AFTER THE DEAR COLLEAGUE LETTER: DEVELOPING ENHANCED DUE PROCESS PROTECTIONS FOR TITLE IX SEXUAL ASSAULT CASES AT PUBLIC INSTITUTIONS

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Abstract

Since the formation of the American Republic, Americans have maintained a fundamental mistrust of government power. In the Title IX realm, the Obama Administration exacerbated those concerns. In its efforts to enforce Title IX and to reduce sexual misconduct on campuses, the Obama Administration issued a "Dear Colleague Letter" in April 2011 and a follow up Question and Answer document in April 2014, both of which set out OCR's view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. This 2011 Dear Colleague Letter "explains the requirements of Title IX pertaining to sexual-harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence." Although the 2011 Dear Colleague Letter and the 2014 Q & A result in an increased focus on the problems of sexual assault on campus, some scholars have suggested these documents undermine due process. On September 22, 2017, the Secretary of Education released new guidance that revoked both the 2011 Dear Colleague Letter and the 2014 Q & A document. Instead, OCR re-established its 2001 Revised Sexual Harassment Guidance as the guiding light for future assessments of institutional compliance. Further, the Secretary announced her plans to initiate a "rulemaking process that responds to public comment." The proposed rulemaking process will undoubtedly address multiple stakeholder concerns with the approach to sexual misconduct, but one anticipates that due process concerns for public institutions will be near the top of the list of concerns addressed in rulemaking effort. The purpose of this Essay is to set out a vision for what due process in the Title IX sexual assault context should look like. In accomplishing this purpose, the author —drawing on existing case law, policy arguments, and his own experience as a higher education lawyer—proposes a set of due process protections which will equitably balance the interests of (a) Complaining Witness seeking redress for multiple forms of sexual misconduct, (b) Respondents seeking protection against lifelong stigmas arising from unfair campus proceedings, and (c) institutions of higher education seeking to eliminate all forms of educational program discrimination based on sex. This Essay has four parts. Part I examines why Title IX Sexual Assault proceedings require enhanced due process measures. Part II explains why providing enhanced due process to the Respondent does not undermine the institution's obligations to the Complaining Witness. Part III describes the author's vision of what enhanced due process provisions should entail. Finally, Part IV offers some suggestions for private institutions.

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INTRODUCTION

Since the formation of the American Republic, Americans have maintained a fundamental mistrust of government power.[1] In the Title IX realm, the Obama Administration exacerbated those concerns.[2] In its efforts to enforce Title IX and to reduce sexual misconduct on campuses,[3] the Obama Administration issued a "Dear Colleague Letter" in April 2011[4] and a follow up Question and Answer document in April 2014,[5] both of which set out OCR's view of the obligations of institutions receiving federal financial assistance under Title IX and its implementing regulations. This 2011 Dear Colleague Letter "explains the requirements of Title IX pertaining to sexual-harassment also cover sexual violence, and lays out the specific Title IX requirements applicable to sexual violence."[6]

As Fifth Circuit Judge Edith Jones observed, this 2011 Dear Colleague Letter, "was not adopted according to notice-and-comment rulemaking procedures; its extremely broad definition of 'sexual harassment' has no counterpart in federal civil rights case law; and the procedures prescribed for adjudication of sexual misconduct are heavily weighted in favor of finding guilt."[7] Specifically, the Dear Colleague Letter and the 2014 OCR Q & A document: (1) suggest institutions handle sexual assault cases with a single person serving as detective, prosecutor, judge, and jury;[8] (2) maintain hearings are not required;[9] (3) imply "the school should not start the proceedings with a presumption of innocence, or even a stance of neutrality … [but with an assumption] any complaint is valid and the accused is guilty as charged;"[10]

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1 *See, e.g*. Mark David Hall, Roger Sherman and the Creation of the American Republic 12-40 (2013); Marci Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention* in *Christian Perspectives on Legal Thought* 293, 295 (Michael W. McConnell, Robert F. Corchran, Jr., & Angela C. Carmella, eds. 2001); Ian Spier, *The Calvinist Roots of American Social Order: Calvin, Witherspoon, and Madison*, Public Discourse (April 13, 2017) (available at http://www.thepublicdiscourse.com/2017/04/19116/).

2 *See* K.C. Johnson & Stuart Taylor, Jr., The Campus Rape Frenzy 9-10 (2017).

3 Any university that receives federal funds for any purpose is subject to Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2012), and its implementing regulations, 34 C.F.R. § 106 (2015), which prohibit discrimination on the basis of sex in educational programs or activities operated by recipients of federal financial assistance.

4 See Office for Civil Rights ("OCR"), April 4, 2011 "Dear Colleague" letter, available online at: http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter the "2011 Dear Colleague Letter."]

5 On April 24, 2014, additional guidance was issued by the OCR entitled "Questions and Answers on Title IX." Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

6 *Id*.

7 *Plummer v. Univ. of Houston*, 860 F.3d 767, 779–80 (5th Cir. 2017) (Jones, J., dissenting)

8 See White House Task Force to Protect Students from Sexual Assault, Not Alone: The First Report of the White House Task Force to Protect Students from Sexual Assault 14 (Apr. 2014).

9 OCR Questions and Answers, *supra* note 5, at 25.

10 David E. Bernstein, Lawless: The Obama Administration's Unprecedented Assault on the Constitution and the Rule of Law 126 (2015).

(4) forbid the consideration of the complainant's sexual history with anyone other than the accused student;[11] (5) discourage cross-examination;[12] (6) allow an appeal of not guilty verdicts;[13] and (7) mandate a preponderance of the evidence—rather than clear and convincing evidence or beyond a reasonable doubt—as the standard for determining guilt.[14] Although the 2011 Dear Colleague Letter and the 2014 Q & A result in an increased focus on the problems of sexual assault on campus,[15] some scholars have suggested these documents undermine due process.[16]

On September 22, 2017, the Secretary of Education released new guidance that revoked both the 2011 Dear Colleague Letter and the 2014 Q & A document.[17] Instead, OCR established *Revised Sexual Harassment Guidance* as the guiding light for future assessments of institutional compliance.[18] Further, the Secretary announced her plans to initiate a "rulemaking process that responds to public comment."[19] The proposed rulemaking process will undoubtedly address multiple stakeholder concerns with the approach to sexual misconduct, but one anticipates that due process concerns for public institutions will be near the top of the list of concerns addressed in rulemaking effort.[20] The purpose of this Essay is to set out a vision for what due process in the Title IX sexual assault context should look like.[21]

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11 OCR Questions and Answers, *supra* note five, at 31.

12 *See Id*. at 30-31.

13 Dear Colleague Letter, *supra note* 4, at 12.

14 *Id*. at 11.

15 When these tragic events occur, the institution has a constitutional and legal obligation to support the Complaining Witness. *See* discussion at p. 11.

16 Bernstein, *supra* note 10, at 124.

17 Betsy DeVos, *Secretary's Prepared Remarks on Title IX Enforcement*, Antonin Scalia Law School, George Mason University (September 7, 2017).

18 Office for Civil Rights, Dear Colleague Letter dated September 22, 2017, p. 2, *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf. The 2017 Dear Colleague Letter was released simultaneously with *Q&A on Campus Sexual Misconduct, available at https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf*

19 DeVos, *supra* note 17.

20 For the most part, this Essay addresses only public institutions. Because private institutions are not constitutional actors, the Due Process Clause does not apply to the actions of the institutions or their employees. Although he acknowledges that private institutions are not constitutional actors under current Supreme Court jurisprudence, Professor Rubenfeld suggests that, in the context of Title IX sexual assault hearings, the courts should consider private institutions to be state actors. *See* Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 Tex. L. Rev. 15 (2017). As he explained, "[u]nder the Dear Colleague letter, Title IX remained of course an equality statute, but OCR was pursuing Title IX's equality objectives by compelling schools to do law enforcement on the federal government's behalf." *Id.* at 46. Regardless of the merits of Professor Rubenfeld's argument, private institutions should seriously consider adopting this framework and contractually agreeing to follow this framework. If a student is expelled by a private institution for sexual assault and subsequently sues, the courts may well expect a process that resembles what public institutions are providing. Moreover, as noted in Section IV below, federal regulations impose an obligation on all institutions receiving federal financial aid to adopt "prompt and equitable" grievance procedures.

21 Although the author generally focuses on the due process obligations of public institutions, private institutions, which adopt similar protections as a part of their sexual misconduct policies,

In accomplishing this purpose, the author—drawing on existing case law, policy arguments, and his own experience as a higher education lawyer—proposes a set of due process protections which will equitably balance the interests of (a) Complaining Witness[22] seeking redress for multiple forms of sexual misconduct, (b) Respondents seeking protection against lifelong stigmas arising from unfair campus proceedings, and (c) institutions of higher education seeking to eliminate all forms of educational program discrimination based on sex.

This Essay has four parts. Part I examines why Title IX Sexual Assault proceedings require enhanced due process measures. Part II explains why providing enhanced due process to the Respondent does not undermine the institution's obligations to the Complaining Witness. Part III describes the Author's vision of what enhanced due process provisions should entail. Finally, Part IV offers some suggestions for private institutions.

I. Enhanced Due Process Measures Are Required In Title IX Sexual Assault Proceedings

Unlike the legal traditions of other cultures, the Anglo-American-Australasian legal tradition has required procedural due process before governmental actor deprives an individual of life, liberty, or property.[23] "Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone or it protects no one."[24] Due process prevents arbitrary governmental action, [25] but it is ultimately a search for truth—did the individual actually do the action for which he is accused?[26] All doubts are resolved in favor of the

must carefully adhere to any self-imposed procedural obligations. The failure to do so would enable a dissatisfied party to assert a claim against the institution based on a breach of contract theory.

22 For simplicity's sake, this Essay uses the term "Complaining Witness" to designate the person who believes that he/she was harmed by a violation of an institution's sexual misconduct policy. While some quoted materials may refer to such individuals as "victims" or "survivors," the author considers "Complaining Witness" to be more neutral and balanced. Similarly, the term "Respondent" will be used by the author to designate the person who the Complaining Witness believes violated the institution's sexual misconduct policy, even though some quoted materials may refer to such individuals as the "alleged perpetrator" or "accused."

23 *Compare* Roger Alan Boner & William E. Kovacic, *Antitrust Policy in Ukraine*, 31 Geo. Wash. J. Int'l L. & Econ. 1, 6 (1997) (describing the lack of due process in the Ukraine), *and* Haibo He, *The Dawn of the Due Process Principle in China*, 22 Colum. J. Asian L. 57, 93 (2008) (stating that China does not have a tradition of due process), *with* Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 Cornell L. Rev. 1181, 1211–12 (2005) (describing the distinctive Anglo-American tradition of due process), *and* Belinda Wells & Michael Burnett, *When Cultures Collide: An Australian Citizen's Power to Demand the Death Penalty Under Islamic Law*, 22 Sydney L. Rev. 5, 19 (2000) (describing the application of due process in South Australia and its roots in English history).

24 DeVos, *supra* note 17.

25 *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

26 *See* David A. Harris, *The Constitution and Truth Seeking: A New Theory on Expert Services for Indigent Defendants*, 83 J. Crim. L. & Criminology 469, 473 (1992) ("[T]he search for truth is the reason the Constitution protects the right to confrontation, the right to compulsory process and the right to put on a defense.").

individual.[27] The focus is on preventing false convictions.[28] As Blackstone noted, it is better for ten guilty men to go free than to imprison an innocent man.[29]

Due process clearly applies when a public university seeks to expel a student for disciplinary reasons,[30] but the judiciary has allowed universities to apply a less rigorous standard than that imposed in the context of a criminal proceeding.[31] Despite the life-altering consequences of an expulsion,[32] a state university need not transplant "wholesale . . . the rules of procedure, trial and review which have evolved from the history and experience of courts."[33] Because student disciplinary hearings "are not criminal trials, and therefore need not take on many of those formalities,"[34] "neither rules of evidence nor rules of civil or criminal procedure need be applied."[35] Indeed, as long as the student has notice of the charges, an explanation of the evidence against him, opportunity to present his side of the story, and the evidence is sufficient, there is no constitutional violation.[36] Notice requires nothing more "than a statement of the charge against them."[37] As to the hearing, "[c]ross-examination, the right to counsel, the right to transcript, and an

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27 Henry L. Chambers, Jr., *Reasonable Certainty and Reasonable Doubt*, 81 MARQ. L. REV. 655, 658–59 (1998).

28 *See* Elizabeth Kaufer Busch, *Sexual Assault: What's Title IX Got To Do With It?*, ___ PERSPECTIVES IN POLITICAL SCIENCE _____, _____ (2017) (Discussing differences between Due Process approach and the Inquisitorial System).

29 *See* 2 WILLIAM BLACKSTONE, COMMENTARIES *358 ("[B]etter that ten guilty persons escape, than that one innocent suffer.").

30 *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 222-23 (1985). The requirement to provide due process dates from the landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158–59 (5th Cir. 1961).

31 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). *See also Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633–37 (6th Cir. 2005) (collecting cases and analyzing the amount of process due in student disciplinary cases).

32 Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process Law*, 19 N. ILL. U. L. REV. 739, 754–55 (1999); James M. Picozzi, Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L.J. 2132, 2138 (1987); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 683 (2001). Indeed, in some states, if the student was expelled for sexual assault, that fact is noted on the student transcript. VA. CODE ANN. § 23-9.2:18. Given the potential liability for admitting a known sex offender, it will be difficult for students to transfer to other institutions. *See* Christopher M. Parent, *Personal Fouls: How Sexual Assault by Football Players Is Exposing Universities to Title IX Liability*, 13 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 617, 634–35 (2003) (explaining the liability that universities are exposed to because of student sexual harassment and suggesting that this may make them more cautious regarding which students they accept). In the Southeastern Conference, an athlete who is disciplined for sexual assault is ineligible to play at any other conference school. SOUTHEASTERN CONFERENCE RULES 4.1.19.

33 *Mathews v. Eldridge*, 424 U.S. 319, 348 (1976).

34 *Flaim*, 418 F.3d at 635.

35 *Id*.; *see also Nash v. Auburn Univ*., 812 F.2d 655, 665 (11th Cir. 1987) (holding that a student disciplinary hearing is not required to follow the formal rules of evidence); *Henson v. Honor Comm. of Univ. of Va*., 719 F.2d 69, 73 (4th Cir. 1983) (same).

36 *Goss v. Lopez*, 419 U.S. 565, 581 (1975).

37 *Nash v. Auburn University*, 812 F.2d 655, 663 (11th Cir. 1987).

appellate procedure have not been constitutional essentials, but where institutions have voluntarily provided them, courts have often cited them as enhancers of the hearing's fairness."[38] While Respondents have a right to consult legal counsel,[39] there is no right to active participation by attorneys.[40] In short, due process requires "only that [students] be afforded a meaningful hearing,[41] and that the decision be supported by substantial evidence.[42] As long as a public university meets the constitutional standards, it need not follow its own internal procedures and rules in order to satisfy its constitutional obligations.[43]

II. Providing Enhanced Due Process Does Not Undermine the Institution's Obligations to the Complaining Witness

With the diminution of due process protections, the possibility of erroneous outcomes—false convictions—increases. Yet, this increased possibility of error has no corresponding benefit. "The notion that a school must diminish due process rights to better serve the 'victim' only creates more victims."[44]

Public institutions frequently have ignored their obligations to support the Complaining Witness.[45] Following the decline of the in loco parentis doctrine, many

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38 William A. Kaplin & Barbara A. Lee, THE LAW OF HIGHER EDUCATION § 10.3.2.3 (5th ed. 2013.).

39 *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that "at most the student has a right to get the advice of a lawyer"); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); *see Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate).

40 *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 636 (6th Cir. 2005) ("Ordinarily, colleges and universities need not allow active representation by legal counsel or some other sort of campus advocate."); *see also Osteen*, 13 F.3d at 225 (noting that during a disciplinary hearing, "the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel, as by examining and cross-examining witnesses and addressing the tribunal"); *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 74 (4th Cir. 1983) (holding a student received due process even though a practicing attorney did not conduct his defense because two student-lawyers consulted extensively with the student's attorney throughout the proceedings).

41 *Tigrett v. Rector & Visitors of the Univ. of Virginia*, 290 F.3d 620, 630 (4th Cir. 2002)

42 *Nash,* 812 F.2d at 667-68

43 *Riccio v. County of Fairfax,* 907 F.2d 1459, 1469 (4th Cir. 1990) (noting that violations of federal due process are to be measured by federal standards, not by a state's standard); *Bills v. Henderson*, 631 F.2d 1287, 1298 (6th Cir. 1980) ("[P]rocedural rules created by state administrative bodies cannot, of themselves, serve as a basis for a separate protected liberty interest."); *Bates v. Sponberg*, 547 F.2d 325, 329–30 (6th Cir. 1976) ("It is not every disregard of its regulations by a public agency that gives rise to a cause of action for violation of constitutional rights. Rather, it is only when the agency's disregard of its rules results in a procedure which in itself impinges upon due process rights that a federal court should intervene in the decisional processes of state institutions."); *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972) (holding that a university's violation of its own procedures did not amount to a violation of federal due process).

44 DeVos, *supra* note 17.

45 *See* Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 387 (2014) (stating that increased awareness of sexual assault on campuses highlights the need for public institutions to significantly improve their

universities have tolerated a student-life culture that enabled heavy drinking and casual sex.[46] Such an environment does not prevent or justify sexual assault and, indeed, indirectly encourages it.[47] When students have come forward with allegations of sexual assault, campus officials often failed to: (1) provide adequate psychological counseling; (2) grant accommodations, such as changes in class schedule or housing; or (3) prevent retaliation by the alleged perpetrator's supporters.[48] If a Complaining Witness wished to pursue justice against a Respondent, the university often simply referred them to the criminal justice system, where police and prosecutors would not pursue ambiguous cases.[49] If the school initiated student disciplinary proceedings, it was often a horrific experience for the complainant.[50] Sadly, at some institutions, the Respondent's status as an athlete or the child of a wealthy donor apparently influenced the decision to pursue discipline or the sanction involved.[51]

When a student makes an allegation of sexual assault, a public institution has a constitutional, legal, and moral obligation to support the Complaining Witness.[52] Reporting is going to be painful for the Complaining Witness, but a university can minimize the pain to the fullest extent possible. Specifically, a public institution must make timely and age-appropriate resources available to the Complaining Witness—whether it is relocation of residence, schedule adjustments, medical assistance, or psychological counseling.[53] Of course, the institution must ensure the Respondent or the Respondent's friends and allies do not retaliate against the Complaining Witness.[54]

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procedures for responding to this problem); 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, 214–17 (2011) (reviewing instances in which schools have failed to appropriately respond to allegations of sexual assault).

46 *See* Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 Wayne L. Rev. 379, 383 (2016) (noting how students are generally treated as adult consumers and are "free to engage in various activities at their own discretion").

47 Christopher P. Krebs et al., The Campus Sexual Assault (CSA) Study 2-5–2-8 (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (noting that substance abuse and prior consensual sexual activity are major risk factors for sexual assault).

48 *See* Cantalupo, *Burying*, *supra* note 45, at 214–16 (describing instances in which university officials failed to provide appropriate support, protection, or accommodations for sexual assault Complaining Witness, or failed to act at all).

49 *See* Nancy Chi Cantalupo, *"Decriminalizing" Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 487–488 n.28 (2012) (noting that many institutions' sexual assault reporting guidelines emphasize contacting police).

50 Cantalupo, *Burying*, *supra* note 45, at 214–16.

51 Bernstein, *supra* note 10, at 123.

52 As part of its constitutional obligations under the Equal Protection Clause, a public institution should encourage Complaining Witness to report the acts against them to the police and should support the student after the report. However, the OCR guidance takes a different view. Bernstein, *supra* note 10, at 124–25.

53 2001 Guidance at (VII)(A).

54 *Id*.

The institution has these obligations regardless of any uncertainties or ambiguities about the case. A student, who sincerely believes she is a victim of sexual assault, is going to manifest the trauma of a rape complainant even though the Respondent may claim innocence or the evidence is at best inconclusive.[55]

These obligations are in addition to—not in place of—the obligations to the individual accused of the sexual assault. Fulfilling the institutional obligations to the Complaining Witness will not harm the Respondent. Diminishing the due process protections for the Respondent will not help the Complaining Witness. In fact, the 2017 guidance reflects that OCR expects institutions to provide both the Complaining Witness and the Respondent with interim measures without regard to "fixed rules or operating assumptions that favor one party over another."[56]

III. What Enhanced Due Process Measures Entail

A. The 2017 OCR Perspective

In the 2017 guidance, OCR set forth a number of procedural steps which institutions must now take in order discharge their Title IX obligations. During its investigation, those steps include:

- The use of a trained investigator to:
  - Analyze and document the available evidence;
  - Objectively evaluate the credibility of the parties and witnesses;
  - Synthesize all of the evidence – both inculpatory and exculpatory; and
  - Assess the unique and complex circumstances of each case.[57]
- Notice to the Respondent that includes:
  - The allegations constituting a potential violation of the school's sexual misconduct policy;
  - Sufficient details to prepare a response, including:
    - The identities of the parties involved,
    - The specific section of the code of conduct violated,
    - The specific conduct allegedly constituting the violation, and
    - The date and time of the alleged incident; and

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55 While the 2011 DCL and the 2014 Q & A impose this obligation, the 2017 Q & A document requires no specific interim measures, only that an institution should assess the need for interim measures necessary to avoid depriving any student of his/her education. 2017 Q&A, *supra* note 18, at 3.

56 *Id*.

57 *Id*., p. 4.

– Sufficient time to prepare a response before an initial interview;

- A written report summarizing the relevant exculpatory and inculpatory evidence; and
- Timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.[58]

In addition, OCR identified additional procedural safeguards that would apply in any adjudication of the parties' interests, including:

- The preparation of findings of fact and conclusions as to whether the facts support a finding of responsibility on each of the alleged violations;
- Equal access for both parties to any information to be used during any informal or formal disciplinary meetings and hearings, including the investigation report;
- An opportunity to respond to the report in writing prior to a decision;
- Equal processes for both parties during the pendency of the adjudication procedure;
- Equal access to advisors in the resolution of any claim based on sexual assault, domestic violence, dating violence, or stalking; and
- Adjudicators without conflicts of interests.[59]

Finally, OCR has noted that institutions are not obligated to provide both parties with a right of appeal, but to the extent that both parties are given the ability to appeal, the appeal procedures must be equally available to both parties.[60]

Although the 2017 Q & A does much to restore balance to Title IX proceedings, the notice and comment process contemplated by OCR will provide a variety of stakeholders with the opportunity to address the question of what due process protections should be injected into sexual misconduct proceedings on campus. Based on the author's experiences with multiple matters arising on multiple campuses, the author believes the following protections are ones that protect the parties' interests and are ones that are within the realm of that which can be reasonably expected of institutions whose primary responsibility is educating students rather than adjudicating quasi-criminal complaints of violence and less serious complaints of other forms of discriminatory conduct.

B. The Author's Perspectives

Considerable confusion has existed for years about the roles of the Complaining Witness, the Respondent, and the institution in sexual misconduct hearings. The author believes the criminal judicial system provides a useful analogy. The

58 *Id.*

59 *Id.*, p. 5.

60 *Id.*, p. 7.

author believes the Complaining Witness in a Title IX proceeding is analogous to a criminal complainant, the Respondent is analogous to a criminal defendant, and the institution is analogous to the State. Just as the State prosecutes, plea bargains, and enforces the outcome of a criminal case, so too should the institution prosecute, informally resolve, enforce the outcome of a campus sexual misconduct proceeding. Ultimately, it is the institution that must ensure that its educational programs are being offered without discrimination based on sex, not the complainant. Thus, just as the State decides whether to prosecute (or not prosecute) or plea bargain a criminal matter based on the State's assessment of public safety concerns, the institution should determine whether to prosecute (or not prosecute) or informally resolve a Title IX complaint based on the institution's assessment of how it can best fulfill its Title IX obligations.

Undoubtedly, a state's attorney wisely considers a criminal victim's desires in making a decision about how best to proceed with a criminal case. Similarly, any institution would be wise to consider a Title IX Complaining Witness's desires in making decisions about how best to proceed with a Title IX case. However, in both the criminal setting and the Title IX setting, the Complaining Witness's interests are secondary to the interests of the State and the institution. The institution, not the Complaining Witness, is ultimately responsible for ensuring that it discharges its Title IX obligations by taking "immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."[61]

The criminal process analogy impacts the concept of the campus grievance process. Criminal prosecutors are expected to seek the truth of what occurred and outcomes consistent with the law, not to ignore exculpatory evidence just because the criminal victim feels aggrieved. Similarly, institutions should seek the truth of what occurred and outcomes consistent with their sexual misconduct policy so as to discharge the institution's Title IX obligations. Hopefully, the result of the Title IX proceedings will satisfy the Complaining Witness, but that will not always be the case, nor should Complaining Witness satisfaction be the goal of the institution's efforts.

Thus, if the goals of the campus sexual misconduct proceedings are finding the truth and achieving outcomes consistent with the law, one must assess what procedural safeguards have been shown in other types of proceedings to promote the truth and outcomes consistent with applicable law, even if some modification of those safeguards is necessary in light of a hearing likely to be conducted by individuals with limited experience and training in conducting adversarial proceedings.

The author believes the following safeguards have consistently proven useful in promoting the truth and outcomes consistent with the law.

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61 2001 Guidance at (VII).

1. Strict Separation of Roles

To achieve the truth, institutions must strictly separate the investigative, prosecutorial, adjudicative, and appellate functions. America's criminal justice system acknowledges the possibility that individuals may abuse their power; so, it disperses authority among multiple individuals and contains structural safeguards to prevent abuse of power.[62] A prosecutor must obtain a grand jury indictment or preliminary hearing finding of probable cause.[63] A single juror can prevent a finding of guilt.[64] A guilty verdict, but not an acquittal, is subject to appellate review.[65] The authority to imprison an individual is never concentrated in an individual.[66] While neither our constitutional system nor our criminal justice system operates perfectly, avoiding concentrations of power and authority makes it more likely that society, rather than a faction,[67] will prevail and only the guilty will go to jail.

The same principles must apply when a public university confronts an allegation that could result in expulsion. The individuals who investigate the allegation must not be involved in the decision to prosecute, the determination of guilt, or the appellate review. The individuals who determine whether to initiate disciplinary proceedings must not be involved in the investigation or the adjudication of guilt.[68] The individuals who determine whether the student is, in fact, guilty must not be involved with the investigative phase, the decision to charge, or the appellate review. The appellate panel must have not be involved in the investigation, prosecution, or hearing. To that end, the author proposes that Title IX Coordinators serve in a role analogous to that of a prosecutor. Title IX Coordinators should oversee the institutional complaint process, but they should delegate the investigation of the complaint to trained investigators.

2. An Objective Investigation with the Opportunity to Respond

Initially, there should be an investigation—conducted by internal staff or outside investigators—that should involve interviewing the Complaining Witness, the Respondent, and any relevant witnesses as well as all available evidence.[69] The

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62 *See, e.g.*, Bertrall L. Ross II, *Reconciling the* Booker *Conflict: A Substantive Sixth Amendment in a Real Offense Sentencing System*, 4 Cardozo Pub. L., Pol'y & Ethics J. 725, 758 (2006) (describing the separate roles given to the judge and the jury); James Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 Duke L.J. 651, 656 (1976) (discussing different procedural safeguards in our criminal justice system).

63 *Thirty-Ninth Annual Review of Criminal Procedure: 2010*, 39 Geo. L.J. Ann. Rev. Crim. Proc. 223, 239, 247 (2010).

64 *Burch v. Louisiana*, 441 U.S. 130, 134 (1979) (holding that there is a constitutional right to a unanimous jury if the jury only has six members).

65 U.S. Const. amend. V, § 1.

66 *See* Ross, *supra* note 62, at 758–59 (noting that the judge and jury have different functions so that one entity does not have all the power).

67 The Federalist No. 10 (James Madison).

68 Moreover, the Respondent should have the right to offer a rebuttal to the investigative report.

69 *See* Andrew T. Miltenberg & Philip A. Byler, *Representing An Accused in College Sexual Misconduct Disciplinary Proceedings*, 43 Litigation 1, 5-6 (Fall 2016).

investigator's conclusions should be reduced to writing. Once the final investigative report is completed, both the Complaining Witness and the Respondent should have an opportunity to rebut and supplement the Report.

3. Independent Determination of Probable Cause for Hearing

Not all criminal complaints are supported by sufficient evidence to warrant a trial. In some instances, there is only evidence to support a lesser charge while in other instances, the evidence supports no charge against the accused. In all such situations, it is a matter for the prosecutor to determine, hopefully with the goal of achieving equal justice under the law, whether to proceed. Even when the prosecutor wishes to proceed, the prosecutor must still persuade a grand jury to indict or a preliminary hearing judge that a crime has been committed.[70] A similar process should be employed in the Title IX context.

Specifically, the author believes that some university official or officials, who are independent of the Title IX Coordinator, should determine if there is probable cause to believe the allegations against the Respondent could be found to be true by a reasonable trier of fact—either a hearing officer or a hearing panel. In making this determination, the official or officials would rely on the investigator's report and any rebuttal/supplemental material supplied by the Complaining Witness and the Respondent. If the official or officials determine there is probable cause, then matter should proceed to hearing. If there is no probable cause, the complaint should be dismissed.

4. A Hearing with Adequate Procedural Safeguards

a. Clear Notice of the Specific Allegations

Fundamental fairness requires that any individual accused of a violation be notified of the specific charge against the individual at the earliest possible stage of the proceeding. In the interest of obtaining the unfettered perspective of the Respondent, investigators may well want to inquire of a Respondent about the case without specifying the reason for the inquiry. While such an approach may well provide helpful information, the broader goal of providing an "equitable" hearing under Title IX leads to the conclusion that "gotcha" investigative tactics have no place in sexual misconduct proceedings.

The OCR suggests a similar, but slightly different, conclusion. It states:

> Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview.[71]

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70 Review, *supra* note 63, at 29, 247.

71 2017 Q & A, *supra* note 18, at 4.

The "once it decides to open an investigation" language is somewhat perplexing and ripe for mischief. If a complaint is filed, is there ever a situation when an institution might conclude not to conduct at least some form of a limited investigation? So, the notice protections should be triggered with the filing of a complaint by either a complaining party or by the institution on its own volition. When the complaint is initiated, the notice protections should automatically follow rather than being triggered by some ambiguous notion of when an institution comes to a conclusion that the matter is worthy of serious attention.

Finally, the author agrees with the OCR's recent conclusion that the notice should include "the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident."[72]

b. Access to All Inculpatory and Exculpatory Evidence

To ensure the correct result, the Respondent must have access to all inculpatory and exculpatory evidence.[73] There should be no surprises at the hearing.[74] OCR adopted this approach in its most recent guidance.[75]

c. Access to an Advisor

Since the 2013 adoption of the Violence Against Women Act amendments to the Clery Act, institutions must provide all parties to a campus sexual misconduct proceeding with "the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor or their choice."[76] Notably, there is no requirement that any advisors be permitted only a requirement that the parties have the same opportunities to have others present. The author believes the involvement of advisors, and specifically attorney advisors, is essential to the preservation of the parties' due process rights. Well-informed counsel can help to inform the tribunal of due process concerns along the way so the tribunal can

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72 *Id.*

73 *See* Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1210–11 (2000) (stating that criminal procedural rules require the government to produce all material and exculpatory evidence upon request). Schools should apply the same rules to disciplinary proceedings.

74 While this proposition may seem obvious, it presents special problems in the context of the Complaining Witness's previous sexual history. "Over the last few decades, almost all American courts have limited the extent to which accused rapists can bring in the sexual past of an alleged victim. This ensures that rape trials are not in effect also putting the victim on trial." Bernstein, *supra* note 10, at 125. Public universities must follow the same approach as the federal rules of evidence FED. R. EVID. 412 or applicable state law, *See* Pamela J. Fisher, State v. Alvey: *Iowa's Victimization of Defendants Through the Overextension of Iowa's Rape Shield Law*, 76 IOWA L. REV. 835, 835 n.1 (collecting rape shield laws from most states).

75 2017 Q & A, *supra* note 18, at 4.

76 20 U.S.C. §1092(f)(8)(B)(iv)(II) and 34 C.F.R. §668.46(k)(2)(iii). "Advisor" is defined by 34 C.F.R. §668.46(k)(3)(ii) as "any individual who provides the accuser or accused support, guidance, or advice."

address those concerns during the grievance process rather than in a federal lawsuit. This Essay addresses the scope of the advisor's involvement in more detail below. Thus, the author believes that Respondents must have access to an advisor of their choosing, and the advisor must be able to participate in at least some limited fashion.[77] The regulations ultimately adopted by OCR should eliminate any question as to whether the Respondent can have an advisor present.

d. The Right to Cross-Examine Witnesses

Effective cross-examination is critical to the goal of getting to the truth of what occurred. Since "[c]ross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested,"[78] there must be some form of cross-examination.[79] Some advocates for complainants have voiced legitimate concerns that cross-examination can be a means for the Respondent to re-victimize the complainant. Institutions can ameliorate that concern by utilizing one or more techniques designed to eliminate or at least substantially reduce the invective that may often otherwise accompany questions posed by one party to the other. However, these arrangements should be limited to the cross-examination of the parties. Institutions should regular cross-examination of all non-parties.

e. The Institution Has the Burden of Proof

In the hearing, the burden of proving the case should be on the institution. Again, using the criminal justice system as a model, engaged criminal victims can be helpful to the prosecution, but in the end, the criminal victim has no responsibility to generate the evidence necessary to convict the defendant. The state must bear that burden.

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77 While a public university is not required to provide an attorney for a student accused of sexual assault, *Lassiter v. Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 25 (1981), the institution cannot prohibit the student from seeking legal counsel; *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting that "at most the student has a right to get the advice of a lawyer"); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988) (noting that a student is not forbidden from obtaining legal counsel before or after the disciplinary hearing); *see Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 464 (S.D.N.Y. 2015) (reaffirming *Osteen*); *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 582 (E.D. Va. 1996) (noting that procedures that afforded the student the opportunity to consult with an attorney outside of the disciplinary hearings were adequate). Nor can the university prohibit an attorney from being present at the hearing and offering advice as a *passive* participant. *C.f. Osteen*, 13 F.3d at 225 (holding that when the student may also face criminal charges, "it is at least arguable that the due process clause entitles him to consult a lawyer, who might for example advise him to plead the Fifth Amendment"); *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978) (holding that when criminal charges are also pending, a student must be allowed to have an attorney present during the disciplinary hearings to provide advice, but the attorney does not have to actively participate in the student's defense).

78 *Davis v. Alaska*, 415 U.S. 308, 316 (1974).

79 Although trial attorneys strive to perfect the technique of leading questions, the veracity and accuracy of a witness's testimony can be questioned and refuted without leading questions. Instead, cross-examination can take place through the hearing officer or by requiring advocates to ask more open-ended questions.

The institution should carry the same responsibility in a Title IX proceeding. Since Respondents have a presumption of innocence, the institution has the burden of proving guilt.[80] While complaining witnesses can do much to assist the institution in the presentation of the case on campus, it is the institution's obligation to present witnesses, documents, and other forms of evidence at the hearing. The issue then becomes what level of proof is required for a finding of responsibility.

f. Clear and Convincing Evidence by Unanimous Verdict

The standard of proof must be high enough to avoid wrongful convictions. In the criminal justice system, a conviction for sexual assault requires the prosecution to prove every element of the offense beyond a reasonable doubt (99% certainty).[81] However, if a student disciplinary system uses a lesser standard, such as clear and convincing evidence (75%), or, as the OCR 2011 Dear Colleague Letter mandated, a mere preponderance of the evidence (50.01%),[82] then the likelihood that an innocent person will be found guilty increases dramatically.[83] Although use of a preponderance of the evidence is constitutionally acceptable,[84] institutions—as a matter of policy—should diminish the chances of false convictions by be utilizing a clear and convincing evidence standard or a beyond a reasonable doubt standard.[85]

To be sure, the lower preponderance of the evidence standard is the norm in most civil litigation,[86] but a Title IX sexual assault proceeding is akin to a criminal prosecution.[87] As Professor Rubenfeld argues, both the quasi-criminal nature of the

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80 *See* Barton L. Ingraham, *The Right to Silence, the Presumption of Innocence, the Burden of Proof, and a Modest Proposal: A Reply to O'Reilly*, 86 J. Crim. L. & Criminology 559, 562–63 (1996) (noting that although the prosecution in a criminal case has the burden to prove all the elements of the crime charged, the defendant in a criminal case has no burden of proof). Although some insist Complaining Witness have "procedural equality," Nancy Chi Cantalupo, *Address: The Civil Rights Approach to Campus Sexual Violence*, 28 Regent U. L. Rev. 185, 193 (2016), the governmental actor cannot transfer its responsibilities to a private individual. The matter is not *Victim/Survivor v. Alleged Perpetrator*; the matter is *Public University v. Alleged Perpetrator*. It is the public university that has the constitutional and legal obligation to remedy known incidents of sex discrimination, including sexual assault. It is the alleged perpetrator who violated the university's rules.

81 *Jackson v. Virginia*, 443 U.S. 307, 309 (1979) (stating that the Constitution requires application of the reasonable doubt standard for all criminal convictions).

82 Dear Colleague Letter, *supra* note 4, at 11.

83 *See* John Villasenor, *Probabilistic Framework for Modeling False Title IX "Convictions" Under the Preponderance of the Evidence Standard,* 15 Law, Probability, & Risk 223 (2016).

84 *See* William E. Thro, *No Clash of Constitutional Values: Respecting Freedom & Equality in Public University Sexual Assault Cases*, 28 Regent University Law Review 197, 209 (2016).

85 Although no court has held that using preponderance of the evidence violates due process, the original public meaning of the due process clause may well require a higher standard when the consequences are life altering. The modern procedural due process jurisprudence, with its emphasis on "practical factors" represents a significant departure form original public meaning. *See* Gary Lawson, *Due Process Clause* in Heritage Guide to the Constitution 16494(2nd Edition, David F. Forte & Matthew Spalding, eds. 2014) (Kindle Edition).

86 *See* Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU Educ. & L.J. 143, 145 (2013).

87 *Doe v. University of Kentucky*, 860 F.3d 365, 369-370 (6th Cir. 2017).

proceedings and the fact some States require a higher standard of proof to declare someone a sex offender suggest institutions should use a higher standard of proof.[88]

3. Broad Appeal Rights for the Respondent

If the Respondent is found "not guilty," then the matter should end.[89] The Anglo-American legal tradition, drawing upon ideas expressed in Greek, Roman, and Canon law, has long recognized the principle that no person should be subjected to "double jeopardy."[90] To allow the Complaining Witness or the University to appeal a not guilty verdict and, thus, potentially subject the Respondent to a second trial violates both the letter and the spirit of this universal maxim.

Alternatively, if the Respondent is found "guilty," then the respondent should have the right to appeal on any legal or factual ground. [91] This does not mean that the appellate proceeding is a de novo trial. Rather, it simply means that the appellate tribunal—like any appellate court—should review factual findings for clear error and legal conclusions on a de novo basis.

IV. A Suggested Course for Private Institutions

As previously noted, due process obligations do not apply to private institutions.[92] However, Title IX does not give private institutions a free pass to adopt whatever rules they wish to adopt. In fact, regulations adopted soon after the enactment of Title IX require that all institutions receiving federal financial aid adopt "prompt and equitable" grievance procedures to address student or employee claims arising under Title IX.[93] Although the courts have not addressed the meaning of "prompt and equitable" grievance procedures under Title IX, one expects that federal courts will ultimately conclude that there is little difference between the "prompt and equitable" procedures required by regulation and the "due process" required by the Constitution.

Consequently, private institutions will be well-advised to monitor the evolution of judicial decisions pertaining to the due process obligations of public institutions. Those decisions may ultimately prove to be harbingers of private institution obligations yet to be imposed pursuant to regulations promulgated pursuant to Title IX.

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88 Rubenfeld, *supra* note 20, at 60-61.

89 The Dear Colleague Letter required that Complaining Witness be able to appeal a not guilty verdict. *See* Dear Colleague Letter, *supra* note 4, at 12.

90 G. Robert Blakey, *Double Jeopardy* in in Heritage Guide to the Constitution 16259(2nd Edition, David F. Forte & Matthew Spalding, eds. 2014) (Kindle Edition).

91 Many institutions limit appeals to specific grounds, such as the discovery of new information. *See* Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie SukGersen, Fairness For All Students Under Title IX 2 (2017).

92 *See* note 20, *supra.*

93 34 C.F.R. §106.8

In the meantime, trustees, presidents, and other policymakers at private institutions should consider whether, irrespective of due process obligations, their Title IX grievance procedures are equitable to all concerned. In light of existing regulations, it is their current duty to provide no less.

CONCLUSION

Sexual assault is a major problem on public university campuses. When any member of the campus community alleges sexual assault by another member of the campus community, the institution owes an obligation to both the Complaining Witness and the Respondent. As to the Complaining Witness, the institution must provide support and must respond to the allegations in a manner that is not deliberately indifferent.[94] With respect to the Respondent, the public institution must provide due process.

Because of the potentially life-changing consequences of being declared responsible for sexual assault, due process concerns are enhanced. To address these concerns, institutions should strictly separate roles, allow rebuttal/supplementation to the investigative report, have an independent determination of whether to proceed, conduct a hearing that is designed to find the truth, and provide for meaningful appeals.

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94 *Davis v. Monroe County,* 526 U.S. 629, 644 (1999).