who was affected by the story and we will continue to investigate the events of that evening.

December 7, 2014: Jackie's Former Suitemate Comes to Her Defense

Emily Clark, who shared a suite with Jackie during her freshman year, writes an op-ed (http://www.cavalierdaily.com/blog/on-sexual-assault-letters-from-the-community/2014/12/a-letter-from-a-friend-jackies-story-is-not-a-hoax) in the UVA newspaper describing how she became increasingly depressed during fall of 2012, eventually going home right before finals. "Sometime that year I remember her letting it slip to me that she had had a terrible experience at a party," Clark writes. "I remember her telling me that multiple men had assaulted her at this party. She didn't say anything more." She continues:

> However, the articles released in the past few days have been troubling to me, and the responses to them even more so. While I cannot say what happened that night, and I cannot prove the validity of every tiny aspect of her story to you, I can tell you that this story is not a hoax, a lie or a scheme. Something terrible happened to Jackie at the hands of several men who have yet to receive any repercussions.

December 10, 2014: Jackie's Friends Suggest "Drew" Is a Fabrication

The Washington *Post* unveils another shocking twist (http://www.washingtonpost.com/local/education/u-va-students-challenge-rolling-stone-account-of-attack/2014/12/10/ef345e42-7fcb-11e4-81fd-8c4814dfa9d7_story.html) : Randall, Andy, and Cindy, the three students who rushed to help Jackie on September 28, 2012, say details she gave them about Drew, her date that night, led them to question whether he was real.

Randall says he befriended Jackie soon after they arrived on campus. She was interested in a romantic relationship, but he said he wanted to remain friends. A short time later, Jackie began telling her three friends about Drew, a handsome junior from chemistry class who had a crush on her. They asked for the upperclassmen's number, and started exchanging text messages with him. In texts provided to the *Post*, he raves about "this super smart hot" freshman who shares his love of the band Coheed and Cambria.

Drew laments that he really likes Jackie, but she's interested in someone else. "Get this she said she likes some other 1st year guy who dosnt like her and turned her down but she wont date me cause she likes him," he writes. "She cant turn my down fro some nerd 1st yr. she said this kid is smart and funny and worth it." Randall is now convinced that he's the first year.

Jackie's friends were never able to locate Drew on social media or UVA's database. The *Post* confirmed no student by that name has ever been enrolled in the university.

The texts also included photos of Drew, which Randall provided to the paper. While his name does not match the one Jackie provided, the *Post* managed to track him down. He says he's a high-school classmate of Jackie's but he "never really spoke to her." He has not visited UVA in at least six years, he is not in a fraternity, and he was in another state at an athletic event on the night of the alleged rape.

Randall says that after the alleged gang rape, Drew wrote him an email, "passing along praise that Jackie apparently had for him."

While *Rolling Stone* says Randall declined to be interviewed "citing his loyalty to his own frat," he says he was never contacted and would have talked to the magazine.

Andy and Cindy say Erdely didn't contact them either. Last week Jackie revealed the name of her attacker to a different group of friends for the first time. Andy, Cindy, and Randall say they've never heard the name.

While the three friends are portrayed as shockingly callous in the original article, they say they did everything they could to help Jackie that night. "She had very clearly just experienced a horrific trauma," Randall said. "I had never seen anybody acting like she was on that night before, and I really hope I never have to again. ... If she was acting on the night of Sept. 28, 2012, then she deserves an Oscar."

The *Post* notes, "The article's writer, Sabrina Rubin Erdely, did not respond to requests for comment this week."

The newest revelations mean that someone is lying about Erdely's attempts to reach out to Randall. Slate's Hanna Rosin explains (http://www.slate.com/blogs/xx_factor/2014/12/10/rolling_stone_sabrina_rubin_erdely_the_washington_post_inches_closer_to.html) :

> That could mean one of two things: Jackie could have given Erdely fake contact information for Randall and then posed as Randall herself, sending the reporter that email in which he supposedly declined to participate in the story. Erdely also could have lied about trying to contact Randall. *Rolling Stone* might have hinted at this possibility in its "Note to Our Readers (http://www.rollingstone.com/culture/news/a-note-to-our-readers-20141205) " when it referred to a "friend of Jackie's (who we were told would not speak to *Rolling Stone*)" but later spoke to the *Washington Post*. That would take Erdely a big step beyond just being gullible and failing to check her facts, moving this piece in the direction of active wrongdoing.

December 14, 2014: Jackie's Friends Dispute *Rolling Stone*'s Account, Using Their Real Names

The students identified in the *Rolling Stone* piece as "Andy," "Cindy," and "Randall" put their names to their version of events in an interview (http://bigstory.ap.org/article/0559772b9bdb44b0b6d05a034c3d8bb2/friends-say-they-pushed-uva-jackie-call-cops) with the Associated Press. Alex Stock, 20, Kathryn Hendley, 20, and Ryan Duffin, 20, said that after getting a frantic call from Jackie on the night of the alleged rape, they rushed to meet her at a picnic table outside UVA's Fitzhugh dorm.

Kathryn Hendley disputed *Rolling Stone*'s description of her as a "self-declared hookup queen" who said Jackie shouldn't go to the police because "we'll never be allowed into any frat party again." "I'm offended that she made me out to be this really awful, self-serving person, which is really not based on any personality traits that I actually have," Hendley told (http://www.washingtonpost.com/local/education/u-va-students-put-their-names-to-account-of-attack-aftermath/2014/12/12/ea83fcce-822b-11e4-9f38-95a187e4c1f7_story.html) the Washington *Post*. In her AP interview, Hendley says that when she arrived at the picnic table, Jackie didn't want her to be part of the conversation about what to do next, so she watched the discussion from afar.

Ryan Duffin says that when they found Jackie, "it looked like she had been crying ... Her lip was quivering, her eyes were darting around. And right then, I put two and two together. I knew she had been on this date and people don't usually look like that after a date." She told her friends that she was forced to perform oral sex on five men. "My first reaction was, 'We need to go to police,'" Duffin said. "I wanted to go to police immediately. I was really forceful on that, actually. And I almost took it to calling (the police) right there." He said he pulled out his phone and was about to call 911, "but she didn't want to and," he thought, "'I can't do that if she doesn't want to do it.'"

Duffin says he even talked to his RA about the incident several days later, without using Jackie's name, to see if he should call the police anyway. The RA told him he could encourage her to contact the authorities, but it was her decision.

Alex Stock confirmed both friends' accounts. "Jackie's response was, 'I don't want to,'" Stock said. "'I don't want to do that right now. I just want to go to bed.'"

As seen in the video below, Duffin said he still wants to believe Jackie is telling the truth, but he doesn't know where he stands. "The thing is, it doesn't matter," he said. "It doesn't matter if it's true or not, because whether this one incident is true, there's still a huge problem with sexual assault in the United States."

All three say *Rolling Stone* never contacted them before the article was published last month, but Erdely recently reached out to them and said she was re-reporting the story. Hendley also said Erdely apologized to her for how she was portrayed in the story.

Melissa Bruno, a spokeswoman for *Rolling Stone*, told (http://www.huffingtonpost.com/2014/12/15/rolling-stone-uva-students-article_n_6327446.html) the Huffington Post that the magazine "is conducting a thorough internal review of the reporting, editing, and fact-checking" of Erdely's story. Apparently, this effort is separate from Erdely's. Two of the friends told (http://www.washingtonpost.com/blogs/erik-wemple/wp/2014/12/12/rolling-stone-begins-fully-reporting-its-rape-story/) the *Post* that they've been contacted by a different *Rolling Stone* reporter in recent days.

December 14, 2014: Jackie's Other Friend, Alex Pinkleton, Describes Her Conversations With Erdely

In a separate interview on Sunday, Jackie's friend Alex Pinkleton (not Alex Stock, who responded to Jackie's call for help) said she still believes Jackie was raped, but she isn't happy with how the story was reported. Pinkleton, a fellow rape survivor who was quoted in the *Rolling Stone* piece, told CNN's *Reliable Sources* (http://reliablesources.blogs.cnn.com/2014/12/14/student-source-for-rolling-stones-disputed-uva-rape-story-speaks-out/) that she thinks Erdely's "intentions were good" in writing about sexual assault on campus, but "the job was done poorly."

"I am upset with that aspect of it, but I also know that she was trying to come from a point of advocacy," Pinkleton said. "But as a reporter, you can't be, like, an advocate and support a story and listen to it and think everything is true and then report on it without trying to figure out if it's true. My job as an advocate was never to question Jackie's story or question the details, because I didn't need to. But the role that she's in as a reporter, she needed to do that."

Pinkleton said she too has been contacted by Erdely following the controversy, but she has yet to get back to her.

December 15, 2014: Phone Records Raise More Doubts About "Drew"

Jackie's friends shared more details about how they contacted "Drew," the man she claims she was on a date with the night she was raped.

According to (http://dailycaller.com/2014/12/16/university-of-virginia-students-catfishing-scheme-revealed/) the Daily Caller, the name she gave them for the attractive upperclassman who had a crush on her was "Haven Monahan." No one by that name was enrolled on campus, or even lived in the area.

She encouraged them to text him, and eventually they had three different phone numbers for Haven. Research (http://www.washingtontimes.com/news/2014/dec/15/friends-uva-rape-accuser-begin-doubt-story/?page=all#pagebreak) by the Washington *Times* determined that all three numbers are registered to internet services that allow people to text without a phone number or redirect calls to different numbers.

Ryan Duffin said he received no response when he texted the first number Jackie gave him. Someone identifying himself as Haven contacted him from a different phone, claiming he was using a friend's phone because his wasn't working. Later Haven started texting the friends from a third number, which he said was his BlackBerry. Previously, the Washington *Post* determined that a photo sent from that number was of one of Jackie's high school classmates, who was not in contact with her at the time and is not named Haven.

December 22, 2014: *Rolling Stone* Asks the Columbia Journalism School to Conduct an Independent Review of Its Report

Following unconfirmed reports that *Rolling Stone* was re-reporting its campus rape piece, editor and publisher Jann Wenner announced that the magazine has asked the Columbia Journalism School to investigate the matter. The following editor's note will appear in the next print issue of *Rolling Stone*:

> In RS 1223, Sabrina Rubin Erdely wrote about a brutal gang rape of a young woman named Jackie at a party in a University of Virginia frat house ["A Rape on Campus"]. Upon its publication, the article generated worldwide attention and praise for shining a light on the way the University of Virginia and many other colleges and universities across the nation have tried to sweep the issue of sexual assault on campus under the rug. Then, two weeks later, The Washington Post and other news outlets began to question Jackie's account of the evening and the accuracy of Erdely's reporting. Immediately, we posted a note on our website, disclosing the concerns. We have asked the Columbia Journalism School to conduct an independent review – headed by Dean Steve Coll and Dean of Academic Affairs Sheila Coronel – of the editorial process that led to the publication of this story. As soon as they are finished, we will publish their report.

January 12, 2015: Police Say They Have No Reason to Believe That Rape Took Place at Phi Kappa Psi

As the spring semester started at UVA, the school reinstated (http://www.washingtonpost.com/local/education/phi-kappa-psi-fraternity-reinstated-at-university-of-virginia/2015/01/12/1b6ddd50-9a69-11e4-96cc-e858eba91ced_story.html) its chapter of Phi Kappa Psi, saying police have cleared the frat, for now. Charlottesville police Captain Gary Pleasants confirmed that while they're still investigating the case, "We found no basis to believe that an incident occurred at that fraternity, so there's no reason to keep them suspended."

"We are pleased that the University and the Charlottesville Police Department have cleared our fraternity of any involvement in this case," said Phi Psi President Stephen Scipione. "In today's 24-hour news cycle, we all have a tendency to rush to judgment without having all of the facts in front of us. As a result, our fraternity was vandalized, our members ostracized based on false information."

March 23, 2015: The Results of the Police Investigation

Charlottesville, Virginia, police announced (http://nymag.com/daily/intelligencer/2015/03/police-no-evidence-to-support-uva-rape-story.html) at a press conference that their five-month investigation turned up no evidence to corroborate Jackie's story. "We're not able to conclude to any substantive degree that an incident occurred at the Phi Kappa Psi fraternity house or any other fraternity house, for that matter," said Police Chief Timothy J. Longo. "That doesn't mean something terrible didn't happen to Jackie ... we're just not able to gather sufficient facts to determine what that is."

According to the six-page outline (http://ftpcontent.worldnow.com/wvir/documents/Police-RS-Press-Statement-5-23-15.pdf) of the police investigation:

- Jackie was referred to Dean Nicole Eramo due to poor grades and told her on May 20, 2013, that she was sexually assaulted in a UVA fraternity house. Her description of the incident was not consistent with the *Rolling Stone* article.
- In April 2014 Jackie said she was hit in the face with a bottle after she was taunted by four men on campus. The incident is described as "payback" in the *Rolling Stone* article. Jackie told police she was hit by a glass bottle, and her roommate helped her pull glass from her face. The roommate denied this and said the injury was an abrasion.
- Jackie said she called her mother from a parking garage after she was hit by the bottle. Phone records showed no calls were made around that time.
- Jackie met with police several times and refused to provide any information about the alleged sexual assault.

Police found no evidence that there was a party at Phi Kappa Psi on September 28, 2012.

Police were unable to find any evidence that "Haven Monahan," the man Jackie said she was going out with on the night of the rape, is a real person.

The police investigation has been suspended, not closed. "I can't prove that something didn't happen, and there may come a point in time in which this survivor, or this complaining party or someone else, may come forward with some information that might help us move this investigation further," said Chief Longo.

Meanwhile, *Rolling Stone* said its independent investigation into its story will be published (http://nymag.com/thecut/2015/03/rolling-stone-will-publish-review-of-uva-story.html) in April.

Jackie has no comment on the new revelations:

Matt Pearce
@mattdpearce

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Jackie's attorney tells me she has no comment on the police news conference today about the Rolling Stone rape story.

4:11 PM - 23 Mar 2015

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April 5, 2015: *Rolling Stone* Retracts the Story

After conducting an independent review at *Rolling Stone*'s request, a three-person team from Columbia Journalism School released their findings in a 12,000-word report. They concluded (http://nymag.com/daily/intelligencer/2015/04/rolling-stone-retracts-uva-rape-story.html) :

> *Rolling Stone*'s repudiation of the main narrative in "A Rape on Campus" is a story of journalistic failure that was avoidable. The failure encompassed reporting, editing, editorial supervision and fact-checking. The magazine set aside or rationalized as unnecessary essential practices of reporting that, if pursued, would likely have led the magazine's editors to reconsider publishing Jackie's narrative so prominently, if at all. The published story glossed over the gaps in the magazine's reporting by using pseudonyms and by failing to state where important information had come from.

The Columbia journalists found that contrary to what Jackie, Erdely, and *Rolling Stone* have suggested at various points, she never asked to be removed from the story, and there was no agreement that the magazine would not attempt to speak with her alleged attacker.

Rolling Stone has retracted its story and apologized (http://www.rollingstone.com/culture/features/a-rape-on-campus-what-went-wrong-20150405) :

> We are also committing ourselves to a series of recommendations about journalistic practices that are spelled out in the report. We would like to apologize to our readers and to all of those who were damaged by our story and the ensuing fallout, including members of the Phi Kappa Psi fraternity and UVA administrators and students. Sexual assault is a serious problem on college campuses, and it is important that rape victims feel comfortable stepping forward. It saddens us to think that their willingness to do so might be diminished by our failings.

Erdely did the same. "Reading the Columbia account of the mistakes and misjudgments in my reporting was a brutal and humbling experience," she said (http://www.nytimes.com/2015/04/06/business/media/statement-

from-writer-of-rolling-stone-rape-article-sabrina-erdely.html?src=twr&_r=0) , in part. "I want to offer my deepest apologies: to *Rolling Stone*'s readers, to my *Rolling Stone* editors and colleagues, to the U.V.A. community, and to any victims of sexual assault who may feel fearful as a result of my article."

Jann Wenner, *Rolling Stone*'s publisher, said no one involved in the story's publication will be fired. The Columbia review notes that the retraction only concerns the magazine's reporting, and"cannot be understood as evidence about what actually happened to Jackie on the night of Sept. 28, 2012. If Jackie was attacked and, if so, by whom, cannot be established definitively from the evidence available."

May 13, 2015: UVA Associate Dean of Students Nicole Eramo Sues

Dean Eramo, head of UVA's Sexual Misconduct Board, is suing *Rolling Stone*, Wenner Media, and reporter Sabrina Rubin Erdely (http://nymag.com/daily/intelligencer/2015/05/uva-dean-sues-rolling-stone-defamation.html) for portraying her as the "chief villain" in the now-debunked article. The suit says the article suggests Eramo "did nothing" and tried to suppress "Jackie's alleged gang rape to protect UVA's reputation," when in actuality she quickly arranged a meeting with police, introduced her to sexual assault support groups on campus, and told her to encourage other alleged Phi Kappa Psi rape victims to come forward so the university could take action against the fraternity.

"*Rolling Stone* and Erdely's highly defamatory and false statements about Dean Eramo were not the result of an innocent mistake," says the suit, according to (http://www.washingtonpost.com/local/education/u-va-dean-sues-rolling-stone-for-false-portrayal-in-retracted-rape-story/2015/05/12/2128a84a-f862-11e4-a13c-193b1241d51a_story.html?postshare=9251431448467840) the Washington *Post*. "They were the result of a wanton journalist who was more concerned with writing an article that fulfilled her preconceived narrative about the victimization of women on American college campuses, and a malicious publisher who was more concerned about selling magazines to boost the economic bottom line for its faltering magazine, than they were about discovering the truth or actual facts."

Eramo says the *Rolling Stone* story damaged her reputation and caused her physical and emotional distress, which contributed to surgical complications she suffered while being treated for breast cancer. She is seeking more than $7.5 million in damages.

July 29, 2015: Former UVA Fraternity Members Sue *Rolling Stone*

George Elias IV, Stephen Hadford, and Ross Fowler, former Phi Kappa Psi members who graduated in 2013, have filed a defamation suit (http://hosted.ap.org/dynamic/stories/U/US_FRATERNITY_ROLLING_STONE?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2015-07-29-19-48-15) against *Rolling Stone*, Wenner Media, and Sabrina Rubin Erdely. They say they suffered "vicious and hurtful attacks" because details in the article incorrectly led people to assume they were rapists.

"Upon release of the article, family friends, acquaintances, co-workers and reporters easily matched (Elias) as one of the alleged attackers and, among other things, interrogated him, humiliated him, and scolded him," the lawsuit says, adding that Hadford and Fowler "suffered similar attacks." They are suing on three counts and seeking at least $75,000 in damages per count.

July 29, 2015: Managing Editor Will Dana Is Leaving *Rolling Stone*

The magazine revealed that Dana's last day will be August 7, and according to (http://www.nytimes.com/2015/07/30/business/media/will-dana-rolling-stones-managing-editor-to-depart.html) the New York *Times* he "is not leaving for another job, and his successor has not been named." When asked if his exit has something to do with the campus rape article, publisher Jann Wenner said via a spokeswoman, "Many factors go into a decision like this."

"After 19 years at *Rolling Stone*, I have decided that it is time to move on," Dana said in a statement. "It has been a great ride and I loved it even more than I imagined I would. I am as excited to see where the magazine goes next as I was in the summer of 1978 when I bought my first issue."

This post will be updated as more information becomes available.

One Year After 'Rolling Stone's Disastrous "A Rape On Campus," Here's How University Of Virginia Classrooms Have Changed

CHRISTINE STODDARD

December 18, 2015 • NEWS

Founded by Thomas Jefferson in 1819, the University of Virginia looks like a postcard. Lush with gardens and adorned with column after column, it is a place shrouded in Jeffersonian tradition as much as it is Jeffersonian myth. UVA earned its nickname as a "Public Ivy," not only for its appearance but for

its rigorous academics, which rank among the best in the country. Yet, one year ago, on Nov. 19, 2014, a single story cast a pall over the idyllic school long held in high esteem. In America's imagination, UVA suddenly became the setting for wild frat parties where rape ran rampant. That was after "A Rape on Campus: A Brutal Assault And Struggle for Justice at UVA," a longform feature by *Rolling Stone* contributor Sabrina Rubin Erdely.

The now-infamous 9,000-word saga of "Jackie" chronicled the undergraduate's alleged 2012 rape by members of the fraternity Phi Kappa Psi and the confounding aftermath, during which Jackie claimed she was met with doubt and resistance from so-called friends and administrators. Within hours of being posted online, the graphic story went viral — it purported dark trends in fraternity rape, victim shaming, and cover-ups.

The magazine's feature made national headlines when it was published and when it was ultimately retracted. UVA law professor Anne Coughlin, a self-described feminist, says that while the story's detailed account of an alleged rape was certainly shocking, what hurt her and her colleagues more was the story's portrayal of UVA administrators and students as "callous" and

"cold." Friends and administrators alike doubted Jackie's account and failed to show compassion throughout the narrative. "That is not the UVA I know," she says.

With its story, *Rolling Stone* intended to expose the frequency of sexual assault on college campuses. NPR reported in September 2015 that a survey of over 150,000 students at over 24 colleges found that "on average, 23 percent of undergraduate women say they were, in some way, sexually assaulted during their time on campus." And just this month, in November of 2015, *U.S. News and World Report* reported that a staggering one in six American college freshman surveyed said that they were raped during their first year of college when they were too drunk or drugged to get away from their attacker.

But in the immediate aftermath of its publication, as "A Rape On Campus" steadily climbed to a total of 2.7 million page views and inspired multiple online conversations and follow-up think pieces, suspicion about its credibility grew. The frat had always denied the rapes. In April of 2015, it was deemed by the Columbia Journalism Review to be among "the worst journalism of 2014."

Coughlin, for her part, notes that the *Rolling Stone* story "heightened the belief that women lie."

Before that would happen, five months earlier on Dec. 5, 2014, *Rolling Stone*'s managing editor issued an apology letter that noted, "Within days, commentators started to question the veracity of our narrative." That same letter retracted "A Rape On Campus" and would end up preceding the report delivered by Steve Coll, dean of the Columbia School of Journalism and a Pulitzer-winning reporter, and his associates, who combed through the story to unearth its errors and ethical breaches. The verdict? The tale could not be trusted because of journalistic failures committed by "the reporter, the editor,

the editor's supervisor, and the fact-checking department."

Rolling Stone vowed to overhaul the editorial departments that had signed off on the story, and Erderly described the reading of the report as "a brutal and humbling experience" in her statement. Meanwhile, *Rolling Stone* has been struck with a $25 million lawsuit from the fraternity in question, Phi Kappa Psi, as well as two other lawsuits waged by Phi Kappa Psi alumni and UVA associate dean Nicole Eramo, who says she was misrepresented in the article.

Jay Paul/Getty Images News/Getty Images

Coughlin says that, as a law professor who teaches gender issues, campus rape has always been a welcome topic for discussion in her classroom. Like many feminists, she believes the *Rolling Stone* story did a disservice to rape victims, their advocates, and "the entire movement." Even though Jackie's credibility about what happened to her on that now-infamous night in 2012 was damaged, no one can say for sure exactly what, if anything, happened to her.

Which is why things need to change. One year after the *Rolling Stone* story was published, UVA's classrooms are no longer the same. The shift has occurred at a campus-wide academic policy level and according to choices made by individual professors.

The Ensuing Conversations

Coughlin points to several calls for change that occurred on campus after the *Rolling Stone* article. Last spring, for example, an informal working group of UVA law students began regularly gathering to examine issues related to rape

and criminal law. One of the main topics of conversation was Title IX, a federal law that prohibits gender-based discrimination in federally funded educational programs and activities.

What role, if any, they asked, should universities have in investigating and adjudicating rape? What laws should exist, and how should they be enforced?

Meanwhile, administrators and faculty at the Law School gave advice regarding the revision of the university's policy on sexual and gender-based harassment. Kimberly Reich, director of media relations at UVA School of Law, tells Bustle, "Additionally, all Law School students and employees are now required to complete training modules designed to help prevent sexual and gender-based harassment."

The Law School was not the only campus body responding to the article. Denise Walsh, a professor of Women, Gender & Sexuality studies at UVA, tells Bustle that the *Rolling Stone* story inspired many professors in the School of Arts and Sciences to amend their syllabi: "The most common change, according to informal student feedback I received this semester, was to include a statement noting the resources available at the university for anyone struggling with gender, sexual, or domestic violence."

She adds that regular conversations about the story took place during class in November and December last year. After the story was published, Walsh decided to open up her classes to all students and faculty who wished to discuss the *Rolling Stone* article. She said that they talked about everything from the seriousness of Jackie's alleged assault to the challenges of addressing sexual assault across college campuses.

Jay Paul/Getty Images News/Getty Images

″I opened one of my [gender-based violence] classes to all faculty and students who wished to discuss the *Rolling Stone* article,″ she says. “A number of faculty and students attended and talked about many aspects of the story, from concern about the seriousness of the assault reported to how to address sexual assault across college campuses.”

″I can say that gender-based violence issues are much more part of the classroom conversation — and that is the result of what students are interested in talking about as well as what faculty are willing to discuss,″ Walsh adds.

A Student Collective On Gender Violence

In September this year, Walsh and Nick Winter, a professor in UVA′s Department of Politics whose research interests include gender and politics, drafted a proposal for a University Of Virginia-based Institute on Power, Violence, and Inequality that would focus on understanding and preventing

sexual violence. It would explore sexual violence on university campuses, in wartime situations, home environments, and other spaces around the world, according to the proposal.

"Specifically, gender-, race-, sexuality-, and other power-based violence are particularly complex and intellectually important because they all occur at the intersections of systems of legitimate and illegitimate power and formal and informal systems of authority," write Walsh and Winter in the proposal.

Jay Paul/Getty Images News/Getty Images

While the Institute has not yet been approved by the university, Walsh says they recently received confirmation from UVA that the collective will be funded. Next semester, it will host guest speakers, an undergraduate forum for input on curricular changes, and a monthly conference to share research related to power, violence, and inequality. Graduate RAs will assist with the collective's organization and operations.

Changes At The Women's Center

Other areas on campus are considering changes, too. Take the Maxine Platzer Lynn Women's Center at UVA, which works toward gender justice on campus. The center offers counseling services, provides body positive education, coordinates internships, runs a volunteer corps, and manages opportunities in engaged scholarship where students can earn hands-on experience that complements their classwork.

Leigh Ann Carver, communications and development officer at the center, says it has gradually increased its services in recent years, but the *Rolling Stone* story "heightened publicity." In December 2014, UVA's Office of the Provost funded two new positions at the Women's Center: an education outreach and prevention specialist for the Gender Violence and Social Change program and a full-time counselor-in-residence experienced in trauma. There is also another new person on campus: Kelley Hodge, UVA's new full-time Title IX coordinator and a trial attorney who has served as the Safe Schools Advocate for the Pennsylvania Commission on Crime and Delinquency in Philadelphia for the past four years. While not a Women's Center employee, her relevance to the center's mission is apparent.

The Aftermath

In June 2015, UVA president Teresa Sullivan's office issued a document entitled, "Next Steps to Address Sexual Assault Prevention and Response and to Effect Change in the University's Climate." In it, Sullivan listed actions the administration had thus far undertaken to respond to university rape culture.

Jay Paul/Getty Images News/Getty Images

Those actions reportedly include developing new student orientation and new resident assistant training; the creation of the Not on Our Grounds initiative, a campaign-based initiative that targets sexual violence; new UVA-specific training modules focused on sexual assault; partnering with Futures Without Violence and Harvard Law School and hosting a May 2015 meeting of sexual assault prevention experts to design a curriculum addressing assault prevention and response; participation in the national GreenDot program; and coming up with alcohol-free programming with the University Programs Council during the first several weeks of the fall semester to create weekend alternatives to Greek social activities.

University spokesperson Anthony P. de Bruyn tells Bustle in a statement that shortly after Thanksgiving break this year, the UVA President's Ad Hoc Group on University Climate and Culture received word that various initiatives are in the works for the spring semester. Updates will be posted on the University Climate and Culture website. He adds that UVA "will continue to implement substantive reforms," noting that "the negative repercussions of this

irresponsible journalism continue today."

One year ago, *Rolling Stone* made a monumental error — a failure at every stage of its editorial process, which culminated in a piece of faulty journalism that contributed to the narrative of those who stand against rape survivors.

But that error also contributed to the growing national conversation about campus rape. In Carver's Oct. 5 blog post for the Women's Center, she writes, "In the long run, the level of attention brought to the issue of sexual assault nationally and locally over the past couple of years is bound to be a good thing."

Some women's rights groups agree. "I've been an activist for 25 years," says Kristen Houser, the chief public affairs officer at the National Sexual Violence Resource Center in Pennsylvania. "All the things we activists have been hoping for are finally actually happening. While the story didn't hold up to the standards of journalism, it still shone a light a something that needed to be addressed. The story highlighted a problem that people are finally paying attention to."

"So many universities really are reexamining policies, practices, how they're staffing Title IX office," she continues. "They're making it a top priority. We are all going to benefit from that."

Images: Wikimedia Commons; Wikimedia Commons; Bob Mical/Flickr

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DECEMBER 11, 2015

SHUTTING DOWN CONVERSATIONS ABOUT RAPE AT HARVARD LAW

BY JEANNIE SUK

Nineteen Harvard Law School professors have signed a statement criticizing the documentary "The Hunting Ground" for its portrayal of a sexual-assault case.
PHOTOGRAPH BY GRETCHEN ERTL / THE NEW YORK TIMES / REDUX

This is a piece on a subject about which I may soon be prevented from publishing, depending on how events unfold. Last month, near the time that CNN broadcast the documentary "The Hunting Ground (http://www.thehuntinggroundfilm.com/)," which focusses on four women who say their schools neglected their claims of sexual assault, I joined eighteen other Harvard Law School professors in signing a statement (http://hlrecord.org/2015/11/19-harvard-law-professors-defend-law-student-brandon-winston-denouncing-his-portrayal-in-the-hunting-ground/) that criticized the film's "unfair and misleading" portrayal of one case from several years ago. A black female law student accused a black male law student of sexually assaulting her and her white female friend. The accuser, Kamilah Willingham, has graduated from the law school and is featured in the film. The accused, Brandon Winston, who spent four years defending himself against charges of sexual misconduct, on campus and in criminal court, was ultimately cleared of sexual misconduct and has been permitted to reënroll. The group that signed the statement, which includes feminist, black, and leftist faculty, wrote that this was a just outcome. (The faculty, of which I'm a member, made the final decision not to dismiss Winston from the law school, after a contrary recommendation made by the school's administrative board, but I rely only on public knowledge produced by the film and his criminal trial, and don't draw on any confidential or internal information about the case.)

Winston's attorneys have put public documents related to his case on a dedicated Web site (http://brandonproject.org/) so that people who see the film can evaluate the facts of the case for themselves. I won't belabor the merits of the case or the accuracy of the film here, but, as Emily Yoffe noted on *Slate* (http://www.slate.com/articles/news_and_politics/doublex/2015/06/the_hunting_ground_a_closer_look_at_the_influential_documentary_reveals.html), "what the evidence (including Willingham's own testimony) shows is often dramatically at odds with the account presented in the film." The evidence reveals that Winston, who was involved in a confused, drunken encounter, was not, as Willingham claims in the film, "a rapist" or "a predator" (Her statement that "he is

a rapist" was edited out when the film was broadcast on CNN.) Harvard officials were not indifferent to Willingham's complaint; Winston was removed from the law school and investigated by the school, an independent fact-finder, and the local district attorney. In e-mails to the lawyer for a white female student, who had accused a black college quarterback of rape and ultimately appeared in the film, one of the producers expressed the filmmakers' intent to "ambush" him, and explained (http://www.nationalreview.com/article/427166/smoking-gun-e-mail-exposes-bias-hunting-ground) that "we don't operate the same way as journalists" since the film is "very much in the corner of advocacy for victims" and had no "need to get the perpetrator's side." This raised questions about whether fairness and accuracy are even important for an advocacy film, but the filmmakers have continued to insist (http://www.thehuntinggroundfilm.com/the-facts/) that "the truth is on our side." In a comment to *The New Yorker*, they wrote, "We fully stand behind Willingham's account—everything in the film is accurate." Disagreement is an expected part of the exchange, which, on the whole, helps move the public discussion toward more nuanced perceptions of campus sexual-assault narratives.

But last week the filmmakers did more than understandably disagree with criticism of the film, which has been short-listed for the Academy Award for best documentary. They wrote, in a statement (http://www.thecrimson.com/article/2015/12/3/website-challenges-hunting-ground/) to the *Harvard Crimson*, that "the very public bias these professors have shown in favor of an assailant contributes to a hostile climate at Harvard Law." The words "hostile climate" contain a serious claim. At Harvard, sexual harassment is "unwelcome conduct of a sexual nature," including verbal conduct that is "sufficiently persistent, pervasive, or severe" so as to create a "hostile environment." If, as the filmmakers suggest, the professors' statement about the film has created a hostile environment at the school, then, under Title IX, the professors should be investigated and potentially disciplined.

To my knowledge, no complaint of sexual harassment has been filed with Harvard's Title IX office—though I've been told by a high-level administrator that several people have inquired about the possibility—and I don't know if the school would proceed with an investigation. Precedent for such an investigation exists in the case of Laura Kipnis, a feminist film-studies professor at Northwestern University, who earlier this year wrote an article criticizing aspects of Title IX policies and culture and was accused of creating a hostile environment on campus; Northwestern conducted an investigation and ultimately cleared Kipnis of sexual-harassment charges. A handful of students have said that they feel unsafe at Harvard because of the professors' statement about the film. If a Title IX complaint were filed and an investigation launched, the professors wouldn't be permitted to speak about it, as that could be considered "retaliation" against those who filed the complaint, which would violate the campus sexual-harassment policy.

What could possibly be the logic on which criticism of "The Hunting Ground" could be said to contribute to a hostile environment, or to cause a student to feel

unsafe? The film features the first-person narratives of individuals who describe their sexual assaults and then go on to describe the insensitivity of campus officials or police who did not vindicate their claims. At the Sundance festival première, which I attended, when an audience member asked what people could do to join the fight against campus sexual assault, one of the survivors featured in the film responded, simply, "Believe us." It is a near-religious teaching among many people today that if you are against sexual assault, then you must always believe individuals who say they have been assaulted. Questioning in a particular instance whether a sexual assault occurred violates that principle. Examining evidence and concluding that a particular accuser is not indeed a survivor, or a particular accused is not an assailant, is a sin that reveals that one is a rape denier, or biased in favor of perpetrators.

This is the set of axioms on which one might build a suggestion that challenging the accuracy of "The Hunting Ground" contributes to a hostile environment on campus. If I am a student at a school where professors seem to disbelieve one accuser's account, then it is possible that they could disbelieve me if I am assaulted. That possibility makes me feel both that I am unsafe and that my school is a sexually hostile environment. Under this logic, individuals would not feel safe on campus unless they could know that professors are closed off to the possibility that a particular person accused of sexual misconduct may be innocent or wrongly accused. But, then, what would be the purpose of a process in which evidence on multiple sides is evaluated? Fair process for investigating sexual-misconduct cases, for which I, along with many of my colleagues, have fought (https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html), in effect violates the tenet that you must always believe the accuser. Fair process must be open to the possibility that either side might turn out to be correct. If the process is not at least open to both possibilities, we might as well put sexual-misconduct cases through no process at all.

The ironclad principle that you must always believe the accuser comes as a corrective to hundreds of years in which rape victims were systematically disbelieved and painted as liars, sluts, or crazies. This history, along with the facts that sexual assault is notoriously underreported and that the crime suffers no more false reports than other crimes—and the related idea that only those actually assaulted would take on the burden of coming forward—leads many advocates today to the "always believe" orthodoxy. We have seen recent high-profile instances in which that article of faith has led to damaging errors, as in *Rolling Stone's* reporting of a rape at the University of Virginia, or the prosecution of the Duke lacrosse case. The extent of the damage comes out of the fact that "always believe" unwittingly renders the stakes of each individual case impossibly high, by linking the veracity of any one claim to the veracity of all claims. When the core belief is that accusers never lie, if any one accuser has lied, it brings into question the stability of the entire thought system, rendering uncertain all allegations of sexual assault. But this is neither sensible nor necessary: that a few claims turn out to be

false does not mean that all, most, or even many claims are wrongful. The imperative to act as though every accusation must be true—when we all know some number will not be—harms the over-all credibility of sexual assault claims.

Sexual assault is a serious and insidious problem that occurs with intolerable frequency on college campuses and elsewhere. Fighting it entails, among other things, dismantling the historical bias against victims, particularly black victims—and not simply replacing it with the tenet that an accuser must always and unthinkingly be fully believed. It is as important and logically necessary to acknowledge the possibility of wrongful accusations of sexual assault as it is to recognize that most rape claims are true. And if we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against black men in rape accusations. The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track, despite all the campus-climate surveys. Administrators and faculty who routinely work on sexual-misconduct cases, including my colleague Janet Halley (http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/), tell me that most of the complaints they see are against minorities, and that is consistent with what I have seen at Harvard. The "always believe" credo will aggravate and hide this context, aided by campus confidentiality norms that make any racial pattern difficult to study and expose. Let's challenge it. Particularly in this time of student activism around structural and implicit racial bias pervading campuses, examination of the racial impact of Title IX bureaucracy is overdue. We are all fallible—professors, students, and administrators—and disagreement and competing narratives will abound. But equating critique with a hostile environment is neither safe nor helpful for victims. We should be attentive to our history and context, and be open to believing, disbelieving, agreeing, or disagreeing, in individual instances, based on evidence.

Jeannie Suk is a professor at Harvard Law School.

Presidential Committee on Campus Sexual Misconduct:
Findings and Recommendations

Temple University
2014

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Executive Summary

Temple University President Neil Theobald formed the Presidential Committee on Campus Sexual Misconduct in September 2014 and charged it with obtaining a comprehensive understanding of the current policies, procedures, and campus climate regarding sexual misconduct, as well as developing strategies and recommendations to ensure that Temple University is providing a safe and healthy environment for all members of the Temple community. To achieve these goals three subcommittees were formed, including Current Education, Policies, Support, and Adjudication; Best Practices; and Climate Survey. The subcommittees met regularly between September and December 2014.

The Current Education, Policies, Support, and Adjudication subcommittee reviewed a variety of programs, resources, and policies currently in place at Temple. The subcommittee determined that Temple already has in place many of the support services, adjudication procedures, educational programs, and policies recommended by the U.S. Department of Education.

The Best Practices subcommittee conducted extensive literature reviews to identify best practices on sexual misconduct prevention and education. The subcommittee also conducted a review of research on effectiveness of sexual misconduct interventions on college campuses.

The Climate Survey subcommittee conducted a sexual misconduct climate survey to assess students' perceptions of university leadership, policies, and reporting related to campus sexual misconduct; knowledge of policies and reporting procedures; perceptions regarding readiness to help; bystander confidence; incidence of sexual misconduct events; and preferred resources and services to assist with events of sexual misconduct. While the survey found generally positive perceptions of Temple's leadership, policies, and reporting, it also indicates areas that can be improved upon; these areas serve as a basis for the recommendations presented in this report.

Based on the findings of the three subcommittees, the Presidential Committee on Campus Sexual Misconduct proposes a number of recommendations to help ensure that Temple University is addressing sexual misconduct prevention needs and providing the most effective services to the university community by increasing the education on sexual misconduct and strengthening the infrastructure of sexual misconduct resources and services.

The committee recognizes that its recommendations must be evaluated in light of available resources, which may vary over time depending on forces and actions external to the university. Therefore, the committee's recommendations are presented with the goal of providing the maximum benefit to the university community to educate on and prevent sexual misconduct through a number of alternative structures depending on the level of investment that may be possible in the near-, mid-, and long-term.

The major recommendations of the Committee are as follows:

- Upgrade misconduct education through programs that are comprehensive in addressing multiple levels of influence for sexual misconduct and integrate various interventions that work together in sufficient dosage with repeated exposure
- Engage in university-wide informational and educational campaigns that are tailored to the different university stake-holder communities and assure that all members of the university complete baseline training
- Improve the organization and accessibility of information regarding sexual misconduct policies, procedures, and resources by restructuring a ‘one stop, one shop’ website that is no more than 2-3 clicks from the Temple University homepage
- Include sexual misconduct website location in course syllabi
- Improve accessibility of training support materials by offering them in languages other than English and various formats to ensure their relevance to different cultural groups
- Explore how to provide 24/7 counseling and hotline support services
- Enable anonymous reporting of sexual misconduct incidents
- Offer amnesty to victims of sexual misconduct for alcohol and drug-related infractions that occur in conjunction with an act of sexual misconduct
- Create a centralized sexual misconduct office to develop and expand educational offerings, provide coordinated and comprehensive support for victims, and coordinate existing services and campus-wide efforts
- Invest in additional staff for counseling, support, and education
- Review and update all appropriate policies and practices as they pertain to adjudication to ensure they meet or exceed requirements, including providing more training for Student Conduct Board members and incentives to serve on the board.

A. Introduction

Recently, significant national attention has been given to sexual misconduct on college and university campuses. The national discussion about campus sexual misconduct and recent investigations initiated by the Department of Education pertaining to allegations of Title IX sexual harassment and sexual assault violations by a variety of institutions of higher education has motivated Temple to institute a full review of the university's policies, educational programs, enforcement, victim support, and adjudication efforts. Campus police data, Student Conduct referrals, and Equal Opportunity Compliance investigations of alleged sexual harassment and sexual assault, corroborate the view that comprehensive analysis of this issue on Temple's campus is appropriate at this time.

In September 2014, Temple University President Neil Theobald formed the Presidential Committee on Campus Sexual Misconduct and charged it with obtaining a comprehensive understanding of the current policies, procedures, and campus climate, as well as developing strategies and recommendations to ensure that Temple University is providing a safe and healthy environment for all members of the Temple community. The committee was chaired by Dr. Laura Siminoff, Dean of Temple's College of Public Health, and made up of faculty members, administrators, and students.

B. Methodology

To accomplish its mission, the members of the committee were divided into three subcommittees: 1) Current Education, Policies, Support, and Adjudication; 2) Best Practices; and 3) Climate Survey. The respective goals of the subcommittees were to review current Temple University policies and procedures, assess best practices from other institutions, and conduct a university-wide climate survey to better understand students' perceptions of the issue of sexual misconduct.

For the purposes of the committee's work, *sexual misconduct* was defined as "a range of behaviors that are unwanted by the recipient and include remarks about physical appearance; persistent sexual advances that are undesired by the recipient; unwanted touching; unwanted oral, anal, or vaginal penetration or attempted penetration; the unwanted taking and or releasing of nude photographs; and stalking."

The subcommittees convened regularly between September and December 2014. The Current Education, Policies, Support, and Adjudication subcommittee reviewed a variety of programs, resources, and policies currently in place at Temple, including: educational programs for students, faculty, and staff; current victim support services provided by the Sexual Assault Counseling and Education unit of Tuttleman Counseling Services, Donna Gray of Campus Safety Services, and the Wellness Resource Center; police procedures for reports of sexual misconduct; the student conduct process; and a cursory review of 1) the Education and

Prevention of Sexual Assault, Domestic Violence, Dating Violence, and Stalking Policy and 2) the Student Conduct Code.

The Best Practices subcommittee focused on both prevention and intervention strategies at other universities. The subcommittee reviewed the research literature on efficacy of preventive strategies, in addition to government and organizational resources for best practices on sexual misconduct prevention and education. The subcommittee also conducted a review of research on evidence for the effectiveness of sexual misconduct interventions on college campuses. Lastly, the subcommittee met with key Temple University staff to ascertain their suggestions regarding resources and changes necessary to provide better education and response to campus sexual misconduct.

The Climate Survey subcommittee conducted a review of the literature on campus climate surveys and consequently developed a survey adapted from the Office on Violence Against Women's proposed campus climate survey to the Temple student population and service environment (Office on Violence Against Women [OVW], 2014). After review by the Temple University Institutional Review Board the survey was piloted with students and edited based on their recommendations. The survey was then administered in two waves using Qualtrics. The first wave, occurring in November 2014, had a total of 1,407 surveys completed out of 16,000 sampled students, for a response rate of 8.8%. Only completed surveys were used for analysis. The second wave of surveys, occurring in February 2015, had a total of 2,356 completed out of 17,442 sampled students, for a response rate of 13.5%; no students new to Temple in the spring 2015 semester were invited to complete the survey. The combined response rate for both waves of the survey was 11.3%. The web-based survey assessed Temple University undergraduate and graduate students' perceptions of leadership, policies, and reporting related to: a) campus sexual misconduct, b) knowledge of policies and reporting, c) perceptions regarding readiness to help, d) personal bystander confidence and confidence in others, e) incidence of sexual misconduct events, and f) suggested resources and services to assist with events of sexual misconduct.

C. Subcommittee Findings

1. Results of Climate Survey

The 2014 Climate Survey conducted by the Climate Survey subcommittee generated a total of 3,763 complete surveys out of 33,442 sampled Temple University (TU) students; the response rate was 11.3%. Only completed surveys were used for analysis. Undergraduate students accounted for 2,961 of the completed surveys, while graduate students accounted for 802 surveys. An overview of the survey findings is presented below, and additional details can be found in the Technical Report included in Appendix A.

For the purposes of the Climate Survey, *sexual misconduct* was defined as "a range of behaviors that are unwanted by the recipient and include remarks about physical appearance; persistent sexual advances that are undesired by the recipient; unwanted touching; unwanted oral, anal, or

vaginal penetration or attempted penetration; the unwanted taking and or releasing of nude photographs; and stalking." *Stalking* was defined as "a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear."

Survey Limitations

There are some limitations to the data collected in the 2014 Climate Survey. First, the response rate was low (11.3%). Receiving only 3,763 completed surveys from a sample of 33,442 is likely indicative that the responses and experiences relayed by those participating are not representative of the student population. To the extent that respondents' propensity for participating in the survey is associated with the fundamental topic of the survey, self-selection bias is a likely problem. Participation based on a predetermined characteristic, like having previously experienced sexual misconduct or having certain attitudes towards the topic, can produce a sample that is not representative of the population as a whole (Olsen, 2008; Regents of the University of California, 2014). Ultimately, it cannot be determined how participants and non-participants may be inherently different. Second, some technological errors did occur during the implementation of the survey. During both survey waves Qualtrics experienced some errors with skip logic and conditional questioning. In the first wave some students who experienced at least one form of sexual misconduct were not asked the related follow-up questions to assess the events in greater detail (i.e. how many times the type of event occurred, whether or not the event(s) were reported, or who was involved). In both the first and second waves, errors occurred with the conditional questioning related to policy and prevention trainings. Therefore, it is not known if these individuals' experiences may have notably differed from those of others who did not encounter technological difficulties.

Also, the number of sexual misconduct events reported by some subgroups was low (e.g., graduate students, individuals identifying as other gender). Consequently, it is difficult to draw conclusions based on a small sample size. Additionally, the survey was conducted in two distinct waves with four months passing in between; this may have led to differences in how participants in the first and second waves answered questions. However, results of the two waves of surveying were compared and no significant differences were found. Finally, six questions were modified between the survey waves. Four questions were condensed into two prior to the initiation of the second wave and two questions were condensed into one halfway through the second wave due to technological errors. The differing presentation of the questions may have led to differences in how participants responded to the questions.

Demographic Description of the Sample

Of the 3,763 surveys included in the analysis, 73.8% were between the ages of 18 and 23, while 26.2% were 24 or older. Respondents primarily self-identified as white (68.8%), Asian (11.3%), or black or African American (10.1%). Additionally, 5.7% identified as being of Hispanic or Latino ethnicity and 94.3% identified as non-Hispanic. Respondents identified as female

(62.9%), male (35.8%), and "other gender" (1.3%); the Temple student population by gender is about 51% female and 49% male. A higher percentage of respondents being female is typical of online surveys (Smith, 2008). The majority of respondents identified as heterosexual (85.0%), with fewer identifying as bisexual (7.5%), gay (2.2%), lesbian (1.6%), and questioning (1.9%). Sexual orientation was similar between undergraduate and graduate students.

Over half of respondents (53.3%) reported being a student at Temple for less than two years (graduate: 47.9%, undergraduate: 56.0%). Additionally, 92.4% of respondents reported spending the majority of their time on Temple's main campus (graduate: 70.8%, undergraduate: 98.2%). Graduate students more often reported spending their time on another campus than did undergraduate respondents, including the Health Sciences campus (17.5%) and the Center City campus (5.1%). Undergraduate respondents more often reported living on or near campus (59.2%) compared to graduate students (17.2%); 82.8% of graduate students live more than 10 blocks from campus. Of those responding to the survey, 7.5% were affiliated with a social fraternity or sorority.

Survey Results: Perceptions of Leadership, Policies, and Reporting

Graduate student survey respondents were generally more confident in the university's leadership and policies than were undergraduate students. While the majority of graduate respondents positively perceived that the university would take corrective action against the offender (72.5%) and would take steps to protect the safety of the person making the report (78.2%), undergraduate respondents were less confident (66.9% and 72.0%, respectively). Students were the most positive about the university's ability to keep knowledge of a sexual misconduct report limited to those who need to know in order to appropriately respond to the report (graduate: 89.0%, undergraduate: 85.7%). Perceptions of the likelihood (*very likely*, *moderately likely*, and *slightly likely*) of retaliation against the victim (graduate: 94.0%, undergraduate: 93.2%) and negative effects on educational achievement of the victim (graduate: 82.3%, undergraduate: 81.6%) were the least favorable.

In order to provide a summary score of the items assessing these perceptions, a mean item score and mean scale score were derived (after recoding two items for directionality) for the total sample. The mean item score, the average score for the individual items, was found to be 2.91, which is equivalent to *moderately likely*. The mean scale score, the average total score for the scale, was 32.00 (SD=6.86) of a possible maximum score of 44.

On average, male graduate and undergraduate respondents have more positive perceptions of Temple's leadership and policies than do female graduate and undergraduate respondents. Male respondents had more favorable perceptions than females on each measure. For instance, 93.7% of graduate males and 86.3% of undergraduate males indicated that the university is *very likely* or *moderately likely* to take a report seriously, while 83.3% of graduate females and 71.1% of undergraduate females responded in this manner. Also, 86.2% of graduate males and 79.4% of undergraduate males believe that the university is *very likely* or *moderately likely* to take

corrective action against the offender, while 64.7% of graduate female respondents and 60.6% of undergraduate female respondents believe this. These differences in perception can be seen through the calculated mean item score for each group: graduate males (3.16), undergraduate males (3.06), graduate females (2.88), and undergraduate females (2.80); the higher the mean item score, the more positive the perceptions held by that group.

Survey Results: Training

Over two-fifths of respondents, 41.1% of graduate respondents and 42.8% of undergraduate respondents, reported having received training on Temple's policies and procedures regarding sexual misconduct; 18.7% and 18.2%, respectively, were not sure. First-year students (47.5%) were the most likely to report having received this training. For graduate respondents, training on policies and procedures was reported as being primarily received through new student orientation (24.8%), another specialized training (26.9%), or other, which primarily included online trainings and trainings related to employment (39.1%). Undergraduate respondents most often reported having received training during new student orientation (58.5%), a program for an organization (19.4%), or during Welcome Week (18.5%).

Similar to training on policies and procedures, 41.9% of respondents reported having received training in prevention of sexual misconduct (graduate: 32.7%; undergraduate: 44.4%), although 16.8% were unsure if they had received this training. Of those who received training in sexual misconduct prevention, 24.0% found it to be *very useful* (graduate: 25.5%, undergraduate: 23.7%) and 32.9% found it to be *moderately useful* (graduate: 30.0%, undergraduate: 33.5%); however, 7.2% reported that the training was *not useful* (graduate: 7.2%, undergraduate: 7.2%).

Survey Results: Knowledge of Policies and Reporting

Over one-half (58.3%) of survey respondents *agreed* or *strongly agreed* that they knew where to get help if they experienced sexual misconduct; more undergraduate respondents (58.3%) agreed than did graduate respondents (48.0%). Respondents were less familiar with Temple's formal procedures for addressing complaints of sexual misconduct; 37.6% *agreed* or *strongly agreed* that they knew Temple's formal procedures to address complaints of sexual misconduct. Although students reported not necessarily knowing the formal procedures, over half (55.6%) have confidence that Temple administers the procedures to address complaints fairly; 17.3% *disagreed* or *strongly disagreed*.

Survey Results: Readiness to Help

Almost one-half (47.3%) of respondents believe that sexual misconduct is a problem at Temple University; 35.4% *neither agree nor disagree*. Undergraduate respondents were more likely than graduate respondents to believe that sexual misconduct is a problem at Temple. Undergraduates (61.3%) were also more likely to feel there is a need to think about sexual misconduct on campus than were graduate respondents (56.7%). Undergraduate (40.5%) and graduate (40.1%) respondents were equally likely to believe there is something they can do about sexual

misconduct at Temple. Half (50.8%) of respondents think they should learn more about sexual misconduct, while 32.7% *neither agree nor disagree*.

Survey Results: Bystander Confidence, Self

Overall, respondents had confidence in themselves to personally intervene if they observe potential sexual misconduct. Over half of respondents said they were *very likely* or *moderately likely* to confront other students who make inappropriate sexual comments (graduate: 60.0%, undergraduate: 59.7%) and to report students who engage in sexual harassment or unwanted sexual behaviors (graduate: 71.1%, undergraduate: 68.3%). An even greater number of respondents reported being likely to report students who use force to engage in sexual contact (graduate: 85.1%, undergraduate: 78.8%). Proportionately, more graduate students reported being likely to act than did undergraduate students.

For both graduate (54.1%) and undergraduate students (47.6%), about half of the survey respondents said they were *not at all likely* to allow personal loyalties to affect reporting of sexual misconduct incidents. Likewise, few respondents (17.2%) said they were *very likely* or *moderately likely* to not report an incident of sexual misconduct for fear of being punished for an infraction such as underage drinking; more undergraduate respondents (19.1%) answered in this manner than did graduate respondents (10.3%). The majority of respondents reported that they were *very likely* or *moderately likely* (graduate: 81.4%, undergraduate: 77.8%) to be willing to be interviewed or serve as a witness in a sexual misconduct case; only 3.9% of graduate respondents and 5.5% of undergraduate respondents felt they were *not at all likely* to do so.

In order to provide a summary score of the items assessing personal bystander confidence, a mean item score and mean scale score were derived (after recoding two items for directionality) for the total sample. The mean item score, the average score for the individual items, was found to be 3.14, which is equivalent to *moderately likely*. The scale mean score, the average total score for the scale, was 18.82 (SD=3.41) of a possible maximum score of 24.

Survey Results: Bystander Confidence, Others

Respondents were less confident that other students would intervene as compared to how they believed they would respond when observing potential sexual misconduct. While about 60-80% of respondents, depending on the circumstance, said they personally were *very likely* or *moderately likely* to intervene, they reported believing only 30-50% of other students would intervene in the same circumstance.

One-third (33.3%) of respondents said they perceived that other students were *very likely* or *moderately likely* to confront another student who makes inappropriate sexual comments; 39.6% believed other students would report a student engaging in unwanted sexual behavior. Respondents were more likely to have confidence that other students would report a student using force to engage in sexual behavior (48.8%). Graduate students reported less confidence that others would confront students or report those engaging in unwanted sexual behavior as compared to undergraduate respondents.

Few respondents (13.6%) said they believed others were *not at all likely* to allow personal loyalties to affect reporting of sexual misconduct incidents; over half (56.7%) of respondents said others were *very likely* or *moderately likely* to allow personal loyalties to affect whether or not they would report an incident of sexual misconduct. Also, 56.4% of respondents perceived that others were *very likely* or *moderately likely* to choose not to report an incident of sexual misconduct for fear of being punished for an infraction such as underage drinking; 16.6% of respondents felt that others were *not at all likely* to allow this to affect their reporting. Less than half (44.6%) of respondents have confidence that others are *very likely* or *moderately likely* to be willing to act as a witness or be interviewed in a sexual misconduct case; 13.5% felt that others were *not at all likely* to do this. Graduate respondents generally had less favorable levels of confidence in other students' ability or willingness to act regarding sexual misconduct than did undergraduate respondents.

The mean item score for the total sample, the average score for individual items on the scale, was found to be 2.36 (somewhat likely), while the mean scale score, the average total score for the scale, was 14.17 (SD=3.95) of a possible maximum score of 24. On average, respondents perceived that other students were *somewhat likely* to intervene in sexual misconduct events, but state that they themselves were *moderately likely* to intervene; this can be seen in the mean item score of 2.30 when discussing others and a mean item score of 3.14 when discussing one self. Likewise, the mean scale scores also differed between perceptions of other (14.17, SD=3.95) and self (18.82, SD=3.41), indicating that respondents have higher confidence in their own likelihood to act than that of others.

Survey Results: Prevalence of Sexual Misconduct

For the purposes of the Sexual Misconduct Climate Survey, *sexual misconduct* was defined as "a range of behaviors that are unwanted by the recipient and include remarks about physical appearance; persistent sexual advances that are undesired by the recipient; unwanted touching; unwanted oral, anal, or vaginal penetration or attempted penetration; the unwanted taking and or releasing of nude photographs; and stalking." *Stalking* was defined as "a pattern of repeated and unwanted attention, harassment, contact, or any other course of conduct directed at a specific person that would cause a reasonable person to feel fear." Respondents who started at Temple University in the fall 2014 semester were asked about sexual misconduct events that occurred only during the fall semester; respondents who had been at TU prior to the fall 2014 semester were asked about sexual misconduct events that occurred during the 2014 calendar year. No students new to Temple in the spring 2015 semester were included in the survey.

Overall, 29.1% of respondents reported knowing someone who was a victim of sexual misconduct in 2014: 49.6% of undergraduate and 10.6% of graduate respondents knew a victim. Of the 29.1% of respondents reporting knowing a sexual misconduct victim at TU, the majority knew one person (47.7%), followed by two (24.7%), three (12.2%), or four or more (13.3%).

Survey respondents identified a total of 971 events of sexual misconduct for 2014: 919 among undergraduate respondents and 52 among graduate respondents. While an individual may have experienced only one form of event, it may have occurred multiple times. Therefore, the total of 971 is not an absolute frequency of events, but rather a measure of the sum of the number of types of events experienced by individual respondents.

There were 626 unique respondents who identified as having experienced at least one sexual misconduct incident (graduate: 40, undergraduate: 586). Overall 16.6% of all survey respondents experienced at least one form of sexual misconduct. The majority of the 626 respondents experienced one type of event (64.1%). Multiple types of events by an individual occurred as follows: two (23.6%), three (6.5%), four (4.6%), and five (1.1%). The most common types of events experienced by respondents were forced touching of a sexual nature (graduate: 25, undergraduate: 443), stalking (graduate: 14, undergraduate: 195), forced sexual intercourse (graduate: 2, undergraduate: 76), and forced sexual penetration with a finger or object (graduate: 1, undergraduate: 75). While an individual may have experienced only one form of event, it may have occurred multiple times.

A greater proportion of undergraduate respondents (19.8%) were victims of sexual misconduct than graduate respondents (5.0%). Additionally, respondents living on campus or within 10 blocks of campus had a greater proportion of individuals experiencing events of sexual misconduct (22.9%), as compared to respondents residing more than 10 blocks from Temple's campus (7.6%).

Although the frequency of individuals who experienced sexual misconduct was greater among those not affiliated with a social fraternity or sorority and among individuals identifying as heterosexual, proportionally individuals affiliated with Greek life and those identifying as non-heterosexual were more likely to have experienced sexual misconduct. While this analysis does suggest that proportionately more individuals affiliated with Greek social life have experienced sexual misconduct than have individuals not affiliated with social Greek life, this does not suggest anything about the affiliation of the perpetrator or where the incident occurred. Of those respondents affiliated with social Greek life, 23.2% were victims of sexual misconduct, compared to 16.1% of non-Greek life respondents. Likewise, 26.1% of non-heterosexuals were victims of sexual misconduct, compared to 15.0% of heterosexuals.

The frequency of respondents who experienced sexual misconduct was greatest among individuals identifying as female (543), however proportionally more respondents identifying as other gender experienced at least one incident of sexual misconduct. Over one-third (34.6%) of respondents identifying as other gender were the victim of sexual misconduct in 2014, compared to females (23.0%) and males (4.8%). Although individuals identifying as other gender have the greatest proportion of individuals who have experienced sexual misconduct, the numbers are small and therefore may not provide an accurate representation of the population.

The most common types of events respondents experienced multiple times were forced touching of a sexual nature, stalking, sexual penetration with a finger or object, and forced sexual intercourse. Of those who experienced forced touching of a sexual nature, 47.9% experienced it at least two times. Of those respondents who experienced sexual penetration with a finger or object, 33.3% experienced this at least twice. Of those who experienced forced sexual intercourse, 26.3% experienced this at last two times. Of those who were stalked, 20.8% were stalked by at least two different individuals.

Most respondents who stated that they had experienced sexual misconduct did not report any of the occurrences of the event (72.6%); few respondents reported *some* occurrences (4.9%) or *all* occurrences (6.1%) of the events. Those who reported at least some occurrences of the events had mixed opinions regarding the helpfulness of the reporting experience; 9.3% found reporting to be *very helpful*, 18.7% found it to be *moderately helpful*, and 43.9% said it was *not helpful*. Respondents' reasons for not reporting events varied, however the most common reasons included not thinking what happened was serious enough to report (40.6%), wanting to deal with it on their own/feeling it is a private matter (32.3%), not thinking others would think it was serious (31.6%), having other things to focus on or be worried about (29.3%), wanting to forget it happened (25.4%), and not thinking the school would do anything about it (23.1%).

Over half (55.3%) of the incidents identified by respondents involved a person affiliated with Temple as the perpetrator. Whereas undergraduate respondents were almost three times as likely to have experienced a sexual misconduct incident involving a Temple-affiliated individual (56.0%) than a non-Temple-affiliated individual (20.7%), the frequency of Temple-affiliated (42.3%) versus non-Temple-affiliated (28.8%) incidents among graduate respondents was more comparable.

Half (50.6%) of the events occurred in the neighborhoods surrounding Temple where students live, while over one-quarter (27.4%) occurred on a Temple campus. Among graduate respondents, the largest proportion of events occurred somewhere else (28.9%), other than on a Temple campus or in the neighborhoods surrounding Temple; 9.9% of undergraduates experienced events somewhere other than on campus or in the neighborhoods around campus.

Respondents who stated that they sought care or advice after a sexual misconduct incident typically went to a friend (47.9%) or family member (16.1%); few students sought help from university resources like Tuttleman Counseling Services (7.3%), Campus Safety Services (7.0%), or the Wellness Resource Center (2.6%). A significant portion of respondents (47.4%) chose not to seek any help or advice after a sexual misconduct event.

Undergraduate respondents were more likely to have experienced sexual misconduct (excluding instances of stalking) when they were passed out, drugged, drunk, incapacitated, or asleep (52.2%). Graduate respondents were almost 50% less likely than undergraduate respondents to have experienced sexual misconduct when they were passed out, drugged, drunk, incapacitated,

or asleep (28.6%). Non-stalking sexual misconduct was almost three times as likely to occur among graduate students when alcohol or drugs were not involved (63.2%) as when they were.

The services most frequently reported by all respondents that they would like to have available if they were the victim of sexual misconduct or were helping a friend who was a victim included anonymous online reporting (76.8%), free anonymous STD/HIV testing (75.7%), a Temple 24-hour hotline (69.4%), 24-hour sexual assault counseling services (67.2%), a Temple website with clear information about sexual misconduct (66.7%), information about how to support a friend who was the victim of sexual misconduct (59.0%), peer support services (55.0%), and a system navigator to provide guidance about the reporting process (54.0%).

Summary Conclusions of Climate Survey Results

Overall, the survey indicates that the diffusion of education and knowledge concerning sexual misconduct are as yet superficial within the student population. Reports of receiving training on sexual misconduct policies and procedures and prevention are low; two-fifths of students stated they had received training, while almost one-fifth was unsure. Knowledge about Temple's policies and reporting procedures are mixed. Respondents reported knowing where to go to receive help, but were less sure of Temple's formal reporting procedures.

All respondents have largely positive opinions of Temple's leadership and policies for sexual misconduct, however there is a range of responses from positive to negative. Graduate respondents are more positive about the Temple University climate than are undergraduate respondents, although responses from the two groups were generally similar. Male respondents also report more favorable perceptions about university leadership and response on this issue compared to female respondents. Although the majority of respondents have relatively positive perceptions of Temple University's ability to properly address sexual misconduct incidents, they recognize that sexual misconduct is a problem in and around campus and that students need to learn more about it.

There were 626 unique individuals identifying 971 events of sexual misconduct in 2014. The most common types of events were forced touching of a sexual nature, stalking, forced sexual intercourse, and forced sexual penetration with a finger or object. Very few of the events were reported to Temple University or other authorities. Most respondents who acknowledged being a victim of sexual misconduct sought help from a friend or family member or did not seek any help. It is noteworthy that few respondents sought help from Temple services.

Finally, there was an expressed desire and preference for several resources including an anonymous online reporting system for victims of sexual misconduct (76.8%), free anonymous STD/HIV testing (75.7%), a Temple 24-hour hotline (69.4%), 24-hour sexual assault counseling services (67.2%), and a Temple University website with clear and simple information about sexual misconduct policies and procedures (66.7%). A strong preference was expressed that these services be Temple University-provided services.

2. Resources for Training and Interventions at Temple University

Best Practices for Training and Interventions

The April 2014 White House Task Force to Protect Students from Sexual Assault report identified key evidence-based strategies for the primary prevention of sexual misconduct. The report describes best practices for developing, selecting, and implementing prevention strategies with the best chance of successfully changing sexual misconduct behaviors in communities (Centers for Disease Control and Prevention [CDC], 2014). The focus is on primary prevention at the population level, preventing sexual misconduct before it happens. The social-ecological model is utilized to understand sexual misconduct and the effects of possible prevention strategies by examining characteristics of the individual, their relationships, the community, and the larger societal and cultural contexts in which they live (CDC, 2014).

A task force of the American Psychological Association identified the following characteristics of effective prevention: 1) comprehensive, 2) appropriately timed in development, 3) sufficient dosage, administered by well-trained staff, 4) socio-culturally relevant, based in a sound theory of change, 5) built on or support positive relationships, 6) utilize varied teaching methods, and 7) include outcome evaluation (CDC, 2014; Nation et al., 2003). Effective prevention strategies need to be comprehensive in addressing multiple levels of influence for sexual misconduct (e.g., individuals, relationships, societal contexts) and integrating various interventions that work together (Nation et al., 2003). Sufficient dosage and repeated exposure to prevention messaging is key; messages should be provided during high-risk times, but reinforced with follow-up programs in order for the messaging to have an effect (Nation et al., 2003). Well-trained, sensitive, and supportive staff members are important to ensure that prevention education is conveyed appropriately and accurately, however peer education services have shown to be successful as well (Berkowitz, 2002; Foubert & McEwen, 1998; Kilmartin et al., 2008; Schwartz & Dekeseredy, 1997). Socio-culturally relevant programs and approaches are necessary; if programs do not address culturally relevant topics or the unique needs of varied groups of individuals they will not be as successful. Having a foundation in a theory of change like the Stages of Change Model or Social Ecological Model will help guide the prevention strategies towards successful techniques. Building on and supporting positive relationships helps promote trust and utilization of resources. Effective prevention strategies also need to use varied teaching methods including in-person, online, lecture, role-play, discussion, reflection, and group activity in order to reinforce messages. Lastly, it is important that outcome evaluations be conducted to ensure that programs and messages are providing useful education and meeting established goals, instead of assuming that a program is effective based purely on anecdotal or case study evidence (Nation et al., 2003).

Only two programs have been empirically found to be effective for preventing sexual misconduct, *Safe Dates* and *Shifting Boundaries*. Both programs were developed for middle school and high school students; however adaptations for the college environment may be useful. Other programs like *Bringing in the Bystander* and *Coaching Boys into Men* may be effective,

although studies have not yet measured sexual misconduct as evaluation outcomes for these programs; outcome measures have focused on increasing sexual misconduct protective factors and decreasing sexual misconduct risk factors. Brief, one-session educational programs have been found *not* to generate lasting effects. These programs may increase awareness of an issue, but are unlikely to affect behavioral patterns that were developed and continually reinforced across the lifespan. Evidence and theory suggests that preventing sexual misconduct requires a change from low single dose programming to more comprehensive strategies that address risk factors at multiple levels of influence that are provided in higher doses and reinforced across time.

Education and Intervention Resources at Temple University

Temple University currently has a variety of resources available regarding sexual misconduct training and interventions. The ***Wellness Resource Center (WRC)*** focuses on primary prevention by providing education and prevention services to students in various formats: classrooms, orientations, online, small group, student groups, events, campaigns, and social media. The WRC uses programming that is specific to the students' year in school in order to provide them with appropriate and timely information, including alcohol and substance abuse awareness and conflict resolution, in addition to sexual assault and interpersonal violence information. They focus on exposing students prior to the start of the school year and through their arrival to campus, when joining student groups, and at other high-risk and high availability times of the year. The WRC also provides education in a socio-culturally relevant manner by utilizing gender neutral language, addressing the lesbian/gay/bisexual/transgender (LGBT) community, and incorporating student experiences when working with small groups. Students may go to the WRC on their own or be referred by another student or staff or faculty member. The WRC is *not* confidential and therefore any reports of sexual misconduct communicated to a WRC staff member must be reported; for confidential services, students must utilize Tuttleman Counseling Services, a distinction that may be unclear to many in the Temple University community.

The ***Sexual Assault Counseling and Education (SACE) Unit of Tuttleman Counseling Services*** concentrates on secondary prevention services by offering crisis intervention, counseling, and case management to individuals who have experienced sexual misconduct, including sexual assault, partner violence, sexual harassment, or stalking. Its mission is to provide students with resources for ongoing support and aid in re-establishing a sense of safety for those who are survivors of sexual misconduct. Tuttleman Counseling Services is the only confidential resource on campus for students; discussing a sexual misconduct event to any other Temple office will require that the event be reported to the university. Tuttleman Counseling Services is already overextended and there is a waiting list for counseling appointments, a situation incompatible for providing crisis services. Currently it does not have the capacity to better accommodate this student need nor does it have the capacity to develop an infrastructure for education regarding sexual violence and resources.

Campus Safety Services focuses on both primary and secondary prevention of sexual misconduct. Incidents of sexual misconduct can be reported to and investigated by Campus Safety Services. Additionally, in collaboration with other departments, Campus Safety Services offers Rape-Aggression-Defense (RAD), offers an introductory self-defense program to develop and promote the option of self-defense for women who may be attacked. The Special Services Coordinator for Campus Safety Services also works with victims of sexual misconduct by informing them of available resources, Temple's policies, and the possible avenues of action. Because there is currently not another process in place to assist students in finding services or determining the appropriate course of action, the Special Services Coordinator often serves to fill this gap. She frequently meets with students who have experienced incidents of sexual assault, domestic/dating violence, rape, or stalking (in addition to victims of other non-sexual crimes) regarding housing, academic, and medical needs, as well as emotional support.

Various educational and awareness programs and campaigns exist at Temple University. All incoming students are assigned *"Think About It,"* an online program designed to educate students about sexual misconduct, drugs and alcohol, and mental health. While 75% of new students complete the program annually, the program is currently not mandated by the university. All incoming undergraduate students also receive education about policies regarding sexual misconduct, affirmative consent, and university procedures for reporting such events, however many students do not recall receiving this education.

In the fall of 2014, organizations within Temple University participated in the White House's *"It's On Us"* campaign intended to empower students to recognize and identify acts of sexual misconduct, intervene in situations where consent has not or cannot be given, and create an environment in which sexual misconduct is neither accepted nor tolerated. The campaign hopes to promote and foster changes within the Temple community and empower individuals to speak out against sexual misconduct or to act if they observe an incident of sexual misconduct.

Faculty and staff receive education on sexual misconduct during new employee orientations. However, the focus is on awareness of resources rather than comprehensive education. Faculty and staff are also required to complete online training programs regarding the reporting of child abuse, the Clery Act, and discrimination and harassment. Nonetheless, no process is currently in place for staff to receive additional education. Many faculty and staff throughout the University are designated Campus Security Authorities through the Clery Act, and therefore receive additional and ongoing training regarding reporting crimes to the university. Equal Opportunity Compliance Ombudspersons are faculty and staff throughout the university who have been designated to aid students, faculty, and staff in matters of harassment and resolving informal complaints associated with violations of university nondiscrimination/equal opportunity policies, including sexual harassment.

3. Temple University Sexual Misconduct Website

Best Practices for Websites

Websites regarding sexual misconduct should be easily recognized and easily accessible. A sexual misconduct webpage should be reached within two or three clicks from a university's main menu and be easily searchable using common words. It is recommended that the webpage navigation enable users to quickly ascertain the meaning of links and the information that would be included within them; users should be able to determine where they need to navigate to within the webpage in order to find the information they need. The information should also be presented in a clear manner. If policies are included as resources, the policies should be broken down and explained rather than only provided in verbatim text. Information should also be presented in a culturally-relevant manner; if students are the primary users of the webpage, utilizing tools such as videos may be appropriate. The information provided on the webpage should be comprehensive in that all information related to sexual misconduct is provided within one section of the university website without the need to navigate elsewhere. Lastly, it is important that the webpage identify what action to take in an emergency situation and provide step by step information concerning how to respond to specific scenarios.

Temple University Website

The Temple University website (www.temple.edu) provides a variety of information regarding prevention of sexual misconduct and resources and services for sexual misconduct. However, the information is generally fragmented and difficult to find. A test of the website found that it required between 7 and 10 clicks to navigate to the main information site on sexual misconduct. Moreover, there is currently no one location on the Temple website to find all sexual misconduct information. A search of the terms, "sexual misconduct" or "sexual assault" on the Temple University website generated top search results for Temple policies related to these topics. The policies are published verbatim and were judged difficult to understand for a student and even a 'lay' faculty or staff member.

4. Adjudication Process

Temple University Adjudication Process

Courts in Pennsylvania (and the Third Circuit) have found that Temple's disciplinary procedures comply fully with the Due Process Clause of the United States Constitution. See, e.g., Osei v. Temple University, 518 Fed. Appx. 86, No. 11–4033 (3d Cir. 2013); Johnson v. Temple University, 2013 WL 5298484, Civil Action No. 12–515, (E.D.Pa. 2013). An institution such as Temple need only provide the basic elements of due process: notice and an opportunity to be heard. See Sill v. Pennsylvania State Univ., 462 F.2d 463 (3d Cir. 1972) (notice and the opportunity to be heard satisfy the basic requirements of due process).

Temple exceeds the minimal required due process guarantees and, among other things, grants an adjudication meeting to all sexual misconduct complainants as well as accused students, including written notice of the meeting. Temple ensures that all respondents in sexual misconduct cases get an impartial hearing board made up of a chairperson and board members.

Students also have an opportunity to speak on their behalf, present witnesses and other evidence, and participate in questioning other witnesses through the hearing board. An accused student is not required to testify and that decision is not construed against them. Both an accused student and the accuser are allowed to have a personal advisor and the advisor may be an attorney; both students are permitted to have a spouse or parent/guardian in attendance. The Student Conduct Board's determination of responsibility is made on the basis of whether it is "more likely than not" that the accused student violated the Student Conduct Code. Both the complaining student and the accused student have the right to appeal the outcome of the hearing. Typically, the adjudication of these matters in completed within about 60 days, taking into consideration the university's calendar.

D. Recommendations

Enhance Education and Training

- ➔ Mandatory sexual misconduct training for students on an annual basis. The mechanism to enforce this requirement needs further study.
- ➔ Repeated exposure to comprehensive information is necessary for reinforcing policies and procedures and affecting behavioral and cultural change. Therefore more dose intensive, longitudinal programs are recommended.
- ➔ Inclusion of sexual misconduct information in course syllabi similar to information provided for disability resources and services.
- ➔ Enhance training for faculty and staff to understand reporting obligations and options and support of victims of sexual misconduct.
- ➔ Create sexual misconduct education materials that are culturally competent and sensitive to literacy.
- ➔ Continue to promote and create sexual misconduct campaigns that empower students and faculty/staff
    - o Continue the It's On Us campaign
    - o Implement a program such as the Red Flag campaign, a public campaign designed to address dating violence and prevent it on college campuses
    - o Create a program, similar to SafeZone, in which highly trained faculty and staff are publicly identified as having completed the highest level of specialized training in the support of sexual misconduct victims
    - o Greater attention should be placed on secondary prevention methods such as bystander intervention.

According to the Climate Survey, only 41.7% of respondents indicated receiving training on policies and procedures concerning sexual misconduct; 39.1% said they had not received training and 18.3% were unsure. Additionally, only 41.9% said they received training on prevention of sexual misconduct; 41.3% reported that they had not received prevention training, while 16.8% were not sure. The survey also found that over half (58.3%) of students reported knowing where

to get help if they experienced sexual misconduct, but only one-third (37.6%) agreed that they knew Temple's formal reporting procedures.

Students currently receive sexual misconduct education during new-student orientation, although according to the Climate Survey, many students either do not recognize this training or do not recall having received it. Students are also exposed to trainings through "Think About It". Although students are encouraged to complete the program, there are no penalties if they do not. Repeated exposure to comprehensive information is necessary for reinforcing policies and procedures and affecting behavioral and cultural change. Therefore it is recommended that baseline training be compulsory supplemented throughout the year by other, ongoing media campaigns and educational programming.

A number of options are possible to enforce completion of baseline training. One option considered by the Committee is to place an academic hold on student grades until completion of the training program. Appropriate Temple University administrators should address these and other options.

Evidence-based programs such as Safe Dates and Shifting Boundaries, both dating violence prevention programs, have been found to be effective at reducing sexual violence victimization and perpetration (CDC, 2014). Although these programs were initially designed for middle school settings, adaptations can make them appropriate for the college setting.

Effective prevention strategies cross multiple contexts, and the incorporation of sexual misconduct information within the classroom will also serve to promote a culture that does not tolerate acts of sexual misconduct, as well as serving to empower those who may be victims of sexual misconduct.

All faculty and staff receive education about sexual misconduct during new staff orientation. However, there is no one system in place to implement ongoing sexual misconduct education. The enrichment of this training, including regular refreshers and the introduction of new information, will help faculty and staff remember and internalize knowledge and make them more reliable resources for students.

Some faculty and staff across the university are designated Campus Security Authorities in compliance with the Clery Act. However, Temple University is a complex institution and a diverse constituency. Other programs are needed to address their needs. For example, a SafeZone program can be created to foster and maintain environments that are culturally competent and supportive of LGBT individuals, as well as heterosexuals, and would complement the Campus Security Authority roles. These individuals would be publicly identified as being specially trained support contacts on issues of sexual misconduct. The identification of these "SafeZone" trained individuals would also serve to denote a community that cares about sexual misconduct and is equipped to provide prevention and support.

Greater attention should be given to issues concerning literacy and cultural competency for sexual misconduct education. For example, Temple University has many students who do not speak English as a first language. While students are expected to have a certain level of English proficiency, providing materials in their language of preference would help ensure that the information is clearly understood. Print materials should be available in common languages other than English and in formats accessible to students with disabilities. Video materials should have closed captioning if translation is not possible. Consideration should also be given to cultural competency, as individuals of other cultures may have different perceptions of acceptable and unacceptable behaviors. The Climate Survey also indicated that many students are not clear about what constitutes sexual misconduct or what warrants reporting. All students should be comprehensively educated on what constitutes sexual misconduct, why such behaviors are unacceptable, and the importance of acknowledging and acting if one experiences or witnesses an act of sexual misconduct.

The Climate Survey revealed a disproportionate representation of sexual misconduct victims among non-heterosexual students. Although 15.0% of respondents identified as non-heterosexual, 23.5% of sexual misconduct victims were non-heterosexual. Likewise, 1.3% of respondents identified as other-gender, but 2.9% of sexual misconduct victims identified as other-gender; one-third (34.6%) of other-gender respondents were the victim of sexual misconduct in 2014, compared to 23.0% of females and 4.8% of males. Given the disproportionate number of non-heterosexual respondents and other-gender respondents who experienced incidents of sexual misconduct, additional outreach needs to be directed towards lesbian, gay, bisexual, and transgender students. Greater attention should also be placed on ensuring that materials are sensitive and relevant to individuals identifying as LGBT.

Finally, additional campaigns that promote a culture that encourages speaking out against sexual misconduct and rejects engaging in sexual violence should be fostered. It has been demonstrated that students who are exposed to sexual misconduct messaging and education in a variety of contexts and through a variety of means are more likely to retain the knowledge and change their behavioral patterns. Student organizations may support sexual misconduct education and student empowerment by becoming involved with such campaigns. Examples of these campaigns are in-class bystander intervention trainings (e.g., Bringing in the Bystander, Men's Program/1 in 4, Mentors in Violence Prevention). Potentially some of these trainings could be targeted to occur in certain general education courses that the majority of students take to ensure that a significant proportion of the student body is being exposed to bystander intervention messaging and training. Ideally trainings would be an hour, however even a shorter time period allotted to the topic would be beneficial. Outcome evaluation is also necessary to monitor the effectiveness of these programs.

Increase and Coordinate Services

- ➔ Provide 24/7 crisis support services, inclusive of counseling and a hotline.
- ➔ Provide a mechanism for anonymous reporting of sexual misconduct incidents.

- ➔ Create a centralized office designated for sexual misconduct and sexual violence, including specific positions for a Director and a Coordinator of Interpersonal Violence Support Services.
- ➔ Dedicate staff positions that are required for crisis services, such as counseling and navigation.

The Climate Survey revealed that only 7.3% of unique individuals who reported sexual misconduct incidents reported seeking care or advice from Tuttleman Counseling Services and only 2.6% from the Wellness Resource Center. This indicates that students do not perceive or desire to obtain services directed at sexual misconduct incidents within these institutional services. Although this may be due to lack of knowledge, there is a known preference for these services to be provided by dedicated, crisis oriented venues that are open during hours that more traditional counseling and wellness services are unavailable.

Currently, Tuttleman Counseling Services does not have its own hotline; rather it promotes a city-wide rape crisis center, Women Organized Against Rape (WOAR), that offers various resources, including a 24-hour hotline. Respondents reported a desire for 24-hour sexual assault counseling services as well as a Temple run 24-hour hotline. A 24-hour a day service is recommended as many incidents of sexual misconduct do not occur during these times. If victims are not able to receive support or resources at the times when they need them, they may be less likely to seek out those resources at other times. Crisis support services should also be made available to accused students as needs arise. The Climate Survey found that overwhelmingly, TU students would prefer Temple University-focused services over other community-based support services. This could be due to comfort level, convenience, or knowledge and confidence in the Temple system. A compromise to this approach would be for Temple to contract with an outside organization with contacts and services dedicated to Temple University students. It is noted that any organization would need to be well versed in Temple's resources, services, and policies so that clear and accurate information is provided.

Additional information and research is needed to determine whether crisis support services would be better provided directly through Temple or through a community organization. While WOAR may be a possible entity, other community organizations should also be investigated as potential collaborators. More research may be needed to determine the exact structure and venue for services.

Another important issue was the need for anonymous reporting. This service will provide students the opportunity to make the university aware of sexual misconduct incidents without individuals having to personally come forward as victims if they do not desire to do so. However, in order for anonymous reporting to be successful it is important that individuals understand what can result from anonymous reporting. With only minimal information and no means for follow-up, an anonymous reporting service must clearly stipulate that the university

will not be able to take any action on the report and that the service will only provide and aware of a probably incident.

The committee lauded the Wellness Resource Center and Tuttleman Counseling Services as staffed by highly motivated health professionals who are well trained. There was an acknowledgement that there is currently insufficient staff to address all of the needs of sexual misconduct prevention and counseling. Current gaps in services include inadequate follow-up to education and inability to provide multiple and intensive education experiences. There is also a lack of coordination between and among the varying units within the university who provide relevant sexual misconduct services. The creation of additional trained staff positions would allow for greater reach and aid in consistent and repeated educational messaging and services.

It is recommended that Temple University develop a specific office that focuses solely on issues surrounding sexual misconduct. This office will serve to reduce confusion as to where to find resources and services, enhance the system that is already in place, as well as to allow for expansion of education and increased support for reporting and service coordination. The office would provide oversight and coordination of sexual misconduct trainings, reporting of sexual misconduct, investigations, and assure that victims receive timely and comprehensive services. It would also help assure that students accused of sexual misconduct receive appropriate assistance and guidance. An office director, coordinator of Interpersonal Violence Support Services and a sexual assault response team could serve to provide victim advocacy and support, guide victims through the university's reporting and processes, and coordinate new educational initiatives.

Current best practices state that having a stand-alone office is the preferred organizational structure for addressing sexual misconduct prevention and service needs (American Association of University Professors [AAUP], 2012). Although a highly visible, centralized office is recommended, the centralized office should work with other offices across the university that are already involved in addressing sexual misconduct and will continue to do so (i.e., WRC, Tuttleman Counseling Services, Campus Safety Services). Resources should not be removed from other offices; rather, the creation of an office specific to addressing sexual misconduct should be in addition to resources that already exist. The exact role of the proposed additional staff positions and the manner in which the centralized office works with other campus entities will need further consideration.

Redesign the Sexual Misconduct Website

- ➔ Design, publish, and maintain a clear, comprehensive sexual misconduct webpage that is easily accessible.

It is recommended that a sexual misconduct webpage within TU be designed. The webpage should contain information on all of the Temple sexual misconduct services and resources, Temple's policies related to sexual misconduct, as well as additional information that provides

simple guidance and instructions that take people through the varying steps for obtaining services related to sexual misconduct incidents and reporting.

Currently the sexual misconduct information that Temple has online is scattered in a variety of places, including webpages for Tuttleman Counseling Services, the Wellness Resource Center, and Campus Safety Services. In addition, there are various links to policies. Best practice is that individuals in need of information regarding sexual misconduct be able to find the information relatively easily without having to spend a great deal of time searching for it. If individuals are not able to find the information they are looking for within a reasonable amount of time and effort, they may cease looking and ultimately not receive a needed service. It is therefore essential that individuals are able to quickly and easily access information on Temple's services and resources.

The webpage should be appropriate and relevant for individuals of diverse circumstances, providing information for both the victim and perpetrator, as well as individuals who are neither a victim nor perpetrator. Information should also be organized so that viewers may identify information specific to a particular group, (e.g., females, males, international or LGBT students). Temple policies should be available in English, as well as other common languages. Policies should also be broken down and explained on the webpage to aid comprehension, with an emphasis on action items. Resources available to students, faculty members, and staff should be provided with additional information about the services. Web links to other campus resources should also be included on the sexual misconduct webpage, such as those for Tuttleman Counseling Services, the Wellness Resource Center, and Campus Safety Services, however any vital information should not require the user to leave the website. The web link for the sexual misconduct webpage should be added to the webpages for other related Temple University entities. Information instructing viewers on how to report an incident of sexual misconduct should be included on the sexual misconduct webpage, as should information on entities from which to receive medical care regardless of whether or not the victim wants to report the incident. Additionally, the webpage should include a space for anonymous reporting of sexual misconduct incidents or other crimes to Campus Safety Services.

Additional information concerning webpage recommendations, as well as examples, can be found in Appendix B.

Modifications to the Adjudication Process

- ➔ Hire a Student Conduct Investigator within the Office of Student Conduct to more effectively and efficiently facilitate sexual misconduct investigations.
- ➔ Provide Student Conduct board members and chairs with additional training concerning sexual misconduct, including more specific understanding of what it is and how it happens, along with sensitivity training.
- ➔ Incentivize active participation on the Student Conduct Board for faculty and staff in order to promote increased participation on the board.

- ➔ Develop and incorporate amnesty language for alcohol/other drug use in sexual misconduct complainants into the Student Conduct Code.
- ➔ Improve communication throughout the adjudication process concerning probable outcomes and punishments. Victims and accused offenders should be more clearly informed of the resources available to them in order to cope with the outcome of the adjudication proceedings.

Many schools utilize a specific examiner who is responsible for conducting the conduct investigation and moving the process forward in an efficient manner. The Student Conduct Board has often relied upon Campus Safety Services for the information it utilizes in conduct cases, however this process is generally more complex and results in time delays. It may be that employing an investigator within the Office of Student Conduct whose purpose is specific to student conduct sexual misconduct investigations would aid the evaluation process.

Because sitting on a board that oversees sexual misconduct cases requires board members to have at least a basic understanding of what constitutes sexual misconduct, in addition to what the policies are, more education for board members is required.

Currently there are few individuals who are active members and eligible to sit on boards concerning matters of sexual misconduct. In order to ensure that board proceedings are able to occur in a timely manner, a greater number of board members need to be available. Incentives should be offered to faculty and staff to increase board participation. The university should determine appropriate incentives based on available resources.

The Sexual Misconduct Climate Survey found that 40.9% of undergraduate respondents and 25.1% of graduate respondents would be *very*, *moderately*, or *somewhat likely* to not report sexual misconduct out of fear that they or others would be punished for infractions such as underage drinking. Consequently, there is a need to aggressively promote that the university would not charge a student for alcohol or other drug use if that person was alleging that they were the victim of sexual misconduct.

Finally, the committee was made aware that victims are sometimes not satisfied with the punishment given to an offender. It was suggested that victims and perpetrators be informed in advance of the possible punishments for a particular offense. By addressing expectations in advance, neither victims nor offenders should be surprised by receipt of a particular punishment. In addition, there is a need to consider that victims and perpetrators may continue to have service needs as a case is ongoing or even after a case is completed. Individuals need to be aware of the services and resources (e.g., housing assistance if the accused lives in the same residence hall, change of courses if the victim and accused are in the same classes, or notification that an offender is returning to campus after serving a punishment) that are available to them after the adjudication proceedings end.

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