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From Brock Turner to Brian Banks: Protecting Victims and Preserving Due Process in The New Area of Title IX

Laura Perry

FROM BROCK TURNER TO BRIAN BANKS: PROTECTING VICTIMS AND PRESERVING DUE PROCESS IN THE NEW AREA OF TITLE IX

LAURA PERRY*

TABLE OF CONTENTS

* Laura Perry is a law student at the University of California, Los Angeles. Laura is passionate about social and racial justice, particularly related to education policy and reform. Laura hopes this Comment will inspire policymakers and universities to implement new policy guidelines that provide for more equitable sexual assault campus proceedings and more resources for survivors of sexual violence. Prior to law school, Laura served as a caseworker in the Conduct Division of the University of California, Berkeley Student Advocate's Office where she represented students in campus adjudicatory proceedings related to sexual assault. After college, she served as a Teach for America corps member in Richmond, California, while simultaneously earning a master's degree in Urban Education and Policy. After graduating law school, she will be clerking for the Central District of California and then for the Ninth Circuit Court of Appeals. She then plans to pursue a career in education equity and reform.

Laura would like to thank Professor Laura Gomez for her thoughtful input and guidance in crafting this Comment. She would also like to thank her parents, Susan and Steven, and her brother Noah for always encouraging her to follow her passions. She would not be here without her family's unwavering support. She would also like to thank all of her friends, extended family, and professional and academic mentors who have supported her throughout her legal career, as well as the staff of the DePaul Journal for Social Justice for their astute feedback and edits in preparing this Comment for publication. Thank you all.

INTRODUCTION: FROM BROCK TURNER TO BRIAN BANKS[1]

In 2016, Brock Turner, a white student athlete at Stanford University, sexually assaulted an unconscious woman behind a dumpster.[2] Turner was sentenced to just six months in prison and served only three months before being released.[3] The maximum sentence for the crime Turner was charged with is fourteen years, but the judge gave him an extremely light sentence, claiming that prison would severely impact Turner's future.[4] Turner's case exemplifies the problems of both rape culture and white privilege on university campuses and in society at large.

Rape culture is defined as "a sociological concept for a setting in which rape is pervasive and normalized due to societal attitudes about gender and sexuality."[5] Rape culture is part of the reason why Turner, a wealthy, white athlete at an elite college, could sexually assault an unconscious woman and face minimal consequences: The judge presiding over his case was more concerned about the consequences for the perpetrator than the victim of the assault. In Turner's case, rape culture intersected with white privilege[6] to afford him a light sentence and sympathy from a white, male judge, while his victim, a woman of color, was unfairly stigmatized for the assault.

Societal norms—such as victim blaming, sexual violence against women in the media, and the tolerance of sexual harassment in the workplace—perpetuate rape culture. These norms work together to not only permit, but also to promote sexual violence.[7] Rape culture has infiltrated college campuses. College campuses "produce an expectation of partying that fosters the development of sexualized peer cultures organized around status."[8] Both a heavy pressure to drink among peers and media influences encouraging college parties lead to a pervasive culture of campus sexual assault. Indeed, there is a cultural double standard not applied to

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[1] Please note, this Comment addresses topics related to rape, sexual assault, and rape culture in the context of college campuses.

[2] Natasha Noman, *Brock Turner Gets Months in Jail—A Black Student Got 5 Years for a Rape He Didn't Commit*, MIC (June 9, 2016), https://www.mic.com/articles/145788/brock-turner-gets-months-in-jail-a-black-student-got-5-years-for-a-rape-he-didn-t-commit.

[3] *Id.*

[4] *Id.*

[5] Alexandra Tsuneta, *What Is Rape Culture?*, MEDIUM (July 3, 2020).

[6] *White Privilege*, MERRIAM-WEBSTER DICTIONARY (Mar. 11, 2021), https://www.merriam-webster.com/dictionary/white%20privilege (defining white privilege as "the set of social and economic advantages that white people have by virtue of their race in a culture characterized by racial inequality").

[7] *Rape Culture*, MARSHALL UNIVERSITY WOMEN'S CENTER (2020), https://www.marshall.edu/wcenter/sexual-assault/rape-culture/.

[8] Molly Hopkins, *Sexual Assault on College Campuses: Feeding a Culture of Dismissal*, RAMAPO J.L. & SOC. (June 15, 2017) https://www.ramapo.edu/law-journal/thesis/sexual-assault-college-campuses-feeding-culture-dismissal/.

men in which intoxicated women are "viewed by our patriarchal society as promiscuous and desiring sex."[9] Rape culture remains a serious problem on college campuses.

In sharp contrast to Brock Turner—who received a very light sentence for sexually assaulting an unconscious woman—Corey Batey, a Black student athlete from Vanderbilt University, received a fifteen-year sentence for a similar crime.[10] Batey's case, when compared to Turner's, illustrates the racial disparities in sentencing between Black and white perpetrators of sexual assault. Beyond disparities in sentencing, Black students accused of sexual assault face the additional challenges of fighting the allegations against them in a racist legal system that has a long history of inadequately applying procedural protections to people of color.[11] For instance, Brian Banks, a modern-day example of the Scottsboro boys,[12] was a Black football player accused of rape at just sixteen years old. He received a five-year sentence for a crime he did not commit. His accuser later admitted to fabricating the allegations.[13] The juxtaposition between Turner and Batey and Banks is stark.

It is impossible to ignore the racial disparities in sentencing and the disparate treatment of white and Black defendants when it comes to sexual assault allegations. On average, Black men receive sentences approximately 20 percent longer than white men who have committed the same crime.[14] This is largely due to factors such as racial biases embedded in prosecutorial policies and sentencing laws, and also in racial biases inherent in judges and juries themselves.[15]

> Prosecutors are likely to charge people more harshly if they're [B]lack than if they're white . . . There are racial disparities at each stage of the process. It snowballs as someone goes through the

[9] *Id. See also* Kayla Hoang, *Rape Culture: Is This The College Experience?*, JOHNSON & WALES UNIV. 2, 5 (Fall 2018) https://scholarsarchive.jwu.edu/student_scholarship/37/.
[10] Noman, *supra* note 2.
[11] Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is The System Biased Against Men of Color?*, THE ATLANTIC (Sept. 11, 2017) http://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/.
[12] The Scottsboro Boys, NATIONAL MUSEUM OF AFRICAN AMERICAN HISTORY & CULTURE (2020), https://nmaahc.si.edu/blog/scottsboro-boys. The Scottsboro Boys were a group of Black teenagers who were falsely accused of raping two white women. Their case illustrates many of the inadequate procedural protections that were afforded to Black defendants such as being tried by all-white juries, rushed trials, inadequate legal representation, and a lack of due process. *Id.*
[13] Noman, *supra* note 2.
[14] *Id.*
[15] Molly Roberts, *Opinion: Why Did We Want Brock Turner Locked Up So Long in The First Place*, WASH. POST (June 7, 2018), https://www.washingtonpost.com/blogs/post-partisan/wp/2018/06/07/why-did-we-want-brock-turner-locked-up-so-long-in-the-first-place/.

> system. This starts with the likelihood of being arrested. Then there's the ability to post bail pre-trial, which research from the Sentencing Project shows leads to better trial outcomes, and to hire a defender. Then there's the jury issue . . . there's evidence that [B]lack defendants are more likely to be convicted than white defendants.[16]

The outcomes for Black men such as Batey and Banks are sadly not surprising when looking back at the history of the prosecution of rape in the United States. The history of rape in this country is stained with the false narrative that rape occurs almost exclusively to white women by Black men.[17] Throughout history, Black men rarely received a fair trial when accused of rape by white women. Some were not even afforded a trial at all and were lynched or attacked by white members of the community who were advancing their own twisted sense of "justice." The 1907 case of *State v. Petit*[18] illustrates this extremely problematic, racist, and entrenched presumption. In *Petit*, the defense counsel seemingly praises the behavior of those who lynch Black men accused of rape:

> Gentlemen of the jury, this man, a [negro], is charged with breaking into the house of a white man in the nighttime and assaulting his wife, with the intent to rape her. Now, don't you know that, if this [negro] had committed such a crime, he never would have been brought here and tried; that he would have been lynched, and if I were there I would help pull on the rope.[19]

This harmful belief in the automatic assumption of guilt of a Black man when a white woman accuses him of rape has persisted over time. Studies show that Black men convicted of raping white women receive more severe sanctions than all other sexual assault defendants.[20]

Moreover, Black women do not receive the same protection as white women when sexually assaulted. During the 1800s, under Louisiana law, the crime of rape was specifically limited to sexual crimes committed against white women.[21]

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[16] Gabby Bess, *How Racial Bias Influenced Stanford Swimmer's Rape Case*, VICE (June 7, 2016) https://www.vice.com/en/article/bjgg95/brock-turner-rape-case-sentencing-racial-bias.
[17] Jennifer Wriggins, *Rape, Racism, and The Law*, 6 Harv. L.J. 103, 103 (1983).
[18] State v. Petit, 119 La. 1013, 1016, 44 So. 848, 849 (1907).
[19] *Id.*
[20] Gary LaFree, *The Effect of Sexual Stratification by Race on Official Reactions to Rape*, 45 AMER. SOC. REV. 842, 852 (1980).
[21] Chelsea Hale & Meghan Matt, *The Intersection of Race and Rape Viewed through the Prism of a Modern-Day Emmett Till,* AMERICAN BAR ASSOCIATION (July 16, 2019),

Louisiana law also had provisions that mandated capital punishment for the rape or attempted rape of a white woman by a slave.[22] While such blatantly racist laws have been overturned, the consequences of unequal protection and lack of justice for Black women are still apparent today.

Throughout American history, the legal system has viewed rape through the lens of the dangerous Black man and the vulnerable and delicate white woman. This false narrative makes it difficult for women of color and gender nonconforming victims to prove their cases. Additionally, this false narrative makes it challenging for men of color, especially Black men, to adequately defend themselves in a legal system that has historically presumed them guilty before their trial.

If this stained history shows us anything, it is that the way our legal system handles rape cases must include protections for both defendants and victims alike, regardless of their race or gender. This is especially true on college campuses where rape culture is prevalent. The goal of this Comment is to address how to best protect victims of sexual assault, while also ensuring that defendants receive access to a fair process, especially when they belong to a group that has been historically unprotected, and even targeted, by the legal system. Indeed, college adjudication proceedings can serve as a model for affording victims of sexual assault protection and an adequate forum to be heard and believed, while simultaneously ensuring due process protections for defendants regardless of their race.

The issue of sexual assault is personal to me for a variety of reasons. During my undergraduate career, I served as a caseworker in the Conduct Division of the University of California, Berkeley Student Advocate's Office. My job was to represent students accused of violating the University of California (UC) Code of Conduct in campus adjudicative proceedings. Many of the cases I worked on involved sexual assault allegations. I represented students, like Turner and Batey, who were accused of sexual assault and harassment.[23]

From my experience at the Student Advocate's Office, I gained an inside look at how universities handle sexual assault proceedings. On one hand, I witnessed students of all genders, sexual orientations, and races who experienced campus sexual assault, and who were often not believed due to a cultural climate that saw rape as commonplace or blamed victims. The statistics on sexual assault on college campuses are startling. According to the National Sexual Violence Resource

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https://www.americanbar.org/groups/litigation/committees/diversity-inclusion/articles/2019/summer2019-intersection-of-race-and-rape/.

[22] *Id.*

[23] The position as a caseworker was particularly challenging and impactful for me as I am a sexual assault survivor.

Center, one in five women will be raped at some point in their lifetime.[24] Approximately 23.8 percent of females and 5.4 percent of males experience rape or sexual assault through physical force, violence, or incapacitation.[25] The rates are even higher for transgender individuals with about 64 percent experiencing sexual assault in their lifetime.[26] College-aged women are three times more likely to be sexually assaulted than women of all other ages.[27] And the rates of sexual assault on university campuses continue to increase. According to the Association of American Universities' 2019 Survey on Sexual Assault and Misconduct, the rate of nonconsensual sexual contact by physical force or inability to consent increased by 3 percent from 2015 to 2019.[28]

On the other hand, I noticed injustices in the ways due process was afforded to respondents in campus sexual assault cases. I witnessed disparities in the treatment of student defendants based on their race and sexual orientation, stemming from systemic biases.

This Comment addresses several areas of importance. By expanding on my first-hand experience at the UC Berkeley Student Advocate's Office, this Comment: (1) approaches the issue of campus sexual assault from a legal lens, (2) seeks to find the proper balance between victims' and defendants' rights by ensuring victims are being heard and believed, while simultaneously ensuring defendants' due process rights are protected regardless of their race, (3) evaluates the appropriate standard of evidence for campus sexual assault hearings to ensure a fair proceeding for both parties, and (4) examines the due process rights of accused students and the proper protections necessary for victims through the evolution of Title IX.

Title IX, a statute that primarily focuses on gender equality in education, has over its forty-nine years in existence, increasingly been applied to sexual assault and harassment cases in university settings. As Title IX has evolved, the Department of Education has published Title IX guidelines and regulations explaining universities' role in campus sexual assault hearings.

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[24] National Sexual Violence Resource Center, *Fact Sheet: Statistics About Sexual Violence*, PENNSYLVANIA COALITION AGAINST RAPE (2017), https://www.nsvrc.org/sites/default/files/2018-01/understandingsexualviolence_onepager_508.pdf

[25] *Id.*

[26] *TGNCB-Prevalence Rates*, END RAPE ON CAMPUS (Mar. 31, 2021), https://endrapeoncampus.org/tngb.

[27] *Campus Sexual Violence: Statistics*, RAPE ABUSE & INCEST NATIONAL NETWORK (Oct. 22, 2020), https://www.rainn.org/statistics/campus-sexual-violence; *Sexual Violence Statistics at a Glance*, NATIONAL ASSOC. OF STUDENT PERSONNEL ADMINISTRATORS INITIATIVE (2020), https://www.cultureofrespect.org/sexual-violence/statistics-at-a-glance/.

[28] *AAU Releases 2019 Survey on Sexual Assault and Misconduct*, ASSOC. OF AMERICAN UNIV. (Oct 15. 2019) https://www.aau.edu/newsroom/press-releases/aau-releases-2019-survey-sexual-assault-and-misconduct.

In response to the rising awareness of the national problem of campus sexual assault during the Obama administration, the Office for Civil Rights (OCR) in the Department of Education (ED) published Title IX guidance documents expanding the rights of victims. The Obama era guidelines stated a preponderance of the evidence is the proper standard of evidence in university campus assault hearings.[29] Under the Trump administration, ED revoked the guidance documents set out in the Obama administration and posted new interim guidelines stating universities could choose between a preponderance of the evidence standard and a clear and convincing evidence standard in an attempt to create more due process protections for defendants.[30] These interim guidelines became official Title IX regulations in May 2020, and the regulations went into effect in August 2020.[31]

Since President Joe Biden took office in January 2021, he has been adamant about reforming the 2020 Guidelines put in place under the Trump administration. In March 2021, Biden issued an executive order calling for the Education Secretary Miguel Cardona to "review within 100 days the Education Department's regulations and policies to make sure they comply with the antidiscrimination policy"[32] related to Title IX and to "consider suspending, revising or rescinding any Trump administration rules that are inconsistent with the policies of the Biden-Harris administration."[33] This Comment provides insights regarding what aspects of the 2020 Guidelines should be abolished, and what aspects should remain and be modified.

This Comment argues that the Trump era Title IX regulations related to evidentiary standards are particularly damaging to victims' rights. In part, however, some aspects of the regulations can protect the due process rights of defendants by allowing for some form of cross-examination. The right to cross-

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[29] ED OCR Dear Colleague Letter 2011, U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS 1, 11 (April 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[30] ED OCR Dear Colleague Letter 2017, U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS 1, 1–2 (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf; *see also* RISA L. LIEBERWITZ, ET. AL., *The History, Uses, And Abuses of Title IX*, American Association of University Professors, 69, 95 (2016); R. Shep Melnick, *The Strange Evolution of Title IX*, NATIONAL AFFAIRS (2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix.

[31] *Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students*, U.S. DEPT. OF ED. (May 6, 2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students/ [hereinafter *Secretary DeVos*]. The new guidelines went into effect in August 2020. *Id.*

[32] Kery Murakami, *Rethinking Title IX*, INSIDE HIGHER ED (Mar. 9, 2021), https://www.insidehighered.com/news/2021/03/09/president-biden-tells-education-department-examine-title-ix-rules.

[33] Tova Smith, *Biden Begins Process to Undo Trump Administration's Title IX Rules*, NATIONAL PUBLIC RADIO (Mar. 10, 2021) https://www.npr.org/2021/03/10/975645192/biden-begins-process-to-undo-trump-administrations-title-ix-rules (internal quotations omitted).

examination can help ensure that defendants who have not always been given a fair opportunity to be heard, such as Black men, have access to fair proceedings in the college adjudicatory setting. This Comment recommends that the Biden administration overhaul most of the new regulations, while maintaining some of the due process protections to create an equitable balance of defendants' and victims' rights in university sexual assault hearings.

Part I of this Comment gives an overview of the evolution of Title IX and explains how Title IX became the guiding force in regulating sexual assault cases on university campuses. Part I also describes the guidelines and regulations set forth for campus sexual assault adjudicatory proceedings under both the Obama and Trump administrations. Part II examines university sexual assault grievance procedures using the University of California, Berkeley as an example. Part III argues that the preponderance of the evidence standard is the most appropriate standard to use in university sexual assault proceedings to best protect victims. Finally, Part IV suggests potential solutions to address the weaknesses of a preponderance standard and to help protect accused students' due process rights.

I. HISTORY OF TITLE IX

Title IX of the Education Amendments of 1972—which was originally created to deal with gender imbalances in college athletics—has developed into the main vehicle governing sexual assault proceedings on university campuses. The expansion of Title IX, through judicial decisions and through U.S. Department of Education guidelines and regulations, is illustrated below.

A. Title IX Background

In the 1960s and 1970s, female college athletes had far fewer opportunities than men. There were no championships for women's sports teams and funding for women's athletics was very limited.[34] During this time, women also had limited access to academic and athletic scholarships, and they were excluded from many "male-dominated" academic programs such as medicine.[35] Title IX was created to help correct this gender imbalance in athletics in the early 1970s. However, over the past forty-nine years, Title IX has become the main source of power universities possess to investigate and adjudicate claims of sexual assault.

Title IX of the Education Amendments of 1972 states that "no person in the United States shall, on the basis of sex, be excluded from participation in, be

[34] *See, e.g.*, Title IX Enacted, HISTORY.COM, (Nov. 16, 2009), https://www.history.com/this- day-in-history/title-ix-enacted.
[35] *See Equal Access to Education: Forty Years of Title IX*, U.S. DEPT. OF JUSTICE, (June 23, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.

denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[36] The statute is enforced by the Office for Civil Rights (OCR) division of the U.S. Department of Education (ED).[37]

The goal of Title IX is to prevent educational institutions from discriminating on the basis of sex, and it is enforceable against institutions that receive federal funding.[38] Title IX has been supplemented by a list of regulations that describe the statute in more detail and include information on discrimination on the basis of sex in admission, recruitment, educational programs, and employment.[39] OCR, as the main office responsible for enforcing Title IX, "evaluates, investigates, and resolves complaints alleging sex discrimination" and conducts "complaint reviews" to investigate any systemic violations.[40]

In 1972, Title IX was enacted as part of the Educational Amendments to the Civil Rights Act of 1964.[41] Signed into law by former President Richard Nixon, Title IX focused on preventing institutions from discrimination on the basis of sex by conditioning federal funding on an agreement from universities not to discriminate.[42] Title IX takes on a wide variety of issues related to sex discrimination beyond athletics including "access to higher education . . . career training and education, education for pregnant and parenting students, employment, the learning environment, math and science education, sexual harassment, standardized testing, and technology."[43]

The scope of enforcement of Title IX has steadily expanded since its inception in 1972. In 1979, the Supreme Court in *Cannon v. University of Chicago*[44] held that a woman who was denied admission to medical school had an implied private right of action to sue the school under Title IX. Later, in 1984, the Supreme Court in *Grove City v. Bell*[45] limited Title IX's enforcement. However, the *Grove*

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[36] 20 U.S.C. §1681(a) (2019) and §1682 (2019).
[37] U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS, *Title IX and Sex Discrimination*, (Jan. 10, 2020).
[38] *Id.* (Title IX applies to institutions that receive federal financial assistance from ED, including state and local educational agencies. These agencies include approximately "16,500 local school districts, 7000 postsecondary institutions, as well as charter schools, for-profit schools, libraries, and museums). *See also Sex Discrimination Frequently Asked Questions,* U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS, (Jan. 10, 2020), https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html.
[39] 34 C.F.R. § 106 (1979).
[40] *Title IX and Sex Discrimination*, *supra* note 37.
[41] *Background Brief Title IX & Sexual Assault Prevention and Response*, NATIONAL ASSOC. OF STUDENT PERSONNEL ADMINISTRATORS (NASPA), (2018) [hereinafter NASPA].
[42] LIEBERWITZ, ET. AL., *supra* note 30. *See also* Melnick, *supra* note 30, at 19; *Equal Access to Education*, *supra* note 35.
[43] LIEBERWITZ, *supra* note 30.
[44] Cannon v. Univ. of Chicago, 441 U.S. 677 (1979); *See also* LIEBERWITZ, *supra* note 30.
[45] Grove City v. Bell, 465 U.S. 555 (1984).

decision was overturned by the *Civil Rights Restoration Act,* which expanded universities' liability under Title IX.[46] Over time, Title IX enforcement has expanded to cover a private right of action for sexual harassment and sexual assault as forms of sex discrimination.

B. Title IX and the History of Sexual Assault on University Campuses

From the 1970s to the 1990s, Title IX transitioned from a statute covering discrimination in athletics to one that governs sexual assault proceedings. Title IX originally did not cover nor apply to sexual assault, and sexual assault and harassment were not mentioned in the original statute.[47] The progression of Title IX to encompass regulations on sexual assault occurred mainly through judicial interpretation. In 1977, the Second Circuit in *Alexander v. Yale University*[48] recognized sexual harassment as a form of sex discrimination for the first time. Recognition of sexual harassment as a form of sex discrimination paved the way for a change in Title IX enforcement. In 1992, the Supreme Court in *Franklin v. Gwinnett County Public Schools*[49] "expanded Title IX to include sexual assault, and specifically rape, as a form of sex discrimination."[50] The *Franklin* decision brought increased awareness to the issue of sexual assault on university campuses.[51]

1. The 1997 and 2001 Office for Civil Rights Guidelines

Although judicial decisions expanded Title IX to include sexual assault, Title IX was never formally revised to address sexual assault in the statute. It was not until 2020 that ED released new legally-binding regulations.[52] Prior to 2020, ED periodically released guidance documents interpreting Title IX, which outlined the responsibilities of institutions regarding allegations of sexual assault and

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[46] *Understanding How and Why Title IX Regulates Campus Sexual Violence,* UNITED EDUCATORS (2015), https://www.ue.org/uploadedFiles/History%20of%20Title%20IX.pdf. *See also* LIEBERWITZ, *supra* note 30 ("Beginning in the 1980s, in response to student and faculty feminist pressure, application of Title IX was expanded to cover not only discrimination in employment and educational facilities but also a wide range of unacceptable forms of sexual conduct.").
[47] *See* LIEBERWITZ, *supra* note 30. *See generally* Susan Ware, *Title IX: A Brief History with Documents* (Bedford Books, 2007); Jessica Gavora, *Tilting the Playing Field: Schools, Sports, Sex, and Title IX* (New York: Encounter Books, 2002).
[48] Alexander v. Yale Univ., 429 F. Supp. 1 (2d Cir. 1997).
[49] Franklin v. Gwinnett Cty. Public Schools, 503 U.S. 60 (1992). *See also* Ellen J. Vargyas, *Franklin v. Gwinnett County Public Schools and Its Impact on Title IX Enforcement*, 19 J.C & U.L. 373, 373 (1993).
[50] NASPA, *supra* note 41.
[51] *Id.*
[52] *Secretary DeVos, supra* note 31.

harassment.[53] Because ED is an administrative agency, it has the authority to provide guidance on how legislation such as Title IX should be implemented. The guidelines released by federal agencies are known as "sub-regulatory guidance."[54] While the guidelines do not have the force of law, in practice they place nearly mandatory authority on educational institutions who rely on federal funds in any capacity.

In response to the rising publicity of sexual assault cases in the national spotlight throughout the 1990s—including the televised judiciary hearing in which Anita Hill testified that then-Supreme Court nominee, Clarence Thomas, had sexually assaulted her[55]—the Assistant Secretary for Civil Rights released the first set of guidelines in 1997 interpreting Title IX.[56] The new guidelines, titled the Sexual Harassment Guidelines, "provide[d] educational institutions with information regarding the standards that are used by the Office for Civil Rights" and gave institutions information on best practices "to investigate and resolve allegations of sexual harassment of students."[57] Significantly, these guidance documents, published under ED's regulatory authority, were made available for public comment.[58] Some critics argue that because the guidance document was available for public comment, the document—which does not have the force of the law behind it—has more credibility because different interested parties had a voice in the drafting process.[59] Unlike later guidance documents, the Sexual

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[53] *See Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations,* CONGRESSIONAL RESEARCH SERVICE (Apr. 12, 2019), https://crsreports.congress.gov/product/pdf/R/R45685/2 ("ED has issued several guidance documents that direct schools to remedy and respond to allegations of sexual harassment. Although these guidance documents do not purport to be legally binding themselves, they explain in detail what ED specifically expects schools to do in order to comply with Title IX.").

[54] *See* NASPA, *supra* note 41 ("Agencies are authorized to issue regulations [subject to presidential approval] and orders to enforce the statute and are responsible for monitoring recipients' compliance with Title IX."). *See also* 20 U.S.C. § 1682; Nondiscrimination on The Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance; Final Common Rule, 265 Fed. Reg. 52, 858 (2000); ENFORCING TITLE IX: A REPORT OF THE U.S. COMMISSION ON CIVIL RIGHTS (1980).

[55] *See generally C-Span, Oct. 11, 1991: Anita Hill Full Opening Statement*, YOUTUBE.COM (Sept. 21, 2018), https://www.youtube.come/watch?v=QbVKSvm274.

[56] *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, 62 Fed. Reg. 12034 (Mar. 13, 1997).

[57] *Id.*

[58] *Id. See also Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties,* U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS, (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[59] *See e.g.*, Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CAL. L. REV. 881, 898–905 (2016). *See also* Jacob E. Gersen, *How the Feds Use Title IX to Bully Universities*, WALL ST. J. (Jan. 26, 2016); Cass R. Sunstein, "*Practically Binding": General Policy Statements and Notice-and-Comment Rulemaking*, 68 ADMIN. L. REV 445 (2016).

Harassment Guidelines of 1997 did not reference the appropriate standard of evidence to use during sexual assault grievance procedures.[60]

In 2001, the 1997 Guidelines were revised.[61] The 2001 Guidelines explained in detail what actions schools must take regarding sexual assault and harassment complaints in order to receive federal funding.[62] The 2001 Guidelines also offered an opportunity for public comment.[63]

Regarding the due process rights of the accused, the 2001 Guidelines stated: "The Constitution [] guarantees due process to students in public and State-supported schools who are accused of certain types of infractions."[64] Strikingly, the 2001 Guidelines acknowledged procedural due process rights of accused students in the university setting. They did not, however, specify which standard of evidence best protects accused students' due process rights, but instead stated that procedures should include "adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence."[65]

2. The Obama Era: Office for Civil Rights Guidelines

The 2001 Guidelines stayed in effect for over ten years. During this time, the narrative surrounding campus sexual assault began to shift as universities around the nation began to experience an "epidemic" of sexual assault.[66] The increase in awareness of the problem of sexual assault, especially among young, college-age students,[67] created a shift in public opinion about how to address this growing crisis. The American people wanted action. The country wanted to see the government address the growing rates of sexual assault and combat the culture of

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[60] *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEPT. OF EDUC. OFFICE FOR CIVIL RIGHTS, 62 Fed. Reg. 12034 (Mar. 13, 1997).
[61] *Revised Sexual Harassment Guidance*, *supra* note 58.
[62] Melnick, *supra* note 30. *See also Revised Sexual Harassment Guidance, supra* note 58, at ii ("We revised the guidance in limited respects in light of subsequent Supreme Court cases relating to sexual harassment in schools. The revised guidance reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX of the Education Amendments of 1972 (Title IX) regarding sexual harassment.")
[63] *Revised Sexual Harassment Guidance*, *supra* note 58, at iii ("OCR received approximately 11 comments representing approximately 15 organizations and individuals. Commenters provided specific suggestions regarding how the revised guidance could be clarified. Many of these suggested changes have been incorporated.").
[64] *Id.* at 22 ("The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.").
[65] *Id.* at 20.
[66] Melnick, *supra* note 30, at 30.
[67] ED OCR Dear Colleague Letter 2011, *supra* note 29.

under-reporting on university campuses.[68] The Obama administration responded to these rallying cries. OCR addressed the spike in sexual assault reports by implementing Title IX compliance offices within all universities, both public and private. The compliance offices were responsible for monitoring sexual misconduct and training universities on how to address sexual assault.[69] This new era expanded the role of Title IX, as updated OCR guidance began requiring institutions to implement stricter procedures to respond to sexual misconduct claims.[70]

a. The 2011 Dear Colleague Letter

In 2011, the Office for Civil Rights released the "Dear Colleague Letter," addressing the nation's growing concern over the rise of sexual assault on college campuses.[71] Upon release of the letter, former Vice President, and current President, Joe Biden emphasized the focus the new guidelines placed on victims' rights by stating: "We are the first administration to make it clear that sexual assault is not just a crime, it can be a violation of [an individual's] rights."[72]

While the document was released in letter format, the 2011 Dear Colleague Letter (DCL) served as a new set of guidelines, updating universities' responsibilities under Title IX in order for them to maintain federal funding.[73] Unlike the 1997 and 2001 Guidelines, the 2011 DCL did not go through a notice-and-comment period, which critics argue places its validity into question.[74] However, because private citizens can sue universities under Title IX,[75] and because universities lose federal funding if they do not follow Title IX, the 2011

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[68] *See* Sarah McMahon, *Changing Perceptions of Sexual Violence Over Time*, National Online Resource Center on Violence Against Women (Oct. 2011), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_ChangingPerceptions.pdf; *see also* NASPA, supra note 41, at 1 (discussing how "the Obama administration directly addressed the culture of under-reporting on college campuses").

[69] Melnick, *supra* note 30, at 30.

[70] *Id.*

[71] ED OCR Dear Colleague Letter 2011, *supra* note 29. *See also* Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, THE CENTER FOR PUBLIC INTEGRITY (Feb. 25, 2010), https://publicintegrity.org/education/lax-enforcement-of-title-ix-in-campus-sexual-assault-cases/ (discussing the lack of enforcement of Title IX which prompted the Obama administration to take action).

[72] Melnick, *supra* note 30, at 27. *See also* NASPA, *supra* note 41, at 2.

[73] ED OCR Dear Colleague Letter 2011, *supra* note 29.

[74] These critics argue the 2001 Guidelines have more validity than the 2011 DCL because the 2001 Guidelines went through the notice-and-comment period. *See* Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter,* 64 U KAN. L. REV. 915, 925 (2016).

[75] Melnick, *supra* note 30, at 21.

DCL served, to a great extent, as binding law until it was revoked under the Trump administration.

The 2011 DCL reframed the issue of sexual assault to focus on victims' rights. In addressing the troubling statistics, the letter noted that according to the National Institute of Justice, "about 1 in 5 women are victims of completed or attempted sexual assault while in college."[76] The letter was a call to action, mandating universities take "immediate steps to protect" university students by completing their own Title IX investigation if an allegation of sexual assault was reported, regardless of whether or not there was a criminal investigation.[77]

In contrast to the previous guidelines,[78] the 2011 DCL set out a mandatory standard of evidence to evaluate complaints: It mandated a preponderance of the evidence standard for all universities to use when evaluating complaints of sexual assault or harassment.[79]

> [I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that sexual harassment or violence occurred). The clear and convincing standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigation of allegations of sexual harassment or violence.[80]

To justify the new mandated standard, the 2011 DCL explained that the Supreme Court applies the preponderance standard when dealing with employment discrimination claims under Title VII, which Title IX is modeled after.[81] Similar to Title VII, Title IX also deals with discrimination—in the university setting

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[76] ED OCR Dear Colleague Letter 2011, *supra* note 29.
[77] *Id.*
[78] *Revised Sexual Harassment Guidance*, *supra* note 58.
[79] A preponderance of the evidence standard represents a "more likely than not" standard of proof. *Id.*
[80] *Id.*
[81] Title VII prohibits discrimination in the employment setting. Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000€ et seq. *See also Sexual Violence Statistics at a Glance*, *Culture of Respect, supra* note 27.

rather than in the employment setting—and should thus parallel the standard used for Title VII claims.[82]

b. The 2014 Question and Answer Document

The Obama administration supplemented the 2011 DCL with a 2014 Question and Answers document (Q&A) that more thoroughly described universities' duties to investigate and adjudicate allegations of sexual assault and violence under Title IX.[83] Similar to the 2011 DCL, the forty-six page 2014 Q&A was not legally enforceable, but rather a guidance document.[84] Even without the official force of law, the document led to many changes in universities' grievance policies nationwide.[85] The 2014 Q&A upheld and clarified the preponderance of the evidence standard as the appropriate standard of review: "[A]ny procedures used for sexual violence complaints, including disciplinary procedures, 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."[86] The document also strongly discouraged, but did not prohibit, schools from allowing parties to cross-examine each other during hearings regarding sexual assault allegations.[87]

There was a lot of political backlash to both Obama era guidance documents because of the lack of notice-and-comment period and because of the documents' strong victims' rights stance.[88] Following the release of both documents, OCR launched investigations into universities across the country for failure to comply with the guidelines.[89] Critics pointed out that the newly mandated preponderance of the evidence standard "had not appeared in Title IX, any Title IX regulation, or

[82] ED OCR Dear Colleague Letter 2011, *supra* note 29, at 11.
[83] U.S. DEP'T . OF EDUC. OFFICE FOR CIVIL RIGHTS., *Questions and Answers on Title IX and Sexual Violence* (April 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter *Questions and Answers 2014*]; *see also Sexual Violence Statistics at a Glance, Culture of Respect, supra* note 27.
[84] *See Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, *supra* note 53.
[85] *See Sexual Violence Statistics at a Glance, Culture of Respect, supra* note 27. "[I]n response, schools hastily revised or rewrote their policies to achieve compliance and established quasi bureaucracies within each institution to investigate and resolve complaints of sexual harassment or violence." Emma Ellman-Golan, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 160 (2017).
[86] *Questions and Answers 2014*, *supra* note 83.
[87] *Id.* at 31.
[88] Critics felt that OCR's new regulations lacked legitimacy because they did not give the public the opportunity to help with the drafting process. *See* Gersen & Suk, *supra* note 59, at 898–905.
[89] *Id.* (discussing how OCR relied on the policies ED created without the backing of a binding regulation or statute).

in the 1997 or 2011 guidance documents," and therefore had no foundation in law.[90]

Regardless, the 2011 DCL and the 2014 Q&A changed the landscape of higher education sexual assault grievance procedures, unofficially mandating a preponderance of the evidence standard to all institutions and shifting the rules to prioritize victims' rights.

3. The Trump Era: Office for Civil Rights Guidelines

In 2016, the presidential election brought in a new narrative surrounding sexual assault. Throughout the national news media, Trump "portray[ed] himself as a victim of 'false smears' from a growing number of women accusing him of making unwanted advances."[91] Trump's campaign manager criticized the New York Times for launching "a completely false, coordinated character assassination against Mr. Trump."[92] One year later, in 2017, the #MeToo movement[93]—which was started by sexual harassment survivor and activist Tarana Burke in 2006—gained traction when the New York Times published an article in which actress Ashley Judd publicly accused Harvey Weinstein of sexual assault.[94] This led a series of other actresses, public figures, and athletes to come forward and describe their own experiences with sexual assault.[95] While the #MeToo movement experienced growing momentum, there was also significant backlash. Critics felt the movement was trying to solve injustice with more injustice, by bypassing the

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[90] *Id.* at 93.

[91] Patrick Healy & Alan Rappeport, *Donald Trump Calls Allegations by Women "False Smears,"* N.Y. TIMES (Oct. 13, 2016), https://www.nytimes.com/2016/10/14/us/politics/donald-trump-women.html. *See also* Melinda Carstensen, *Trump Sexual Assault Allegations: Why Some Victims Stay Silent,* FOX NEWS (Oct. 13, 2016) https://www.foxnews.com/health/trump-sexual-assault-allegations-why-some-victims-stay-silent.

[92] *Carstensen*, *supra* note 91 (quoting Jason Miller, Donald Trump's campaign spokesman).

[93] The #MeToo movement is a social justice movement with the intention of empowering women to speak out about experiencing sexual violence and harassment to show power in numbers. Additionally, it offers community resources and a policy platform for a survivor-led movement for change. ME TOO. HISTORY AND VISION (2018) https://metoomvmt.org/about/.

[94] *See* Jodi Kanto & Megan Twohey, *Harvey Weinstein Paid Off Sexual Harassment Accusers for Decades*, N.Y. TIMES, (Oct. 5, 2017) https://www.nytimes.com/2017/10/05/us/harvey-weinstein-harassment-allegations.html. *See also, #MeToo: A Timeline of Events*, THE CHICAGO TRIBUNE, (Mar. 11, 2020) https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html.

[95] *See generally #MeToo: A Timeline of Events*, *supra* note 94. Others who came forward include Olympic gymnast McKayla Maroney and actress Alyssa Milano. A series of actors and politicians stepped down or were removed from their positions due to these allegations. *Id.*

legal system's due process rights, holding a "trial by media," and taking all accusations at face value without investigation.[96]

The new Trump era guidelines for campus sexual assault focused on this issue: fair process for student defendants. In 2017, ED rescinded the Obama era regulations including the 2011 DCL and 2014 Q&A.[97] In lieu of the withdrawn guidelines, OCR released the 2017 Dear Colleague Letter (DCL), followed by interim guidelines, which remained in place until new revised guidelines were released in 2020.[98]

The 2017 DCL rescinded the 2011 DCL and 2014 Q&A by establishing, like the critics before them, that these earlier guidelines did not go through an open notice-and-comment period in which the public had an opportunity to provide feedback.[99] Thus, the interim guidelines brought back the 2001 guidelines—which had undergone public comment—while simultaneously creating an open notice-and-comment period to allow the public to provide feedback.[100] In

[96] *See* Michael Martin, *Perspectives on The 'Me Too' Movement,* NPR (Sept. 2019), https://www.npr.org/2019/09/01/756564705/perspectives-on-the-metoo-movement (discussing how to justly serve all parties involved in sexual assault situations in response to the #MeToo movement). "The problem with #MeToo—according to its detractors—is that women have bypassed the courts, where due process rights apply, and have gone directly to the public to seek out justice. The public, in turn, has rushed to judgment. Critics argue that justice can only be served by submitting these claims through the formal legal systems that guarantee basic fairness to the accused." Becky Hayes, *The Critics of #MeToo And The Due Process Fallacy,* MEDIUM (Feb. 16, 2018), https://medium.com/the-establishment/the-critics-of-metoo-and-the-due-process-fallacy-92870c87c0cd. *See also* Zephyr Teachout, *I'm Not Convinced Franken Should Quit,* N.Y. TIMES (Dec. 2017), https://www.nytimes.com/2017/12/11/opinion/franken-resignation-harassment-democrats.html. "Zero tolerance should go hand in hand with two other things: due process and proportionality. As citizens, we need a way to make sense of accusations that does not depend only on what we read or see in the news or on social media." *Id.*

[97] ED OCR Dear Colleague Letter 2017, *supra* note 30.

[98] U.S. DEPT. OF EDUCATION, INTERIM GUIDELINES (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=. Finalized guidelines were released on May 6, 2020. *Secretary DeVos, supra* note 31. *See also* ED OCR Dear Colleague Letter 2017, *supra* note 30; U.S. DEPT. OF EDUCATION, *Q&A on Campus Sexual Misconduct* (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

[99] *See Sexual Violence Statistics at a Glance, Culture of Respect*, *supra* note 27.

[100] *See* ED OCR Dear Colleague Letter 2011, *supra* note 29. OCR released the proposed rule through the federal register and allowed for a comment period in which the public could provide feedback on the proposal. When the comment period concluded, OCR reviewed all comments before publishing the final rule. *Sexual Violence Statistics at a Glance, Culture of Respect*, *supra* note 27.

November 2018, OCR released proposed Title IX regulations for public comment.[101]

One major change in the 2018 proposed guidelines was the elimination of the requirement to use the preponderance of the evidence standard in sexual assault adjudication proceedings.[102] Instead, the guidelines gave universities the choice to employ either the preponderance of the evidence standard or the more onerous clear and convincing evidence standard in their procedures.[103]

> In reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses the standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.[104]

In the proposed rules, ED and OCR emphasized their growing concern with the Obama era guidelines' inadequacy in addressing the needs of defendants in sexual assault investigations and adjudications.[105] Some of OCR's concerns included the "overly broad definitions of sexual harassment," "lack of consistency regarding both parties' right to know the evidence relied on by the school investigator," "no right to cross-examine parties and witnesses," and "a federal mandate to apply the lowest possible standard of evidence."[106] Particularly, the interim guidelines emphasized "safeguards" that should be added to the accused's grievance procedures to "ensure a fair and reliable factual determination" during the investigation of the complaint.[107]

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[101] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. 106) [hereinafter Nondiscrimination on The Basis of Sex]; *see also* National Association of Independent Colleges and Universities, *Sexual Assault on Campus* (2016), https://www.naicu.edu/policy-advocacy/issue-brief-index/regulation/sexual-assault-on-campus.
[102] *See Sexual Violence Statistics at a Glance, Culture of Respect*, *supra* note 27.
[103] *See* Nondiscrimination on The Basis of Sex, *supra* note 101.
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *See id*. "The proposed regulation is grounded in core American principles of due process and the rule of law. It seeks to produce more reliable outcomes, thereby encouraging more students to turn to their schools for support in the wake of sexual harassment and reducing the risk of improperly punishing students." Dept. of Ed., *Proposed Title IX Regulation Fact Sheet* (2018), https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf.

On May 6, 2020, the proposed changes were codified into official, legally-binding regulations—in contrast to the Obama era guidelines which never had the official force of law.[108] The final regulations were published after a yearlong comment period in which over 124,000 people had the opportunity to provide their input on the regulations.[109] Some of the key provisions in the 2020 Finalized Regulations include the accused's "right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing."[110] Additionally, the 2020 Finalized Regulations "require[] schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard—and to apply the selected standard evenly to proceedings for all students and employees."[111]

The 2020 Finalized Regulations set into motion a whole new set of critiques. Many see the regulations as regressive and insufficient at protecting survivors of sexual assault in a culture that already normalizes rape, while others see them as a due process victory for defendants.

> Many fear that the mandates are too burdensome and could dissuade sexual-assault victims from coming forward. Victim advocates worry that less oversight from the federal government could squander campuses' progress in curbing sexual violence. But due-process supporters, who say Obama-era federal guidelines unfairly railroaded accused students, hailed the new rules when they were proposed, in 2018.[112]

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[108] "The new Title IX regulation . . . codif[ies] prohibitions against sexual harassment in schools for the first time in history. The regulation carries the full force of law, unlike the previous administration's much-criticized 'Dear Colleague' letter on the topic which denied students basic due process protections and led to cases frequently being overturned by the courts." *Secretary DeVos, supra* note 31.

[109] *Id.* "The final rules were changed to address at least some concerns. The department amended provisions that would have allowed schools to ignore virtually all accusations of misconduct that occurred off campus, and officials changed proceedings that critics argued would have re-traumatized victims." Erica L. Green, *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*, N.Y. TIMES (May 6, 2020) https://www.nytimes.com/2020/05/06/us/politics/campus-sexual-misconduct-betsy-devos.html.

[110] *Secretary DeVos, supra* note 31.

[111] *Id.* The 2020 Finalized Regulations narrow the scope of complaints that colleges are required to investigate by revising the definition of sexual harassment so that universities only have to investigate harassment that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education." While this change is beyond to scope of this Comment, the impact of this change on victims' rights is concerning. *See* Sarah Brown, *What Colleges Need to Know About the New Title IX Rules*, CHRONICLE OF HIGHER EDUCATION (May 6, 2020) https://www.chronicle.com/article/what-colleges-need-to-know-about-the-new-title-ix-rules/.

[112] *Id.*

The new regulations went into effect in August 2020.[113] As universities continue to change their procedures to follow the requirements of the 2020 Finalized Regulations, all students, both victims and defendants alike, have been greatly impacted.

II. University Sexual Violence Procedures and Standards of Evidence

With instruction from the Title IX guidelines and regulations, universities craft their own grievance procedures to resolve claims of sexual assault on their campuses. This section explains the procedures universities use to handle allegations of sexual assault, using the University of California, Berkeley as an example. Moreover, this section discusses the varying standards of evidence used for sexual assault proceedings amongst universities.

A. Sexual Violence Grievance Procedures Background

After an incident of sexual assault occurs between university students, victims or witnesses can report the incident, triggering the university to respond to the allegations. How the university responds to an incident has developed over time as university procedures have evolved based on changing guidelines—from the original 1997 Guidelines, to the Obama era Guidelines, and then to the Trump era Guidelines. The passage of multiple iterations of guidelines from OCR over the years has caused universities to adopt and revise their procedures to align with ED's requirements.[114] Additionally, how a university responds is contingent on each university's internal policies. Since the guidelines provide flexibility to universities, school-specific grievance procedures vary by location, school size, and institutional priorities.[115] Regardless of these differences, all universities receiving federal aid must have internal grievance procedures to handle sexual assault allegations.[116] When OCR passed its initial regulations in 1997 and 2001, OCR required universities to have a Title IX compliance officer and to take

[113] *Secretary DeVos, supra* note 31.
[114] *See Sexual Violence Statistics at a Glance, Culture of Respect*, *supra* note 27.
[115] *Id. See also* Lori Shaw, *Title IX, Sexual Assault, and the Issue of Effective Consent: Blurred Lines—When Should 'Yes' Mean 'No'?* 91 IND. L.J. 1363, 1397 (2016). "Most schools adjudicate possible conduct violations in one or more of the following forums: informal administrative meetings, formal administrative investigations or hearings, or formal board hearings." *Id.*
[116] "Title IX provides ED with some discretion in terms of administrative enforcement of the statute's bar on sex-based discrimination, including the ability to require public and private schools to develop certain procedures for handling complaints (as long as those schools receive federal funds)." *CONGRESSIONAL RESEARCH SERVICE*, *supra* note 53, at 30.

immediate action to resolve sexual harassment complaints.[117] With the passage of the 2011 DCL, many campus grievance procedures were updated to align with the new requirements—such changes included modifying the required standard of evidence in university sexual assault hearings.[118]

The two main university models to investigate allegations under Title IX are the hearing model and the investigator model.[119] Under the hearing model, the university pursues an investigation of an allegation, which is proceeded by an administrative hearing to provide appropriate consequences to the accused student if they are found responsible.[120] Some schools use a live hearing model in which both the accused student and the victim are present, while other schools use a hearing model in which only the accused is present.[121]

Under the investigator model, there is no administrative hearing.[122] While the accused may have access to investigative documents, there is no formal evidentiary hearing for the accused to present their own evidence.[123] The investigator model has been subject to many due process critiques, and courts have found that accused students facing severe disciplinary consequences such as expulsion or suspension should be afforded "some kind of hearing."[124] While both the investigator model and the hearing model were permitted until the end of the Spring 2020 school year, the 2020 Finalized Regulations require all campuses to follow the live hearing model.[125]

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[117] *Revised Sexual Harassment Guidance*, *supra* note 58, at 19 ("Title IX does not require a school to adopt a policy specifically prohibiting sexual harassment or to provide separate grievance procedures for sexual harassment complaints. However, its nondiscrimination policy and grievance procedures for handling discrimination complaints must provide effective means for preventing and responding to sexual harassment."); *see also* University of California, Berkeley, *Fact sheet on UC Berkeley's Sexual Harassment Policies, Procedures, Education and Training, and Services*, CAMPUS NEWS (Dec. 5, 2002). https://www.berkeley.edu/news/media/releases/2002/12/05_harassment.htm.

[118] ED OCR Dear Colleague Letter 2011, *supra* note 29, at 11.

[119] While these are the two models that universities had implemented prior to the 2020 Finalized Regulations, universities were required to change their regulations in Fall 2020 to a live hearing model only. David A. Urban, *Trilogy of Cases Leads the Way on Due Process for Students*, DAILY JOURNAL (2018), https://www.dailyjournal.com/mcle/352-trilogy-of-cases-leads-the-way-on-due-process-for-students.

[120] *Id.*

[121] Since the 2020 regulations went into effect, all schools are required to follow the live hearing model. *Secretary DeVos, supra* note 31.

[122] Urban, *supra* note 119.

[123] *Id.*

[124] Doe v. Univ. of S. California, 246 Cal. App. 4th 221, 221 (2016) (quoting Goss v. Lopez, 419 U.S. 565, 579 (1975)).

[125] *Secretary DeVos, supra* note 31; *see also* INTERIM GUIDELINES, *supra* note 98, at 5.

THE UNIVERSITY OF CALIFORNIA GRIEVANCE SYSTEM AS AN EXAMPLE

The University of California (UC), Berkeley's grievance procedures serve as just one illuminative example of how sexual assault proceedings are handled. Universities throughout the country have their own variation of these procedures. The UC system is the largest public university system in the United States, serving over 280,000 students across ten campuses.[126] UC Berkeley is the oldest of the UC campuses and serves 42,000 undergraduate and graduate students.[127] Between the 2014 and 2018 school years, UC Berkeley investigated over 1569 sexual harassment and sexual violence allegations.[128] As an undergraduate, I served as a caseworker for the UC Berkeley Student Advocate's Office, where I represented students accused of sexual assault in adjudicative proceedings from 2014 to 2016.

The UC's sexual harassment and grievance procedures have changed over time to reflect the changes in the Title IX regulations.[129] When the Equal Employment Opportunity Commission "mandated academic institutions receiving federal assistance" comply with Title IX in the late 1970s, the UC Student Senate adopted a resolution which demanded the Title IX committee establish a sexual harassment grievance procedure.[130] Over the years, the UC grievance procedures were modified as Title IX regulations changed to include more detailed information regarding campus climate and compliance officers,[131] and to set an established 60-day window for investigations.[132]

According to the UC Student Adjudication Model used in Spring 2020—which has now been modified in light of the new guidelines—the grievance procedure involves a seven-step process that begins with an individual placing a report, followed by an investigation, notice of charges, notice of findings,

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[126] *UC System, Overview,* University of California, https://www.universityofcalifornia.edu/uc-system (last visited Apr. 10, 2021).
[127] Cal Facts Brochure, available at *By the Numbers*, U.C. BERKELEY, https://www.berkeley.edu/about/bythenumbers (last visited Apr. 10, 2021).
[128] This data represents all incoming allegations received by the Office for the Prevention of Harassment and Discrimination (OPHD) between the 2014–2018 calendar years. University of California Berkeley, *Sexual Assault & Harassment Data*, UC REGENTS (2020), Cal Facts Brochure, available at *By the Numbers*, U.C. BERKELEY, https://www.berkeley.edu/about/bythenumbers (last visited Apr. 10, 2021).
[129] Hannah Stommel, *Bureaucratizing Consent: An Analysis of Sexual Freedom Paradigms in University of California, Berkeley Sexual Harassment Policies*, 30(2) BERKELEY UNDERGRADUATE J. 1, 18-19 (2017).
[130] *Id.* at 8.
[131] *Id.* at 25 (2005 Berkeley Campus Procedures for Responding to Reports of Sexual Harassment to 2010 Berkeley Campus Procedures for Responding to Reports of Sexual Harassment).
[132] *Id.*

opportunity to meet and comment, notice of decision, and finally an appeal process if requested by the accused.[133]

The process begins if a plaintiff (known as a complainant in campus proceedings) decides to file a complaint with the Center for Student Conduct (CSC) after they have been assaulted. The CSC then investigates the complaint that has been filed, and notifies the defendant (known as a respondent in campus proceedings) with a "Notice of Possible Violation" letter.[134] The UC System follows the preponderance of the evidence standard, and thus they are required to prove that it is "more likely than not" that the respondent committed an act of sexual violence.[135] If CSC finds from their investigation that it is more likely than not that the complainant's allegations are true, CSC provides the respondent with a "Notice of Charges" letter. The respondent then has the option to resolve the charge through an informal meeting in which a sanction is negotiated between the respondent and CSC.[136] If the respondent and the administrator cannot reach a negotiation during the informal meeting, the respondent has a right to a formal hearing. Prior to the new 2020 Finalized Regulations, the formal hearing was not a live hearing, and thus the respondent did not have the opportunity to confront their accuser because the complainant was not present at the hearing. However, under the new 2020 Finalized Regulations, the accused in sexual assault proceedings has the right to a live hearing.[137]

If the respondent decides to exercise their right to a hearing, they are notified about the date and time of the formal hearing.[138] There are two different types of hearings that the respondent can choose from. The first type of hearing, known as a panel hearing, involves a panel of one faculty member, one staff member, and one student member who review the evidence and make a determination about whether or not the respondent is guilty of the charges alleged, and if so, what the appropriate sanctions for the respondent are.[139] The panel hearing is presided over by a hearing officer, who serves as a quasi-judge, making determinations about procedural and evidentiary issues throughout the hearing.[140] In an administrative

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[133] Univ. of Cal., Berkeley, *Sexual Violence and Sexual Harassment Student Investigation and Adjudication Framework (Policies Applying to Campus Activities, Organizations and Students (PACAOS) Appendix E)*, (July 31, 2019), [hereinafter Student Adjudication Model Process Flow Chart], https://sa.berkeley.edu/sites/default/files/RevisedPACAOS-AppendixE.pdf.
[134] Student Advocate's Office, *Conduct: The Student Conduct Process*, U.C. Berkeley, [hereinafter Student Advocate's Office], https://advocate.berkeley.edu/conduct/.
[135] Univ. of Cal., Berkeley, *Berkeley Campus Code of Student Conduct* (Jan. 2016), section II.D.2.d.5 [hereinafter Code of Student Conduct], http://sa.berkeley.edu/sites/default/files/Code%20of%20Conduct_January%202016.pdf
[136] *Id.* at section II.D.2.b.
[137] *Secretary DeVos, supra* note 31.
[138] *Code of Student Conduct*, *supra* note 135, at section II.D.2.
[139] *Id.* at section II.D.2.a.
[140] *Id.*

hearing, there is no panel present, and the hearing officer alone serves as both the judge and jury, making evidentiary decisions and determining the outcome of the case.[141]

The hearing has its own set of evidentiary rules and procedures because it is not a formal court trial. However, the hearing has many parallels to a lawsuit.[142] The CSC represents the complainant's interests, investigating the complainant's formal complaint and recommending appropriate sanctions for the respondent in response.[143] The CSC presents witnesses and evidence regarding the case, serving as a quasi-prosecutor.[144] At UC Berkeley, the campus has a Student Advocate's Office[145] that provides student representation for respondents.[146] Prior to the 2020 Finalized Regulations, the university itself did not provide any formal counsel or advisor to the accused student, but students were permitted to hire their own attorney.[147] However, after the new regulations were released in May 2020, all universities now must provide respondents with some form of an advisor for the hearing.[148]

While the general grievance process remains identical for all alleged violations of the UC Code of Conduct, from plagiarism to sexual violence allegations, the UC Sexual Violence and Harassment Policy (SVSH Policy) details specific requirements for adjudication of Title IX sexual assault and harassment violations.[149] Some requirements of the policy are that the parties and witnesses address only the hearing officer and not each other, and that the hearing officer is the only one with the ability to question witnesses and parties.[150] The passage of the 2020 Finalized Regulations required changes to this UC policy,

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[141] *Id.* at section II.D.2.b.
[142] "While the procedures of a hearing are similar to those of a court trial (including opening statements, closing statements, and questions), a hearing is much more flexible and does not need to adhere to many of the rules found in standard legal practice (such as orders of procedure and standards of evidence)." *Student Advocate's Office*, *supra* note 134.
[143] Code of Student Conduct, s*upra* note 135, at section II.C.
[144] *Id.* at section II.D.2.d.1.
[145] Student Advocate's Office, *supra* note 134.
[146] I served as one of these representatives at UC Berkeley, representing respondents in campus sexual assault adjudicatory proceedings.
[147] Code of Student Conduct, *supra* note 135.
[148] "If a party does not have an advisor present at the live hearing, the school must provide, without fee or charge to that party, an advisor of the school's choice who may be, but is not required to be, an attorney to conduct cross-examination on behalf of that party." *SUMMARY OF MAJOR PROVISIONS OF THE DEPARTMENT OF EDUCATION'S TITLE IX FINAL RULE*, U.S. Dept. of Ed. (May 6, 2020) [hereinafter Summary of Final Rule].
[149] Univ. of Cal., Interim Sexual Violence and Sexual Harassment Policy (Aug. 14, 2020), [hereinafter Berkeley SVSH Policy], https://policy.ucop.edu/edu/doc/4000385/SVSH.
[150] *Id.*

and students' advisors can now directly ask witnesses and the other party relevant questions during cross-examination.[151]

The SVSH Policy also states that "the hearing officer will decide whether a violation of the [Sexual Violence and Sexual Harassment Policy] . . . occurred based on a Preponderance of the Evidence standard."[152] Either the hearing officer or panel, whichever the respondent chooses, will determine whether or not the respondent is guilty by a preponderance of the evidence. If they find the respondent guilty of sexual assault based on the allegation, the hearing officer or panel will determine the appropriate sanctions, which include dismissal from the university, suspension, and exclusion from areas of campus.[153]

B. Standards of Evidence

The standard of evidence used by the UC System—the preponderance of the evidence standard—is one of three standards of evidence used in the United States judicial system: (1) the preponderance of the evidence standard, (2) the beyond a reasonable doubt standard, and (3) the clear and convincing evidence standard.

The preponderance standard is the most common standard of evidence used in civil proceedings. Indeed, in nearly all civil proceedings, "the party with the burden of proof must convince the trier of fact that it is more likely than not that the facts [they] allege are true."[154] Because in civil proceedings "an error in favor of the defendant is just as costly as an error in favor of the plaintiff," the preponderance standard "promises the greatest accuracy."[155] The burden still lies with the plaintiff, and even with a preponderance standard, there is always a presumption of innocence for the defendant.

On the other end of the spectrum in criminal cases, courts apply the beyond a reasonable doubt standard. In criminal cases, the government has the burden of proving that the defendant is guilty beyond a reasonable doubt. This standard is significantly more challenging to meet than a preponderance standard because "punishing an innocent person is considered a much graver mistake than letting a guilty one go free."[156]

More stringent than the preponderance standard and less stringent than the beyond a reasonable doubt standard is the clear and convincing evidence standard. This standard is often criticized for being vague and unclear, and courts have

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[151] Summary of Final Rule, *supra* note 148.
[152] Berkeley SVSH Policy, *supra* note 149.
[153] *Id.*
[154] Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 461 (2002).
[155] *Id.*
[156] *Id.* at 462.

defined it in a variety of ways.[157] One definition states: "[T]he party with the burden of proof must convince the trier of fact that it is highly probable that the facts [they] allege[] are correct."[158] The clear and convincing standard is used in both civil and criminal trials.[159] It is often applied in civil cases when a serious interest is at stake, including cases involving fraud, wills, withdrawing life support, and termination of parental rights.[160]

STANDARDS OF EVIDENCE IN UNIVERSITY GRIEVANCE PROCEDURES

Since the beyond a reasonable doubt standard is used solely for criminal cases and has not been proposed as an evidentiary standard in campus sexual assault proceedings, this Comment does not explore this standard further. Rather, this Comment explores the two proposed standards that the Title IX guidelines have presented—the clear and convincing standard and the preponderance of the evidence standard—to evaluate which one best protects victims' rights, while simultaneously preserving student defendants' due process rights in university sexual assault proceedings.

The definitions for the preponderance of the evidence standard and clear and convincing standard are the same in the university context as they are in the legal setting. Thus, the clear and convincing standard produces a more rigorous burden on the complainant to prove a respondent is guilty than the "more likely than not" preponderance standard.[161]

Even before the Obama administration released the 2011 DCL and required universities to mandate a preponderance standard,[162] most higher education institutions already used the preponderance of the evidence standard.[163] However,

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[157] *See* Bryan M. Bennet*, Evidence: Clear and Convincing Proof: Appellate Review*, 32 CAL. L. REV. 74, 75 (1944) ("The precise meaning of 'clear and convincing proof' does not lend itself readily to definition.").

[158] Sherwin, *supra* note 154, at 462; *see also* Colorado v. New Mexico, 467 U.S. 310, 315 (1984) (finding that the clear and convincing standard means that the evidence is highly and substantially more likely to be true than untrue).

[159] Legal Information Institute, *Clear and Convincing Evidence*, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/clear_and_convincing_evidence (last visited Apr. 10, 2021).

[160] *Id.; see also* Sherwin, *supra* note 154, at 642.

[161] CONGRESSIONAL RESEARCH SERVICE, *supra* note 53, at 28.

[162] ED OCR Dear Colleague Letter 2011, *supra* note 29, at 11.

[163] Katharine K. Baker et al., *Title IX and the Preponderance of the Evidence: A White Paper*, FEMINISTLAWPROFESSORS.COM, http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf. *See also* Deborah L. Brake, *Fighting The Rape Culture Wars Through The Preponderance of The Evidence Standard*, 78 MONT. L. REV. 109, 128 (2017) (explaining the prevalence of the use of the preponderance standard by most higher education institutions prior to 2011 "reflects the view of student conduct professionals that this standard best mediates the competing interests at stake in student disciplinary proceedings.").

some universities—mostly elite private institutions—using the clear and convincing standard had to modify their standard to comply with the 2011 Guidelines.[164] The passage of the 2017 Interim Guidelines allowed these universities to return to the clear and convincing standard they had previously used in their campus adjudication models.[165] The release of the 2020 Finalized Guidelines affirmed the interim guidelines, giving universities a choice between the two evidentiary standards.[166]

III. Appropriate Standard of Evidence in University Sexual Violence Hearings

This section examines which standard of evidence in campus sexual assault proceedings best protects all victims and preserves the due process rights of all respondents regardless of their race or gender. Ultimately, this section concludes that the most equitable standard of evidence for campus sexual assault hearings is a preponderance of the evidence standard.

A. Due Process Requirements in the Campus Context

Due process for students accused of sexual misconduct in campus adjudications "is a hotly contested and controversial area of the law."[167] In the legal context, due process rights are well defined: Each individual has the right to due process under the Fifth and Fourteenth Amendments, which prohibits the government from taking an individual's life, liberty, or property without due process of law.[168]

Any accused individual facing legal consequences has the right to fair procedures including notice and the opportunity to be heard.[169] Some examples of due process guarantees that may be provided in civil proceedings—these guarantees are often more expansive in criminal proceedings—include: (1) notice, (2) some form of a hearing, (3) an impartial tribunal, (4) an opportunity for confrontation and cross-examination, and (5) an opportunity for discovery.[170] In a campus hearing, the respondent is not facing legal consequences, therefore, the respondent's protections are less clear.

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[164] NASPA, *supra* note 41; *see also* Baker et al., *supra* note 163; Brake, *supra* note 163.
[165] Interim Guidelines, *supra* note 98, at 5.
[166] *Secretary DeVos, supra* note 31.
[167] *See* Urban, *supra* note 119.
[168] U.S. Const. amend. X; U.S. Const. amend XIV.
[169] *See* Medina v. California, 505 U.S. 437, 443 (1992); *see also Procedural Due Process Civil,* Justia, https://law.justia.com/constitution/us/amendment-14/05-procedural-due-process-civil.html (last visited Apr. 10, 2021).
[170] *See* Justia, *supra* note 169.

While hundreds of years of case law have spelled out what procedural due process means in legal proceedings, what due process encompasses in campus disciplinary proceedings is still developing. In *Mathews v. Eldridge*,[171] the United States Supreme Court set out a due process balancing test. According to *Matthews*, courts should consider three factors to ensure a defendant's due process rights are met: (1) the privacy interest affected, (2) the risk of error, and (3) the governmental burdens. In *Board of Curators of the University of Missouri v. Horwitz,* the Supreme Court applied the *Mathews* due process test to college campuses, determining that "[a] university, therefore, must have greater flexibility in fulfilling the dictates of due process than a court or administrative agency.[172] In effect, the *Horwitz* Court concluded that campus disciplinary proceedings are distinct from court proceedings and, in turn, require less protection for the accused.[173]

Even though the requirements of due process in student discipline proceedings is unclear, courts have continued to hold that the due process clause applies to university proceedings. Because public universities are state actors, they are subject to the requirements of due process.[174] Additionally, since private universities use public funds under Title IX, they are also subject to due process requirements in their student discipline hearings.[175]

The Supreme Court addressed what due process in student discipline cases entails in *Goss v. Lopez*.[176] Here, the Supreme Court held that due process for student respondents has two over-arching requirements of "some kind of notice" and "some kind of hearing."[177] The *Goss* Court found that "students facing suspension . . . must be given some kind of notice and some kind of hearing" in accordance with their due process rights.[178] Notably, the Court did not hold that an evidentiary hearing was required under the facts of the specific case, but found that some form of due process is required in campus disciplinary proceedings and that these procedural protections should increase based on the severity of the penalty.[179] Decided in 1975, the *Goss* Court set out a baseline due process requirement for universities to abide by when establishing their student conduct proceedings.

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[171] Mathews v. Eldridge, 424 U.S. 319 *(*1976).
[172] Board of Curators of the Univ. of Missouri v. Horowitz*,* 435 U.S. 78 (1978).
[173] *Id.* at 85–88.
[174] *See* Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214, 223 (1985).
[175] *Id.*
[176] Goss v. Lopez, 419 U.S. 565 (1975).
[177] *Id.* at 579.
[178] The case involved high school students who challenged their ten day suspension from high school. The Court held that the students had a legitimate property interest in their education, and thus had rights in association with this interest. *Id.*
[179] *Id.* at 575–76.

Since *Goss*, college students who have been accused of sexual assault in university disciplinary proceedings have claimed that their campuses' disciplinary Title IX proceedings violate their due process rights.[180] While this issue has been litigated at the circuit level, the Supreme Court has not yet examined whether the Obama era or Trump era Title IX procedures violate students' due process rights. However, in *Plummer v. Univ. of Houston*, the Fifth Circuit held: "[W]hether a public university has afforded a student due process 'is a fact-intensive inquiry and the procedures required to satisfy due process will necessarily vary depending on the particular circumstances of each case.'"[181] Based on the current case law, it is unclear what exactly encompasses due process protections for students.

A major factor in determining whether students' due process rights are met in university disciplinary proceedings is the standard of evidence used in those proceedings. The standard of evidence required is also a major distinction between the Obama era guidelines and the Trump era guidelines. Subsection III.B will examine which standard of evidence best protects victims in an academic setting, while still fulfilling universities' due process obligations to student defendants.

B. Preponderance of the Evidence Is the Most Appropriate Evidentiary Standard for an Academic Setting

A preponderance of the evidence standard is the most appropriate standard of evidence for handling sexual assault accusations in the university setting, as it best ensures victims' rights are vindicated while still preserving defendants' due process rights.

This section explores why a preponderance standard is the most equitable standard for university proceedings, by examining the effect of both the preponderance standard and the clear and convincing standard on victims and respondents in campus proceedings. First, a preponderance standard is more protective of victims and helps increase student confidence in reporting assault. Additionally, a majority of schools voluntarily adopted a preponderance of the evidence standard prior to its mandate, emphasizing an institutional preference. Moreover, because sexual assault proceedings hold serious consequences for both respondents and complainants, the preponderance standard—that gives equal weight to the evidence on both sides—strikes the appropriate balance. Next, because Title IX cases are a form of civil rights cases, they should use the same

[180] *See* CONGRESSIONAL RESEARCH SERVICE, *supra* note 53 (citing Plummer v. Univ. of Houston, 860 F.3d 767, 779–80 (5th Cir. 2017)). In *Plummer*, students argued that the university violated their due process rights, but the Fifth Circuit held that the rights of the accused students in the university hearings were adequately protected. *Id.*

[181] *See id.* (citing *Plummer*, 860 F.3d at 777).

preponderance standard that is used in all other civil rights cases. Finally, the emphasis on witness credibility lends itself to the preponderance standard—a standard that does not advantage one party over the other.

1. A Preponderance Standard Is More Protective of Victims

A preponderance of the evidence standard best protects victims and marks the most equitable allocation of power between defendants and victims, known as respondents and complainants in the university context. The preponderance standard requires a belief of "50 percent and a feather" to find the accused guilty and gives equal weight to the concerns of both parties. By definition, this standard creates an equal playing field for survivors and respondents.

Setting a "standard higher than the preponderance of the evidence tilts proceedings to unfairly benefit respondents."[182] Even with a preponderance standard, there is always a presumption of innocence for the accused. When universities use a more robust standard, such as the clear and convincing standard, the proceedings unfairly favor the defendant by forcing the complainant to prove their case by a higher standard.[183] By placing an even higher burden on survivors, a clear and convincing standard promotes a culture where survivors' experiences are doubted.

Three public interest organizations—Equal Rights Advocacy, the Democracy Forward Foundation, and the National Center for Youth Law—brought a complaint against the U.S. Department of Education under the Trump administration, arguing that the 2017 Title IX Interim Guidelines were unlawful and procedurally deficient.[184] Significantly, one of the organizations' chief complaints was that the Trump era guidelines have a "devasting effect[t] on students' equal access to educational opportunity."[185] As these organizations argued in their complaint, one major flaw with the Trump era guidelines is that they allow for universities to use a clear and convincing evidence standard. A clear and convincing standard unjustly swings the pendulum in favor of respondents, creating an uneven playing field for victims whose experiences of assault must meet a higher burden to warrant redress in a university hearing.

[182] *See* NASPA, *supra* note 41.
[183] *See id.*
[184] Complaint, Case No. 3:18-cv-00535 (Filed Jan. 25, 2018) https://nwlc.org/wp-content/uploads/2018/01/Dkt.-1-Complaint-filed.pdf.
[185] *Id.*

2. A Preponderance Standard Increases Student Confidence in Reporting Sexual Assault and Helps Combat Rape Culture

Throughout universities in the United States, rape and sexual assault have become normalized in campus culture. Rape culture makes it even more important that victims are heard and believed, particularly in a climate that tries to minimize their assaults and blame them for being assaulted. The number of victims who are sexually assaulted is significantly higher than the number of sexual assaults reported, and this disparity is even higher on college campuses. Around 75 to 95 percent of victims of campus sexual assault do not report their experience.[186] In comparison, about 63 percent of victims of sexual assault do not report their assault to police outside of the college setting.[187] This gap in reporting is largely due to a climate of permissiveness and the prevalence of rape culture on college campuses causing victims not to report out of fear of not being believed. The government and campus community have a strong interest in encouraging victims to report their assaults because the more survivors feel confident to report, the more effectively universities' justice systems will be able to monitor and prevent assaults and combat the normalization of rape in college.

A preponderance standard increases victims' confidence in reporting sexual assault. Currently, the most common reason students do not report sexual assault is because they do not think anyone will do anything to help.[188] A clear and convincing evidence standard makes it more difficult for victims to win their cases.[189] Since the campus adjudication process takes time and is emotionally draining, students often feel discouraged from reporting an assault when they do not think they have a chance of being believed by the university.[190] Thus, a preponderance standard gives victims more confidence that they will be believed and in turn increases the likelihood victims will report an assault. The more victims feel confident to report their assaults, the more the perpetrators of these assaults face consequences, and the less rape becomes normalized and accepted in campus communities.

Another way to determine the proper evidentiary standard is to consider incentives. A preponderance standard incentives victims of sexual assault to

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[186] NASPA, *supra* note 41.
[187] NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, *supra* note 24.
[188] *See* ASSOCIATION OF AMERICAN UNIVERSITIES, AAU CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (Sept. 3, 2015), https://www.aau.edu/key-issues/aau-climate-survey-sexual -assault-and-sexual-misconduct-2015. [hereinafter "AAU CLIMATE SURVEY"].
[189] Research shows that when using a clear and convincing standard of evidence, universities overwhelmingly failed to find sufficient evidence to hold defendants' accountable for sexual violence. *See* Ellman-Golan, *supra* note 85.
[190] *See id.*

report their cases.[191] Evidence "suggests that the best way to change the culture, not only on campuses but in society, is to educate everyone[,]" which will only happen "if victims[] are confident enough in the system to report their experience."[192] If victims see other survivors experiencing successful outcomes within the Title IX campus proceedings, they will feel more confident to report their own assault.[193] A preponderance standard will not only encourage victims to report, but also will help change universities' culture regarding sexual assault.

3. Majority of Universities Adopted the Preponderance Standard Voluntarily

Most higher education institutions had already adopted a preponderance of the evidence standard before the 2011 DCL made the standard mandatory.[194] Universities determined on their own without government intervention that a preponderance standard strikes the best balance between protecting victims and preserving defendants' due process rights. According to one study, 80 percent of universities used the preponderance standard prior to the 2011 DCL.[195] The fact that higher education institutions used the preponderance standard before it was mandated suggests that universities interpreted the original 1997 Regulations' requirement to use "a proof standard that does not reflect a presumption for or against the credibility of either party" to mean a preponderance standard.[196] The majority of universities' adoption of the preponderance standard before it was mandated lends credence to the argument that they perceived it to be the most equitable standard in ensuring justice for both parties.

4. Victims Have Serious Interests at Stake in Title IX Proceedings

In *Herman v. Huddleston*,[197] the Supreme Court held that the preponderance standard "allows for both parties to share the risk" in an equal manner, whereas a

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[191] Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault,* 2013 BYU EDUC. & L.J. 143, 148 (2013).
[192] Chris Loschiavo & Jennifer L. Waller, *The Preponderance of the Evidence Standard: Use in Higher Education Campus Conduct Process,* ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION (2015).
[193] *Id.*
[194] *See* Baker, *supra* note 163 (finding that most college disciplinary programs used the preponderance of the evidence standard years before the Obama era guidelines made the standard mandatory).
[195] *Id.* In the study, 191 schools were surveyed. 168 of the schools surveyed specified which standard of proof their university used, and 136 of those universities used the preponderance standard. *Id.*
[196] *Id.* (discussing how the appropriate standard of evidence to use in university hearings was rarely in contention in early OCR investigations).
[197] Herman & MacLean v. Huddleston, 459 U.S. 375 (1983).

clear and convincing standard places the burden on the victim.[198] University proceedings are the perfect example of an environment where both parties should share the risk equally, instead of placing the burden on victims.

While both the respondent and complainant have serious interests at stake, the victims' interests are particularly compelling and need to be protected in the university context. It is also important to acknowledge the risks the accused faces, such as damages to their reputation and to their current and future education. Many student respondents accused of sexual assault face expulsion from their university and may be forced to move out of university housing or withdraw from classes, even as an interim measure before the factfinder has come to a decision.[199] These measures vary between states, with some states requiring students' transcripts to note that the student has been expelled because of an accusation of sexual assault.[200] While these are serious interests, a preponderance standard, along with other due process protections, adequately addresses these concerns by allowing the respondent to share the burden equally with the complainant.

Alternatively, the complainant has essential interests at stake, such as their right to feel safe in their own community and their sense of justice and closure for wrongful acts committed against them.[201] The outcome of the proceedings may also affect the survivor's decision to stay at the university. If the respondent is not expelled or suspended, the student may choose to leave the institution because they do not feel emotionally or physically safe to attend classes with their assaulter.[202] If the complainant chooses to stay on campus, they may not be able to succeed in the academic institution due to severe stress caused by the assault.[203] The Association for Student Conduct Administration States:

> Considering the serious potential consequences for all parties in these cases, it is clear that preponderance is the appropriate standard by which to reach a decision, since it is the only standard that treats all parties equitably. To use any other standard says to

[198] *Id.* at 390.

[199] Ellman-Golan, *supra* note 85, at 183. *See also* Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT, (Jan. 12, 2015), https://prospect.org/justice/sex-lies-justice/.

[200] "[A]s some states like—New York and Virginia . . . [have begun] to pass legislation requiring schools to note on a student's transcript whether the student was suspended or expelled for sexual misconduct, [they] may face severe restrictions, similar to being put on a sex offender list, that curtail [their] ability to gain a higher education degree." Ellman-Golan, *supra* note 85, at 175.

[201] The university is another party that has an interest in the outcome of the proceedings. The university's interests include protecting future students from harm and limiting their own liability. U.S. DEPT. OF ED. OFFICE FOR CIVIL RIGHTS, Letter from Seth Galanter, Acting Assistance Secretary, *Seth Galanter*.

[202] Loschiavo & Waller*, supra* note 192.

[203] *Id.*

> the victim/survivor, "Your word is not worth as much to the institution as the word of the accused" . . . When both students have so much to lose, depending on the outcome of the hearing, preponderance is the appropriate standard.[204]

In cases of sexual assault, the survivor often faces a lifetime of healing and recovery from the trauma they experienced. Getting some form of closure from the results of the proceedings can help with a victim's recovery.[205] A preponderance standard takes into consideration survivor trauma and gives the complainant the best opportunity to receive a just outcome in their case.

While universities do not have the same authority as legal institutions, the results of the campus proceedings have a major impact on the interests of both parties, and especially on victims of assault. This makes a preponderance standard—in which both parties share the risk equally—a more appropriate standard than one which places the burden on victims.

5. University Sexual Assault Proceedings More Closely Mirror Civil Proceedings than Criminal Proceedings

University sexual assault proceedings and investigations are neither civil lawsuits nor criminal proceedings, yet critics on both sides of the political aisle compare them to both.[206] Although university disciplinary hearings parallel some aspects of civil and criminal law, campus proceedings are unique. While they do not fit squarely into either category, university proceedings are more analogous to civil lawsuits that use a preponderance standard.

The preponderance standard is the default standard for nearly all civil cases. The standard is used in proceedings that range from "whether individuals and families are eligible for a range of critical benefits standing between them and severe poverty" to "whether domestic violence victims can obtain protection orders that evict abusers or limit abusers' custody of shared children."[207] These civil cases affect individuals who have very serious liberties at stake. While university grievance proceedings are not civil proceedings, the liberties at stake for both the complainant and respondent are equally as important as the parties in the above examples. Thus, the use of a clear and convincing standard would imply that the rights of a complainant and respondent in university proceedings are greater than those of a civil victim trying to obtain a protective order from their abuser.

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[204] *Id.*
[205] *See* AAU CLIMATE SURVEY, *supra* note 188.
[206] *See* Ellman-Golan, *supra* note 85 at 169–170.
[207] Baker, *supra* note 163.

Standards higher than the preponderance standard often align with the goals of criminal law, in which the consequences are much more severe than in university proceedings. A conviction in a criminal court often results in incarceration and an individual's loss of freedom. If the sexual assault allegation from the complainant is pursued by the state at the criminal level, the accused student would receive the procedural protections of the beyond a reasonable doubt standard in any criminal proceedings.[208] However, universities do not have the same power over students' liberties as the government does.[209] The most extreme sanction in the university setting is expulsion. While expulsion is a serious consequence, the liberty interests at stake for the respondent are less severe than imprisonment.[210] As described by the 2014 Q&A: "[A] title IX investigation will never result in incarceration of an individual and, therefore, the same . . . legal standards are not required."[211]

Another major distinction between university and criminal proceedings is that the university is responsible for the liberty of two parties—the complainant and the respondent. Thus, a preponderance standard acknowledges that "the institution has competing obligations to the victim and to the accused" and that "setting the scale either below or above the midline of certainty skews the balance too far in the favor of the advantaged party."[212]

While campus sexual assault hearings more closely align with civil proceedings, there are still some significant differences. Campus conduct centers do not have the same authority and resources to ensure fair processes the way legal institutions do.[213] Higher education proceedings do not have formalized rules for admission of evidence, nor do they allow for discovery proceedings, subpoenas of witnesses, or changes to venue.[214]

The goals of legal institutions and universities in resolving sexual assault complaints also vary. Universities play a quasi-protector role and have an interest in the well-being of both parties.[215] Alternatively, legal institutions in civil proceedings seek only to resolve the conflict. As institutions of learning for young adults, universities seek to protect "students from conduct that may not constitute

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[208] *See id.*
[209] *Id.*
[210] *See infra* Part III.B.4.
[211] *Questions and Answers 2014*, *supra* note 83. Since the standard of evidence for Title IX investigations differs from a criminal investigation, a Title IX investigation must continue regardless of whether the criminal investigation is terminated. This is because of universities' duty to provide a "safe and nondiscriminatory environment for all students." *Id.*
[212] Matthew R. Triplett, Note*, Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 502–05 (2012); *see also* Esteban v. Central Missouri State College*,* 277 F. Supp. 649 (W. D. Mo. 1967).
[213] *See* Loschiavo & Waller*, supra* note 192.
[214] *Id.*
[215] *See* Ellman-Golan, *supra* note 85 at 156; Gertner, *supra* note 199.

a crime or that cannot be proven with admissible evidence."[216] Thus, while a preponderance standard is appropriate in Title IX proceedings, other due process rights must be available to protect the accused student since many of the procedural protections provided to defendants in civil cases do not exist in campus proceedings and could disproportionately affect accused students of color.[217]

The lesser-used clear and convincing standard, which is found in a limited number of both civil and criminal cases, is likewise not appropriate for an academic setting that is neither criminal nor civil. For example, immigration proceedings use a clear and convincing standard of evidence. In these proceedings, the defendant's strong interest in remaining in the United States triggers the clear and convincing standard. While the interests of a student respondent in campus proceedings are important, a student "remaining enrolled in her or his school of choice does not rise to the level of significance of a deportation hearing."[218] Additionally, in a campus proceeding, there is the interest of another individual at stake—the victim—an interest that does not exist in an immigration case. One student author argues that the accused student's interest is more comparable to a military hearing for involuntary discharge of an officer, in which a preponderance standard is used.[219] Similar to soldiers who apply and voluntarily commit to a military branch, students "voluntarily enroll[] in their school of choice and have an interest in remaining at that school."[220] While the interests of student respondents differ from both an immigrant in a deportation hearing and an officer being discharged from the military, the students' risks are more closely aligned with the latter in which a preponderance standard is used.

6. Campus Sexual Assault Hearings Are Discrimination Cases and Should Parallel Civil Rights Law

Title IX—which governs university sexual assault proceedings and evidentiary standards—was drafted to create gender equality and prevent discrimination in educational institutions. All discrimination and civil rights litigation use a preponderance standard. As Title IX is a sex discrimination statute—and sexual assault and harassment have been deemed a form of sex discrimination under Title IX—it is imperative that all Title IX proceedings use the same standard of evidence as other types of discrimination proceedings.[221] Title IX was modeled

[216] Ellman-Golan, *supra* note 85, at 175.
[217] *See infra* Part IV.A.
[218] Triplett, *supra* note 212.
[219] *Id.*
[220] *Id.*
[221] *See* Loschiavo & Waller, *supra* note 192.

after Title VII of the Civil Rights Act of 1964,[222] which prohibits discrimination in the workplace. Title VII is also enforced by OCR and uses a preponderance standard.[223] The 2011 DCL cited to a number of cases related to Title VII litigation that held that a preponderance standard is the proper standard in Title VII discrimination cases.[224]

Additionally, Title IX parallels Title VI of the Civil Rights Act of 1964, another civil rights statute that prohibits discrimination on the basis of race rather than gender in educational institutions.[225] Under Title VI, a preponderance standard is used when evaluating allegations of racial discrimination on university campuses.[226] Thus, it would be inconsistent for universities to investigate sex discrimination under a different evidentiary standard than racial discrimination.

Title IX proceedings should follow the legal precedent of all areas of civil rights law—all of which use a preponderance standard. Campus disciplinary proceedings based on violations of Title IX are unique from other student conduct proceedings because Title IX implicates civil rights law—specifically discrimination based on sex. Some college campuses that use the clear and convincing standard contend that because they use this standard for all campus policy violations, it is appropriate to use the clear and convincing standard for sexual assault cases. However, other policy violations such as plagiarism do not implicate the same civil rights violations as Title IX sexual misconduct violations.[227] Therefore, a mandatory preponderance standard is necessary for all higher education sexual assault grievance procedures—even for those institutions that use a higher standard for other student conduct violations—because of the civil rights implications of Title IX violations.

The 2011 DCL emphasized that the preponderance standard is the correct standard of evidence in campus sexual assault proceedings because of the severity of the civil liberties infringed upon by the complainant's allegations. According to

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[222] Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq).

[223] Baker, *supra* note 163; s*ee also* ED OCR Dear Colleague Letter 2011, *supra* note 29 ("The Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964").

[224] *See* ED OCR Dear Colleague Letter 2011, *supra* note 29, at 11 n.26 (citing Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance of the evidence standard generally applies in cases under Title VII)); *see also id.* (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 252–55 (1989) (approving the preponderance standard in Title VII sex discrimination cases) (plurality opinion)).

[225] Title VI of The Civil Rights Act of 1964 (42 U.S.C. § 2000d) (2019); *see also* Baker, *supra* note 163.

[226] U.S. DEPT. OF ED., WALLINGFORD BOARD OF EDUCATION, VOLUNTARY RESOLUTION AGREEMENT, Complaint No. 01-13-1207; *see also* ED OCR Dear Colleague Letter 2011, *supra* note 29, at 11 n.28 (discussing how "Title IX regulations adopt[ed] the procedural provisions applicable to Title VI").

[227] Baker, *supra* note 163.

the 2011 DCL, using a "higher standard is inconsistent with the standard of proof established for violations of [] civil rights."[228] A clear and convincing standard would treat student victims of sexual violence differently than all other victims of discrimination.[229]

> Tolerating a different standard from the preponderance standard in cases involving sexual violence or other forms of gender-based harassment would allow schools to provide less legal protection to student victims of sexual harassment than the vast majority of comparable populations involved in civil, civil rights and student disciplinary proceedings, all of which overwhelmingly use the preponderance standard. To name just a few, these groups include other students alleging other kinds of sex discrimination; students alleging discrimination based on other protected categories, like race or disability; gender-based violence survivors seeking protection orders in civil court; students alleging other forms of student misconduct; and students accused of sexual or any other misconduct who sue their schools in civil court.[230]

Many universities vehemently support a preponderance standard regardless of legislative changes on the national level.[231] In a letter to the U.S. Department of Education in 2019, Janet Napolitano, the UC President, and Suzanne Taylor, the interim UC Systemwide Title IX Coordinator, wrote that the UC system believes the preponderance standard is the most appropriate standard of evidence for university hearings and intends to keep using it.[232] Significantly, this letter pointed out that in the Department of Education's own Title IX investigations, ED uses the preponderance standard.[233] Even though the 2020 Finalized Guidelines no longer require a preponderance standard, the UC system plans to continue to use the preponderance standard in all campus sexual misconduct proceedings.[234]

7. The Determination of Guilt or Innocence Depends in Witness Credibility

In campus sexual assault proceedings, the respondent's sanctions are often determined by witness statements, which compose the majority of the factual

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[228] ED OCR Dear Colleague Letter 2011, *supra* note 29.
[229] Baker, *supra* note 163.
[230] *Id.*
[231] *See* Suzanne Taylor & Janet Napolitano, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, Letter (Jan. 28, 2019).
[232] *See id.*
[233] *Id.* at 10.
[234] *Secretary DeVos*, *supra* note 31.

record. There are rarely additional facts in the record beyond what was seen or heard by the complainant, the respondent, and any witnesses. With much of the factual record based on hearsay, the standard of proof should be one that gives equal weight to both sides' experiences. A clear and convincing standard would give more weight to a defendant's voice and create an "insurmountable obstacle for victims with meritorious claims" whose only evidence is their own experience.[235]

Since campus proceedings are not criminal in nature, it is important that these cases "strike[] a balance between over-protecting the accused at the expense of victims while providing accused students with ample opportunity and administrative due process protections to contest the case against them."[236] A preponderance standard, coupled with due process protections, strikes the appropriate balance, while a clear and convincing standard casts immediate doubt on victims' credibility. Indeed, the preponderance standard gives equal weight to both parties' statements, ensures victims have a voice, and still leaves the burden on universities to prove the respondent is at fault.

IV. Due Process Protections to Ensure Fair Title IX Proceedings for All Respondents Regardless of Race

While a preponderance standard is important to ensure fair proceedings for complainants and respondents alike, additional protections for respondents are necessary when taking an intersectional approach to university sexual assault adjudication. By examining how sexual assault allegations and procedures intersect with racial disparities, universities can help ensure that all respondents receive adequate due process, regardless of their race. In order to protect all respondents, some form of cross-examination is essential in combination with the preponderance standard in all Title IX sexual assault hearings.

A. Due Process Concerns with the Preponderance Standard and Racial Disparities in Sentencing

While this Comment argues that the preponderance standard is the most appropriate evidentiary standard to protect victims in the university context, many critics argue that the preponderance standard does not do enough to protect respondents' due process rights. Due process rights are particularly important in the sexual assault context due to this country's long history of Black men being disproportionately punished and presumed guilty for the rape of white women.[237]

[235] Triplett, *supra* note 212.
[236] Baker, *supra* note 163.
[237] Hale & Matt, *supra* note 21.

This Section describes critics' concerns that the preponderance standard is dangerous for respondents, particularly respondents of color. Section 4.B then discusses how to mitigate these concerns by expanding due process protections in university procedures for student respondents.

1. Addressing the Reliability Concerns of the Preponderance Standard

One of the main concerns of critics of the Obama era guidelines is that a mandated preponderance standard unfairly impacts defendants. The Department of Education under the Trump administration argued that although the preponderance standard is used in civil cases, civil litigation provides certain features that promote reliability that Title IX grievance proceedings do not.[238] Thus, to combat this distinction between civil litigation and Title IX proceedings, the 2020 Finalized Regulations gave universities the option to choose between a preponderance and clear and convincing standard.[239]

Because Title IX sexual assault proceedings do not have rules of evidence or provide discovery procedures to the same extent as the rules of civil procedure, critics argue the proceedings are less likely to be reliable.[240] For instance, civil litigation provides defendants "with many due-process protections that seek to ensure fair and reliable proceedings" not provided to respondents in Title IX proceedings such as "public pleadings," "the right to confront and cross-examine witnesses," "extensive discovery process," "rules of evidence," and "the right to a jury trial."[241] In August 2020, some of these procedures, such as the right to cross-examine a witness, became mandated for university proceedings; however, respondents still lack many of these protections.[242]

Indeed, proponents of the clear and convincing standard argue that to combat these reliability problems, universities should mandate a higher standard of evidence to protect defendants' due process rights.[243] This logic, however, hurts

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[238] *See* Nondiscrimination on The Basis of Sex*, supra* note 101.
[239] *Secretary DeVos, supra* note 31.
[240] *See* Nondiscrimination on The Basis of Sex*, supra* note 101; *see also* Katie Reilly, *A Yale Student Accused Her Classmate of Rape*, TIME (Mar. 9, 2018) https://time.com/5192004/yale-university-sexual-assault-trial/ (discussing how in civil proceedings, defendants have protections such as receipt of a specific, written complaint; clear rules of evidence; knowledge of the testimony of adverse witnesses; and the right to discovery, cross-examination, and the calling of expert witnesses).
[241] *See* UNITED EDUCATORS, *supra* note 46.
[242] *See Secretary DeVos, supra* note 31.
[243] A few district courts have agreed with these critics when considering whether a preponderance of the evidence standard is enough to protect defendants' due process rights. *See, e.g.*, Lee v. Univ. of New Mexico, No. 1:17-cv-01230-JB-LF (D. N.M. Sept. 20, 2018) (finding that a preponderance standard is not the proper standard for disciplinary expulsion cases because of the severe consequences); Doe v. Univ. of Miss., No. 3:18-CV-138-DPJ-FKB, 2019 WL 238098, at

victims because a higher standard of evidence makes it harder for victims to prove that they have been sexually assaulted in a system that already lacks many discovery and evidentiary procedures and promotes rape culture. Instead, keeping a more equitable standard such as a preponderance standard and increasing other due process protections for defendants is a better way to combat reliability challenges.[244]

Critics also argue that Title IX grievance proceedings are similar to civil proceedings that use the clear and convincing standard of evidence such as sexual misconduct cases involving professional disciplinary proceedings for medical doctors,[245] and sexual harassment cases involving lawyers.[246] Those in support of a clear and convincing standard argue that these civil cases are similar to university sexual assault disciplinary proceedings because "a finding of responsibility carries particularly grave consequences for a respondent's reputation and ability to pursue a profession or career."[247]

While there are similarities between these cases and Title IX proceedings, there are other ways to protect respondents without hurting victims' ability to have their voices heard, such as increasing due process protections for respondents. Additionally, the context of student disciplinary cases compared to professional disciplinary cases is relevant. The consequences for an accused student, while serious, are different than those of a professional in the work force. An expelled student can still pursue their degree at another university, and they are not at risk of losing a professional license. Moreover, Title IX proceedings are more similar to other civil litigation cases that use a preponderance standard, such as civil rights discrimination cases under Title VII.[248]

2. Addressing Concerns about the Implications of the Preponderance Standard on Racial Disparities Between Respondents

Sexual assault Title IX proceedings at universities occur within the complex history of "structural and implicit racial bias pervading campuses."[249] While there

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*10 (rejecting a motion to dismiss on a claim arguing that a preponderance standard in a university sexual assault proceeding violated due process). However, other district courts have held otherwise, finding that a preponderance standard is sufficient. *See, e.g.*, Doe v. Univ. of Mich., 325 F. Supp. 3d 821, 830 (E.D. Mich. 2018), Doe v. Penn. State Univ., 336 F. Supp. 3d 441, 450 (M.D. Pa. 2018).

[244] *See infra* Part IV.B.

[245] *See* Nondiscrimination on The Basis of Sex, *supra* note 101. (discussing Nguyen v. Washington Dept. of Health, 144 Wash. 2d. 516 (2001)).

[246] *Id*. (discussing Disciplinary Counsel v. Bunstine*,* 136 Ohio St. 3d 276 (2013)).

[247] *Id.*

[248] *See infra* Part III.B.6.

[249] Jeannie Suk, *Shutting Down Conversations about Rape at Harvard Law*, NEW YORKER, Dec. 11, 2015, https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school.

are no official national statistics on how race affects campus sexual assault complaints, there is a long history of bias against Black men with regards to rape allegations by white women.[250]

In the process of creating the most equitable Title IX proceedings, it is important to be aware of the racial biases against Black respondents and "acknowledge the possibility of wrongful accusations of sexual assault" based on racial bias.[251] In fact, scholar Nancy Gertner argues that "feminists should be especially concerned" about fairness and due process for the accused given our dark history of false rape accusations against African American men and the "racial implications of [current] rape accusations."[252] While the empirical data on sexual assault allegations based on the race of the respondent is limited because OCR does not require universities to document the race of the respondent, "the general social disadvantage that [B]lack men continue to carry in our culture can make it easier for everyone in the adjudicative process to put the blame on them."[253] The case of Brock Turner versus the case of Corey Batey is particularly illustrative.[254] The disparities in sentencing based on race for comparable offenses—for example six months for a white defendant and fifteen years for a Black defendant—is sadly unsurprising. While both cases were handled in the court system, similar disparate results would likely occur in campus adjudicatory proceedings, which provide respondents with even fewer procedural protections.

Additionally, when students of color are accused of sexual assault they are often "uniquely defenseless . . . typically lacking financial resources, a network of support, and an understanding of their rights."[255] These factors may be exacerbated by implicit biases toward "minority students on campus."[256]

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[250] *See* Emily Yoffe, *The Question of Race in Campus Sexual-Assault Cases: Is The System Biased Against Men of Color*? THE ATLANTIC, Sept. 11, 2017; Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103 (2015) ("American racial history is laced with vendetta-like scandals in which [B]lack men are accused of sexually assaulting white women" that are often "not wrongdoers at all.")

[251] *See* Suk, *supra* note 249.

[252] Gertner, *supra* note 199.

[253] Halley, *supra* note 250 ("Since there are no national statistics on how many young men of any given race are the subject of campus-sexual-assault complaints, we are left with anecdotes about men of color being accused and punished."); Yoffe, *supra* note 250 (discussing how one professor noted that while Black men make up only about 6 percent of college undergraduates, they were vastly overrepresented as respondents in the sexual assault cases the professor had tracked over the past two years).

[254] *See* Noman, *supra* note 2.

[255] Yoffe, *supra* note 250.

[256] *Id.* (quoting Gersen) ("[I]f we have learned from the public reckoning with the racial impact of over-criminalization, mass incarceration, and law enforcement bias, we should heed our legacy of bias against [B]lack men in rape accusations.").

While it is important to think about the racial implications of sexual assault accusations against defendants of color, it is also important to consider the implications of sexual assault on victims who do not present as the stereotypical white, female, cisgender, heterosexual victim. In fact, the evidence suggests that the prevalence of sexual assault is greater for students who do not identify as heterosexual.[257] There is little research on racial differences in sexual assault victims on college campuses.[258] However, national research shows that multiracial and indigenous women experience sexual assault at higher rates than white women, and receive less protection through our justice system.[259] Victims of color, regardless of their sexual orientation, often face many of the same challenges as defendants of color in sexual assault proceedings, such as having their credibility overtly and unfairly subject to question. Moreover, victims of color often lack access to resources essential to dealing with sexual assault.

Thus, an evidentiary standard that takes into account the racial implications on both victims and defendants—and gives equal weight to the implications on both parties as the preponderance standard does—is the most equitable standard for university sexual assault proceedings. Additional procedural protections can still be put into place to ensure fair hearings for student respondents, without minimizing the protections afforded to victims.

3. Addressing Concerns about Heightened Stigma Against Sexual Assault Respondents and Mistaken Findings of Guilt

Respondents involved in sexual assault disciplinary proceedings face increased stigma. A finding of guilt increases the reputational damage and stigma faced by a respondent. Thus, critics of the mandated preponderance standard argue that a higher standard of evidence better protects respondents against a mistaken finding of guilt and, consequently, a severely tarnished reputation.[260] Additionally, critics argue that "the media . . . has put pressure on schools to hold students responsible for serious harm even when [evidence is inconclusive]," making a preponderance

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[257] Gay and bisexual men are at an increased risk of being raped in their lifetime due to a combination of risk factors including vulnerability to homophobic sexual assaults. Based on a 2010 survey by National Intimate Partner and Sexual Violence, heterosexual women had a 17 percent chance of experiencing rape within their lifetime, compared to a 46 percent chance for bisexual women. Most heterosexual and bisexual women were assaulted by a heterosexual male. Donna Coker, *Crime logic, Campus Sexual Assault, and Restorative Justice*, 49 TEX. TECH L. REV. 147, 164 (2016).

[258] *See id.*

[259] Nearly 34 percent of multiracial women and 27 percent of indigenous women experienced sexual assault compared to 18.8 percent of white women. *Id.*

[260] *See* Nondiscrimination on The Basis of Sex*, supra* note 101.

standard even more risky.[261] Furthermore, these critics argue that mistaken findings of guilt are a real possibility with a preponderance standard that finds guilt at just over 50 percent.[262]

However, rates of false accusations are extremely low, especially compared to rates of victims who do not report their assault.[263] While the extremely low possibility of false accusations is real, so is the very real and persistent stigma toward victims. The integrity of victims is often questioned, and many are not believed. This is particularly true in campus climates that promote rape culture. The solution to addressing critics' concern of mistaken findings of guilt is not to enforce a higher standard of evidence which hurts victims, but rather to increase other due process protections for defendants, particularly for defendants who have a greater risk of being falsely accused. For example, although false rape accusations are extremely rare, Black defendants are disproportionately subject to wrongful convictions for accusations of rape.[264] Thus, due process protections can be used as a tool to ensure that all defendants, regardless of race, receive the procedural protections that were established to ensure a fair hearing.

B. Due Process Protections to Ensure Equitable Treatment Amongst Respondents

The concerns of critics of the preponderance standard can be solved by increasing due process protections for respondents, rather than heightening the evidentiary standard. Due process counterbalances—such as the right to cross-examination and a live hearing—protect respondents without decreasing the protection that the preponderance standard affords victims.

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[261] Ellman-Golan, *supra* note 85 at 174; *see also* Gertner, *supra* note 199.

[262] *See* Ellman-Golan, *supra* note 85. Critics bring up examples of false allegations such as the Duke Lacrosse Case in which three members of the Duke lacrosse team were falsely accused of rape in 2006. The case ultimately led to the resignation of the lead prosecutor in the case and all charges against the defendants were dropped. Robert P. Mosteller, *The Duke Lacrosse Case, Innocence, and False Identifications: A Fundamental Failure to "Do Justice"*, 76 FORDHAM L. REV. 1338, 1339 (2007).

[263] "Data indicates that survivor reports of sexual assault and false accusations against student respondents do not occur at the same rate; between 75–95% of survivors do not report their experiences to the campus, while only between 2% and 10% of sexual assault reports are false." ASSOCIATION OF AMERICAN UNIVERSITIES, *supra* note 187.

[264] Hale & Matt, *supra* note 21.

1. Counterbalancing the Preponderance Standard with Due Process Protections

While the preponderance standard ensures an equitable allocation of power between respondents and complainants during a proceeding, respondents of all races should also be afforded protections to ensure equitable treatment. The Supreme Court in *Goss* established that due process rights apply to defendants in campus proceedings.[265] Scholar Nancy Gertner discusses "how critical the enforcement of defendants' rights [are] to the integrity and, even more, to the reliability" of our legal system.[266] In discussing Harvard University's adoption of the preponderance standard, Gertner argues that the preponderance standard is harmful to defendants when "coupled with the least protective procedures."[267] Gertner's critique highlights the importance of procedural safeguards, especially because these safeguards are often unfairly applied to defendants of color in our criminal justice system.

The preponderance standard, when paired with rigorous due process protections for defendants, adequately protects defendants' rights and helps ensure defendants of color are afforded the opportunity to defend themselves in a system that is often biased toward them. There must be "procedural mechanisms in place" in order for the preponderance standard to be effective.[268] Even the Trump era 2017 Proposed Regulations stated that "in light of the due process and reliability protections afforded under the proposed regulations, it could be reasonable for recipients to choose the preponderance standard instead of the clear and convincing standard." The 2017 Proposed Regulations thus acknowledged that with the proper due process protections, the preponderance standard is highly effective.[269] However, by giving universities the option to use a clear and convincing standard, the 2017 Proposed Regulations and the 2020 Finalized Guidelines tip the scale too far in favor of respondents and minimize protections afforded to victims.[270]

During my time at the Student Advocate's Office at UC Berkeley, I witnessed and advised respondents in many campus adjudication proceedings. I saw first-hand the flaws and strengths of the campus conduct model. A strength of the system was its use of the preponderance of the evidence standard, which ensured both parties' statements carried equal weight. However, the system was flawed in that respondents were unable to have a live hearing, to have their "day in court,"

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[265] Goss v. Lopez, 419 U.S. 565 (1975).
[266] Gertner, *supra* note 199, at 33.
[267] *Id.*
[268] Doe v. Cummins, 662 F. App'x 437, 449 (6th Cir. 2016); *see also* CONGRESSIONAL RESEARCH SERVICE, *supra* note 53.
[269] *See* Nondiscrimination on The Basis of Sex*, supra* note 101.
[270] INTERIM GUIDELINES, *supra* note 98; *Secretary DeVos*, *supra* note 31.

and to adequately have an opportunity to question the allegations against them. These flaws were especially harmful to students of color who faced the additional burden of having assumptions made against them due to systemic biases. My experience as a student advocate affirmed my belief that the preponderance of the evidence is the most appropriate standard, and also that increased due process protections should be added to campus adjudicative proceedings.

While I maintain that the 2011 DCL and 2014 Q&A did propose the proper standard of evidence in the academic setting by mandating a preponderance standard, the 2011 and 2014 Guidelines did not do enough to ensure that all defendants' due process rights were protected during university proceedings. Alternatively, the 2020 Finalized Guidelines did increase due process protections for respondents, but the new regulations hurt victims by giving universities the option to select either a preponderance standard or a clear and convincing standard.[271]

Thus, as the Biden administration prepares to update the Trump era Title IX guidelines, this Comment proposes that the new Biden era guidelines mandate a preponderance standard while preserving some due process protections proposed by the current regulations such as a right to a live hearing and the right to cross-examine one's accuser with some modifications. I discuss the benefits of these two due process protections to supplement a preponderance standard in Section IV.B.2 and IV.B.3.

2. Due Process Right to a Live Hearing to Ensure Fair Procedure for All Respondents

To ensure respondents are adequately protected in Title IX proceedings, they should have the right to some protections afforded to civil litigants. One such protection, suggested by the 2017 Proposed Regulations—and finalized by the 2020 Regulations[272]—is the right to a live hearing in the higher education context. The American Civil Liberties Union (ACLU), a prominent civil rights organization, supports increased procedural protections in campus proceedings, such as the right to a live hearing, as a means of addressing and eliminating racial disparities in the treatment of respondents.[273]

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[271] Summary of Final Rule, *supra* note 148. "The Final Rule requires the school's grievance process to state whether the standard of evidence to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard" and adds provisions to the 'live hearing with cross-examination' requirement for postsecondary institutions." *Id.*

[272] Proposed Title IX Regulation Fact Sheet, *supra* note 84; Summary of Final Rule, *supra* note 148.

[273] Conor Friedersdorf, *The ACLU Moves to Embrace Due Process on Title IX*, THE ATLANTIC (Feb. 8, 2019) https://www.theatlantic.com/ideas/archive/2019/02/aclu-title-ix/582118. "The ACLU supports many of the increased procedural protections required by the Proposed Rule for

One important aspect of the preponderance standard in Title IX proceedings is that it ensures complainants have the opportunity to have their voices heard and believed. Requiring a live hearing ensures that same right is preserved for respondents. A live hearing gives respondents a "meaningful opportunity to be heard" prior to the university imposing sanctions or making a decision on their culpability.[274]

Many district courts have also stated the importance of the right to a live hearing in university disciplinary proceedings. In *Doe v. University of Michigan*,[275] the university sexual assault disciplinary proceedings followed a model in which an investigator met separately with the complainant and respondent, interviewed witnesses, and provided sanctions for the defendant without an opportunity for a live hearing. The court held that "the university violated the accused student's right to due process."[276] In *Doe v. Pennsylvania State University,*[277] the district court similarly held that the investigator model violated the accused's constitutional rights because it did not allow a decisionmaker to assess credibility concerns.

The right to a live hearing mitigates many of the concerns expressed by critics of the preponderance standard with regard to defendants' rights. With a live hearing, respondents have the ability to act as their own witness in front of the decisionmaker. Allowing some of the procedural protections from civil litigation into the campus adjudication process—such as the right to a live hearing—increases due process protections for respondents without infringing on the rights of victims. Thus, the 2020 Finalized Guidelines' inclusion of students' right "to challenge evidence at a live hearing" has secured important due process rights for student defendants and should be preserved when the guidelines are revised.[278]

Title IX grievance proceedings, including the right to a live hearing and an opportunity for cross-examination in the university setting, the opportunity to stay Title IX proceedings in the face of an imminent or ongoing criminal investigation or trial, the right of access to evidence from the investigation, and the right to written decisions carefully addressing the evidence." *Id.*

[274] CONGRESSIONAL RESEARCH SERVICE, *supra* note 53 (quoting Lachance v. Erickson, 522 U.S. 262, 266 (1998)).

[275] Doe v. Univ. of Mich., 325 F. Supp. 3d 821, 830 (E.D. Mich. 2018).

[276] *Id.* at 830.

[277] Doe v. Penn. State Univ., 336 F. Supp. 3d 441, 450 (M.D. Pa. 2018) (discussing how in the court's view, the investigator model's "virtual embargo on the panel's ability to assess [] credibility raises constitutional concerns.")

[278] *Secretary DeVos, supra* note 31.

3. Due Process Right to Cross-Examination to Ensure Fair Procedure for All Respondents

Another important due process protection that the 2020 Finalized Guidelines mandate is the right of accused students to cross-examine their accuser through an advisor.[279] Since the factfinders in Title IX proceedings base most of their decisions on hearsay, evaluating witness credibility is a key component of the decision-making process. With determinations of a respondent's culpability often coming down to witness statements, it is important that both parties have the opportunity to challenge witness's credibility through cross-examination. Furthermore, cross-examination can help combat implicit biases that witnesses and decisionmakers may have regarding race that can affect the outcome of a proceeding.[280]

In *Doe v. Baum*,[281] the Sixth Circuit found that a "university must give the accused student or [their] agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder." The Court held that cross-examination in Title IX proceedings should be constitutionally required. The court in *Doe v. Pennsylvania State University* used similar reasoning:

> In a case like this, however, where everyone agrees on virtually all salient facts except [consent] . . . there is really only one consideration for the decisionmaker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns.[282]

Although the right to cross-examine one's accuser is not a necessary feature of due process in the civil context, courts have often ruled in favor of cross-examination as a due process protection in civil cases when credibility is critical to the outcome of the case. Additionally, because Title IX proceedings lack many of the procedural protections afforded to civil litigants, the ability to cross-examine their accuser is essential to ensure accused students receive a fair hearing. The 2020 Finalized Regulations ensured this right and affirmed the majority opinions in *Baum* and *Pennsylvania State University*, mandating a right of accused students to challenge the credibility of their accuser.

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[279] Summary of Final Rule, *supra* note 148.
[280] CONGRESSIONAL RESEARCH SERVICE, *supra* note 53.
[281] Doe v. Baum, 903 F.3d 575, 581–82 (6th Cir. 2018).
[282] *Penn. State Univ*., 336 F. Supp. 3d at 450.

Many victims' rights advocates are concerned that cross-examination is intimidating and emotionally traumatizing for victims, especially for victims who struggled to come forward.[283] This is a serious and important concern that must be mitigated. The *Baum* court addressed this issue, proposing that "universities could allow the accused student's agent to conduct cross-examination on [their] behalf . . . without subjecting the accuser to the emotional trauma of directly confronting [their] alleged attacker."[284] While the 2020 Finalized Regulations adopted the *Baum* court's reasoning and do not require the victim to be directly questioned by the respondent, the 2020 Regulations still require cross-examination to be "conducted directly, orally, and in real time by the party's advisor of choice," forcing the victim to endure additional trauma.[285]

The cross-examination requirement in the new regulations goes too far. A better way to protect defendants' rights, without causing additional harm to victims, is to allow respondents and their advisor to pose written questions in advance to be asked by a neutral factfinder. The Biden administration should revise the 2020 Regulations to allow only certain forms of cross-examination that do not require the victim to directly face their attacker or their attacker's advisor in real time. The opportunity for defendants to challenge the credibility of their accuser in this manner—particularly defendants of color subject to witnesses' racial biases—preserves respondents' due process rights while protecting victims from enduring additional trauma.

With these revisions to the cross-examination requirement in place to protect victims, cross-examination is effective and necessary for respondents to ensure they have the opportunity to question their accuser's credibility, identify inconsistencies in their accuser's story, and combat the sentencing disparities and unfair treatment of defendants of color in our legal system.

CONCLUSION

Over the past 49 years, Title IX has been repeatedly modified and adapted through guidance documents and regulations as society's understanding of gender discrimination and sexual assault has changed. Title IX should again be modified to ensure a fair outcome for all parties and to begin to combat the prevalence of rape culture in universities across the country. The campus adjudication model proposed by this Comment—one with a mandated preponderance standard in conjunction with increased due process protections for the accused—must be guaranteed for all students. Although the 2020 Finalized Regulations ensure respondents now receive additional due process protections, such as the right to a

[283] *See* Taylor & Napolitano, *supra* note 231.
[284] *Baum*, 903 F.3d at 581–82.
[285] Summary of Final Rule, *supra* note 148.

live hearing, universities still have the option to use a clear and convincing evidentiary standard that harms victims.

Accused students' due process rights are imperative to realizing fair Title IX sexual assault proceedings in universities, especially given our legal system's history of unfair treatment of defendants of color. But merely using a clear and convincing evidence standard results in a loss of victims' rights. Rather, mandating a preponderance standard for Title IX proceedings, while maintaining other protections for respondents, is the best way to protect both defendants' due process rights and victims' voices.

Brock Turner's case is illustrative of two deeply ingrained problems on college campuses and in American society: racial injustice and rape culture. This Comment's proposed adjudication model that includes a mandated preponderance of the evidence standard and added procedural protections for all students can be the first step toward creating a more equitable campus adjudicatory system for student victims and defendants alike and can serve as a model for more equitable proceedings in the legal system at large.