WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS

Task Force on the Response of Universities and Colleges to Allegations of Sexual Violence

Approved by the Board of Regents
March 2017

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AMERICAN COLLEGE OF TRIAL LAWYERS POSITION STATEMENT REGARDING CAMPUS SEXUAL ASSAULT INVESTIGATIONS

The American College of Trial Lawyers maintains and seeks to improve the standards of trial practice, professionalism, ethics, and the administration of justice through education and public statements on important legal issues relating to its mission. The College strongly supports the independence of the judiciary, trial by jury, respect for the rule of law, access to justice, and fair and just representation of all parties to legal proceedings.

ACTL recognizes, and is deeply concerned by, the problem of sexual assaults on college campuses. ACTL believes in the importance of protecting all students from sexual misconduct and ensuring that they are provided an educational environment free of sexual harassment.

ACTL also believes that it is important to ensure that students investigated for, or charged with, sexual assault or misconduct violations be afforded basic fairness and due process.

There have been recent statements by respected faculty from a number of law schools declaring that those subject to such investigations or charges are being denied fundamental rights. For example, 28 members of the Harvard Law School Faculty in their statement expressed their belief that: "Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."[1] Similarly, 16 members of the Penn Law School Faculty in an open letter addressing guidelines issued by the U.S. Department of Education's Office of Civil Rights ("OCR") to enforce Title IX of the Education Amendments Act of 1972, opined: "Although we appreciate the efforts by Penn and other universities to implement fair procedures, particularly in light of the financial sanctions threatened by OCR, we believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness. We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses."[2] In another open letter addressing these issues, professors of law from institutions across the United States stated their belief that: "Through a series of … directives and enforcement actions, OCR has steadily expanded the definition of sexual harassment and imposed a growing range of responsibilities on colleges to curb such conduct. As a result, free speech and due process on campus are now imperiled."[3]

These concerns about fairness and due process have been echoed in a number of recent

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1 Opinion, "Rethink Harvard's sexual harassment policy." *The Boston Globe*, October 15, 2014. http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

2 Schow, Ashe, "UPenn law professors speak out against new campus sexual assault policy," *Washington Examiner*, February 18, 2015, http://www.washingtonexaminer.com/upenn-law-professors-speak-out-against-new-campus-sexual-assault-policy/article/2560365.

3 Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault, May 17, 2016.

decisions by state and federal judges in cases brought by accused or disciplined students.[4] There is no clear consensus as to how much process is constitutionally or contractually required to be provided to the subjects of such investigations, and the outcome often depends on whether the institution is public or private. Some courts, in addition to expressing concern as to the adequacy of the process provided students, have recognized other avenues of possible relief, including statutory claims such as under Title IX.[5]

In this position statement and accompanying white paper, ACTL submits its recommended standards for these investigations.

1. Sexual misconduct investigations and hearings should be conducted with due consideration for any appearance of partiality, including that which might arise from the factfinder's other responsibilities or affiliations.

2. The subject of a sexual misconduct investigation should promptly be provided with the details of the allegations and advised of his/her right to consult legal counsel.

3. The subject of a sexual misconduct investigation has the right to be advised and accompanied by legal counsel at all stages of the investigation.

4. The parties to a sexual misconduct investigation should be permitted to conduct some form of cross-examination of witnesses, in a manner deemed appropriate by the institution, in order to test the veracity of witnesses and documents.

5. The subject of a sexual misconduct investigation should be provided with access to all evidence at a meaningful time and in a meaningful manner so that he/she can adequately respond to it.

6. The standard of proof for "responsibility" should be clear and convincing evidence.

7. Factfinders in sexual misconduct investigations and hearings should produce written findings of fact and conclusions sufficiently detailed to permit meaningful appellate review.

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4 See, e.g., *Doe v. Rectors and Visitors of George Mason Univ.*, 132 F.Supp.3d 712 (E.D.Va 2015); *Doe v. Washington & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015); *Doe v. Columbia Univ.*, 101 F.Supp.3d 356 (S.D.N.Y. 2015), *judgment vacated by Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016).

5 See, e.g., *Prasad v. Cornell Univ.*, No. 5:15-cv-322, 2016 WL 3212079 (N.D.N.Y. Feb. 24, 2016); *Doe v. Brown Univ.*, 166 F.Supp.3d 177 (D.R.I. 2016); *Doe v. Brandeis Univ.*, 177 F.Supp.3d 561 (D. Mass. 2016); *Doe v. Middlebury Coll.*, No.1:15-cv-192-jgm, 2015 WL 5488109 (D. Vt. Sept. 16, 2015).

AMERICAN COLLEGE OF TRIAL LAWYERS WHITE PAPER ON CAMPUS SEXUAL ASSAULT INVESTIGATIONS

In 2011, in response to increased concern over sexual assaults on university campuses, the U.S. Department of Education's Office for Civil Rights (OCR) issued a Dear Colleague Letter outlining the procedures private and public higher education institutions must follow in investigating and adjudicating sexual harassment complaints under Title IX.[1] The letter and its 2014 clarification have generated difficult legal questions, with institutions forced to balance their responsibilities under federal law, their desire to treat both complaining parties and alleged perpetrators fairly, and the substantial resources dedicated toward sexual assault prevention, training, and investigation. In an August 2016 article, a law professor described the dilemma facing educational institutions:

> The schools in these cases must feel themselves to be in an impossible position. On the one hand, they must take sexual assault seriously and remedy their previously neglectful handling of claims. Not doing enough means risking a federal Title IX investigation, with the threat of losing federal funding . . . . But, when schools do too much, they face potential lawsuits from accused students for violating, among other things, Title IX. When it comes to sexual-assault cases, campus administrators could be forgiven for feeling on a knife's edge.[2]

Judges have also recognized the difficulties colleges and universities face in balancing these competing interests, with one federal judge noting in a September 2016 decision that universities are "in a double bind. Either they come under public fire for not responding to allegations of sexual assault aggressively enough or they open themselves to Title IX claims simply by enforcing rules against alleged perpetrators."[3]

ACTL believes that in a well-intentioned effort to address the significant problem of campus sexual assault, OCR has established investigative and disciplinary procedures that, in application, are in many cases fundamentally unfair to students accused of sexual misconduct. This white paper analyzes the issues and recommends specific improvements.

HISTORICAL BACKGROUND

OCR's Influence on College Sexual Assault Investigations

On April 29, 2014, OCR published "Questions and Answers about Title IX and Sexual Violence," a document intended to clarify campuses' legal requirements under Title IX as articulated

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1 As set forth on DOE's website: "The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights."

2 Jeannie Suk Gersen, *College Students Go to Court Over Sexual Assault*, *The New Yorker* (Aug. 5, 2016), http://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault.

3 *Austin v. Univ. of Oregon*, __ F.Supp.3d __, Nos. 6:15-cv-02257-MC and 6:16-cv-00647-MC, 2016 WL 4708540 at *9 (D. Or. Sept. 8, 2016).

in the April 4, 2011 "Dear Colleague" letter on sexual violence.[4] All higher education institutions that receive federal funds must comply; according to a press release from DOE, schools that "violate the law and refuse to address the problems identified by OCR can lose federal funding or be referred to the U.S. Department of Justice for further action."[5]

According to Catherine Lhamon, Assistant Secretary for Civil Rights, the legal bases of the Dear Colleague Letters (DCLs) stem from the United States Supreme Court's confirmation that, under the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(D), agencies may issue guidance without notice-and-comment procedures; such guidance does not have the force and effect of law but rather, is intended to advise the public of the construction of Title IX.[6]

According to the 2014 Q&A, a federally funded school violates a student's Title IX rights regarding student-on-student sexual violence if:

1. The alleged conduct "is sufficiently serious to limit or deny a student's ability to participate in or benefit from the school's educational program"; that is, it creates a "hostile environment"; and

2. The school, after receiving notice, "fails to take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment, prevent its recurrence, and, as appropriate, remedy its effects."[7]

This standard is applied in both administrative enforcements of Title IX and where injunctive relief is sought. Where damages are sought, the standard is actual knowledge and deliberate indifference.

Procedures

In order to be Title IX compliant, an institution must disseminate a notice of nondiscrimination, designate at least one employee as a Title IX coordinator, and adopt and publish grievance procedures for resolving sexual harassment and sexual violence complaints. The grievance procedures must contain the following:

- Notice to students and employees of the procedures, including where complaints may be filed;

- A statement of the institution's jurisdiction over Title IX complaints;

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4 Office for Civil Rights, "Questions and Answers about Title IX and Sexual Violence," *U.S. Dep't of Education* (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter 2014 Q&A].

5 Department of Education, U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i.

6 Letter from Catherine E. Lhamon, Ass. Sec. for Civil Rights, Dep't of Educ. to Sen. James Lankford, Chairman, Subcommittee on Regulatory Affairs and Federal Management at 2 (Feb. 17, 2016) [hereinafter Lhamon Letter] (citing *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199 (2015)).

7 *Id*. at 10.

- "Adequate" definitions of sexual harassment and hostile environments;
- Reporting protocols, including policies on confidential reporting;
- Identification of responsible employees;
- Provisions for "adequate, reliable, and impartial investigation of complaints," including opportunity for both parties to present witnesses and evidence;
- Notice of interim measures that may be taken to protect students;
- Application of the preponderance of the evidence standard which is to be used for deciding complaints;
- Established, prompt time frames for the complaint process;
- Notice of potential remedies for students and sanctions against perpetrators;
- Written notice to both parties of the outcome of the complaint; and
- Assurance the institution will employ measures to prevent recurrence of sexual violence and allay discriminatory effects on the complainant.[8]

Although Title IX permits institutions to use student disciplinary procedures, general Title IX grievance procedures, sexual harassment procedures, or separate procedures to handle sexual violence allegations, OCR emphasizes that any procedures used for sexual violence complaints "must meet the Title IX requirement of affording a complainant a prompt and equitable resolution . . . including applying the preponderance of the evidence standard of review."[9]

Investigations on Campus

OCR utilizes the term "investigation" to refer to the fact-finding process and any hearing and decision-making protocol an institution uses to determine: "(1) whether or not the conduct occurred; and (2) if the conduct occurred, what actions the school will take to end the sexual violence, eliminate the hostile environment, and prevent its recurrence."[10] OCR cautions that imposing sanctions against a perpetrator without additional remedies "likely will not be sufficient to eliminate the hostile environment and prevent recurrences."[11]

Investigations must be "adequate, reliable, impartial, and prompt"; they must also include an opportunity for both parties to present witnesses and other evidence. A hearing is not necessarily required.[12] The investigation may include: conducting interviews of the parties and witnesses,

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8 2014 Q&A at 12-13.
9 *Id*. at 14.
10 *Id*. at 25.
11 *Id*.
12 *Id*. at 25.

reviewing law enforcement investigation documents, reviewing student files, and examining other relevant evidence. An institution "must give the complainant any rights that it gives to the alleged perpetrator."[13] Accordingly:

- If the institution permits one party to have an attorney or advisor, or restricts the ability of attorneys or advisors to speak or participate, it must apply this rule equally;
- If the institution permits one party to submit expert testimony, it must apply this rule equally;
- If the institution allows for an appeal, it must apply this rule equally;
- Both complainant and alleged perpetrator must be informed in writing of the outcome of the complaint and any appeal; and[14]
- The institution "must use a preponderance-of-the-evidence" standard in any Title IX proceeding.[15]

Institutions should notify complainants that they may file a criminal complaint and must refrain from dissuading a complainant from doing so.[16] OCR notes that because a Title IX investigation will never result in incarceration, "the same procedural protections and legal standards [present in a criminal investigation] are not required."[17] Title IX investigations are "not discretionary"; they must be conducted even if a criminal investigation is ongoing or terminates without an arrest.[18] Although an institution may be required to temporarily delay a fact-finding investigation while law enforcement gathers evidence, an institution should work with campus police, law enforcement, and prosecutors to identify when evidence-gathering is complete so that the school may "promptly resume and complete its fact-finding for the Title IX investigation."[19]

If the institution uses a hearing process, it may determine whether it allows the parties to be present for the entirety of the hearing, with the caveat that permission to one party to be present must be granted equally to both parties.[20] An institution "must not require a complainant to be present at the hearing as a prerequisite to proceed."[21] If requested, the institution should ensure the parties do not have to be in the same room together at the same time.

OCR also "strongly discourages a school from allowing the parties to personally question or cross-examine each other during a hearing."[22]

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13 *Id*. at 26.
14 *Id*.
15 *Id.*
16 *Id.*
17 *Id.* at 27.
18 *Id.*
19 *Id.* at 28.
20 *Id.* at 30.
21 *Id.*
22 *Id.* at 31.

OCR states that a 60-calendar day timeframe for the entire investigative process—not including appeals—is typical. Although OCR does not require investigations to be completed within sixty days, it will evaluate "on a case-by-case basis" whether the prompt and equitable standard has been met.[23]

Appeals from Investigations

The appeals process "must be equal for both parties."[24] An appeal mechanism is not required by Title IX; however, OCR recommends that an institution provide an appeals process "where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is disproportionate to the findings."[25] Although the institution has latitude in designing an appeals process, it must still "provide[] prompt and equitable resolutions of sexual violence complaints," while taking steps "to protect the complainant in the educational setting."[26]

OCR's Title IX Investigations of Colleges and Universities

As of 2015, OCR was investigating more than 100 colleges and universities as to whether they failed to "fairly investigate and adjudicate cases of sexual violence" under Title IX.[27] In 2014, OCR took, on average, 1,469 days to complete an investigation, compared to 379 in 2009.[28] In June 2016, it was reported that there were 246 ongoing investigations into 195 colleges and universities, with an additional sixty-eight Title IX investigations into sixty-one institutions' handling of sexual harassment.[29]

At the conclusion of its investigations, OCR publishes resolution letters and agreements, stating whether an institution's policies and notices are compliant with the regulation implementing Title IX and what remedial actions need to be taken.

With regards to the reporting of sexual assault statistics, the Department of Education has also been aggressive in enforcing the Clery Act, issuing fines to eight schools in 2013, although no more than three had been issued per year in the preceding twenty-two years.[30] From January 2013 to December 2016, thirty schools were fined.[31] On November 3, 2016, the Department announced it would fine Pennsylvania State University nearly $2.4 million for its violations of the Clery Act and

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23 *Id.* at 32.
24 *Id.* at 38.
25 *Id.* at 37.
26 *Id.*
27 Jake New, Justice Delayed, *Inside Higher Ed* (May 6, 2015), https://www.insidehighered.com/news/2015/05/06/ocr-letter-says-completed-title-ix-investigations-2014-lasted-more-4-years.
28 *Id.*
29 Tyler Kingkade, There Are Far More Title IX Investigations of Colleges than Most People Know, *Huffington Post* (Jun. 16, 2016), http://www.huffingtonpost.com/entry/title-ix-investigations-sexual-harassment_us_575f4b0ee4b053d433061b3d.
30 Rebecca Lacher & Pedro A. Ramos, U.S. Department of Education Levies More Fines for Clery Act Violations, *Mondaq* (Jan. 30, 2014), http://www.mondaq.com/unitedstates/x/289764/Education/US+Department+Of+Education+Levies+More+Fines+For+Clery+Act+Violations.
31 Federal Student Aid, Clery Act Reports, *U.S. Dep't of Education* (2016), https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports.

the Drug-Free Schools and Communities Act—"by far the largest fine ever imposed under the law."[32]

While OCR has issued many decisions criticizing colleges and universities for various failures to protect the Title IX rights of the complainant, the Office's first decision finding that the rights of an *accused* had been violated was released on October 12, 2016. The decision found that Wesley College discriminated on the basis of sex against a male student accused of planning and implementing the nonconsensual videotaping of a sexual encounter by "subject[ing] him to an inequitable grievance and appeal process."[33] In its letter, OCR found that resolution of the complaint was "not equitable" because the accused student was not: afforded his resolution options, given an opportunity to share his story and benefit from an investigation of that story, permitted to challenge evidence the College relied on, or provided an adequate opportunity to defend himself at the hearing.[34] Even in this determination, however, OCR provided no guidance as to specific procedures institutions must or even should implement to protect the rights of accused students, apart from providing them with some form of notice and some type of opportunity to respond.

Legal Landscape: Scholars, Commentators, and the Courts Respond

In her August 5, 2016 article, Professor Gersen argues that that the position that college campuses are unable to provide procedural fairness, such that sexual assault investigations should be left to criminal justice authorities, "represents a false choice"; due process is possible "outside the court system" and should be employed in institutional investigations as a "check on pressures to trample fairness for the accused."[35] That concern is reflected in numerous letters, policy statements, articles and an increasing number of judicial decisions, echoing the belief that the requirements imposed by OCR have resulted in accused students being "railroaded" through the campus disciplinary systems, bereft of adequate due process protections in the face of deeply serious charges.

For example, in May 2011, the advocacy group Foundation for Individual Rights in Education (FIRE) published an open letter to OCR's Assistant Secretary for Civil Rights expressing concerns that the 2011 DCL left institutions "uncertain as to their obligation to provide due process protections."[36] Quoting from the 2014 Q&A, in which OCR specifically cautions that institutions "should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant," FIRE asserted that such "unnecessarily opaque and deeply troubling" language "invites the potential for abuse."[37]

Recently, several courts have recognized that the processes utilized by certain universities for investigating and disciplining students accused of sexual misconduct fail to comport with due

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32 Jake New, Historic Fine for Penn State, *Inside Higher Ed* (Nov. 4, 2016), https://www.insidehighered.com/news/2016/11/04/education-departments-historic-sanction-against-penn-state-clery-violations.

33 Letter from Beth Gellman-Beer, Supervisory Attorney of OCR Philadelphia to Robert E. Clark III, President of Wesley College at 1 (Oct. 12, 2016), http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.

34 *Id.* at 24.

35 Gersen, *supra*, at 35.

36 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. (May 5, 2011) [hereinafter FIRE Letter], https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011.

37 2014 Q&A at 13; FIRE Letter.

process.[38] For example, in *Doe v. Rectors and Visitors of George Mason University*, the court found that the procedures followed by the university, a state entity, had deprived the accused student of a protected liberty interest—the charge of sexual misconduct "plainly call[ed] into question [the] plaintiff's good name, reputation, honor, or integrity," altered his legal status as a student, and had the potential to impact his future educational and employment endeavors.[39] The court ruled that the University failed to afford constitutionally adequate process—it did not provide the student with notice of the full scope of the charges against him (a defect that was not cured during the subsequent appeals), which in turn impacted his opportunity to be heard and put on evidence that addressed the context in which the charges arose.[40] Administrators also had off-the-record and ex-parte meetings with the complainant without informing the accused student what had transpired therein; one administrator assigned the appeal to himself despite having had "extensive ex parte contact with [the complainant] over the summer" and admitted he had "prejudged the case."[41] Sanctions were also imposed on the student without a basis for the decision. The court held that although any one of the procedural irregularities in isolation would not rise to a constitutional violation, the "accumulation of mistakes" resulted in a violation of due process.[42]

In *Doe v. University of Southern California*, the court partially affirmed a student's petition for a writ of administrative mandate challenging his suspension.[43] The court found that the student had been deprived of notice and hearing where he was "not provided any information about the factual basis of the charges against him, he was not allowed to access any evidence used to support those accusations unless he actively sought it through a written request, and he was not provided with any opportunity to appear directly before the decision-making panel to rebut the evidence presented against him."[44]

The First Circuit held in *Cloud v. Trustees of Boston University* that the disciplinary hearings of private universities must be conducted with "basic fairness" and that court-established evidentiary and procedural rules may be referred to "in measuring the adequacy and fairness of the hearing."[45] In

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38 A number of law professors and other scholars have also joined the criticism of OCR and its DCLs. *See e.g.* KC Johnson & Stuart Taylor Jr., Stanford Sex Assault Case: Sentence Was Too Short—But the System Worked, *The Washington Post* (Jun. 9, 2016), https://www.washingtonpost.com/opinions/stanford-case-shows-why-the-justice-system-should-handle-campus-sexual-assault/2016/06/08/38a6af24-2cf2-11e6-9b37-42985f6a265c_story.html?utm_term=.120ecbec4f1c (noting that "[t]he procedural rules [required by OCR] are systematically slanted against the accused" and that "accusers are not subject to meaningful cross-examination, which the Supreme Court has called 'the greatest legal engine ever invented for the discovery of truth.' "); Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault, SAVE (May 16, 2016), http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf (stating disciplinary policies "must afford due process protections that are appropriate to the particular circumstances, considering the harm it has caused to other students, the degree to which the conduct has interfered with other students' access to educational benefits, and the severity of potential sanctions. These due process protections include informing students of the specific conduct at issue, providing them with access to all evidence, assuring students enjoy the assistance of an independent advocate, affording them the right to cross-examination, and utilizing the appropriate standard of proof"); Members of Harvard Law School Faculty, 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 (alleging Harvard's policies for adjudicating cases of sexual misconduct, which do not ensure counsel for the accused, an opportunity to discover facts, confront witnesses, and present a defense at a hearing, and restrict all components of the adjudication to a Title IX compliance office, "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation").

39 149 F.Supp. 3d 602, 613-14 (E.D. Va. 2016) (quotation omitted).

40 *Id.* at 617.

41 *Id.* at 619.

42 *Id.* at 621.

43 246 Cal. App. 4th 221 (2016).

44 *Id.* at 248.

45 720 F.2d 721, 725 (1st Cir. 1983).

March 2016, the District of Massachusetts relied in part on *Cloud* to hold that a complaint plausibly alleged a violation of basic fairness where a private university failed to provide a student accused of sexual misconduct with "a variety of procedural protections . . . many of which, in the criminal context, are the most basic and fundamental components of due process of law," including no right to notice of charges, counsel, confrontation of the accuser, cross-examination of witnesses, examination of evidence or witness statements, or an effective appeal.[46]

In June 2016, a student who had been disciplined after being found responsible for sexual misconduct filed a lawsuit against both the university and the Department of Education alleging in part that requiring institutions to use a preponderance of the evidence standard violates the APA, insofar as it constituted rule-making without notice and an opportunity for public comment, an action taken in excess of statutory authority, and an arbitrary and capricious action.[47] A decision on the Department's motion to dismiss is pending.

Concerns over the partiality of investigators and adjudicators have also been the subject of a number of lawsuits. For example, in *Doe v. Brandeis University*, the District of Massachusetts critiqued Brandeis University's Special Examiner Process, in which a "single individual was essentially vested with the powers of an investigator, prosecutor, judge, and jury"; the court remarked that the dangers of combining these powers in a single individual, with few rights to appeal and review, are "obvious."[48] Similarly, in *Doe v. Washington & Lee University*, the Western District of Virginia concluded that bias existed on the part of the University's Title IX officer that was material to the outcome of the student's disciplinary proceeding "due to the considerable influence she appears to have wielded in those proceedings," where the Title IX officer had presented an article positing that "sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations," a factual situation paralleling the circumstances under which the student was found responsible for sexual misconduct.[49]

Although there have been increasing numbers of suits filed by students found responsible for sexual misconduct, no clear judicial trends have yet emerged. For example, in a November 22, 2016 decision, the Fourth Appellate District of the California Court of Appeal reversed a superior court's determination that a male student accused of sexual misconduct was not afforded a fair hearing, that substantial evidence did not support the university panel's decision to suspend him, and that the Dean and university regents "improperly increased his punishment in response to his

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46 *Doe v. Brandeis Univ.,* 177 F.Supp. 3d 561, 603 (D. Mass. 2016). Compare *Doe v. Trustees of Boston Coll*., No. 15-cv-10790, 2016 WL 5799297 at *21 (D. Mass. Oct. 4, 2016) (finding institution provided "basic fairness" when disciplinary process was in accord with school policies, student was given prompt notice of charge and factual allegations against him, he had benefit of attorney-advisor in hearing and could present testimony, and he received two reviews of the board's decision).

47 *See* Amended Complaint, *Doe v. Lhamon*, No. 1:16-cv-01158-RC (D.D.C. Aug. 15, 2016).

48 *Doe*, 177 F. Supp. 3d at 606.

49 No. 6:14-cv-00052, 2015 WL 4647996 at *10 (W.D. Va. Aug. 5, 2015); *see also Sahm v. Miami Univ.*, 110 F.Supp. 3d 774, 778 (S.D. Ohio 2015) ("The thrust of the allegations against [the Title IX coordinator"] appears to be that her multiple roles as a part-time police officer, a member of the Task Force on the Prevention of Sexual Assault, and a Title IX investigator made her biased against [the plaintiff] during her investigation of the alleged assault of [the complainant]. The factual assertion that she discouraged a witness from testifying at the disciplinary hearing is troubling. However, these facts pleaded against [the Title IX coordinator] do not suggest a gender bias against males so much as against students accused of sexual assault"), *but see Doe v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 601-602 (S.D. Ohio 2016) (concluding that because school disciplinary boards are entitled to a presumption of honesty and impartiality, a plaintiff must allege specific statements indicating bias or a pattern of decision-making indicating gender was an influence, beyond simply sexual assault training provided to staff members and pressure exerted on universities by OCR).

appealing the Panel's decision and recommended sanctions."[50] The appellate court found that, under the "extremely deferential substantial evidence standard of review," there was sufficient evidence to buttress the panel's decision, given the complainant's testimony at the hearing and the investigator's report.[51] Further, the court did not find the process unfair, noting that the accused student "was provided with notice of his alleged violation, informed regarding the basis of that violation, and given the opportunity to put forth his defense."[52] Finally, the court found that the dean was authorized to sanction the student—as the panel was empowered only to give recommendations—and did so "per the applicable sanctioning guidelines."[53] Although the court acknowledged that the university's procedures "were not perfect" and noted it had "some concerns," it ultimately concluded that on the record, it could not find the process unfair.[54]

Some courts have held that even in public institutions, the Due Process Clause "does not compel a university to allow cross-examination at all"[55]; others have found that "[a]ccused students do not have the right to be actively represented by an attorney at a disciplinary hearing"[56] and that there is no prohibition against the use of hearsay evidence in school disciplinary hearings or refraining from assigning the burden of proof to either party.[57]

ACTL'S RECOMMENDATIONS

ACTL has the following concerns relating to the present state of campus sexual misconduct investigations, many of which directly arise from OCR's policies and promulgations and which adversely impact the rights of students accused of sexual misconduct.

Need For Procedural Due Process

ACTL recognizes that colleges and universities face a difficult task in accommodating the inherent tension between fairness to accused students and to complainants and achieving a proportionate balance. However, basic fairness requires that sexual misconduct investigations provide accused students with effective procedural protections. As one federal judge has noted, in such investigations, the stakes are "very high," as students are charged with serious offenses "that carry the potential for substantial public condemnation and disgrace."[58]

Although disciplinary policies at public universities must comport with the Fourteenth Amendment, "those same protections are not available to students enrolled in private colleges and

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50 *Doe v. Regents of the Univ. of Cal.*, D068901, __ Cal. Rptr. 3d __, 2016 WL 6879293 at * 1 (Cal. App. 4th Nov. 22, 2016).
51 *Id*. at *2.
52 *Id*.
53 *Id*.
54 *Id*.
55 *Doe v. Ohio State Univ*, No. 2:15-cv-2830, 2016 WL 692547 at *7 (S.D. Ohio Feb. 22, 2016), *report and recommendation adopted*, No. 2:15-cv-2830, 2016 WL 1578750 (S.D. Ohio Apr. 20, 2016).
56 *Johnson v. Temple Univ. of the Commonwealth Sys. of Higher Educ.*, No. 12-515, 2013 WL 5298484 at *10-11 (E.D.Pa. Sept. 19, 2013).
57 *Doe*, 173 F.Supp.3d at 603.
58 *Id.* at 604.

universities."[59] ACTL believes that all students, whether at public or private institutions, who are accused of sexual misconduct should be guaranteed due process protections. To that end, ACTL submits that accused students should be:

- **Provided with an investigation or hearing conducted with due consideration for any appearance of partiality, including any that might arise from the factfinder's other responsibilities or affiliations;**
- **Promptly provided with the details of the allegations and advised of their right to consult legal counsel;**
- **Provided the right to be advised and accompanied by legal counsel at all stages of the investigation or hearing;**
- **Provided with access to all evidence at a meaningful time and in a meaningful manner, so that they can adequately respond to it;**
- **Permitted to conduct some form of cross-examination of witnesses, in a manner deemed appropriate by the institution, in order to test the veracity of witnesses and documents;**
- **Provided with a process where the standard of proof for responsibility should be clear and convincing evidence; and**
- **Provided with written findings of fact on completion of the investigation or hearing sufficiently detailed to permit meaningful appellate review.**

Need For Impartial Investigations

A critical piece of procedural justice is the belief that an individual has been investigated and sentenced by an impartial factfinder.[60] The judicial system strives to avoid both actual impropriety and the appearance thereof; regardless of whether misconduct occurred, courts should guard against actions or appearances that may "reasonably cause an objective observer to question [a factfinder's] impartiality."[61]

OCR describes its 2011 DCL as a "guidance document" that "does not add requirements to existing law."[62] But, in the words of one court, the power of the Dear Colleague Letters stems from the Department of Education's ability to "hold[] the specter of loss of federal funds as a sword over . . .

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59 *Beauchene v. Mississippi Coll.*, 986 F.Supp.2d 755, 765 (S.D. Miss. 2013) (citing *Rendell-Baker v. Kohn*, 457 U.S. 830, 837 (1982)); *see also* 2011 DCL at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator.").

60 *See, e.g., Muse v. Sullivan*, 925 F.2d 785, 790 (5th Cir. 1991) ("The due process requirement that a litigant's claim be heard by a fair and impartial factfinder applies to administrative as well as judicial proceedings."); *In re Murchison*, 349 U.S. 133, 136 (1955) ("[N]o man is permitted to try cases where he has an interest in the outcome.").

61 *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 865 (1988); *cf Offutt v. United States*, 348 U.S. 11, 14 (1954) ("[J]ustice must satisfy the appearance of justice.").

62 2011 DCL at 1 n.1. *See also* Lhamon Letter at 3 (Feb. 17, 2016) ("[I]t is Title IX and the regulation, which has the force and effect of law, that OCR enforces, not OCR's 2011 (or any other) DCL. OCR's 2011 DCL simply serves to advise the public of the construction of the regulation it administers and enforces.").

universities' heads in the event it were to find that [a] university failed to comply with Title IX."[63]

As one professor observed, faced with the threat of a federal investigation, coupled with a possible loss of federal funding, "schools could even be said to have a financial stake in the outcomes of the cases they decide—a possible conflict of interest."[64] Title IX officials, some of whom, as the aforementioned cases discuss, have been accused of partiality in their handling of complaints, owe their position to the 2011 DCL, which required colleges and universities to designate a Title IX coordinator.[65]

Concerns of withdrawal of federal funding, combined with media attention surrounding campus sexual assault, may cause universities—consciously or not—to err on the side of protecting or validating the complainant at the expense of the accused. These not-so-subtle pressures may contribute to partial and discriminatory investigations and the absence of protection for the accused. One former federal judge has noted that the preponderance of the evidence standard, in combination with media pressure, "effectively creates a presumption in favor of the woman complainant. If you find against her, you will see yourself on *60 Minutes* or in an OCR investigation where your funding is at risk. If you find for her, no one is likely to complain."[66]

Recently, in the first case of its kind to reach a federal circuit court, the Second Circuit reversed the district court's dismissal of a complaint alleging Columbia University violated Title IX by demonstrating sex bias in its investigation and suspension of the accused student for alleged sexual assault.[67] In reviewing the complaint, the court found that the student pled sufficient facts—the investigator and panel did not seek out his identified witnesses, comply with Columbia's procedures protecting alleged perpetrators, or reach conclusions supported by the weight of the evidence—to support an inference Columbia was motivated in its actions by "pro-female, anti-male bias . . . adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assaults by male students."[68]

In order to enhance subjective and objective procedural fairness and reduce the incidence of conflicts of interest, educational institutions should: (1) screen for and assign only individuals without actual or perceived bias to participate in the disciplinary process; and (2) consider identifying individuals and organizations outside universities that can act as investigators and/or decision-makers in Title IX cases, such that universities are not forced to police their own compliance with federal law. OCR should also embody within its policy documents the need for investigations and hearings to be conducted with due consideration for even the appearance of partiality arising from the factfinder's other responsibilities or affiliations within the institution.

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63 *Doe*, 166 F.Supp.3d at 181.

64 Gersen, *supra*; *see also* Hartocollis, *supra* (noting that "[m]ore than 200 colleges and universities are under federal investigation for the way they have handled complaints of sexual misconduct, up from 55 [in 2014].").

65 *See* Hartocollis, *supra* (observing that Title XI coordinators can earn $50,000-$150,000 a year, that the Association of Title IX Administrators has 5,000 members and has "doubled in size for each of the past two years", and that schools like Harvard and Yale have between thirty and fifty individuals working as Title IX supporters and coordinators).

66 Gertsen, *supra*, at 8.

67 *Doe v. Columbia Univ*., 831 F.3d 46 (2d Cir. 2016).

68 *Id*. at 56. *See also Doe*, 166 F.Supp.3d at 189 (finding complaint plausibly alleged gender bias motivating investigation and punishment levied against male student accused of sexual assault sufficient to sustain a Title IX claim); *Doe*, 2015 WL 4647996 at *10 (finding student plausibly pled a Title IX claim in alleging the university's disciplinary procedures "amount to a practice of railroading accused students" and that gender bias motivated his expulsion (quotation omitted)).

ACTL understands that many schools use a so-called investigative model in college disciplinary proceedings. However, with that model, we believe there is a heightened need for investigators to be qualified, appropriately trained, and impartial, since there is no separate adjudicative body to hear and weigh evidence and make findings of fact. To that end, any model should ensure there is an opportunity for meaningful appellate review by requiring the issuance of written findings of fact that adequately set forth the basis for any recommendation or decision.[69]

The Right to Counsel, Access Evidence, and Notice of Allegations

ACTL strongly believes that there are considerable benefits to extending accused students these procedural protections, whether at a private or public institution, beyond the simple but undeniable value of making investigations as equitable as possible.

Students at private universities may invoke due process protections if "they meet the threshold requirement of showing that the State somehow involved itself in what would otherwise be deemed private activity."[70] In expanding Title IX's protections, creating a mandatory Title IX investigative process (mandating hiring of a Title IX coordinator), and outlining acceptable procedures (mandating use of preponderance of evidence standard), the federal government has arguably "involved itself" in the disciplinary protocols of individual universities.[71] In recognition of its untraditional, expansive role, as well as its ability to command compliance through fines and the withholding of federal funding, we believe that OCR should amend its guidance letters to provide due process protections for accused students at both private and public institutions.

There is also a growing body of evidence demonstrating that the presence of procedural justice is critical to an individual's acceptance of the outcome of dispute. Scholars have found that individuals who believe that a dispute resolution process was fair but the outcome unfair are almost as satisfied as those who believe both were fair, an explanation credited to, among other things, the "importance to one's self-esteem of being treated fairly by authoritative individuals and institutions . . . and the possibility that lay individuals used their assessment of process fairness to help them assess ambiguous outcomes."[72]

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69 *Accord* Conor Friedersdorf, *What Should the Standard of Proof Be in Campus Rape Cases?*, *The Atlantic* (Jun. 17, 2016), http://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505/ ("…if the 'preponderance of the evidence' standard survives both litigation and debate, it ought to at least be paired with procedural reforms that guarantee that the accused on campuses are transparently told the charges against them, given access to evidence, allowed legal representation, and otherwise afforded *at least* the same rights and safeguards against injustice that they'd have in a civil case with comparable stakes." (emphasis in original)).

70 *Beilis v. Albany Med. College of Union Univ.*, 525 N.Y.S. 2d 932, 934 (N.Y. App. Div. 1988).

71 See *Remy v. Howard Univ.*, 55 F.Supp. 2d 27, 29 (D. D.C. 1999) ("[T]he government must exert control over an institution before a body becomes subject to governmental . . . restrictions.").

72 Deborah A. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 Penn. St. L. Rev. 165, 179 n. 63 (2003); *see also* Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential*, 33 Law & Soc. Inquiry 473, 491 (2008) (reporting result of studies suggesting "people were more willing to accept a decision that was reached via a procedure in which they felt treated fairly"); Tamar R. Birckhead, *Toward a Theory of Procedural Justice for Juveniles*, 57 Buff. L. Rev. 1447, 1454 (2008) (noting that "when juveniles perceive that they have been treated fairly by law enforcement and the courts—a judgment shown not to be dependent upon the outcome of the case—they are less likely to recidivate."); Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 Wm. & Mary L. Rev. 1843, 1875 (2002) (arguing research suggests safety of domestic violence victims can be aided by attending to batterers' perception of fairness, as "fair treatment affects compliance regardless of whether the ultimate result is viewed as right or wrong").

Ensuring procedural justice in campus sexual assault investigations thus serves a dual purpose. First, it affirms the critically important sexual assault prevention goals of Title IX and the Department of Education. The problem of campus sexual assault is widely recognized to have reached "epidemic levels." [73] An Association of American Universities (AAU) study of 150,000 students at 27 colleges and universities showed that 27.2% of female college seniors reported they had "experienced some kind of unwanted sexual contact . . . carried out by incapacitation, usually due to alcohol or drugs, or by force."[74]

Procedural justice can reduce recidivism and ensure sexual assault investigations are regarded with seriousness and respect, ending the backlash incurred by any public perception that these investigations serve only to railroad and scapegoat individual men. As one retired federal district judge, now a lecturer at Harvard Law School, writes:

> You don't have to believe that there are large numbers of false accusation[s] of sexual assault—I do not—to insist that the process of investigating and adjudicating these claims be fair. In fact, feminists should be especially concerned, not just about creating enforcement proceedings, but about their fairness. If there is a widespread perception that the balance has tilted from no rights for victims to no due process for the accused, we risk a backlash. Benighted attitudes about rape and skepticism about women victims die hard. It takes only a few celebrated false accusations of rape to turn the clock back.[75]

Second, if alleged perpetrators are treated fairly, they are more likely to accept a decision of culpability, perhaps leading to less litigation against colleges and universities, which would in turn free up institutional resources better used for sexual assault education and prevention.[76]

In sum, ACTL believes that by ensuring accused students are afforded due process protections—including a fair and impartial investigator/decision maker, the right to notice of the allegations, access to evidence, some form of cross-examination, assistance by counsel, with the standard of proof by clear and convincing evidence, and written factual findings and conclusions—educational institutions can simultaneously ensure investigations are fair and equitable, promote procedural justice, comply with the U.S. Constitution, and enhance public confidence in their adjudicative procedures and the broader goal of prevention.

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73 Abby Ohlheiser, *Study Finds 'Epidemic' of Sexual Assault Among First-Year Women At One U.S. College*, *The Wash. Post* (May 20, 2015), http://www.washingtonpost.com/news/grade-point/wp/2015/05/20/study-finds-epidemic-of-sexual-assault-among-first-year-women-at-one-u-s-college/.

74 Richard Pérez-Peña, 1 in 4 Women Experience Sex Assault on Campus, *NY Times* (Sept. 21, 2015), http://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html.

75 Nancy Gertner, *Sex, Lies, and Justice: Can We Reconcile the Belated Attention to Rape on Campus with Due Process?*, *The American Prospect* at 3 (Winter 2011).

76 *See, e.g.,* Anemona Hartocollis, *Colleges Spending Millions to Deal With Sexual Misconduct Complaints*, *NY Times* (Mar. 29, 2016), http://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html (observing that responding to a lawsuit "can run into the high six or even seven figures, not counting a settlement or verdict"); *Doe v. Brown Univ*., 166 F.Supp. 3d 177, 180 (D. R. I. 2016) ("This case is one of a number of recent actions in the federal district courts in which a male student has sued a university that found him responsible for committing sexual assault after an allegedly flawed and deficient disciplinary proceeding.").

Some Form of Cross-Examination

ACTL believes OCR's goal of protecting victims from re-victimization can be balanced with due process. For example, the *Doe v. University of Southern California* court rejected the argument that confrontation and cross-examination of witnesses was necessary in an investigation involving student sexual assault, echoing the concerns of the 2011 DCL that allowing an alleged perpetrator to directly question an alleged victim "may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."[77] However, the court noted that there are "alternate ways" to enable accused students to hear the evidence against them and it cited cases where, for example, a complainant's testimony was tape-recorded and played for the accuser, a screen was placed between the parties, or testimony was given through closed-circuit television.[78]

Similarly, concern about students questioning one another in such cases has been addressed by some colleges and universities by permitting the accused to submit questions to a third-party, such as the investigator, to be asked of the complainant. At the University of Delaware, investigators provide both the complainant and the respondent a chance to "present questions they believe should be asked of the other party and witnesses and the opportunity to respond to statements made by others," though only in instances where it has been "deemed appropriate by the investigator."[79] The University of Dayton provides accused students with the right to request a hearing board to "consider their submitted questions for other parties (investigators, complainant, witnesses) at the hearing in those cases that go before the University Hearing Board."[80] Similarly, although Indiana University prevents complainants and respondents from directly questioning each other at sexual misconduct hearings, it permits the parties to submit questions to the chair of the hearing panel to be asked of other parties, although the chair or other panel members "will review questions prior to posing to the other party to prevent questioning that is not permitted under these proceedings."[81]

The Inadequacy of Preponderance of the Evidence Standard

It is well accepted that the standard of proof in most noncriminal adjudications is preponderance of the evidence. In *Addington v. Texas*, the Supreme Court noted that such a standard is appropriate in a "typical civil case involving a monetary dispute between private parties" where society at large has a "minimal concern with the outcome."[82] However, the Court observed that an intermediate standard is "no stranger to the civil law" and can be used in civil cases "involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant."[83] Where the interests at stake "are deemed to be more substantial than mere loss of money,"—for example, where a defendant risks "having his reputation tarnished erroneously"—a plaintiff's burden of proof is often

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77 246 Cal. App. 4th at 245 (quoting 2011 DCL at 12).
78 *Id*. at 245 n.12.
79 Office of the President, *Sexual Misconduct Policy*, University of Delaware at 23 (Aug. 5, 2016), available at http://sites.udel.edu/sexualmisconduct/files/2016/08/20160809-Sexual-Misconduct-Policy-1muljdr.pdf.
80 University of Dayton, *Sexual Harassment/Misconduct Policy* (n.d.), available at https://udayton.edu/studev/dean/civility/sexual_harassment_misconduct.php.
81 IU Office of Student Welfare and Title IX, *Sexual Misconduct*, Indiana University at 12 (revised Aug. 25, 2016), available at http://policies.iu.edu/policies/categories/administration-operations/equal-opportunity/sexual-misconduct.pdf.
82 441 U.S. 418, 423 (1979).
83 *Id*. at 424.

increased to clear and convincing evidence.[84]

The suitability of the clear and convincing evidentiary standard for sexual assault investigations is striking. Such cases are not "typical civil" matters based exclusively on "monetary dispute[s]"; moreover, as expressed through position statements from the White House, both national political parties, and state governments across the country, society has a significant interest in preventing and investigating sexual violence.[85] Further, alleged perpetrators risk a substantial tarnishing of their reputation. As the Supreme Court recognized in *Goss v. Lopez*, charges of misconduct leading to a suspension can "seriously damage…students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[86] In such cases:

> [T]he private interest is compelling. The Plaintiffs faced charges of sexual assault against a fellow student, charges that could have led to their expulsions and did lead to their suspensions. The potential consequences reach beyond their immediate standing at the University. The Supreme Court has noted that where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied . . . The Plaintiffs argue, and this Court accepts, that these charges could have a major immediate and life-long impact on their personal life, education, employment, and public engagement.[87]

The "majority" of courts addressing the constitutionally required evidentiary standard for school disciplinary proceedings "have held that due process requires disciplinary decisions to be based on 'substantial evidence.' "[88]

Judge Gertsen described the current regime as "the worst of both worlds, the lowest standard of proof, coupled with the least protective procedures."[89] Recognition of the significant adverse consequences to students found responsible in sexual misconduct disciplinary proceeding, combined with the absence of virtually all of the procedural rights provided in civil lawsuits, such as voir dire, trial by judge or jury, or full cross-examination, compels an accompanying call for a higher standard of proof.[90]

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84 *Id.*; *see, e.g., Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (applying clear and convincing evidence standard to terminations of parental rights); *Woodby v. INS*, 385 U.S. 37, 48-49 (1966) (applying standard to deportation proceeding); *see also Tijani v. Willis*, 430 F.3d 1241, 1245 (9th Cir. 2005) (recognizing Supreme Court has affirmed principle that "a heightened burden of proof" is on the State in civil proceedings where "the individual interests at stake…are both particularly important and more substantial than mere loss of money." (quotations omitted)).

85 *Addington*, 441 U.S. at 423.

86 419 U.S. 565, 575 (1975).

87 *Gomes v. Univ. of Maine Sys.*, 365 F.Supp.2d 6, 16 (D. Me. 2005) (citations and quotations omitted).

88 Lavinia M. Weizel, Note, *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, 1633 (2012).

89 Gertsen, *supra*, at 8.

90 *Compare* Chris Loschiavo & Jennifer L. Wallace, *The Preponderance of Evidence Standard: Use in Higher Education Campus Conduct Processes*, Association for Student Conduct Administration (n.d.) ("When both students have so much to lose, depending on the outcome of the hearing, preponderance is the appropriate standard . . . the expelled student can make a new beginning at another institution.") with *Doe*, 177 F.Supp. 3d at 607 ("[T]his was not a criminal proceeding, and Brandeis is not a governmental entity. Nonetheless [the student] was required to defend himself in what was essentially an inquisitorial proceeding that plausibly failed to provide him with a fair and reasonable opportunity to be informed of the charges and to present an adequate defense. He was ultimately found 'responsible,' and received a penalty that may permanently scar his life and career.").

CONCLUSION

ACTL strongly supports efforts to remedy the longstanding failure to adequately address the problem of sexual misconduct, particularly on college campuses. But we believe that OCR has imposed on colleges and universities an investigative and adjudicative system that does not ensure basic fairness for accused students. Under the current system everyone loses: accused students are deprived of fundamental fairness, complainants' experiences are unintentionally eroded and undermined, and colleges and universities are trapped between the two, while facing a potential loss of federal funding.

ACTL advocates for a system that encompasses essential elements of due process: a fair and impartial investigation and hearing by qualified factfinders, and granting students the right to be advised and accompanied by counsel, to be permitted some form of cross-examination, to examine the evidence, to receive adequate written factual findings, and to be found responsible only if the evidence satisfies the clear and convincing standard. These steps would enhance procedural justice and ensure the confidence of participants and the public in the fairness of Title IX investigations on campus.

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