

**ARE CAMPUS SEXUAL ASSAULT  
TRIBUNALS FAIR?: THE NEED FOR  
JUDICIAL REVIEW AND ADDITIONAL  
DUE PROCESS PROTECTIONS  
IN LIGHT OF NEW CASE LAW**

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*The pervasiveness of sexual assault on college and university campuses and the schools' failures to take sexual assault seriously have resulted in recent reforms to college campus disciplinary proceedings. The federal government has largely prompted this wave of reform through Title IX, requiring schools to employ particular policies and procedures for investigating and adjudicating sexual assault as a condition of receiving federal funds. Although the federal government's mandates may be properly motivated, these reforms are criticized because they encourage schools to enact procedures that are heavily stacked against those accused of sexual assault. Consequently, students alleging that they have been wrongfully held responsible for sexual assault violations due to flawed disciplinary procedures have brought lawsuits against their schools. Recent case law demonstrates that some schools, in an attempt to comply with Title IX, have employed procedures that are fundamentally unfair to accused students.*

*This Note considers the interests involved in campus investigatory and adjudicatory systems through an analysis of recent cases and the procedural flaws that have emerged. It further evaluates procedural protections that would strike a better balance between the interests of the accusers, the accused, and the schools. In conclusion, this Note argues that in light of the recent case law, more meaningful judicial review and additional due process protections are necessary for accused students.*

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#### INTRODUCTION

Imagine Erica.<sup>1</sup> She is out at a campus bar with her friends.<sup>2</sup> She has a few drinks, and the next thing she remembers is being in a cab with men

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1. This story is based on Erica Kinsman's allegation that Jameis Winston raped her from the *New York Times's* examination of the investigation. See Walt Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), [http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?\\_r=1](http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html?_r=1) [<https://perma.cc/G9ZZ-35HR>]. Ms. Kinsman's allegations were also a subject of the documentary, *The Hunting Ground*. THE HUNTING GROUND (Anchor Bay 2015).

2. See Bogdanich, *supra* note 1.

whom she has never met.<sup>3</sup> She next remembers waking up in an unfamiliar apartment while a stranger is raping her.<sup>4</sup> Erica reports her rape to the local police department, which conducts minimal investigation.<sup>5</sup> The Office of the State Attorney declines to charge her rapist.<sup>6</sup> Erica also brings a claim through her school's on-campus disciplinary process.<sup>7</sup> A month later, the school learns that another student had accused the same student of rape.<sup>8</sup> The Dean of Students emails the school's Policy Chief indicating that no disciplinary proceedings will be taken against the accused student for either assault, in contravention of the school's policies.<sup>9</sup> A year later, school officials meet with Erica's rapist, who refuses to answer any questions.<sup>10</sup> The school never interviews Erica.<sup>11</sup> The school holds a hearing more than two years after the incident, during which Erica's rapist answers only three questions.<sup>12</sup> In making its determination, the school considers that Erica did not give verbal consent to sexual activity, which means her rapist violated school policy.<sup>13</sup> Still, the hearing officer does not find the accused student responsible for rape.<sup>14</sup>

Now imagine Drew.<sup>15</sup> He is at a college dorm party drinking with friends.<sup>16</sup> At the end of the party, Drew's female friend, C.B., tells him that she needs a place to stay for the night.<sup>17</sup> Drew offers that she can spend the night in his room and expects that she will sleep on the mat that he and his roommate use for overnight guests.<sup>18</sup> Instead, Drew and C.B. spend the night in Drew's bed and engage in what Drew believes is consensual sex.<sup>19</sup>

A few months later over summer break, Heather Cowan, an Equal Opportunity Specialist for the school, contacts Drew and asks to speak with him over Skype, but does not provide a reason for the conversation.<sup>20</sup>

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3. *See id.*

4. *See id.*

5. *See id.*

6. *See The Facts of The Hunting Ground*, HUNTING GROUND FILM (2015), <http://www.thehuntinggroundfilm.com/the-facts/> [<https://perma.cc/GH8L-4CKD>].

7. *See id.*

8. *See id.*

9. *See id.*; *see also infra* Part I.A.2.

10. *See The Facts of the Hunting Ground*, *supra* note 6.

11. *See id.*

12. *See id.* Erica answered 156 questions. *Id.*

13. *See id.*; *see also Full Copy of Jameis Winston Florida State Code-of-Conduct Hearing Decision*, TALLAHASSEE DEMOCRAT (Dec. 22, 2014, 8:04 AM), <http://www.tallahassee.com/story/sports/college/fsu/2014/12/21/jameis-winston-hearing-decision-full-copy/20743065/> [<https://perma.cc/3ZLY-HFAP>].

14. *See The Facts of the Hunting Ground*, *supra* note 6.

15. This story is based on the facts articulated by the court in *Sterret v. Cowan*, 85 F. Supp. 3d 916, 923–25 (E.D. Mich. 2015), *appeal dismissed*, No. 15-1121 (6th Cir. Feb. 6, 2015), and by Emily Yoffe in an article published in *Slate*. *See* Emily Yoffe, *The College Rape Overcorrection*, SLATE: DOUBLEX (Dec. 7, 2014, 11:53 PM), [http://www.slate.com/articles/double\\_x/doublex/2014/12/college\\_rape\\_campus\\_sexual\\_assault\\_is\\_a\\_serious\\_problem\\_but\\_the\\_efforts.single.html](http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.single.html) [<https://perma.cc/C88T-4FK5>].

16. *See* Yoffe, *supra* note 15.

17. *See id.*

18. *See id.*

19. *See id.*

20. *Sterret*, 85 F. Supp. 3d at 923.

Cowan questions Drew about his sexual encounter with C.B., which Drew explains was consensual.<sup>21</sup>

Upon returning to school in the fall, the university removes Drew from his dorm.<sup>22</sup> A month later, Drew receives a short document containing Cowan's summary of their conversation, and Drew responds to the report "listing concerns about key omitted facts and information, significant due process violations[,] raising specific questions," and rebutting each allegation made by the witnesses.<sup>23</sup> Nevertheless, Cowan's final report finds him responsible for sexual misconduct in violation of the school's policies.<sup>24</sup>

Drew meets with the administration at the university and explains that a "terrible mistake has been made."<sup>25</sup> Drew hires an attorney, who presents additional concerns about the university's procedures, provides affidavits from Drew, and supplies additional evidence.<sup>26</sup> Cowan does not amend her finding.<sup>27</sup> The administration upholds Cowan's determination, and Drew is suspended for four years—until C.B. graduates.<sup>28</sup> Drew's appeal is denied, despite his presentation of new evidence, and he also is denied the opportunity to testify under oath.<sup>29</sup> The Appeals Board lessens the length of his suspension, but mandates that to be readmitted to the school, Drew must admit to sexual misconduct.<sup>30</sup> During the course of the entire proceeding, the school never holds a hearing.<sup>31</sup>

The prevalence of sexual assault<sup>32</sup> on college campuses presents a problem in the United States today.<sup>33</sup> A 2015 study for the Association of

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21. *See id.*

22. *See Yoffe, supra* note 15.

23. *Sterret*, 85 F. Supp. 3d at 923–24.

24. *Id.* at 924.

25. *Id.*

26. *See id.*

27. *See id.*

28. Yoffe, *supra* note 15.

29. *Sterret*, 85 F. Supp. 3d at 925.

30. *See id.*; *see also Yoffe, supra* note 15.

31. Drew sued the school for violating his due process rights. *See Sterret*, 85 F. Supp. 3d at 924–29. All claims were dismissed except one, the school appealed, and Drew eventually reached a rare settlement after mandatory mediation. *See id.*; *see also Emily Yoffe, A Campus Rape Ruling, Reversed*, SLATE: DOUBLEX (Sept. 15, 2015, 2:01 PM), [http://www.slate.com/articles/double\\_x/doublex/2015/09/drew\\_sterrett\\_and\\_university\\_of\\_michigan\\_the\\_school\\_vacates\\_its\\_findings.html](http://www.slate.com/articles/double_x/doublex/2015/09/drew_sterrett_and_university_of_michigan_the_school_vacates_its_findings.html) [<https://perma.cc/44Q4-XBD4>]. For further discussion of due process rights, *see infra* Parts I.A.1, II.B.1.

32. This Note uses the terms sexual assault and sexual misconduct interchangeably to mean forms of sexual harassment and sexual violence as defined by the Department of Education in its "Dear Colleague" letter. *See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER* (2011) [hereinafter DEAR COLLEAGUE LETTER], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/AVD5-K5R6>]. The letter defines sexual violence as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion." *Id.* at 1–2.

33. *See generally* DAVID CANTOR ET AL., THE ASS'N OF AM. UNIVS., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015),

American Universities found that one in four female students experience nonconsensual sexual contact in college.<sup>34</sup> Typically, when a victim reports such an incident, the college conducts an internal investigation to determine whether the institution should take disciplinary action against the accused student. Many have argued that schools have systematically failed to hold students accountable for their actions.<sup>35</sup>

These shortcomings, coupled with the prevalence of sexual misconduct on college campuses, provoked national debate and spurred colleges,<sup>36</sup> Congress, and the White House to act.<sup>37</sup> Colleges have begun to reform their policies, especially in light of an April 2011 “Dear Colleague” letter addressed to all Title IX institutions from the Department of Education’s (DOE) Office for Civil Rights<sup>38</sup> (OCR). Over time, however, these reforms have drawn criticism for “overcorrecting” the problem by overlooking the important and legally mandated protection of the interests and rights of those accused of misconduct.<sup>39</sup>

Analyzing recent cases in which courts have evaluated campus disciplinary proceedings, this Note ultimately agrees with this position and applies recent case law to newly proposed legislation to advocate for additional due process protections for the accused. Part I describes the laws and legal principles that have shaped current campus disciplinary proceedings. Part II then highlights the tension that exists between the interests of the accusers, the interests of the accused, and the interests of schools. Part II also analyzes judicial review of the decisions of school disciplinary proceedings to evaluate the effectiveness of these adjudicatory systems. In light of the reaction of courts, Part III argues that current

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[https://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf) (finding that one in four women are victims of nonconsensual sexual contact in college) [<https://perma.cc/BPQ5-UK9H>]; *see also* CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, U.S. DEP’T OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that one in five women are victims of nonconsensual sexual contact in college) [<https://perma.cc/FNE2-MBPY>].

34. CANTOR ET AL., *supra* note 33, at 23, 81. This number represents the percentage of college seniors experiencing nonconsensual sexual contact involving physical force, incapacitation, coercion, and absence of affirmative consent since beginning college. *See id.* Similarly, past oft-cited studies have shown that one in five women and one in sixteen men are sexually assaulted during college and that 90 percent of these incidents are not reported. *See* NAT’L SEXUAL VIOLENCE RES. CTR., INFO & STATS FOR JOURNALISTS, STATISTICS ABOUT SEXUAL VIOLENCE (2015), [http://www.nsvrc.org/sites/default/files/publications\\_nsvrc\\_factsheet\\_media-packet\\_statistics-about-sexual-violence\\_0.pdf](http://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf) [<https://perma.cc/92YG-29YX>]; KREBS ET AL., *supra* note 33, at xiii.

35. *See, e.g.*, Walt Bogdanich, *Reporting Rape and Wishing She Hadn’t*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html> [<https://perma.cc/H4U7-3F9M>]; Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [<https://perma.cc/D379-ALQY>].

36. This Note uses the term “college” to denote both colleges and universities.

37. *See infra* Part I.B–C.

38. *See* DEAR COLLEAGUE LETTER, *supra* note 32.

39. *See, e.g.*, Yoffe, *supra* note 15.

school policies do not appropriately balance the interests of the students and the schools and unfairly overlook the rights of the accused. Analyzing the newly proposed campus sexual assault legislation within the context of the recent reversals of college disciplinary decisions, this part then argues for more meaningful judicial review and eventual procedural reform.

I. SEXUAL ASSAULT ON COLLEGE CAMPUSES:  
A BRIEF OVERVIEW OF THE LEGAL LANDSCAPE SHAPING COLLEGE  
INVESTIGATORY AND ADJUDICATORY POLICIES AND PROCEDURES

Disciplinary proceedings on college campuses today are largely shaped by the protections afforded to students under the Fourteenth Amendment to the U.S. Constitution and Title IX's procedural requirements regarding the investigation and adjudication of sexual assault on college campuses.<sup>40</sup> Part I.A provides an overview of the procedural due process rights of students in public colleges, as well as the policies and procedures that all federally funded schools must employ under Title IX. Part I.B outlines recent legislation with respect to sexual assault on college campuses. Part I.C then describes three newly proposed bills that would add protection for both accusers and the accused.

*A. The Foundation of School Sexual Assault Proceedings*

Although sexual assault can be adjudicated through criminal prosecution, schools investigate and adjudicate allegations of sexual assault internally through separate, independent systems.<sup>41</sup> Title IX requires schools to take "immediate and effective steps to end sexual harassment and sexual violence."<sup>42</sup> As such, schools have adjudicatory systems in place for determining whether they should take disciplinary action against a student for violating its sexual assault policies.<sup>43</sup> These policies exist to protect students from sexual violence and to ensure that schools fairly and

40. See generally U.S. CONST. amend. XIV; 20 U.S.C. § 1681(a) (2012); DEAR COLLEAGUE LETTER, *supra* note 32.

41. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2–3 (2001) [hereinafter 2001 OCR GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/SC6P-WQQP>]; see also DEAR COLLEAGUE LETTER, *supra* note 32, at 4. Some commentators argue that sexual assault that occurs on a college campus, particularly nonconsensual sex offenses, should be dealt with solely through the school's internal adjudicatory system using the DOE's framework. See, e.g., Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 267–79 (2015); Nancy Chi Cantalupo, "Decriminalizing" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 518–24 (2012). Others have argued that law enforcement should handle all sexual assault accusations. See, e.g., Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 60–61 (2013); Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<https://perma.cc/7JCM-X7PG>].

42. See DEAR COLLEAGUE LETTER, *supra* note 32, at 2.

43. See Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 492–93 (2012).

appropriately respond to allegations.<sup>44</sup> The primary objective of a school's adjudicatory system is to "combat sexual violence, sexual assault, and sexual harassment on [college] campuses; navigate the legal and regulatory challenges inherent to doing so; and, more broadly, foster a culture of respect, inclusion, and civility."<sup>45</sup>

### 1. Due Process

Disciplinary proceedings at public colleges must afford students limited procedural due process rights under the Fourteenth Amendment.<sup>46</sup> As public schools are considered state actors for purposes of the Fourteenth Amendment,<sup>47</sup> any action by a school that deprives a student of "life," "liberty," or "property" without due process of law is a due process violation.<sup>48</sup>

The Fifth Circuit first recognized the procedural due process rights of public school students in the landmark case of *Dixon v. Alabama State Board of Education*.<sup>49</sup> In *Goss v. Lopez*,<sup>50</sup> the Supreme Court further recognized that students must be afforded due process before they are deprived of their education, in which they have a property interest.<sup>51</sup> The Court also found that students have a "liberty" interest in their education because expulsion or suspension from school threatens a person's "good name, reputation, honor, or integrity."<sup>52</sup> Any deprivation of a student's

44. See Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL'Y REV.* 387, 388–89 (2015) ("Underlying any critique of the current processes for investigation, adjudication, and prevention shaped by federal law is the concern that we in higher education are doing right by those who have suffered sexual violence and sexual assault, and doing all that is within our power to prevent sexual violence and sexual assault from happening in the first place.").

45. See *id.* at 389.

46. See *Goss v. Lopez*, 419 U.S. 565, 574–76 (1975) (interpreting *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 155 (5th Cir. 1961), to stand for the proposition that public institutions owe students procedural due process rights before they are suspended or expelled from the institution); see also DEAR COLLEAGUE LETTER, *supra* note 32, at 12 ("Public and state-supported schools must provide due process to the alleged perpetrator.").

47. See *Goss*, 419 U.S. at 574–76; *Dixon*, 294 F.2d at 155; Gary Pavela & Gregory Pavela, *The Ethical and Educational Imperative of Due Process*, 38 *J.C. & U.L.* 567, 581–89 (2012).

48. U.S. CONST. amend. V; *id.* amend. XIV; ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 557–59 (4th ed. 2011). This Note addresses only procedural due process issues with respect to school disciplinary procedures.

49. 294 F.2d 150 (5th Cir. 1961) (holding that the school should have afforded the student procedural due process prior to suspending him for ten days).

50. 419 U.S. 565 (1975).

51. *Id.* at 576. Courts have not held that *Dixon* and *Goss* apply to private schools. See, e.g., *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 542–47 (1987); *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*8 (W.D. Va. Aug. 5, 2015). Thus, private schools need not afford their students the same due process protections as public institutions. Private school students who believe they have been wrongly expelled or suspended can sue their schools in tort or for breach of contract and have recently begun to seek legal recourse for gender discrimination under Title IX. See *infra* notes 212, 295; *infra* Part II.B.2.

52. *Goss*, 419 U.S. at 574 (quoting *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).

“property interest in educational benefits . . . [or] liberty interest in reputation” without due process is therefore unconstitutional.<sup>53</sup> Although the Court in *Goss* was faced with the disciplinary proceedings of a secondary school, courts have extended the holding in *Goss* to higher education institutions, including public colleges.<sup>54</sup>

*Goss* recognized that the process owed to the accused depends on the circumstances of each case and involves balancing the parties’ interests.<sup>55</sup> Due process requires, at a minimum, the opportunity to be heard “at a meaningful time and in a meaningful manner.”<sup>56</sup> However, courts have not uniformly recognized what process is owed to public school students in disciplinary proceedings.<sup>57</sup>

## 2. Title IX

Title IX of the Education Amendments of 1972, applicable to all schools receiving federal funds—including both public and private institutions—prohibits sex discrimination in educational programs and activities.<sup>58</sup> In 2001, the DOE’s OCR found that sexual harassment and assault was a form of sex discrimination under Title IX,<sup>59</sup> and the Supreme Court has recognized this interpretation of Title IX in private lawsuits against schools.<sup>60</sup>

53. *Id.* at 576.

54. See Pavela & Pavela, *supra* note 47, at 583–85; see also Lavina M. Weizel, Note, *The Process That Is Due: Preponderance of the Evidence As the Standard of Proof for University Adjudications of Student-On-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1622–23 (2012).

55. See *Goss*, 419 U.S. at 577–84; see also *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 155 (5th Cir. 1961) (“The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.”).

56. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); see also *Goss*, 419 U.S. at 581.

57. See Triplett, *supra* note 43, at 500–02; see also *infra* Part II.B.1.

58. 20 U.S.C. § 1681(a) (2012) (“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”).

59. See 2001 OCR GUIDANCE, *supra* note 41, at 3.

60. See *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (holding that schools may be liable to students for student-on-student sexual harassment when the school is “deliberately indifferent to sexual harassment, of which [the school has] actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school”). Under *Davis*, accusers can sue their schools for failing to properly investigate and adjudicate sexual assault accusations. See, e.g., *Albiez v. Kaminski*, No. 09-cv-1127, 2010 WL 2465502, at \*5 (E.D. Wis. June 14, 2010); *Kelly v. Yale Univ.*, No. Civ.A. 3:01-cv-1591, 2003 WL 1563424, at \*3 (D. Conn. Mar. 26, 2003); see also *Henrick*, *supra* note 41, at 73–76. Courts have not generally recognized an equivalent private right of action for those accused who believe that their school has been “deliberately indifferent” to an allegedly defective hearing, or their innocence, because it does not constitute sexual harassment. See, e.g., *Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*12 (D. Md. Aug. 21, 2015); *Doe v. Univ. of S.*, 687 F. Supp. 2d 744, 757–59 (E.D. Tenn. 2009); see also *Henrick*, *supra* note 41, at 74–75. *But see Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014) (denying defendant’s motion to dismiss plaintiff’s claim that the school was

OCR oversees federally funded institutions to identify instances of sex discrimination.<sup>61</sup> OCR issued guidance in 2001 requiring schools to take “prompt and effective action to end harassment, prevent it from recurring, and remedy the effects of the harassment on the victim” as soon as the school knows or reasonably should know of the harassment.<sup>62</sup> The 2001 guidance also states that “[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn.”<sup>63</sup> Thus, to comply with the requirements of Title IX, schools must independently investigate and adjudicate accusations of student-on-student sexual harassment and assault.<sup>64</sup>

OCR issued a “Dear Colleague” letter on April 4, 2011, which supplemented its 2001 guidance.<sup>65</sup> The letter outlines procedural requirements for schools’ investigation and adjudication of sexual assault accusations, including providing training to officials participating in disciplinary proceedings<sup>66</sup> and taking interim steps to ensure the safety of the accuser throughout the process.<sup>67</sup> The letter requires that schools adopt and publish notice of nondiscrimination and grievance procedures and appoint a Title IX coordinator to ensure compliance.<sup>68</sup> As to the rights of accused students, the letter states that schools “must provide due process to the alleged perpetrator” but it should not “restrict or unnecessarily delay the Title IX protections for the complainant.”<sup>69</sup>

The letter does not require that schools hold hearings, but indicates that schools must “provide equitable grievance procedures.”<sup>70</sup> These equitable procedures should include adhering to a preponderance of the evidence standard of proof,<sup>71</sup> notifying both parties of the school’s determination within sixty days,<sup>72</sup> and providing equal opportunities for both parties to

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deliberately indifferent to the alleged defective hearing because the school disregarded warnings from the prosecutor that the accuser had made false allegations).

61. See *Frequently Asked Questions About Sexual Harassment, Including Sexual Violence*, U.S. DEP’T EDUC., OFF. CIV. RTS. (2015), <http://www2.ed.gov/about/offices/list/ocr/qa-sexharass.html> [https://perma.cc/8D2Y-HPTA].

62. 2001 OCR GUIDANCE, *supra* note 41, at 12.

63. *Id.* at ii.

64. See *id.* at 3–4.

65. See DEAR COLLEAGUE LETTER, *supra* note 32. Some commentators have noted that this guidance did not follow notice-and-comment rulemaking procedures and have argued that it is thus not legally binding on schools. See, e.g., Henrick, *supra* note 41, at 60–61; Napolitano, *supra* note 44, at 394–95. The OCR stated that notice-and-comment rulemaking was not required because the guidance “does not add requirements to applicable law.” DEAR COLLEAGUE LETTER, *supra* note 32, at 1 n.1.

66. See DEAR COLLEAGUE LETTER, *supra* note 32, at 12.

67. *Id.* at 15.

68. *Id.* at 4, 7.

69. *Id.* at 12.

70. *Id.* at 10.

71. *Id.* at 10–11. Previously, schools typically adhered to the “clear and convincing” standard of proof in disciplinary proceedings. See Djuna Perkins, *Behind the Headlines: An Insider’s Guide to Title IX and the Student Discipline Process for Campus Sexual Assaults*, 59 Bos. B.J. 19 (2015). This is a higher standard of proof than the “preponderance of the evidence,” or “more likely than not,” standard. See *id.*

72. See *id.* at 12–14.

present witnesses and evidence, review the opposing party's statements,<sup>73</sup> and appeal the school's judgment.<sup>74</sup> The OCR emphasized that criminal investigations may occur in parallel with school disciplinary proceedings, but also that the investigations should not be determinative of one another.<sup>75</sup>

Schools are not required to allow students to retain legal representation throughout the process.<sup>76</sup> However, if a school does allow legal representation, the school must afford that right to each party equally.<sup>77</sup> Additionally, the letter "strongly discourages schools from allowing the parties personally to question or cross-examine each other."<sup>78</sup>

OCR issued additional guidance on April 29, 2014,<sup>79</sup> mandating that schools use the preponderance of the evidence standard and ensure the complainant's safety during the disciplinary proceedings.<sup>80</sup> The guidance also suggests that schools do not use students as adjudicators in disciplinary proceedings<sup>81</sup> and requires that investigators and adjudicators be prohibited from asking questions about the accuser's past sexual encounters with anyone other than the accused.<sup>82</sup>

Institutions risk loss of funding<sup>83</sup> and the initiation of an OCR investigation<sup>84</sup> if they do not to comply with these requirements.<sup>85</sup> This leverage allows the OCR to set standards for sexual assault disciplinary proceedings on many college campuses.<sup>86</sup>

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73. DEAR COLLEAGUE LETTER, *supra* note 32, at 11–12.

74. *See id.*

75. *See id.* at 10.

76. *See id.* at 12.

77. *See id.*

78. *Id.*

79. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter OCR QUESTIONS AND ANSWERS], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [https://perma.cc/4TAL-T8JD].

80. *See id.* at 13; *see also* Perkins, *supra* note 71.

81. *See* OCR QUESTIONS AND ANSWERS, *supra* note 79, at 30 n.30.

82. *See id.* at 31; *see also* Perkins, *supra* note 71.

83. *See* Major Robert E. Murdough, *Barracks, Dormitories, and Capitol Hill: Finding Justice in the Divergent Politics of Military and College Sexual Assault*, 223 MIL. L. REV. 233, 253 n.90 (2015); *see also* Charles M. Sevilla, *Campus Sexual Assault Allegations, Adjudications, and Title IX*, CHAMPION, Nov. 2015, at 16.

84. *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutes with Open Title IX Sexual Violence Investigations (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [https://perma.cc/DV9B-WWXU].

85. *See* DEAR COLLEAGUE LETTER, *supra* note 32, at 16.

86. *See id.*; *see also* Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 281–83 (2009); Sevilla, *supra* note 83, at 19.

### B. Recent Legislation

Some colleges have declined to follow the OCR's guidance, and their disciplinary procedures have been scrutinized as a result.<sup>87</sup> Coupled with high rates of sexual assault on college campuses, this has sparked a national conversation and prompted efforts from the White House,<sup>88</sup> Congress, and state legislatures<sup>89</sup> to prevent and appropriately deal with sexual assault on college campuses.

Most notably, Congress passed the Campus Sexual Violence Elimination Act (Campus SaVE Act or "the Act") on March 7, 2013.<sup>90</sup> The Campus SaVE Act was intended to increase transparency with respect to sexual violence on campus.<sup>91</sup> First, the Act mandates that schools report instances of domestic violence, dating violence, and stalking.<sup>92</sup> Additionally, the Act requires that schools publish the details of their disciplinary proceedings, develop awareness and prevention programs, and provide training for all participating school officials.<sup>93</sup>

The Act codifies part of the OCR guidance from the "Dear Colleague" letter, including the requirements that schools publish the details of their

87. The OCR has launched numerous investigations into colleges' responses to sexual assault allegations. *See* U.S. Dep't of Educ., *supra* note 84. Colleges' handling of sexual assault accusations also has faced much scrutiny in the media in recent years. *See, e.g.,* Bogdanich, *supra* note 35; Robin Wilson, *Colleges Under Investigation for Sexual Assault Wonder What Getting It Right Looks Like*, CHRON. HIGHER EDUC. (Aug. 11, 2015), <http://chronicle.com/article/Colleges-Under-Investigation/232205> [https://perma.cc/398Q-NURK].

88. On January 22, 2014, President Obama established a White House Task Force to Protect Students from Sexual Assault ("the Task Force"). *See* Press Release, White House Office of Press Sec'y, Memorandum—Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [https://perma.cc/SSK8-K83N]. The Task Force released its first report in April 2014, which sanctioned much of what was included in the OCR's "Dear Colleague" letter. *See generally* NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT (2014), <https://www.notalone.gov/assets/report.pdf> [https://perma.cc/W5H9-HGLH]; *see also* Perkins, *supra* note 71, at 20.

89. California and New York recently passed affirmative consent laws, or "yes means yes" laws, which require that college students obtain "affirmative consent" prior to and while engaging in sexual activity. *See* Aaron Mendelson, *California Passes 'Yes-Means-Yes' Campus Sexual Assault Bill*, REUTERS (Aug. 29, 2014), <http://www.reuters.com/article/2014/08/29/us-usa-california-sexcrimes-idUSKBN0GT0U920140829> [https://perma.cc/7TD4-3HH9]; Press Release, Governor Cuomo Signs 'Enough is Enough' Legislation to Combat Sexual Assault on College and University Campuses (July 7, 2015), <http://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university> [https://perma.cc/A9TG-V8GQ]. Many other states are considering implementing similar laws. *See* Jennifer Medina, *Sex Ed Lesson: "Yes Means Yes," But It's Tricky*, N.Y. TIMES (Oct. 14, 2015), <http://www.nytimes.com/2015/10/15/us/california-high-schools-sexual-consent-classes.html> [https://perma.cc/46Y9-V3F7].

90. *See* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (codified as amended in 20 U.S.C. § 1092(f)).

91. *See* Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 444 (2014).

92. Violence Against Women Reauthorization Act § 304(a).

93. *Id.* § 304(a)(5).

disciplinary procedures, provide appropriate notice to the parties, and create awareness and prevention programs.<sup>94</sup> Notably, however, the Campus SaVE Act does not codify the use of the preponderance of the evidence standard.<sup>95</sup> The Act solely requires that schools use a uniform standard and provide a “prompt, fair, and impartial” proceeding and determination.<sup>96</sup> This includes permitting both parties to have others present at the hearing and informing both parties simultaneously of any decisions in writing.<sup>97</sup>

Additionally, the Campus SaVE Act implements numerous requirements to protect accusers<sup>98</sup>: (1) the accuser must be informed of the policy and potential sanctions and be provided contact information for medical, counseling, and legal services; (2) the accuser can ask for changes in their academic, living, and working conditions; (3) schools must assist accusers in obtaining legal protection from the accused, such as a restraining order; and (4) schools must assist accusers if they choose to pursue criminal charges.<sup>99</sup>

### C. Newly Proposed Legislation

OCR guidance and the Campus SaVE Act have not quelled the debate surrounding the proper adjudication of campus sexual assault. Scholars have criticized the current procedures as lacking adequate protection for the accused.<sup>100</sup> Congress has since proposed three bills aimed at reducing the prevalence of sexual assault on college campuses. Of the three, one purports to provide additional protection for accusers, and two intend to add additional due process protections for the accused.

#### 1. The Campus Accountability and Safety Act (CASA)

Congress is currently considering the Campus Accountability and Safety Act (CASA), which would standardize college responses to sexual assault allegations and provide additional procedural protection for accusers.<sup>101</sup> The bill would require schools to (1) appoint a confidential advisor for accusers to provide support and assistance throughout the reporting and healing process, (2) provide accusers and the accused with notice of the initiation of an investigation within twenty-four hours, (3) provide

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94. See DEAR COLLEAGUE LETTER, *supra* note 32, at 13–15.

95. Violence Against Women Reauthorization Act § 304(a)(5).

96. *Id.*

97. See Duncan, *supra* note 91, at 453.

98. See *id.*

99. See Violence Against Women Reauthorization Act § 304(a)(5).

100. See, e.g., Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [<https://perma.cc/K8XU-NCJ9>]; Eugene Volokh, *Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/> [<https://perma.cc/44QJ-C6ST>].

101. See generally Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).

specialized training for all involved in the proceedings, and (4) enter a memorandum of understanding with local law enforcement to delineate the roles that each would play during an investigation of a sexual assault accusation.<sup>102</sup> CASA also would create a safe harbor provision for reporting students and impose fees upon schools for noncompliance.<sup>103</sup>

The bill would additionally implement requirements that schools survey their students every two years about their experiences with sexual violence and publish the results.<sup>104</sup> The DOE also would be required to publish the names of schools under investigation for Title IX violations.<sup>105</sup>

## 2. The Safe Campus Act and the Fair Campus Act

The previous section outlined the provisions of CASA, a bill that aims to add additional protections for accusers. Dueling bills also have been proposed which would greatly increase the procedural due process protections of the accused in campus sexual assault disciplinary proceedings.

Congress is currently considering two related bills: the Safe Campus Act<sup>106</sup> and the Fair Campus Act.<sup>107</sup> The bills are substantively very similar. Both would require that accusers and the accused receive written notice of the initiation of an investigation and a meaningful opportunity to respond to allegations, the right to representation (by an attorney or other advocate), and the right to examine witnesses.<sup>108</sup> Both bills further mandate that colleges make all evidence available to both parties.<sup>109</sup> To limit conflicts of interest, individuals would not be permitted to play multiple roles in the investigation and adjudicatory processes.<sup>110</sup> Reporting students and witnesses also would receive safe harbor assurance so that they will not be punished for other violations that are revealed because of their cooperation.<sup>111</sup> Further, both of the proposed bills would allow a school to use the standard of proof that it deems appropriate.<sup>112</sup> Finally, each would create a private right of action for students found erroneously responsible for sexual assault, allowing them to bring a federal civil action against their schools within a year of the decision.<sup>113</sup> A court would then review the school's decision to determine whether it was "arbitrary, capricious, or contrary to law."<sup>114</sup>

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102. *Id.* §§ 3, 4, 7.

103. *Id.* § 4.

104. *Id.* § 2.

105. *Id.* § 5.

106. Safe Campus Act of 2015, H.R. 3403, 114th Cong. (2015).

107. Fair Campus Act of 2015, H.R. 3408, 114th Cong. (2015).

108. *See* H.R. 3403 § 2; H.R. 3408 § 2.

109. *See* H.R. 3403 § 2; H.R. 3408 § 2.

110. *See* H.R. 3403 § 2; H.R. 3408 § 2.

111. *See* H.R. 3403 § 2; H.R. 3408 § 2.

112. *See* H.R. 3403 § 2; H.R. 3408 § 2.

113. *See* H.R. 3403 § 2; H.R. 3408 § 2.

114. *See* H.R. 3403 § 2; H.R. 3408 § 2.

The sole difference between the two bills is the proposed role of law enforcement in campus disciplinary proceedings. The Safe Campus Act would require schools to alert law enforcement of any sexual assault allegations before initiating an investigation on their own.<sup>115</sup> If the alleged victim reported the incident to the school but did not wish to involve the police, “the institution may not initiate or otherwise carry out any institutional disciplinary proceeding with respect to the allegation.”<sup>116</sup> Thus, under the Safe Campus Act, law enforcement would have to be notified for the accuser to seek justice in any capacity.<sup>117</sup> The Fair Campus Act includes no such provision.<sup>118</sup>

## II. EVALUATING CAMPUS SEXUAL ASSAULT DISCIPLINARY PROCEDURES: JUDICIAL REVIEW

The recent national focus on sexual assault and the newly proposed legislation highlight the tension between the interests of the accusers, the accused, and the schools with respect to campus sexual assault disciplinary tribunals. This part outlines the issues with which courts have grappled to evaluate the current model of campus sexual assault tribunals and whether it strikes the appropriate balance between these competing interests. Part II.A describes the competing interests at stake. Part II.B then focuses on judicial review and examines the methods that courts have used to evaluate the decisions of campus sexual assault tribunals on both public and private college campuses.

### A. *Competing Interests*

All students have an interest in their education that schools must protect to the utmost extent.<sup>119</sup> Education plays a paramount role in society today. Thus, school disciplinary procedures should promote a secure environment conducive to learning and avoid erroneously denying students their education.

#### 1. Interests of the Accusers and the Accused

Considering the prevalence of sexual assault on college campuses,<sup>120</sup> a school's priority should be to protect its students from sexual violence. For victims, sexual assault is a traumatizing event that often bears lifelong consequences.<sup>121</sup> These symptoms may be exacerbated if the assailant

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115. See H.R. 3403 § 2.

116. See *id.*

117. See *id.*

118. See H.R. 3408 § 2.

119. See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988) (“The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma are, of course, paramount.”).

120. See *supra* note 33 and accompanying text.

121. See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 398 (2005). While the lifelong effects of sexual assault on victims should not be overlooked, this

remains on campus,<sup>122</sup> and therefore an accuser's primary goal when initiating proceedings may be to remove the accused from campus. An accused student's presence on campus may effectively deny an accuser his or her right to an education.<sup>123</sup> As such, accusers have an interest in fast proceedings and hearings that do not require them to confront the accused.<sup>124</sup> Further, some argue that school procedures should be "victim-centered," or primarily intended to protect the alleged victim of sexual assault.<sup>125</sup>

However, accused students have an interest in their education and protecting their public image, both of which are important for a student's education and eventual professional life. The consequences of expulsion from a college can be long lasting.<sup>126</sup> Students dismissed from school retain disciplinary records that can impede transfer to another school, graduation, and admission to graduate and professional schools.<sup>127</sup> Because many jobs require specified degrees, expulsion has the potential to limit severely a student's future career options.<sup>128</sup> Accused students also have an interest in protecting their good name.<sup>129</sup> The internet and the prevalence of social media on college campuses likely intensifies the effect an erroneous conviction can have on a student's reputation.

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Note focuses solely on the accusers' interests in the context of school disciplinary proceedings.

122. *See id.* at 398–99.

123. *See* Sarah Edwards, *The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 *DUKE J. GENDER L. & POL'Y* 121, 137 (2015) ("Unlike the criminal justice system, universities have the power to separate the victim from her attacker once a report is received, thus minimizing the risk that the victim will be deprived of access to education and the ability to succeed at her school.").

124. Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 *B.C. L. REV.* 653, 660 (2001).

125. *See, e.g.*, Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 *J.C. & U.L.* 613, 682–83 (2009) [hereinafter Cantalupo, *Campus Violence*]; Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 *NASPA J. ABOUT WOMEN HIGHER EDUC.* 49, 57–66, 70–74 (2010) [hereinafter Cantalupo, *College Response*]; *see also* Diane L. Rosenfeld, Commentary, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 *HARV. L. REV. F.* 359, 369 (2015).

126. *See* *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (noting that a student being suspended from high school could impact future employment opportunities); *see also* Tenerowicz, *supra* note 124, at 683.

127. *See* Robert B. Groholski, Comment, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law*, 19 *N. ILL. U. L. REV.* 739, 786–87 (1999); *see also* Tenerowicz, *supra* note 124, at 683. However, it has been argued that few students that are found responsible for sexual assault are actually expelled. *See* Tylor Kingkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, *HUFFINGTON POST: BREAKING THE SILENCE* (Sept. 29, 2014, 8:59 AM), [http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault\\_n\\_5888742.html](http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html) [<https://perma.cc/9NK3-YHUK>].

128. *See* Goholski, *supra* note 127, at 786; *see also* Tenerowicz, *supra* note 124, at 683.

129. *See* Goholski, *supra* note 127, at 786–87; *see also* Tenerowicz, *supra* note 124, at 683.

Additionally, accused students have an interest in the assistance of legal, or other, representation to navigate the often-intimidating school disciplinary process.<sup>130</sup> This interest is particularly high for accused students because testimony delivered during an on-campus hearing may be admissible in a criminal proceeding related to the same charges.<sup>131</sup>

Both accusers and the accused have an interest in fair proceedings that effectively adjudicate sexual assault accusations. For accusers, this includes fast and efficient proceedings with minimal due process protections for the accused, particularly no guarantee of a right to confront<sup>132</sup> and the use of a preponderance of the evidence standard of proof.<sup>133</sup> For the accused, this includes an adversarial hearing with the opportunity to confront the accuser and adverse witnesses, unbiased investigators and adjudicators, the right to representation, and the use of a higher standard of proof than the preponderance of the evidence standard.<sup>134</sup>

## 2. Interests of the School

Schools are under pressure to handle sexual assault allegations effectively and to protect their student bodies through effectuating procedures that appropriately balance the interests of the accusers and the accused. In doing so, schools must also consider their limited resources and the cost of additional procedure.<sup>135</sup>

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130. See Tenerowicz, *supra* note 124, at 692; see also Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 341 (1999); Groholski, *supra* note 127, at 789.

131. See Douglas R. Richmond, *Students' Right to Counsel in University Disciplinary Proceedings*, 15 J.C. & U.L. 289, 300 (1989); Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 373 (1987); Tenerowicz, *supra* note 124, at 691.

132. The "Dear Colleague" letter indicated that allowing the parties to personally cross-examine each other "may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment." DEAR COLLEAGUE LETTER, *supra* note 32, at 12; see also Swem, *supra* note 131, at 377; Tenerowicz, *supra* note 124, at 690.

133. A controversial aspect of the "Dear Colleague" letter is the mandated use of the preponderance of the evidence standard. Some argue that it unfairly tips the scale in favor of the accusers. See, e.g., Ryan D. Ellis, *Mandating Injustice: The Preponderance of the Evidence Mandate Creates a New Threat to Due Process on Campus*, 32 REV. LITIG. 65, 80–81 (2013); Barclay Sutton Hendrix, Note, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 610–15 (2013). Others argue that it appropriately protects the interests of the accusers over those of the accused. See Weizel, *supra* note 54, at 1645–55 (arguing that the preponderance of the evidence standard appropriately balances the interests of accused students in continued education, the risk of erroneous deprivation of the students' interests, and the schools' interest in responding to sexual assault on campus under *Mathews v. Eldridge*); see also Edwards, *supra* note 123, at 132–36; Amy Chmielewski, Note and Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 148.

134. See *infra* notes 272–84.

135. See Hogan, *supra* note 86, at 282–83.

First, schools have an interest in maintaining order on their campuses and protecting the student body.<sup>136</sup> Policies and procedures that fail to punish students for their wrongful acts will allow violent students to remain on campuses, which can create a safety risk and a hostile environment.<sup>137</sup>

Similarly, schools have an interest in complying with Title IX because noncompliance can compel an OCR investigation and loss of funding.<sup>138</sup> The threat of revocation of federal funds incentivizes schools to punish all students accused of sexual assault.<sup>139</sup>

Schools also have an interest in preserving private funding by protecting their reputation and managing their public image.<sup>140</sup> Many colleges that rely on private donations fear that negative media attention about sexual assaults could impact contributions.<sup>141</sup> On the other hand, students found responsible for sexual assault have argued that adverse media attention has had a contrary effect by causing schools to “railroad” students and invariably find the accused responsible.<sup>142</sup>

Finally, schools have an interest in avoiding litigation.<sup>143</sup> Wronged victims generally have had more success suing their schools for improperly handling sexual assault accusations than the accused have had suing their schools for due process violations, Title IX discrimination, or breaches of contract.<sup>144</sup> Commentators have argued that this unequal threat of litigation incentivizes schools to hold accused students accountable by implementing and conducting proceedings that are unfairly stacked against the accused.<sup>145</sup>

*B. The Courts Weigh In:  
Judicial Review of Campus Disciplinary Tribunal Decisions*

The wave of new standards on college campuses has demonstrated that “the legislative and executive branches clearly expect[] college officials to adjudicate potential sex crimes, to do so swiftly and harshly, and that due process would be of secondary concern.”<sup>146</sup> As a result, those accused of sexual misconduct, and who believe that they erroneously were found

136. *See* *Goss v. Lopez*, 419 U.S. 565, 580 (1975); *see also* Berger & Berger, *supra* note 130, at 353.

137. *See generally* Cantalupo, *supra* note 41; Edwards, *supra* note 123, at 137 (“[C]ampus adjudication of sexual violence is an anti-discrimination right, protecting students’ access to educational opportunities at their respective schools.”).

138. *See supra* notes 83–86 and accompanying text.

139. *See* Henrick, *supra* note 41, at 81.

140. *See id.* at 81–83.

141. *See id.*

142. *See, e.g.,* *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*8, \*10 (W.D. Va. Aug. 5, 2015); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 360 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015).

143. *See* Henrick, *supra* note 41, at 81.

144. *See id.* at 77–79; *see also* Nancy Chi Cantalupo, *Violating Student Victims’ Rights Is Expensive*, TIME (May 15, 2014), <http://time.com/99697/campus-sexual-assault-nancy-chi-cantalupo/> (“[S]chools face exponentially more expensive liability for violating student victims’ rights under Title IX . . . than they do for violating accused assailants’ due process rights.”) [<https://perma.cc/D3EQ-25EW>].

145. *See* Sevilla, *supra* note 83, at 19; *see also* Henrick, *supra* note 41, at 75.

146. Murdough, *supra* note 83, at 254.

responsible because of fundamentally unfair adjudicatory procedures, have filed an increasing number of lawsuits against their schools.<sup>147</sup> Part II.B.1 outlines the recent cases in which students have alleged that their schools' disciplinary proceedings were fundamentally unfair and violated their due process rights. Part II.B.2 then outlines the recent Title IX cases in which students have alleged that their schools erroneously found them responsible for sexual assault due to gender discrimination. Part II.B.3 discusses the implications of the cases discussed in the two previous sections.

It is important to note that the role of courts in reviewing decisions of colleges is "neither to advocate for the best practices or policies nor to retry disciplinary proceedings."<sup>148</sup> However, courts' focus on determining the merits of due process and Title IX claims sheds light on potential best practices for handling sexual misconduct on college campuses.

### 1. Due Process Cases

After the OCR issued its "Dear Colleague" letter in 2011, a number of students who alleged that they had been wrongfully found responsible for sexual assault sued their schools for procedural due process violations.<sup>149</sup> However, because students facing disciplinary action at school do not face the same consequences that they would face in the criminal justice system,<sup>150</sup> courts have been hesitant to overturn these decisions as long as the schools afforded students minimal due process protections.<sup>151</sup> Recently, however, courts have overturned the findings of campus tribunals in two cases, perhaps signaling the beginning of the courts' recognition of the fundamentally unfair nature of school procedures after the "Dear Colleague" letter.<sup>152</sup> This section outlines what courts have considered due process violations to identify the elements of campus procedures in need of reform.

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147. According to data tracking all of the due process lawsuits brought by students found responsible for sexual misconduct violations, over 100 lawsuits have been filed since OCR's issuance of its "Dear Colleague" letter. *See Database: Due Process Lawsuits Against Colleges and Universities*, BOYS & MEN EDUC. (updated Nov. 27, 2015) [hereinafter *Due Process Database*], [http://boysmeneducation.com/lawsuits-database/#lawsuits/?view\\_14\\_sort=field\\_19|desc&view\\_14\\_per\\_page=all&view\\_14\\_page=1](http://boysmeneducation.com/lawsuits-database/#lawsuits/?view_14_sort=field_19|desc&view_14_per_page=all&view_14_page=1) [https://perma.cc/YR5B-AKNW].

148. *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 461 (S.D.N.Y. 2015) (citing *Doe v. Univ. of S.*, 687 F. Supp. 2d 744, 755 (E.D. Tenn. 2009)).

149. *See supra* note 147 and accompanying text.

150. *See Cantalupo, supra* note 41, at 517 ("[T]he deprivations of property involved in a school expulsion are not comparable to sending someone to jail and potentially requiring registration as a sex offender.").

151. *See Schaer v. Brandies Univ.*, 735 N.E.2d 373, 381 (Mass. 2000) ("A university is not required to adhere to the standards of due process guaranteed to criminal defendants . . ."); *see also Cantalupo, supra* note 41, at 512–15.

152. *See Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II, at \*23 (Tenn. Ch. Ct. Aug. 10, 2015); *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*6 (Cal. Super. Ct. July 10, 2015) (order granting petition for writ of mandamus), *appeal docketed*, No. D068901 (Cal. Ct. App. Sept. 11, 2015). This unreported order can be found at [http://www.nacua.org/documents/Doe\\_v\\_RegentsUCASanDiego.pdf](http://www.nacua.org/documents/Doe_v_RegentsUCASanDiego.pdf) [https://perma.cc/9RSB-JW3D].

To evaluate whether a school has violated a student's due process rights, courts consider a number of factors including whether the school provided the student with adequate notice of the charges against him or her, whether the school conducted a proper hearing, whether the school afforded the student the right to confront, and whether the school provided the student with a right to counsel.<sup>153</sup> Recent cases demonstrate that courts have not been consistent with respect to what constitutes a due process violation.<sup>154</sup> Instead, courts have recognized that due process is meant to be a flexible standard and that the process owed in a particular situation depends on the balancing of the three factors that the Supreme Court articulated in *Mathews v. Eldridge*<sup>155</sup>:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>156</sup>

Courts have found that due process requires that the accused receive sufficient notice of the charges against him or her in a sufficient amount of time prior to the commencement of disciplinary proceedings.<sup>157</sup> Additionally, one court has held a denial of a hearing to be a due process violation, even where the accused student had the opportunity to respond to the allegations against him through various meetings and writings.<sup>158</sup>

Courts have generally found that students do not have a right to counsel in the context of school disciplinary proceedings<sup>159</sup> and that a student's counsel need not be permitted to take part in disciplinary hearings.<sup>160</sup>

153. See *infra* notes 157–65 and accompanying text.

154. See, e.g., *Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*4 (order granting petition for writ of mandamus); *Sterret v. Cowan*, 85 F. Supp. 3d 916, 929 (E.D. Mich. 2015), *appeal dismissed*, No. 15-1121 (6th Cir. Feb. 6, 2015).

155. 424 U.S. 319 (1976).

156. *Id.* at 335.

157. See *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at \*6 (W.D.N.C. July 22, 2015) (finding that “at a minimum due process requires adequate notice” and that less than twenty-four-hours notice of a charge against plaintiff warranted denying the defendant’s motion to dismiss (citing *Goss v. Lopez*, 419 U.S. 565, 579 (1975))); *Sterret*, 85 F. Supp. 3d at 927 (holding that a student receiving notice of the charges against him after an initial interview “may state a claim of a violation of his due process in light of the length of his suspension”).

158. See *Sterret*, 85 F. Supp. 3d at 929.

159. See *Tanyi*, 2015 WL 4478853, at \*4 (“The Due Process Clause does not necessarily require that students facing expulsion be represented by licensed attorneys.”); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988); see also *Hogan*, *supra* note 86, at 289–91. In the past, courts have split as to whether students should be afforded the right to legal counsel in school disciplinary hearings. See *Swem*, *supra* note 131, at 372.

160. See *Tanyi*, 2015 WL 4478853, at \*4 (citing *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993)); see also *Johanna Matloff*, Note, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169, 172–73, 172 n.23 (2001) (discussing whether attorneys should function solely as advisors or should be permitted to play an active role in the disciplinary proceedings). Courts additionally have split about the role that counsel should play in school disciplinary

Courts also have considered whether schools must provide accused students with the opportunity to confront and cross-examine witnesses and accusers.<sup>161</sup> Generally, students are not entitled to cross-examination at school disciplinary hearings.<sup>162</sup> However, where the charges are particularly serious—such as sexual assault—courts have been more willing to find that schools should grant students the right to cross-examination.<sup>163</sup> In some cases, permitting the accused student to cross-examine adverse witnesses through the hearing panel by submitting questions to the panel to ask the accuser questions at their discretion is sufficient.<sup>164</sup> However, a recent state court found this method to be fundamentally unfair to the accused.<sup>165</sup>

The denial of the accused student's right to confront and cross-examine adverse witnesses, especially the accuser, was a significant factor in the San Diego Superior Court's recent ruling overturning the findings of a University of San Diego campus tribunal.<sup>166</sup> In *Doe v. Regents of the University of California San Diego*,<sup>167</sup> the court found that the use of the tribunal as an intermediary and the placing of the accuser behind a barrier unfairly limited the accused student's right to confront.<sup>168</sup> The Panel Chair asked only nine out of the thirty-two questions that the accused student submitted to the panel and did not ask any follow-up questions.<sup>169</sup> With respect to the use of the barrier, the court found that this too unfairly limited

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proceedings, specifically as to whether their role should be solely advisory. See Groholoski, *supra* note 127, at 773–81; Swem, *supra* note 131, at 374.

161. See, e.g., *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL (Cal. Super. Ct. July 10, 2015) (order granting petition for writ of mandamus), *appeal docketed*, No. D068901 (Cal. Ct. App. Sept. 11, 2015); *Sterret v. Cowan*, 85 F. Supp. 3d 916 (E.D. Mich. 2015), *appeal dismissed*, No. 15-1121 (6th Cir. Feb. 6, 2015).

162. See, e.g., *Sterret*, 85 F. Supp. 3d at 929 (“[C]onfronting the [c]omplainant, let alone other witnesses, is not an absolute right and is generally not part of the due process requirement in a school disciplinary setting.” (citations omitted)); see also Hogan, *supra* note 86, at 291–92.

163. See, e.g., *Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*4 (reversing the school's determination because the school denied the student the opportunity to meaningfully cross-examine adverse witnesses); see also Hogan, *supra* note 86, at 291–92.

164. See Hogan, *supra* note 86, at 292 (explaining that using the panel as an intermediary is an adequate alternative to direct examination, as “the thought of a student accused of rape cross-examining the student complainant is unsettling from a practical as well as legal standpoint in light of the university's duties to the student complainant under Title IX”).

165. See *Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*4 (finding that only asking nine of the accused's thirty-two questions “curtailed the right of confrontation crucial to any definition of a fair hearing”).

166. *Id.* at \*2–4.

167. No. 37-2015-00010549-CU-WM-CTL (Cal. Super. Ct. July 10, 2015) (order granting petition for writ of mandamus), *appeal docketed*, No. D068901 (Cal. Ct. App. Sept. 11, 2015).

168. *Id.*

169. *Id.* at \*4.

the accused student's right to confront, noting "the importance demeanor and non-verbal communication" play in "evaluat[ing] credibility."<sup>170</sup>

Excluding certain evidence also contributed to the court's finding that the school inappropriately limited the accused student's right to confront.<sup>171</sup> The court found that the introduction of a school investigator's report without the investigator's testimony at the hearing constituted a due process violation because the accused student did not have the opportunity to confront the investigator and "refute [her] findings."<sup>172</sup> Additionally, the accused student was not able to review the fourteen witness statements and the two interview statements of the accuser that the investigator relied on to generate the report.<sup>173</sup> Further, the court found that the panel's reliance on this report "improperly delegate[d] the panel's duty to an outside witness that was not present at the hearing."<sup>174</sup>

In evaluating whether the school's findings were supported by substantial evidence, the court criticized the tribunal's failure to consider evidence of the parties' actions after the alleged incident.<sup>175</sup> The court found that the totality of the evidence, particularly because the accuser "admitted that she voluntarily continued consensual sexual activity with [the accused student] later that very same day," did not show "non-consensual behavior," but rather the accuser's "personal regret for engaging in sexual activity beyond her boundaries."<sup>176</sup> The court noted that "[d]ue process requires that a hearing . . . be a real one, not a sham or a pretense."<sup>177</sup> The court reversed the school's decision and held that the hearing was "unfair and that evidence did not support the findings."<sup>178</sup>

The court in *Mock v. University of Tennessee at Chattanooga*<sup>179</sup> similarly reversed the decision of a school's disciplinary tribunal finding that the University of Tennessee at Chattanooga Chancellor presiding over the proceeding "improperly shifted the burden of proof and imposed an untenable standard upon Mr. Mock to disprove the accusation that he forcible [sic] assaulted Ms. Morris."<sup>180</sup> The court found that requiring the

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170. *Id.* at \*3. Courts disagree as to whether placing the accuser behind a barrier during the proceedings diminishes the accused student's opportunity to confront the accuser. Compare *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721 (1st Cir. 1983) (finding that use of a barrier did not constitute a due process violation), with *Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*2; see also Hogan, *supra* note 86, at 293.

171. See *Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*3.

172. *Id.*

173. See *id.*

174. *Id.*

175. *Id.* at \*5.

176. *Id.*

177. *Id.* at \*3 (quoting *Ciechon v. City of Chi.*, 686 F.2d 511, 517 (7th Cir. 1982)).

178. *Id.* at \*6.

179. No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015).

180. *Id.* at \*23. The school's policy was similar to the affirmative consent laws that California and New York have passed. See *supra* note 89. Extended discussion regarding the constitutionality of affirmative consent laws aside from discussion of *Mock* is beyond the scope of this Note. However, this case suggests that affirmative consent laws deny accused students their due process rights. See Sevilla, *supra* note 83, at 19 (discussing the implication

accused to prove that he received affirmative consent is “flawed and untenable if due process is to be afforded the accused.”<sup>181</sup> The court further emphasized that this policy lacks “fundamental fairness” due to the difficulties that students would have in proving that they received affirmative consent.<sup>182</sup>

In sum, courts employ a case-by-case analysis to determine whether a school has afforded a student adequate due process during a disciplinary proceeding. Courts generally have been reluctant to overturn the decisions of campus tribunals and have set a high bar for what constitutes a due process violation. However, *Regents of the University of California San Diego* and *Mock* demonstrate the lower threshold that two state courts have recently applied to determine whether a due process violation has occurred, highlighting the inadequacies of campus tribunals and perhaps signaling the need for reform.<sup>183</sup>

## 2. Title IX Cases: Erroneous Outcome Claims

Students accused of and found responsible for sexual assault violations on either private or public college campuses can bring Title IX claims in federal court alleging that their school intentionally discriminated against them on the basis of their gender. Individuals can bring a Title IX claim against their school for intentional gender discrimination, similar to Title VI

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of *Mock* and the future of affirmative consent laws); see also Allison L. Marciniak, *The Case Against Affirmative Consent: Why the Well-Intentioned Legislation Dangerously Misses the Mark*, 77 U. PITT. L. REV. 51, 57–67 (2015) (arguing that California’s affirmative consent law mandating that school disciplinary hearings use a preponderance of the evidence standard denies the accused their due process rights).

181. *Mock*, No. 14-1687-II, at \*11.

182. *Id.* at \*12 (noting the near impossibility of proving affirmative consent, stating that “[a]bsent the tape recording of a verbal consent or other independent means to demonstrate that consent was given, the ability of an accused to prove the complaining party’s consent strains credulity and is illusory”).

183. See *Mock*, No. 14-1687-II; *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL (Cal. Super. Ct. July 10, 2015) (order granting petition for writ of mandamus), *appeal docketed*, No. D068901 (Cal. Ct. App. Sept. 11, 2015); see also SAMANTHA HARRIS, HERITAGE FOUND., *CAMPUS JUDICIARIES ON TRIAL: AN UPDATE FROM THE COURTS* 6 (2015), [http://thf\\_media.s3.amazonaws.com/2015/pdf/LM165.pdf](http://thf_media.s3.amazonaws.com/2015/pdf/LM165.pdf) (observing that state courts are more willing to overturn school disciplinary decisions if the student is able to demonstrate that the proceedings were unfair, while federal courts hold students to a more stringent standard, requiring that they demonstrate deprivation of due process rights) [<https://perma.cc/LC38-693T>]. Recently, courts have also expressed concern that interim suspensions violate an accused student’s presumption of innocence. See Robby Soave, *Judge Stops USC from Expelling Football Player Who Failed to Prove He Wasn’t a Rapist*, HIT & RUN BLOG (Aug. 13, 2015, 12:10 PM), <https://reason.com/blog/2015/08/13/judge-stops-usc-from-expelling-football> (explaining the reinstatement of a student found responsible for sexual assault citing due process concerns) [<https://perma.cc/L8AC-LUB8>]; see also Press Release, Werksman, Jackson, Hathaway & Quinn, LLP, *California Judge Issues Stinging Rebuke of UC Davis’ Handling of Title IX Sexual Misconduct Case* (Oct. 12, 2015), <http://boysmeneducation.com/wp-content/uploads/2015/11/Press-Release-Werksman-Jackson-Hathaway-Quinn-University-of-California-Davis-case.pdf> [<https://perma.cc/B39G-G3TY>].

claims on which Title IX was modeled.<sup>184</sup> Courts have not recognized that students can bring Title IX claims based on the disparate impact theory, as individuals may bring with respect to Title VII of the Civil Rights Act of 1964.<sup>185</sup> Thus, because valid Title VI claims require that individuals prove discriminatory intent, courts have held that discriminatory intent, or proof that “gender bias [is] a motivating factor,” is similarly required for Title IX claims.<sup>186</sup>

This intent requirement has proven difficult for plaintiffs to plead successfully and has resulted in frequent dismissals of students’ Title IX claims.<sup>187</sup> Complaints that survive a motion to dismiss usually settle.<sup>188</sup> Nevertheless, the decisions in these cases, even at the pleading stage, are probative as to the fundamental fairness of campus sexual assault tribunals on college campuses.

The Second Circuit in *Yusuf v. Vassar College*<sup>189</sup> articulated the two categories of claims that students can bring to argue that a school’s disciplinary proceedings violated Title IX: (1) “erroneous outcome” claims and (2) “selective enforcement” claims.<sup>190</sup> In the erroneous outcome category, “the claim is that the plaintiff was innocent and wrongly found to have committed an offense.”<sup>191</sup> In the selective enforcement category, the “claim asserts that, regardless of the student’s guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was

184. See *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714–15 (2d Cir. 1994). In *Cannon v. University of Chicago*, the Supreme Court held that Title IX should be interpreted similarly to Title VI. 441 U.S. 677, 690–98 (1979) (finding that Title IX prescribed a private right of action because it was “patterned after Title VI of the Civil Rights Act of 1964,” which prohibits discrimination in federally funded programs or activities on the basis of race, color, or national origin). The Court additionally has held that individuals cannot bring disparate impact claims under Title VI. See *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001); see also *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 367 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015). Because individuals only can bring claims of intentional discrimination under Title VI, courts have dismissed Title IX claims based on a disparate impact theory. See, e.g., *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at \*15 (E.D. Va. Sept. 16, 2015); *Weser v. Glen*, 190 F. Supp. 2d 384, 395 (E.D.N.Y. 2002), *aff’d*, 41 F. App’x 521 (2d Cir. 2002).

185. See *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 461–62 (S.D.N.Y. 2015) (citing *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009)). Under Title VII, individuals can bring claims for both intentional discrimination and practices or procedures that have a discriminatory effect, or disparate impact, on a protected class. *Ricci*, 557 U.S. at 577.

186. *Yusuf*, 35 F.3d at 715.

187. See, e.g., *Columbia Univ.*, 101 F. Supp. at 374; *George Mason Univ.*, 2015 WL 5553855, at \*16. In fact, one commentator has referred to it as an “impossible to meet threshold.” See Henrick, *supra* note 41, at 75.

188. See, e.g., Yoffe, *supra* note 31; see also Justin Wm. Moyer, *How a Michigan College Student Beat a Sexual Assault Allegation*, WASH. POST (Sept. 16, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/16/how-a-college-student-beat-a-sexual-assault-allegation/> [https://perma.cc/93QW-WJKV]; Ashe Schow, *Here Come the Settlements Over Lack of Due Process in Campus Sexual Assault Hearings*, WASH. EXAMINER (Jan. 27, 2015), <http://www.washingtonexaminer.com/here-come-the-settlements-over-lack-of-due-process-in-campus-sexual-assault-hearings/article/2559331> [https://perma.cc/4F4M-L4A8].

189. 35 F.3d 709 (2d Cir. 1994).

190. *Id.* at 715.

191. *Id.*

affected by the student's gender."<sup>192</sup> The claims require the student to prove that the school either erroneously found him or her responsible or imposed a severe penalty because of the student's gender.<sup>193</sup> The court in *Yusuf* also emphasized that "wholly conclusory allegations" will not survive a Rule 12(b)(6) motion.<sup>194</sup>

*a. The First Prong: Flawed Proceeding  
Led to an Erroneous Outcome*

To assert a valid erroneous outcome claim, the plaintiff "must allege particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding."<sup>195</sup> Examples of such facts include "procedural flaws affecting the proof" or "evidentiary weaknesses behind the finding of an offense such as a motive to lie on the part of the complainant or witnesses, particularized strengths of the defense, or other reason to doubt the veracity of the charge."<sup>196</sup> Additionally, the plaintiff must "allege particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding."<sup>197</sup> Examples include "statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender."<sup>198</sup>

Courts have subsequently interpreted *Yusuf* to require that two prongs be met for a valid erroneous outcome claim.<sup>199</sup> First, the student must

192. *Id.*

193. *Id.* This Note focuses solely on the "erroneous outcome" category of Title IX claims, as most selective enforcement claims are similarly difficult to plead and dismissed for the same reason that erroneous outcome claims are dismissed—because of the difficulty in plausibly pleading that gender was the motivating factor behind either the flawed proceedings that led to an erroneous outcome or the severe punishment imposed upon the plaintiff. *See, e.g., Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 374–75 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015) (finding that the plaintiff's selective enforcement claim fails for the same reason as the plaintiff's erroneous outcome claim—because the plaintiff failed to demonstrate that the school acted in a particular way because of the plaintiff's gender). The court in *Columbia* also indicated that selective enforcement claims must "include . . . allegations that female students 'were treated more favorably in similar circumstances.'" *Id.* at 374–75 (citation omitted). This is a particularly difficult pleading standard to meet as males are more frequently accused of sexual assault than females. *See id.* Stating this alone, however, solely evidences proceedings that disadvantage the accused over the accusers and only has "the effect of burdening men more than women," which is an unrecognized disparate impact claim. *Id.*

194. *Yusuf*, 35 F.3d at 715.

195. *Id.* At least one court has declined to follow the Second Circuit's particularized fact pleading requirement. *See Blank v. Knox Coll.*, No. 14-CV-1386, 2015 WL 328602, at \*3 (C.D. Ill. Jan. 26, 2015) (finding the *Yusuf* standard to be "a pleading standard found in Federal Rule of Civil Procedure 9(b) that applies specifically to allegations of fraud or mistake").

196. *Yusuf*, 35 F.3d at 715.

197. *Id.*

198. *Id.*

199. *See, e.g., Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*12 (D. Md. Aug. 21, 2015); *Doe v. Wash. & Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996, at \*9 (W.D. Va. Aug. 5, 2015).

demonstrate that the disciplinary proceedings were flawed and led to an erroneous outcome.<sup>200</sup> Second, the student must demonstrate that gender bias was “a motivating factor behind the erroneous finding”<sup>201</sup> and “establish a causal link between the erroneous outcome and the gender bias.”<sup>202</sup>

The first prong of *Yusuf* generally has not been difficult for plaintiffs to satisfy<sup>203</sup>—demonstrating that many of the procedures in place at schools are flawed and lead to erroneous outcomes. Courts look to a variety of factors to determine whether the first prong of the *Yusuf* framework is satisfied<sup>204</sup> and have been rather consistent regarding what factors contribute to a finding that a disciplinary proceeding is procedurally flawed.<sup>205</sup> Courts consider the alleged flaws together in determining whether the disciplinary proceedings were sufficiently flawed to cast doubt on the outcome of the investigation and adjudication.<sup>206</sup>

Courts have looked holistically at whether the school’s procedures evidence an effort to rush to judgment to find an accused student responsible for sexual assault.<sup>207</sup> For instance, courts have found that even a day’s notice of the charges against a student prior to a hearing were sufficient and did not evidence a rush to judgment.<sup>208</sup> However, school officials’ failure to appropriately and adequately consider evidence does demonstrate a school’s intent to rush to judgment.<sup>209</sup>

Courts also have found that the denial of the possibility to consult with an attorney during school disciplinary proceedings is not a Title IX violation.<sup>210</sup> However, if the school’s handbook provides that the student has the right to counsel, a denial of that right is a procedural flaw that contributes to a finding that the first *Yusuf* prong is satisfied.<sup>211</sup> In fact, straying from a school’s written policies and procedures is in and of itself evidence of flawed procedures.<sup>212</sup> However, courts have found that “at

200. *Yusuf*, 35 F.3d at 715.

201. *Id.*

202. *Wash. & Lee Univ.*, 2015 WL 4647996, at \*9 (citing *Yusuf*, 35 F.3d at 715).

203. *See, e.g., Wash. & Lee Univ.*, 2015 WL 4647996, at \*10; *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at \*16 (E.D. Va. Sept. 16, 2015).

204. *See infra* notes 207–28 and accompanying text.

205. *See, e.g., Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 462–74 (S.D.N.Y. 2015).

206. *See Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*13 (D. Md. Aug. 21, 2015).

207. *See Wash. & Lee Univ.*, 2015 WL 4647996, at \*10 (finding that plaintiff’s alleged flaws in the school’s proceedings, including omitting and failing to consider particular evidence “amount[ed] to ‘a practice of railroading accused students’” (citation omitted)); *see also Yu*, 97 F. Supp. 3d at 464–65; *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 752 (S.D. Ohio 2014).

208. *See Doe v. Univ. of S.*, 687 F. Supp. 3d 2d 744, 753 (E.D. Tenn. 2009); *see also Yu*, 97 F. Supp. 3d at 464.

209. *See Wash. & Lee Univ.*, 2015 WL 4647996, at \*10.

210. *See, e.g., Yu*, 97 F. Supp. 3d at 464.

211. *See Salisbury*, 2015 WL 5005811, at \*13; *see also Yu*, 97 F. Supp. 3d at 464.

212. *See Yu*, 97 F. Supp. 3d at 464. In the private school setting, many states have recognized that noncompliance with a school’s written policy and procedures also can give rise to a claim of breach of contract. *See Harris, supra* note 183, at 7; *see also, e.g., Yu*, 97 F.

most the student has a right to get the advice of a lawyer; the lawyer need not be allowed to participate in the proceeding in the usual way of trial counsel.”<sup>213</sup>

Additionally, courts have indicated that biased panel members render a disciplinary proceeding fundamentally unfair.<sup>214</sup> However, courts have not found that the use of one individual to fulfill multiple roles throughout the proceeding to be a procedural flaw.<sup>215</sup>

During the hearing, a school’s denial of a student’s opportunity to present witnesses is considered evidence of a flawed proceeding.<sup>216</sup> Additionally, a tribunal’s failure to consider evidence makes it plausible that the disciplinary procedures may have led to an erroneous outcome.<sup>217</sup> Similarly, courts have considered whether schools provide students with information and evidence critical to their case prior to any hearing determination.<sup>218</sup> Misuse of testimony and critical omissions to the panel are also significant procedural flaws.<sup>219</sup>

Supp. 3d at 481–82; *Bleiler v. Coll. of the Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at \*15 (D. Mass. Aug. 28, 2013), *appeal dismissed*, No. 13-2245 (1st Cir. Apr. 8, 2015) (stating that Massachusetts law recognizes that student handbooks and other college materials create a contract between a school and a student). *But see Wash. & Lee Univ.*, 2015 WL 4647996, at \*11 (“Courts applying Virginia law routinely reject the notion that a ‘Student Handbook’ creates a mutuality of engagement where the terms of the handbook are subject to change.”). However, these claims have been relatively unsuccessful, as in many cases “the issue is that a university’s procedures were unfair, not that they were ignored—and unfairness itself does not generally create a breach of contract claim where the college has followed its own procedures.” Harris, *supra* note 183, at 7; *see also Yu*, 97 F. Supp. 3d at 481–82; *Bleiler*, 2013 WL 4714340, at \*14–17 (finding that a contract existed, but the school adequately followed its procedures and therefore did not breach its contract to the student).

213. *Yu*, 97 F. Supp. 3d at 464 (quoting *Johnson v. Temple Univ.—of Commonwealth Sys. of Higher Educ.*, No. CIV. A. 12-515, 2013 WL 5298484, at \*10 (E.D. Pa. Sept. 19, 2013)).

214. *See, e.g., id.* at 463–64; *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at \*16 (E.D. Va. Sept. 16, 2015) (finding that the plaintiff satisfied the first prong of the *Yusuf* analysis by alleging that the school’s procedure was flawed based on its “failure to provide a neutral arbiter without prior involvement in the case”).

215. *See Yu*, 97 F. Supp. 3d at 466 (holding that allowing the Title IX investigator to testify was not a flaw in the school’s disciplinary proceeding); *see also Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 370 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015). The court in *Yu* noted that, perhaps if the defendant were a public school, the plaintiff would have a valid due process claim because the Due Process Clause guarantees the separation of the roles of prosecutor, witness, and judge. *Yu*, 97 F. Supp. 3d at 466 (citing *Tumey v. Ohio*, 273 U.S. 510, 534 (1927)).

216. *See Sahn v. Miami Univ.*, 110 F. Supp. 3d 774, 778–79 (S.D. Ohio 2015) (finding the Title IX investigator’s “discourag[ing] a witness from testifying at the disciplinary hearing . . . troubling”); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 750 (S.D. Ohio 2014).

217. *See George Mason Univ.*, 2015 WL 5553855, at \*16 (noting that the tribunal’s “failure to consider witness statements” along with other alleged flaws satisfies the first prong of the *Yusuf* analysis); *see also Wash. & Lee Univ.*, 2015 WL 4647996, at \*10; *Doe v. Univ. of Mass.—Amherst*, No. CV 14-30143-MGM, 2015 WL 4306521, at \*8 (D. Mass. July 14, 2015), *appeal docketed*, No. 15-01856 (1st Cir. July 28, 2015).

218. *See, e.g., Univ. of Mass.—Amherst*, 2015 WL 4306521, at \*8 (noting that the plaintiff’s “difficulties getting information” with respect to his case together with other alleged flaws “are sufficient to raise at least some questions about the outcome of his

Courts also evaluate whether schools provide accused students the opportunity to question witnesses.<sup>220</sup> However, requiring that students submit questions for panel members to ask does not give rise to a fatal procedural flaw.<sup>221</sup> This is especially true as the OCR in the “Dear Colleague” letter “strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing.”<sup>222</sup> However, a panel not allowing a party to ask particular questions could be considered a procedural flaw if omitting those questions plausibly led to the tribunal’s erroneous outcome.<sup>223</sup>

Few courts have evaluated the “Dear Colleague” letter’s mandate that schools use a preponderance of the evidence standard in disciplinary proceedings.<sup>224</sup> In *Yu v. Vassar College*,<sup>225</sup> the court evaluated the plaintiff’s argument that the disciplinary panel replaced the preponderance of the evidence standard with a presumption of male guilt, but did not speak directly to the implementation or application of the preponderance of the evidence standard.<sup>226</sup> The court in *Doe v. University of Massachusetts-Amherst*<sup>227</sup> similarly acknowledged the school’s use of the preponderance of the evidence standard in campus disciplinary proceedings and noted that use of the lowest standard of proof “tip[s] the scale in favor of the complainant in cases where testimony from both parties is credible.”<sup>228</sup>

In sum, courts acknowledge that certain disciplinary proceedings are fundamentally flawed. However, courts typically dismiss these same claims because of the difficulty in proving a causal link between the alleged erroneous outcome and the student’s gender.<sup>229</sup> The frequency with which plaintiffs are able to satisfy the first *Yusuf* prong, however, emphasizes the

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disciplinary proceeding”); *see also* *Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*13 (D. Md. Aug. 21, 2015) (“SU barred [p]laintiffs from reviewing witness statements and the list of witnesses prior to the hearing, and failed to provide [p]laintiffs with all evidence that was to be presented to the Board.”).

219. *See Wash. & Lee Univ.*, 2015 WL 4647996, at \*10 (noting that “critical omissions” by school investigators in witness summaries contributed to a finding that the disciplinary proceedings were flawed); *Univ. of Mass.-Amherst*, 2015 WL 4306521, at \*8 (noting that “the misuse of witness testimony by the hearing board” contributed to a finding that the disciplinary proceedings were flawed); *see also Salisbury*, 2015 WL 5005811, at \*13.

220. *See, e.g., Salisbury*, 2015 WL 5005811, at \*13 (noting that the plaintiff was not permitted to ask witnesses particular questions); *Univ. of Mass.-Amherst*, 2015 WL 4306521, at \*8 (noting that “limits placed on [the plaintiff’s] ability to cross-examine witnesses” together with other procedural flaws were “sufficient to raise at least some questions about the outcome of his disciplinary proceeding”).

221. *See Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465–66 (S.D.N.Y. 2015).

222. DEAR COLLEAGUE LETTER, *supra* note 32, at 12.

223. *See Yu*, 97 F. Supp. 3d at 465–66.

224. *See* DEAR COLLEAGUE LETTER, *supra* note 32, at 10–11.

225. 97 F. Supp. 3d 448 (S.D.N.Y. 2015).

226. *Id.* at 469–71.

227. No. 14-30143-MGM, 2015 WL 4306521 (D. Mass. July 14, 2015), *appeal docketed*, No. 15-01856 (1st Cir. July 28, 2015).

228. *Id.* at \*7.

229. *See, e.g., Sahn v. Miami Univ.*, 110 F. Supp. 3d 774, 778–79 (S.D. Ohio 2015) (noting that while the alleged flaw in the proceedings was “troubling,” the facts did not “suggest a gender bias against males so much as against students accused of sexual assault”).

flawed nature of school sexual assault tribunals and highlights the need for procedural reform.

*b. The Second Prong: Discriminatory Intent*

Students have had difficulty effectively pleading discriminatory intent, and courts have not been consistent with respect to what is necessary at the pleadings stage for a Title IX erroneous outcome claim to survive a motion to dismiss. In most cases, absent “statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender,” a court will dismiss a plaintiff’s claim.<sup>230</sup>

In several cases, accused students have argued that their schools exploited them as “scapegoats” to demonstrate to the OCR that the school appropriately handles sexual assault accusations, which evidences discriminatory intent.<sup>231</sup> Similarly, students have argued that their schools have systematically and erroneously found males responsible for sexual assault to ward off negative media attention.<sup>232</sup> Courts are divided as to whether this allegation weighs in favor of finding that the school’s policies were gender biased, at least with respect to evaluating whether a plaintiff’s claim should survive a motion to dismiss.<sup>233</sup>

In *Wells v. Xavier University*,<sup>234</sup> the court accepted this allegation as plausibly evidencing a school’s gender bias.<sup>235</sup> Because the school conducted an “unfair hearing” that the plaintiff alleged was motivated by the school’s attempt to demonstrate to the OCR that it was adequately handling sexual assault accusations, the student’s claim survived the motion to dismiss.<sup>236</sup> The plaintiff contended that the school “had a pattern of decision-making that . . . ultimately resulted in an alleged false outcome that he was guilty of rape.”<sup>237</sup> The court noted that additional evidence of this pattern would ultimately be necessary, but that the allegation in and of itself was sufficient at the pleading stage.<sup>238</sup> Similarly, the court in *Sahm v.*

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230. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994).

231. *See, e.g., Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at \*16 n.27 (E.D. Va. Sept. 16, 2015); *Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*14 (D. Md. Aug. 21, 2015); *Doe v. Wash. & Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at \*9–10 (W.D. Va. Aug. 5, 2015); *Univ. of Mass.-Amherst*, 2015 WL 4306521, at \*8–9; *Sahm*, 110 F. Supp. 3d at 779; *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 747, 751 (S.D. Ohio 2014); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 368–69 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015).

232. *See, e.g., Salisbury*, 2015 WL 5005811, at \*14; *Univ. of Mass.-Amherst*, 2015 WL 4306521, at \*9; *Columbia Univ.*, 101 F. Supp. 3d at 368–69.

233. *Compare Salisbury*, 2015 WL 5005811, at \*13, *Wash. & Lee Univ.*, 2015 WL 4647996, at \*10, *Sahm*, 110 F. Supp. 3d at 778–79, and *Wells*, 7 F. Supp. 3d at 751, with *George Mason Univ.*, 2015 WL 5553855, at \*16, and *Columbia Univ.*, 101 F. Supp. 3d at 370.

234. 7 F. Supp. 3d 746 (S.D. Ohio 2014).

235. *See id.* at 751.

236. *Id.* at 748, 751.

237. *Id.* at 751.

238. *See id.*

*Miami University*,<sup>239</sup> while dismissing the student’s claim on other grounds, noted that allegations that the school “react[ed] against [the plaintiff], as a male, to demonstrate to the OCR that [the school] would take action, as [it] had failed to in the past, against males accused of sexual assault” is a claim “sufficient to state an erroneous outcome Title IX claim.”<sup>240</sup>

The court in *Doe v. Columbia University*<sup>241</sup> declined to follow the reasoning in *Wells*, finding that simply stating that a pattern exists without pleading particular facts that demonstrate that pattern amounts to a “subjective belief, devoid of factual support” and does not satisfy the *Twombly* and *Iqbal* pleadings standards.<sup>242</sup> In *Columbia*, the plaintiff’s complaint included allegations qualified with the statement “upon information and belief” and included claims of gender bias deemed to be conclusory.<sup>243</sup> The court found the complaint inadequate because a “[p]laintiff’s subjective belief that he was the victim of discrimination—however strongly felt—is insufficient to satisfy his burden at the pleading stage.”<sup>244</sup> The court emphasized that plaintiffs must demonstrate that gender was a “motivating factor” in the school’s decision, stating:

[W]hile Columbia may well have treated [the complainant] more favorably than [p]laintiff during the disciplinary process, the mere fact that [p]laintiff is male and [the complainant] is female does not suggest that the disparate treatment was *because of* [p]laintiff’s sex. Indeed, the alleged treatment “could equally have been”—and more plausibly was—“prompted by lawful, independent goals,” such as a desire (enhanced, perhaps, by the fear of negative publicity or Title IX liability to the victims of sexual assault) to take allegations of rape on campus seriously and to treat complainants with a high degree of sensitivity.<sup>245</sup>

Therefore, under *Columbia*, even if a school demonstrates a systematic pattern of unfairly and erroneously finding males accused of sexual assault responsible, unless the student can plead particular facts (such as statements by school officials or tribunal members, or data demonstrating a pattern of gender bias) to demonstrate that these unsound procedures are unfair because the accused students are male, the claim will not survive a motion to dismiss.<sup>246</sup> Further, acting in response to the national media attention

239. 110 F. Supp. 3d 774 (S.D. Ohio 2015).

240. *Id.* at 779 (quoting *Wells*, 7 F. Supp. 3d at 751).

241. 101 F. Supp. 3d 356 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015).

242. *Id.* at 374. The court in *Tanyi v. Appalachian State University* similarly declined to follow *Wells*. See No. 5:14-CV-170RLV, 2015 WL 4478853, at \*10 (W.D.N.C. July 22, 2015) (“[A]s the Southern District of New York noted in *Doe*, ‘that sort of subjective belief, devoid of factual support, is plainly insufficient after *Iqbal* and *Twombly*.’ Accordingly, the Court declines to follow the *Wells* ruling.” (quoting *Columbia Univ.*, 101 F. Supp. 3d at 373)).

243. *Columbia Univ.*, 101 F. Supp. 3d at 370–71.

244. *Id.* at 371.

245. *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 (2007)).

246. *Id.*

placed on college campuses is a “lawful, independent goal” that does not warrant the court’s review.<sup>247</sup>

Subsequent cases have adopted the reasoning in *Columbia* and dismissed students’ gender discrimination claims, creating a high bar for proving gender discrimination.<sup>248</sup> The court in *Doe v. Rector & Visitors of George Mason University*<sup>249</sup> added that there could be many “less admirable—but still non-discriminatory—explanations for [the school’s] decision, such as a lack of common sense,” but that without facts sufficient to make “gender-motivated discrimination” plausible, not just conceivable, the student’s claim must fail.<sup>250</sup>

Recently, two cases provided examples as to what additional facts are necessary at the pleading stage for a court to allow a student’s claim to survive a motion to dismiss.<sup>251</sup> In *Doe v. Washington & Lee University*,<sup>252</sup> the court denied a defendant’s motion to dismiss holding that the school’s alleged flawed procedures, “at least when it comes to charges of sexual misconduct, amount[ed] to ‘a practice of railroading accused students.’”<sup>253</sup> Allegations of this practice stemming from “pressure from the government to convict male students of sexual assault” coupled with an article written by the Title IX investigator, who had considerable influence during the proceedings, evidencing her gender bias rendered the claim sufficient to survive a motion to dismiss.<sup>254</sup>

Similarly, in *Doe v. Salisbury University*,<sup>255</sup> the court found that allegations of government pressure to convict males accused of sexual assault coupled with additional allegations of gender bias were sufficient to establish an erroneous outcome discrimination claim.<sup>256</sup> The court in *Salisbury* seems to have lowered the bar with respect to what constitutes these additional allegations by recognizing that obtaining communications demonstrating a school’s gender bias may require discovery.<sup>257</sup> The court

247. *Id.* (quoting *Twombly*, 550 U.S. at 567).

248. *See Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 WL 4306521, at \*8–9 (D. Mass. July 14, 2015), *appeal docketed*, No. 15-01856 (1st Cir. July 28, 2015) (holding that pressure from the media and OCR do not evidence a school’s gender bias without additional “comments that [the school] targeted [the accused student] based on his gender,” “conduct suggestive of gender bias,” or some type of “data or credible anecdotal references” that demonstrate a pattern of invariably finding males guilty of sexual assault because of their sex); *see also Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at \*16 (E.D. Va. Sept. 16, 2015); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at \*10 (W.D.N.C. July 22, 2015).

249. No. 1:15-CV-209, 2015 WL 5553855 (E.D. Va. Sept. 16, 2015).

250. *Id.* at \*16–17.

251. *See Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811 (D. Md. Aug. 21, 2015); *Doe v. Wash. & Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015).

252. No. 6:14-cv-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015).

253. *Id.* at \*10 (quoting *Haley v. Va. Com. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

254. *Id.*

255. No. JKB-15-517, 2015 WL 5005811 (D. Md. Aug. 21, 2015).

256. *Id.* at \*14–15.

257. *Id.* at \*15 (“While these crucial allegations are all based solely ‘upon information and belief,’ this is a permissible way to indicate a factual connection that a plaintiff

held that allegations couched with the phrase “upon information and belief” that refer to specific facts that if obtained through discovery would evidence gender bias are sufficient to survive a motion to dismiss.<sup>258</sup> Therefore, allegations that schools are invariably finding male students accused of sexual assault culpable as a result of pressure from the DOE and a desire to avoid negative publicity, together with “*specific factual allegations*,” plausibly support claims of intentional gender discrimination and render an accused student’s Title IX erroneous outcome claim valid.<sup>259</sup>

In sum, although few of these cases have survived the pleadings stage, they highlight important issues with respect to investigations and adjudications of sexual assault on college campuses. First, although the second *Yusuf* prong is often difficult for plaintiffs to meet, the first *Yusuf* prong—demonstrating that disciplinary procedures are flawed and have led to an erroneous outcome—has not been difficult to satisfy. As such, courts have not hesitated to point out that many of these campus sexual assault tribunals are fundamentally flawed, thereby leading to erroneous outcomes. Additionally, in evaluating the second *Yusuf* prong, courts’ assessment of plaintiffs’ allegations that schools are railroading them is probative of the fundamental fairness of these procedures. Although courts have dismissed many of these claims, they have acknowledged that pressure from the government has motivated schools to implement policies that “amount to ‘a practice of railroading accused students’”<sup>260</sup> and are characterized by a

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reasonably believes is true but for which the plaintiff may need discovery to gather and confirm its evidentiary basis.”).

258. *Salisbury*, 2015 WL 5005811, at \*14. This is contrary to the court’s holding in *Doe v. Columbia University*, which dismissed the student’s claims regarding gender discrimination indicating that the use of “upon information and belief” merely underscores the absence of particularized evidence supporting an inference that gender bias was causally linked to a flawed outcome. See 101 F. Supp. 3d 356, 370–71 (S.D.N.Y. 2015), *appeal docketed*, No. 15-1661 (2d Cir. May 21, 2015). However, the three “crucial allegations” to which the court refers in *Salisbury* include, by contrast to the allegations in *Columbia University*, “*specific factual allegations*.” Compare *Columbia Univ.*, 101 F. Supp. 3d at 370–74, with *Salisbury*, 2015 WL 5005811, at \*15. The three allegations include: (1) “[u]pon information and belief, SU possesses communications evidencing [d]efendants’ deliberate indifference in imposing wrongful discipline on [p]laintiffs on the basis of their gender,” (2) “[u]pon information and belief, SU possesses communications evidencing SU’s intent to favor female students alleging sexual assault over male students like [p]laintiffs who are accused of sexual assault,” and (3) “upon information and belief . . . [d]efendants’ deliberate indifference was taken to demonstrate to the United States Department of Education and/or the general public that [d]efendants are aggressively disciplining male students accused of sexual assault.” *Id.* at \*14 (citation omitted). The court noted, however, that “[p]laintiffs’ erroneous outcome allegations would be insufficient if they had simply stated something akin to: ‘Upon information and belief, procedural defects were motivated by gender bias.’” *Id.* at \*15. Thus, because these claims allude to specific communications, or facts that are “peculiarly within the possession or control of SU [d]efendants,” they are not simply conclusory statements and are sufficient to survive the defendant’s motion to dismiss. *Id.*

259. *Id.*

260. *Doe v. Wash. & Lee Univ.*, No. 6:14-cv-00052, 2015 WL 4647996, at \*10 (W.D. Va. Aug. 5, 2015) (quoting *Haley v. Va. Com. Univ.*, 948 F. Supp. 573, 579 (E.D. Va. 1996)).

“lack of common sense.”<sup>261</sup> Taken together, this suggests the need for additional due process protections for the accused.

Further, because many of these claims do not survive the schools’ motions to dismiss, students who erroneously have been found responsible for sexual assault do not have the opportunity for meaningful judicial review. Despite the courts’ recognition of the procedurally flawed tribunals and acknowledgement that students have been wrongly suspended or expelled from school, accused students are unable to obtain relief from the courts solely by demonstrating their schools’ rush to judgment. Considering the inherently flawed nature of these campus tribunals and the consequences that students dismissed from their colleges face,<sup>262</sup> the opportunity for judicial review of school tribunals is warranted.

### 3. Case Implications

Students found responsible for sexual assault on college campuses because of flawed proceedings are increasingly bringing their cases to court.<sup>263</sup> The requirements of the “Dear Colleague” letter “put[] enormous pressure on the school to maintain a victim-friendly environment, which can end up creating an environment that is less sympathetic to the accused and tilted in favor of the alleged victim.”<sup>264</sup> The cases discussed in the two previous sections demonstrate that schools, in an attempt to comply with the Title IX mandates, have overcorrected past issues that plagued campus disciplinary procedures and have established fundamentally flawed procedures that lack even minimal due process protections for accused students. Many commentators agree.<sup>265</sup> The recent reversals of decisions of campus sexual assault tribunals signal to some the beginning of important recognition from courts that schools have gone too far in an

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261. *Doe v. Rector & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2015 WL 5553855, at \*16 (E.D. Va. Sept. 16, 2015).

262. *See supra* Part II.A.1.

263. *See Due Process Database*, *supra* note 147.

264. Alexandra Fries, Note, *Student-On-Student Sexual Assault Policy: How a Victim-Centered Approach Harms Men: A Close-Up on Notre Dame’s Changes to Its Student Handbook*, 39 J.C. & U.L. 633, 645 (2013); *see also* Judith Shulevitz, *Accused College Rapists Have Rights, Too: The Victims Deserve Justice. The Men Deserve Due Process*, NEW REPUBLIC (Oct. 11, 2014), <https://newrepublic.com/article/119778/college-sexual-assault-rules-trample-rights-accused-campus-rapists> [<https://perma.cc/8BWT-P7B8>]; FIRE Letter to Office for Civil Rights Assistant Secretary for Civil Rights Russlynn Ali, *May 5, 2011*, FIRE (May 5, 2011), <http://thefire.org/article/13142.html> [<https://perma.cc/NKF4-THEF>].

265. *See, e.g.*, Sevilla, *supra* note 83, at 16 (“Cases challenging administrative expulsions from school are now percolating into state and federal courts, and as they do, the courts are finding the treatment of the accused appalling.”); Yoffe, *supra* note 15. *See generally* Harris, *supra* note 183; Press Release, Stop Abusive and Violent Environments, Four Rulings, Four Reversals: Judges Give ‘Thumbs Down’ on Campus Sex Tribunals (Aug. 25, 2015), <http://www.saveservices.org/2015/08/pr-four-rulings-four-reversals-judges-give-thumbs-down-on-campus-sex-tribunals/> [<https://perma.cc/V79C-QN76>].

attempt to comply with Title IX and have created victim-friendly policies and procedures that are unfairly stacked against the accused.<sup>266</sup>

Many argue that the reason these policies and procedures have been described as “appalling” is the Title IX guidance, which has unfairly tipped the scales in favor of the accusers<sup>267</sup> and has thus created a system that presumes the accused guilty at the outset.<sup>268</sup> Commentators argue that this presumption is a result of monetary pressure on schools from the federal government to take sexual assault seriously.<sup>269</sup> Notably, the nineteen-page “Dear Colleague” letter only includes two sentences that address the rights of the accused.<sup>270</sup> The importance of the rights of the accused to the OCR, according to critics, is “unmistakable” and “implies, ‘oddly and ominously, that the statutory rights of the accuser trump the constitutional due-process [sic] rights of the accused.’”<sup>271</sup>

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266. See, e.g., Sevilla, *supra* note 83, at 19 (“Indeed, recent cases show colleges have no idea how to fairly implement Title IX, and instead have created made-up, arbitrary procedures without due process guarantees of timely notice, confrontation, and a fair hearing.”); Teresa Watanabe, *Ruling in Favor of UC Student Accused of Sex Assault Could Ripple Across U.S.*, L.A. TIMES (July 15, 2010), <http://www.latimes.com/local/education/la-me-ucsd-male-student-20150715-story.html> (discussing the potential impact of *Doe v. Regents of the University of California San Diego*) [<https://perma.cc/QF2Z-VZUE>]; Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015), <http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights> [<https://perma.cc/64Y6-5C49>]; Stop Abusive and Violent Environments, *supra* note 265.

267. See, e.g., Henrick, *supra* note 41, at 54 (arguing that “the process of resolving sexual misconduct allegations under Title IX is fundamentally unfair to the accused and unduly prone to false convictions”); Ellis, *supra* note 133, at 76; Shulevitz, *supra* note 264.

268. See Yoffe, *supra* note 15 (“Unfortunately, under the worthy mandate of protecting victims of sexual assault, procedures are being put in place at colleges that presume the guilt of the accused. Colleges, encouraged by federal officials, are instituting solutions to sexual violence against women that abrogate the civil rights of men.”); see also Henrick, *supra* note 41, at 59; Sevilla, *supra* note 83, at 17; Peter Berkowitz, Commentary, *College Rape Accusations and the Presumption of Male Guilt*, WALL STREET J. (Aug. 20, 2011), <http://www.wsj.com/articles/SB10001424053111903596904576516232905230642> [<https://perma.cc/D8PU-HWGM>].

269. See Janet Halley, Comment, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015) (discussing the “pressure on schools to hold students responsible for serious harm even when—precisely when—there can be no certainty about who is to blame for it”); Conor Friedersdorf, *How Sexual-Harassment Policies Are Diminishing Academic Freedom*, ATLANTIC (Oct. 20, 2015), <http://www.theatlantic.com/politics/archive/2015/10/sexual-harassment-academic-freedom/411427/> (“By threatening to pull federal funds, the OCR has forced schools, even well-endowed schools like Harvard, to adopt sexual misconduct policies that violate many civil liberties.”) [<https://perma.cc/R4XZ-3EHK>]; see also Sevilla, *supra* note 83, at 19 (“Colleges and universities are already strapped for funding. The force of [language threatening the withholding of state and federal funding], the pressures exerted by state and federal governments, and the unilateral focus on ‘victim’ rights creates hydraulic pressure on schools to satisfy their funding masters. The resulting conviction-producing machinery is a sad contradiction to the due process tradition of individualized justice.”).

270. See *supra* note 69 and accompanying text.

271. Henrick, *supra* note 41, at 62 (quoting Wendy Kaminer, *Sexual Harassment and the Loneliness of Civil Libertarian Feminist*, ATLANTIC (Apr. 6, 2011), <http://www.theatlantic.com/national/archive/2011/04/sexual-harassment-and-the-loneliness-of-the-civil-libertarian-feminist/236887/> [<https://perma.cc/PX56-LZF3>]).

As a result, commentators have argued for implementation of additional due process protections for the accused, including the rights to adequate notice of the charges and evidence against the accused,<sup>272</sup> to an impartial hearing,<sup>273</sup> to confront and cross-examine witnesses,<sup>274</sup> and to counsel.<sup>275</sup> Both Harvard University and University of Pennsylvania law professors have written open letters to the OCR expressing their concerns that the policies their respective schools have adopted in an attempt to comply with the OCR guidance “lack the most basic elements of fairness and due process [and] are overwhelmingly stacked against the accused.”<sup>276</sup> Specifically, they have rebuked “[t]he absence of any adequate opportunity to . . . confront witnesses and present a defense at an adversary hearing,”<sup>277</sup> the denial of legal representation for the accused,<sup>278</sup> and the conflict of interest presented by Title IX investigators playing multiple roles in sexual assault investigations and adjudications.<sup>279</sup> The Harvard Law professors also have taken issue with Harvard’s broad definition of sexual violence, arguing that it is “starkly one-sided as between complainants and respondents, and entirely inadequate to address the complex issues in these unfortunate situations involving extreme use and abuse of alcohol and drugs.”<sup>280</sup>

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272. See Tenerowicz, *supra* note 124, at 687–88.

273. See *id.* at 688–89.

274. See *id.* at 690; see also Hendrix, *supra* note 133, at 615–18; Triplett, *supra* note 43, at 520. The right to confront is particularly important in sexual assault cases as they typically rely on credibility determinations. See Swem, *supra* note 131, at 376–77; Tenerowicz, *supra* note 124, at 690.

275. See Groholski, *supra* note 127, at 782–96; Tenerowicz, *supra* note 124, at 691.

276. Bartholet et al., *supra* note 100; see also Volokh, *supra* note 100 (“[P]articularly in light of the financial sanctions threatened by OCR, we believe that OCR’s approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness. We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses.”).

277. Bartholet et al., *supra* note 100; see also Volokh, *supra* note 100 (“Cross-examination has long been considered as perhaps the most important procedure in reaching a fair and reliable determination of disputed facts.”).

278. See Bartholet et al., *supra* note 100 (stating that Harvard’s policy is unfair in part because of its “failure to ensure adequate representation for the accused, particularly for students unable to afford representation”).

279. See *id.* (stating that “[t]he lodging of the functions of investigation, prosecution, fact-finding, and appellate review in one office, and the fact that that office is itself a Title IX compliance office rather than an entity that could be considered structurally impartial” is fundamentally unfair).

280. See *id.*; see also Halley, *supra* note 269, at 112–14 (arguing that Harvard’s policy, which renders sexual conduct between impaired or incapacitated students punishable, is too broad because it does not properly govern the hard cases—the cases in which both the accuser and the accused were “willingly drinking heavily and using powerful drugs” and creates a “per se rule in favor of the complainant and an irrebutable presumption against the respondent”). Janet Halley describes such a rule as creating “the steep asymmetry between the consequences of drinking and drug use for the complainant and for the respondent: for the former, intoxication is, to one degree or another, the basis for a per se finding of unwantedness even when assent—even when consent—has been given; but for the latter, it has no mitigating effect on his conduct.” *Id.* at 113. In fact, a debate exists with respect to how to craft policies that address appropriately the typical campus sexual assault situation,

Other commentators have agreed, such as Janet Halley, a Harvard Law professor who raised similar concerns in her statement before a hearing of the U.S. Senate's Health, Education, Labor and Pensions Committee.<sup>281</sup> Professor Halley advocated for additional due process protections for the accused, including adequate notice and the opportunity for the accused to review the complaint and all material evidence,<sup>282</sup> the right to a fair hearing with the right to confront,<sup>283</sup> and unbiased investigators and adjudicators.<sup>284</sup>

Some commentators, however, disagree, including Caroline Heldman, a professor at Occidental College and cofounder of End Rape on Campus, who stated that “[t]hese lawsuits are an incredible display of entitlement, the same entitlement that drove them to rape.”<sup>285</sup> Even if these procedures are stacked in favor of accusers, many argue that this victim-centered approach appropriately protects the important rights and needs of the accusers over those of the accused, and thus no additional due process

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which some argue consists of cases in which both parties are intoxicated and others argue are instances of target rape. Professor Diane Rosenfeld argues that the “miscommunication” cases that Professor Halley categorizes as the hard cases which render Harvard’s policy problematic are not the norm. *See* Rosenfeld, *supra* note 125, at 371–78. Instead, she argues that campus sexual assault is primarily deliberate targeting, where “students who commit campus rape act in intentional, premeditated, and predatory ways.” *Id.* at 372; *see also* David Lisak, *Understanding the Predatory Nature of Sexual Violence*, 14 *SEXUAL ASSAULT REP.* 49, 49–50 (2011).

281. *Reauthorizing the Higher Education Act: Combatting Sexual Assault: Hearing on S. 590 Before the S. Health, Educ., Labor & Pensions Comm.*, 114th Cong. (2015) (statement of Janet Halley, Royall Prof. of Law, Harvard Law Sch.) [hereinafter Halley Statement].

282. *See* Halley Statement, *supra* note 281, at 2 (“College and university procedures often tilt the process unfairly [against the accused] . . . . The accused have no right to see the complaint. This is fundamental to due process no matter how narrowly conceived.”).

283. *Id.* (“Even when there is a hearing, proper concern for the well-being of complainants has led to unfair restraints on the right of the accused to probe evidence and ask questions.”).

284. *See id.* (describing the use of Title IX officers to fill multiple roles during an investigation as “lack[ing] neutrality and independence and . . . inherently biased”). Halley similarly stated that “[m]any rightly perceive this process to be unfair: far from vindicating our values, this squanders the legitimacy of a vital enterprise. Minimal due process requires truly independent and neutral decision-makers, separated by function to provide accountability.” *Id.*; *see also* Halley, *supra* note 269, at 107–08.

285. Yoffe, *supra* note 15; *see also* Emily Shugerman, *Men Sue in Campus Sexual Assault Cases*, *MS. MAGAZINE BLOG* (June 18, 2014), <http://msmagazine.com/blog/2014/06/18/men-sue-in-campus-sexual-assault-cases/> (quoting Professor Caroline Heldman discussing these recent lawsuits as stating that “[t]hese are students who were found responsible after an extensive adjudication proceeding that is heavily biased in favor of alleged perpetrators”) [<https://perma.cc/75Z7-6MH3>]. Professor Heldman also stated that “[w]e don’t have a problem with false rape reporting, we have a problem with rapes not being reported, a problem with adjudications that favor perpetrators when they are reported and a problem with light sanctions when a student has been found responsible for assault/rape.” *Id.*; *see also* Sevilla, *supra* note 83, at 19 n.22 (describing John Krakauer’s new book, *Missoula*, which argues for “a mandatory belief by police in the truth of the complaining witness’s accusation unless otherwise proven false” because the small number of false rape accusations “are buried in continual assertions that almost all sexual assault complaints are true and that the university and criminal law systems have not taken such charges seriously”).

protections are warranted.<sup>286</sup> For example, Nancy Chi Cantalupo argues that during the hearing stage, the procedures should be tailored toward protecting the alleged victim.<sup>287</sup> Because facing the accused can subject the alleged victim to additional trauma, those that favor a victim-centered approach argue against cross-examination.<sup>288</sup> However, in light of recent case law evidencing the flawed nature of campus procedures, additional due process protections for the accused are necessary in campus sexual assault proceedings.<sup>289</sup>

### III. THE NEED FOR JUDICIAL REVIEW AND ADDITIONAL DUE PROCESS PROTECTIONS FOR THE ACCUSED IN LIGHT OF RECENT JUDICIAL RESPONSE

Additional due process protections should be implemented in school sexual assault policies and procedures in light of the recent cases discussed in Part II. The prevalence of sexual assault on college campuses is unjustifiably high. Although colleges have made progress to reform their procedures to protect victims and hold perpetrators responsible, they must do more. However, it is important that schools do not adopt policies that are fundamentally unfair to the accused. Recent cases demonstrate that many schools have overcorrected by conducting investigations and adjudications that deny accused students fundamentally fair proceedings. A lack of fairness and due process “threaten[s] the effectiveness and legitimacy of the important progress [schools] have made.”<sup>290</sup> As such, this

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286. See *supra* note 125 and accompanying text; see also Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 578–84 (2014); Rosenfeld, *supra* note 125, at 364, 369; Ashe Schow, *Campus Sexual Assault Hearing Applauds Witch-Hunt Mentality*, WASH. EXAMINER (Sept. 10, 2015), <http://www.washingtonexaminer.com/campus-sexual-assault-hearing-applauds-witch-hunt-mentality/article/2571784> (describing how Colorado Representative Jared Polis received a round of applause at a congressional hearing after he “suggested that expelling students based solely on the idea that they might have committed a crime is an acceptable standard”) [<https://perma.cc/6K87-449E>].

287. See Cantalupo, *Campus Violence*, *supra* note 125, at 669–71, 680–88.

288. *Id.* at 683–84 (discussing the effects of cross-examination on a victim, stating that “requiring a student survivor to present her own case and allowing her accused assailant to cross-examine her, even through the hearing board, may actually perpetuate a hostile environment”).

289. The problems with the current system have led some to argue that schools should refer all sexual assault allegations to law enforcement. See *supra* note 41 and accompanying text. While law enforcement should be involved if the accuser wishes, this proposition ignores the mandate of schools to take action under Title IX. See *supra* notes 62–63 and accompanying text. Mandatory reporting to police would also likely decrease the number of reported sexual assaults, which is already low. See Edwards, *supra* note 123, at 139; Alexandra Brodsky & Elizabeth Deutsch, *No, We Can’t Just Leave College Sexual Assault to the Police*, POLITICO (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294.html#.VP4ASr7i7wx> [<https://perma.cc/8WVX-2TW4>]; see also *supra* note 34. Further, this proposition ignores the important role that schools play in protecting the victim and the small number of rapes that are actually prosecuted after being referred to law enforcement. Therefore, this Note argues for reforms to the current on-campus adjudication system in the form of more meaningful judicial review and additional due process protections for the accused.

290. Halley Statement, *supra* note 281, at 1.

part advocates for more meaningful judicial review and additional due process protections for the accused, similar to those proposed in the Fair Campus Act and the Safe Campus Act.<sup>291</sup>

#### A. *Judicial Review*

Students who allege they have been erroneously expelled as a result of on-campus adjudicative processes are increasingly bringing claims against their schools.<sup>292</sup> In both the private and public school contexts, courts generally have been reluctant to overturn a school's decision to expel or suspend students who have been accused of sexual assault. However, some courts have begun to recognize unfairness in these proceedings. Two courts have recently overturned public schools' findings where students asserted due process claims.<sup>293</sup> The willingness of these courts to review the schools' decisions and recognize the unfairness of the procedures should serve as an example for future courts when evaluating the accused's due process claims.

In the context of private schools, courts have dismissed the majority of cases at the pleadings stage, because there exists no equivalent due process claim for students attending nonpublic institutions.<sup>294</sup> If a student at a private university believes he or she has been wrongly found responsible for sexual assault, absent evidence very difficult to obtain prior to discovery demonstrating that the school intentionally discriminated against the student on the basis of gender—such as “statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender”—the accused student has no opportunity for judicial review.<sup>295</sup> Because courts have acknowledged that these proceedings in many cases are fundamentally flawed<sup>296</sup> and that suspension or expulsion can have life-long negative consequences for students upon whom a penalty is imposed,<sup>297</sup> courts should permit these complaints to at least survive the pleadings stage.

The threat of such cases proceeding to discovery, and the associated cost of litigating such claims, will likely incentivize schools to employ fairer proceedings when investigating and adjudicating sexual assault claims. It may also induce settlement.<sup>298</sup> While full remedy and reversal of a school's

291. *See supra* Part I.C.2.

292. *See supra* Part II.B; *see also supra* note 147.

293. *See supra* notes 165–82 and accompanying text.

294. *See supra* note 51 and accompanying text.

295. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994); *see also supra* Part II.B.2.b. In addition to Title IX claims, students also can sue their schools for breach of contract, *see supra* note 212, and in tort. *See, e.g., Doe v. Salisbury Univ.*, No. JKB-15-517, 2015 WL 5005811, at \*8–10 (D. Md. Aug. 21, 2015). However, these cases have largely been unsuccessful and do not provide a meaningful alternative for wrongfully accused students. *See Henrick, supra* note 41, at 78. Given the unsuccessful nature of these suits and the recent trend of students bringing Title IX claims against their schools, further discussion of these alternative claims are beyond the scope of this Note.

296. *See supra* Part II.B.2.a.

297. *See supra* Part II.A.1.

298. *See supra* note 188 and accompanying text.

decision is the ultimate goal for the wrongly accused, settlement opportunities may provide some relief.

However, for now, although many on-campus procedures are substantially flawed, it remains difficult for wrongly accused students to meet the second *Yusuf* prong.<sup>299</sup> The court's analysis of the first *Yusuf* prong should inform its analysis of the second *Yusuf* prong so fewer wrongfully accused students are denied their day in court. Specifically, courts should consider accused students' "scapegoat" arguments together with the flawed nature of the university's proceedings to satisfy the *Yusuf* standard as the courts did in *Wells*,<sup>300</sup> *Sahm*,<sup>301</sup> *Washington & Lee*,<sup>302</sup> and *Salisbury*.<sup>303</sup> At the pleadings stage, plaintiffs' arguments that school procedures amount to railroading the accused through systematically expelling students accused of sexual assault in response to government and media pressure should render a claim sufficiently plausible to survive a motion to dismiss.<sup>304</sup> As the court recognized in *Salisbury*, discovery is necessary to gather evidence to support this type of allegation.<sup>305</sup>

Even if courts continue to grant schools' motions to dismiss in due process and Title IX cases, courts should similarly continue to acknowledge the flawed nature of the proceedings to encourage and influence the reform of school procedures.<sup>306</sup> However, learning retroactively from judicial rulings cannot suffice as a permanent solution, because such opinions come at the expense of innocent and wrongfully convicted students.<sup>307</sup> Instead, judicial review in this capacity should function as an interim check on schools, with the expectation that future reform will eliminate, or at least diminish, the need for the judiciary's role.

Because the interests at stake are so high,<sup>308</sup> eventual reform should include creating a private right of action for students who believe they wrongfully have been expelled or suspended from either a private or public

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299. See *supra* Part II.B.2.b.

300. See *supra* notes 236–38 and accompanying text.

301. See *supra* note 240 and accompanying text.

302. See *supra* notes 238–42 and accompanying text.

303. See *supra* notes 256–59 and accompanying text.

304. This was the argument that many of the plaintiffs made in the cases discussed above, see *supra* Part II.B.2.b, and is the argument that the appellant student is making in the pending appeal of *Doe v. Columbia University*, 101 F. Supp. 3d 356, 360 (S.D.N.Y. 2015), appeal docketed, No. 15-1661 (2d Cir. May 21, 2015). See Brief for Plaintiff-Appellant-Cross-Appellee at 39–41, *Columbia Univ.*, No. 15-1536 (2d Cir. Aug. 18, 2015). This argument should at least satisfy the second *Yusuf* prong at the pleadings stage to allow plaintiffs to gather information that may shed light on the school's motivation or intent for dismissing the student, as the specificity with which the court has demanded facts be pleaded in the complaint is difficult without discovery.

305. See *supra* notes 256–59 and accompanying text.

306. See Sevilla, *supra* note 83, at 18–19 (“[R]ecent cases show colleges have no idea how to fairly implement Title IX, and instead have created made-up, arbitrary procedures without due process guarantees,” but “[h]opefully, judicial rulings will teach these educators a valuable lesson”).

307. Charles Sevilla expressed a similar sentiment, stating that “[a]s these campus cases continue to move into the state and federal courts, schools will learn the way, but at the expense of how many falsely branded young people?” Sevilla, *supra* note 83, at 19.

308. See *supra* Part II.A.

school. The Fair Campus Act and the Safe Campus Act provide for judicial review of campus disciplinary proceedings, establishing a federal private right of action for aggrieved students.<sup>309</sup> The standard of review would be deferential to schools, requiring courts to consider whether the school acted in a manner that was “arbitrary, capricious, or contrary to law.”<sup>310</sup> Congress should adopt such a provision. Although it is not typically a court’s role to meddle in the administrative workings and decisions of schools,<sup>311</sup> judicial review acts as a necessary check on a school’s independent adjudication of a crime that carries serious consequences for all parties involved.<sup>312</sup> Without this safeguard, schools will maintain unbridled discretion to trample on students’ due process rights and to deny them an education.

The creation of a private right of action for accused students would influence schools to act in the shadow of the law. This would likely compel schools to conduct fairer investigations and adjudications of sexual assault to minimize litigation from wrongfully sanctioned students. Money is already a motivating force of college adjudicative processes.<sup>313</sup> The rush to find students responsible for sexual assault when they are accused can be attributed in part to the OCR’s threat to withhold the school’s funding for noncompliance with Title IX.<sup>314</sup> Further, colleges currently face a greater litigation threat from students who believe their sexual assault accusations were not adequately handled.<sup>315</sup> This incentivizes schools to hold accused students accountable quickly to stymie the threat of litigation costs from their accusers.<sup>316</sup> If schools faced a comparable prospect of litigation from the wrongly accused, fairer and more meaningful sexual assault investigations and adjudications on campus will likely result.

Of course, judicial scrutiny of every campus tribunal decision raises concerns of judicial economy. It is untenable to expect courts to play such an active role in reviewing school disciplinary decisions. Consequently, additional protection for the accused is a necessary component of any reform legislation. If meaningful protections for the accused such as those proposed in this Note become standard across college campuses, the need for frequent judicial review likely will be diminished. Meanwhile, courts should play the necessary role in preventing schools from overstepping their boundaries by expelling or suspending students without minimal due process.

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309. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 2 (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 2 (2015); *see supra* Part I.C.2.

310. H.R. 3408 § 2; H.R. 3403 § 2.

311. *See supra* note 148 and accompanying text.

312. *See supra* Part II.A.

313. *See supra* notes 138–41, 269, 276 and accompanying text.

314. *See supra* notes 138–39, 269, 276 and accompanying text.

315. *See supra* notes 144–45 and accompanying text.

316. *See supra* notes 144–45 and accompanying text.

### B. Additional Due Process Protections

Congress should enact legislation requiring both public and private institutions' disciplinary proceedings to include provisions that protect the due process rights of accused students. As discussed above, courts have primarily noted discontent with school adjudications that (1) did not provide sufficient notice of the charges to the accused or provide adequate opportunity to review and refute all material evidence, (2) used a Title IX office that played multiple roles during the proceedings, (3) consisted of an unfair and impartial hearing, (4) lacked equal access to representation, and (5) denied students adequate opportunity to confront adverse witnesses. This section advocates for enactment of legislation with provisions addressing each of these concerns, drawing from the proposed provisions in the Fair Campus Act and the Safe Campus Act. This Note does not take issue with the provisions in CASA that aim to provide additional protection for the accusers, but not without substantial additional protection for the accused.<sup>317</sup>

#### 1. Sufficient Notice and Material Evidence

First, Congress should require schools to provide accused students with sufficient notice and the opportunity to view the complaint and all material evidence. As discussed above, courts in both the due process and Title IX contexts have found that insufficient notice is a due process violation and is fundamentally unfair to the accused. The court in *Tanyi v. Appalachian State University*<sup>318</sup> found that less than twenty-four-hour notice was insufficient.<sup>319</sup> In the Title IX context, the courts in *Doe v. University of South*<sup>320</sup> and *Yu* found that one-day notice was sufficient.<sup>321</sup> Congress should adopt legislation that requires schools to notify students of the charges against them at least twenty-four hours prior to the start of adjudicatory proceedings.

The Fair Campus Act and the Safe Campus Act propose that schools provide parties with written notice “not later than 2 weeks prior to the start of any formal hearing or similar adjudicatory proceeding.”<sup>322</sup> CASA provides that written notice be given to parties within twenty-four hours.<sup>323</sup> Regardless of the timeframe, Congress should enact legislation that provides the accused the right to see the complaint, as this is an essential tenet of due process.<sup>324</sup>

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317. See *supra* Part I.C.1.

318. No. 5:14-CV-170RLV, 2015 WL 4478853 (W.D.N.C. July 22, 2015).

319. See *supra* note 157 and accompanying text.

320. 687 F. Supp. 2d 744 (E.D. Tenn. 2009).

321. See *supra* note 208 and accompanying text.

322. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 2 (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 2 (2015); see also *supra* Part I.C.2.

323. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015); see also *supra* Part I.C.1.

324. See *supra* note 282 and accompanying text.

Second, Congress should adopt legislation that provides the accused with the chance to adequately review and refute material evidence. The absence of such an opportunity in *Regents of the University of California San Diego*, *University of Massachusetts-Amherst*, and *Salisbury* contributed to the courts' findings that the disciplinary proceedings were fundamentally unfair and procedurally flawed.<sup>325</sup> Accordingly, schools should provide students with an adequate and meaningful opportunity to review and refute evidence, such as witness statements and investigator reports, prior to the initiation of disciplinary proceedings.

The Fair Campus Act and the Safe Campus Act provide that schools should “ensure that all parties to the proceeding have access to all material evidence . . . not later than one week prior to the start of any formal hearing or similar adjudicatory proceeding.”<sup>326</sup> Congress should adopt such a provision. Considering the seriousness of the outcome to both parties in these proceedings,<sup>327</sup> the inability to review evidence is a “shocking deprivation of fair process.”<sup>328</sup>

## 2. The Role of Title IX Offices

Congress should reform the role that Title IX coordinators play in campus proceedings. Typically, Title IX coordinators play multiple roles, including “advis[ing] complainants how to file their complaints, receiv[ing] the complaints, conduct[ing] the investigation, hold[ing] the hearing if any, decid[ing] on responsibility, and hear[ing] any appeals,” which presents a conflict of interest problem.<sup>329</sup> In the public-school context, the court in *Regents of the University of California San Diego*, implicitly acknowledged such a bias, finding that a panel’s reliance on the Title IX investigator’s report without the opportunity for the accused to refute it was fundamentally unfair.<sup>330</sup> However, the use of a Title IX investigator to fulfill multiple roles was not evidence of a flawed proceeding in the Title IX context.<sup>331</sup>

The Fair Campus Act and the Safe Campus Act would require schools to “ensure that the proceeding is carried out free from conflicts of interest by ensuring that there is no commingling of administrative or adjudicative roles.”<sup>332</sup> Such commingling includes the involvement of a single person in more than one of the following roles: (1) victim counselor and victim advocate; (2) investigator; (3) prosecutor; (4) adjudicator; or (5) appellate

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325. See *supra* notes 171–73, 218–19 and accompanying text.

326. H.R. 3408 § 2; H.R. 3403 § 2; see also *supra* Part I.C.2.

327. See *supra* Part II.A.

328. Halley Statement, *supra* note 281, at 2; see also *supra* notes 277, 282–83 and accompanying text.

329. Halley Statement, *supra* note 281, at 2; see also *supra* notes 273, 279, 284 and accompanying text.

330. See *supra* note 172 and accompanying text.

331. See *supra* note 215 and accompanying text.

332. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 2 (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 2 (2015); see also *supra* Part I.C.2.

adjudicator.<sup>333</sup> Congress should enact a provision similar to this one to eliminate the bias that Title IX offices, charged with prosecuting sexual assault on college campuses, pose in campus adjudications. Title IX coordinators should be tasked with overseeing the process and ensuring fairness for both parties of the proceedings. In fact, this is consistent with OCR's guidance, which states that the Title IX coordinator should have "ultimate oversight responsibility" and should not have other roles that would "create a conflict of interest."<sup>334</sup>

### 3. Fair Hearing

Congress should require that schools provide students with a fair, impartial hearing for all sexual assault accusations. The court in *Sterrett v. Cowan*<sup>335</sup> found the denial of a hearing to be a due process violation.<sup>336</sup> Courts have also emphasized that failure to provide students the opportunity to present witnesses and the panel's failure to consider evidence during the hearings is fundamentally unfair because "[d]ue process requires that a hearing . . . be a real one, not a sham or a pretense."<sup>337</sup>

The Fair Campus Act and the Safe Campus Act do not explicitly require schools to conduct hearings, but rather that schools "provide each person against whom the allegation is made with a meaningful opportunity to admit or contest the allegation."<sup>338</sup> Considering courts' reactions to adjudication of these allegations without a hearing, Congress should expressly require that schools conduct hearings prior to removing students from campus. In the absence of a hearing, a student cannot meaningfully and adequately defend him or herself.<sup>339</sup>

### 4. Legal Representation

Congress should enact legislation that requires schools to allow students representation during disciplinary proceedings. In the due process and Title IX contexts, courts generally have not recognized an absolute right to attorney representation for students at school disciplinary proceedings.<sup>340</sup> Additionally, courts have not taken issue with a school's denial of an advisors' participation during a hearing.<sup>341</sup> However, considering the significant consequences that accused students face as a result of these

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333. H.R. 3408 § 2; H.R. 3403 § 2.

334. DEAR COLLEAGUE LETTER, *supra* note 32, at 7.

335. 85 F. Supp. 3d 916 (E.D. Mich. 2015).

336. *See supra* note 158 and accompanying text.

337. *Doe v. Regents of the Univ. of Cal. San Diego*, No. 37-2015-00010549-CU-WM-CTL, at \*3 (Cal. Super. Ct. July 10, 2015) (order granting petition for writ of mandamus), *appeal docketed*, No. D068901 (Cal. Ct. App. Sept. 11, 2015) (quoting *Ciechon v. City of Chi.*, 686 F.2d 511, 517 (7th Cir. 1982)); *see also supra* notes 175–78, 216–17, 219 and accompanying text.

338. H.R. 3408 § 2; H.R. 3403 § 2; *see also supra* Part I.C.2.

339. *See supra* notes 273, 277, 283 and accompanying text.

340. *See supra* notes 159, 210–13 and accompanying text.

341. *See supra* note 159 and accompanying text.

hearings,<sup>342</sup> students should be afforded the possibility of attorney representation or other advisors. This attorney or advisor should similarly be allowed to take part in the proceeding because an important aspect of a fair hearing includes the right to confrontation of adverse witnesses, a role that a student's advisor should play.<sup>343</sup> Such a function heeds to caution of the "Dear Colleague" letter, which "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing."<sup>344</sup>

The Fair Campus Act and the Safe Campus Act provide that schools "shall permit each party to the proceeding to be represented, at the sole expense of the party, by an attorney or other advocate for the duration of the proceeding . . . and shall permit the attorney or other advocate to ask questions in the proceeding, file relevant papers, examine evidence, and examine witnesses."<sup>345</sup> Congress should enact such a provision. Access to representation provides students facing serious, long-term consequences with an advocate to represent their interests.<sup>346</sup> However, this raises concerns that such a provision may deny students equal representation because only those who can afford representation will employ it.<sup>347</sup> Thus, to mitigate disparity, schools should ensure that all students have access to a legal or nonlegal advisor from the school.

### 5. Right to Confront

Congress should require that schools allow cross-examination of adverse witnesses. In many sexual assault cases, schools require that students submit questions to a hearing panel that selects which questions to pose to the accuser and witnesses. In the Title IX context, this is an accepted procedure so long as the omitted questions do not materially affect the outcome of the proceeding.<sup>348</sup> In the due process context, one court found this process to be improper where the panel omitted a significant number of questions and did not ask any follow-up questions.<sup>349</sup> To avoid improper limitation of a student's right to confrontation, advisors and advocates for each of the parties should be allowed to ask questions as long as the subject matter is limited to the contested sexual encounter and related events.<sup>350</sup> Although cross-examination can have a harmful emotional impact on

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342. *See supra* Part II.A.1.

343. *See infra* Part III.B.5.

344. DEAR COLLEAGUE LETTER, *supra* note 32, at 12.

345. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 2 (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 2 (2015); *see also supra* Part I.C.2.

346. *See supra* notes 130–31, 275, 278 and accompanying text.

347. *See Tenerowicz, supra* note 124; *see also Berger & Berger, supra* note 130, at 340.

348. *See supra* notes 220–23.

349. *See supra* notes 161–74 and accompanying text.

350. *See Volokh, supra* note 100 ("Rather than abolishing cross-examination, it would be much fairer to impose reasonable limits, including a ban on irrelevant questions regarding the sexual history and sexual orientation of the complainant; control over unfair, oppressive, or overbearing cross-examination; and even separation of the complainant and accused during the hearing.").

accusers,<sup>351</sup> many of these cases often rely on witness testimony and credibility, rendering confrontation an essential element to a fair hearing.<sup>352</sup>

The Fair Campus Act and the Safe Campus Act provide that submission of questions to the hearing panel for cross-examination of the accuser is sufficient.<sup>353</sup> However, in light of courts' evaluation of this process, this responsibility should not lie with the members of the tribunal. Accused students should be entitled to develop a defense that includes the opportunity to confront his or her accuser. Without this possibility, the testimony of the accuser will remain virtually unchallenged, and additional students will be expelled or suspended at the hands of flawed proceedings.

#### 6. The Standard of Proof: Preponderance of the Evidence

The "Dear Colleague" letter's mandate that schools use a preponderance of the evidence standard of proof has provoked much debate. Some have argued that it unfairly favors accusers, while others have argued that it appropriately balances the rights of the parties and that any departure from that standard would render it unfairly burdensome to prove that a sexual assault occurred, interfering with justice.<sup>354</sup>

The cases discussed above reveal that courts have not taken much issue with the use of this evidentiary standard in campus disciplinary proceedings.<sup>355</sup> Accordingly, coupled with the additional due process protections advocated for in this section, the preponderance of the evidence standard is an acceptable burden of proof for the adjudication of sexual assault claims on college campuses. Without additional protections, however, such a low burden of proof would be inadequate because it would tip the scale in favor of accusers.<sup>356</sup>

### CONCLUSION

The attempts of colleges to reform their policies to curb sexual assault and to avoid loss of funding for Title IX noncompliance has created a hostile environment for accused students. While sexual assault on college campuses is in need of further attention, schools have tilted the scales too far in favor of accusers, thereby seriously threatening the rights and futures of wrongfully accused students. "The days when institutions of higher education could use slipshod procedures to address complaints of campus sexual misconduct are, thankfully, over."<sup>357</sup> However, "The window of opportunity to install just and effective processes in their place remains open."<sup>358</sup> Procedures that adequately balance the interests and due process

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351. *See supra* notes 124, 132, 288 and accompanying text.

352. *See supra* notes 168–70, 274, 277 and accompanying text.

353. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 2 (2015); Safe Campus Act of 2015, H.R. 3403, 114th Cong. § 2 (2015); *see also supra* Part I.C.2.

354. *See supra* note 133 and accompanying text.

355. *See supra* notes 224–28 and accompanying text.

356. *See supra* note 228 and accompanying text.

357. Halley Statement, *supra* note 281, at 2.

358. *Id.*

rights of both accusers and the accused are the only way to preserve the academic environment and effectively curb the prevalence of sexual assault on college campuses. The opportunity for interim judicial review and additional due process protections are necessary to strike this balance.