

2017

Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault

Erin E. Buzuvis

Western New England University School of Law, ebuzuvis@law.wne.edu

Follow this and additional works at: <http://digitalcommons.law.wne.edu/facschol>

 Part of the [Civil Rights and Discrimination Commons](#), [Education Law Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Erin E. Buzuvis, Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault, 78 MONTANA L. REV. 71 (2017).

This Article is brought to you for free and open access by the Faculty Publications at Digital Commons @ Western New England University School of Law. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of Digital Commons @ Western New England University School of Law. For more information, please contact pnewcombe@law.wne.edu.

TITLE IX AND PROCEDURAL FAIRNESS: WHY DISCIPLINED-STUDENT LITIGATION DOES NOT UNDERMINE THE ROLE OF TITLE IX IN CAMPUS SEXUAL ASSAULT

Erin E. Buzuvis*

I. INTRODUCTION

As an aspect of its prohibition on sex discrimination, Title IX of the Education Amendments Act of 1972 requires educational institutions that receive federal funding to engage in a “prompt and equitable” response to reports of sexual harassment, including sexual violence.¹ In the last five years, the Department of Education has increased its efforts to enforce this requirement, both resulting from and contributing to increased public attention to the widespread problem of sexual assault among students, particularly in higher education.² The increase in both enforcement and public attention has motivated colleges and universities to improve their policies and practices for addressing sexual assault, including their disciplinary processes. More students are being disciplined as a result.³

Not surprisingly, this increase in discipline for sexual assault has correlated with an increase in litigation by students who have been disciplined for sexual assault under Title IX.⁴ In some cases, disciplined-student plaintiffs have prevailed in overturning their punishment, causing many to sug-

* Professor of Law, Western New England University School of Law.

1. 34 C.F.R. § 106.8(b) (2016).

2. To be sure, sexual assault also occurs among students in high school and younger, and the Department of Education is increasingly investigating school districts’ policies and practices for addressing the problem. Emma Brown, *Reporting a School Sexual Assault Can Increase Victim’s Risk of Punishment*, WASH. POST (Jan. 17, 2016), <https://perma.cc/P4VT-BUJW>. These cases, however, have not given rise to reverse discrimination claims by disciplined students, which are the subject of this Article. Accordingly, this Article focuses on the problem of campus sexual assault and the legal obligations of institutions of higher education.

3. See, e.g., *University of Maryland Expels Record Number of Students for Sexual Assault*, THE DIAMONDBACK (Nov. 9, 2015), <https://perma.cc/B6E6-XX89> (noting a rise in the number of sexual misconduct cases investigated by the University of Maryland and correlating it to an increase in the number of students disciplined for such misconduct). For context, however, it is still the case that the majority of disciplinary proceedings do not find respondents responsible, usually because of lack of evidence. Moreover, less than half of respondents who are found responsible for sexual assault are expelled; the majority receive suspension or some other punishment. *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS, 10–12, <https://perma.cc/6NWY-ARX6> (last visited Oct. 26, 2016) [hereinafter *Confronting Campus Sexual Assault*].

4. One article reports that 75 such cases have been filed since 2013: *At Least 75 Men Suing Colleges Over Unfair Sexual Allegation Repercussions, Discrimination*, CBS NEW YORK (Mar. 23, 2016, 2:47 PM EDT), <https://perma.cc/VU5K-TJCZ>.

gest that colleges and universities are “overcorrecting” for earlier deficiencies in their procedures that lead to under-enforcement of campus policies banning sexual misconduct.⁵ Much of this rhetoric places blame on Title IX for universities’ problems with compliance and calls, either implicitly or expressly, for repeal of Title IX’s application to sexual assault.⁶

This framing of Title IX is both misleading and problematic. Individual stories and cases of procedural error and bias, or allegations of procedural error and bias, in sexual assault hearings are often presented as evidence of a trend that universities have abandoned procedural fairness in order to comply with the new requirements of Title IX. It does seem accurate to suggest that litigation involving students disciplined for sexual assault occurs more frequently today than before the present era of increased enforcement, which effectively began when the Department of Education’s 2011 Dear Colleague Letter clarified the institutional response required under Title IX to reports of sexual assault.⁷ Yet, by clarifying the government’s expectations for colleges and universities under Title IX, the Dear Colleague Letter motivates institutions to make sexual assault easier and more comfortable for victims to report and to improve their policies and procedures for addressing the reports of sexual assault that they receive. It is possible, therefore, that students disciplined for sexual assault are just as litigious as they were prior to the Dear Colleague Letter—there are simply more of them today. This is not because of problems that the Letter caused; rather, it is because of the problems it corrected.

Moreover, the cases in which disciplined students have succeeded on the merits of their claims cannot serve as evidence of a widespread problem without proper context. When contextualized, statistics place those victories within the larger number of cases that universities win on motions to dismiss or summary judgment, the unknown number of cases in which universities impose discipline that is not litigated, and the additional unknown number of cases in which campus disciplinary proceedings do not result in discipline in the first place.⁸

5. Articles that use the word “overcorrection” include, for example: Emily Yoffe, *The College Rape Overcorrection*, SLATE (Dec. 7, 2014, 11:53 PM), <https://perma.cc/WU5X-BNZZ>; Gregg Bernstein, *An Overcorrection on Campus Sexual Assault Policies?*, THE BALTIMORE SUN (Feb. 15, 2015, 6:00 AM), <https://perma.cc/4DTL-LFWF>; Max Kutner, *The Other Side of the Sexual Assault Crisis*, NEWSWEEK (Dec. 18, 2015, 5:33 AM), <https://perma.cc/B8ST-JPVM>.

6. See, e.g., Bernstein, *supra* note 5; Sarah Kuta, *‘Healthy outrage’ fuels attorney suing CU, other schools on behalf of men accused of sexual assault*, DAILY CAMERA (Sept. 2, 2016, 9:54 AM MDT), <https://perma.cc/ECU2-RCMQ>.

7. Letter from Russlynn Ali, Assistant Secretary for Civil Rights, the Dep’t of Educ. Office for Civil Rights, *Dear Colleague Letter* (Apr. 4, 2011), available at <https://perma.cc/9DCF-H77S> [hereinafter *Dear Colleague Letter*].

8. One source reports only 45% of disciplinary proceedings result in the accused student being found responsible for sexual assault. *Confronting Campus Sexual Assault*, *supra* note 3, at 10. It further

R

R

Finally, the rhetoric of Title IX blame fails to recognize that in cases in which disciplined students have prevailed, the winning arguments have not been anti-male bias, which might suggest a problem that is systemic instead of isolated. Nor have disciplined students prevailed on any procedural argument targeting anything that the Department of Education has required institutions to do as part of a Title IX-compliant response to sexual assault. Nothing in Title IX requires or encourages colleges and universities to violate the due process or contractual rights of students who are accused of sexual assault.

This Article examines the recent spate of disciplined-student cases in an effort to harmonize Title IX compliance with the procedural rights of students who are accused of sexual assault. First, by way of background, it describes and provides historical context for Title IX's application to the problem of sexual assault on college and university campuses, as well as the requirements the law imposes on the educational institutions within its scope. Next, it describes the role that Title IX plays in disciplined-student cases themselves. As Part III illustrates, it is popular for disciplined-student plaintiffs—who thus far have all been male—to argue that the college or university's decision to discipline them was tainted by “reverse” sex discrimination prohibited by Title IX. However, even as some courts have determined such claims meet the bare minimum of proper pleading, reverse discrimination claims have yet to prevail on the merits. Part IV describes how disciplined-student plaintiffs have had comparatively more success challenging disciplinary procedures and outcomes using due process, administrative law, and breach of contract claims. This Part also notes that cases in which disciplined students have successfully argued due process, administrative law, and breach of contract claims do not create legal obligations for defendant institutions that conflict with Title IX's requirement to engage in a prompt and equitable response to sexual assault on campus. For these reasons, the Article argues in its final part that neither the fact of litigation by disciplined students nor the examples of their occasional success undermines Title IX and its application to sexual assault. Procedural fairness is an important component of all campus disciplinary hearings, and litigation is an appropriate response to ensure that universities do not commit material errors in disciplining students for sexual assault. However, such litigation should not be viewed as evidence of a problem with Title IX

notes that among students who are found responsible, most are sanctioned by something other than expulsion. In cases where the accused is found responsible, the student is expelled 43% of the time. *Id.* at 12; see also Tyler Kinkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM EST), <https://perma.cc/2N4Z-5N8H> (reporting that among students found responsible for sexual assault, only 30% are expelled).

or a reason to withdraw universities' responsibility to engage a prompt and equitable response to campus sexual assault.

II. TITLE IX'S APPLICATION TO CAMPUS SEXUAL ASSAULT

For those who have encountered Title IX only in the context of athletics, the statute's application to campus sexual assault may seem like an odd departure. In fact, Title IX imposes a general prohibition on sex discrimination onto educational institutions that receive any funding from the federal government.⁹ That sexual harassment is a form of sex discrimination has been a well-settled matter since the Supreme Court's 1986 decision in *Meritor Savings Bank v. Vinson*.¹⁰ There, the Court ruled that unwelcome sexual advances, when sufficiently severe or pervasive to render a workplace environment hostile to members of one sex, constitute sex discrimination under Title VII.¹¹ Predictably, courts have since applied a similar interpretation to Title IX, confirming that sexual harassment is actionable in the educational context as well.¹² Sexual assault is an obvious subset of sexual harassment. It is by definition unwelcome, and because it often has the effect of interfering with a victim's educational opportunities, it is also severe.¹³

Title IX's statutory language authorizes the Department of Education to enforce its provisions and ensure that federal funding does not flow to institutions that are in violation of the statute or its implementing regulations.¹⁴ In addition, the Supreme Court has determined that the statute implies a private right of action by which private litigants can sue educational institutions in federal court to obtain relief,¹⁵ including money damages,¹⁶ for an institution's violation of Title IX. Thus, the resulting system of dual enforcement consists of both private and public mechanisms. Courts have applied both mechanisms to colleges and universities in cases arising from the sexual assault of one student by another.

9. 20 U.S.C. § 1681(a) (2012).

10. 477 U.S. 57 (1986).

11. *Meritor Sav. Bank*, 477 U.S. at 64.

12. *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 75 (1992); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 281 (1998); *Alexander v. Yale Univ.*, 459 F. Supp. 1, 4 (D. Conn. 1977), *aff'd*, 631 F.2d 178, 182 (2d Cir. 1980) (stating that a claim "that academic advancement was conditioned upon submission to sexual demands constitutes [a claim of] sex discrimination in education . . .").

13. *Jennings v. Univ. of N.C.*, 444 F.3d 255, 268, 274 n.12 (4th Cir. 2006) (acknowledging that a single incident of sexual assault or rape could be sufficient to raise a jury question about whether a hostile environment exists); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse "obviously qualify[] as . . . severe, pervasive, and objectively offensive sexual harassment.").

14. *See* 20 U.S.C. § 1682 (2012).

15. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 705–09 (1979).

16. *Franklin*, 503 U.S. at 75.

A. Judicial Enforcement of Title IX in Sexual Assault Cases

A student¹⁷ who is the victim of sexual harassment or assault at the hands of another student (or an institutional employee) may sue the institution for damages.¹⁸ But institutional liability is not automatic in such cases. The Supreme Court has insisted that only the institution's own intentional, unlawful conduct may give rise to a claim for damages under Title IX.¹⁹ An institution will neither be liable for an unintentional or accidental misstep that gives rise to or enables sexual harassment or assault nor will such liability inure on the sole grounds that someone over whom the institution had control committed the offense in question.

The reason for this narrow scope of liability, the Court has reasoned, is Title IX's status as legislation passed pursuant to Congress's power under the Constitution's Spending Clause. Congress does not have plenary power to regulate educational institutions, but it does have the power to appropriate federal funds.²⁰ As an extension of this power, Congress routinely imposes conditions that obligate the recipients of such funding to comply with requirements that Congress would not necessarily have the power to impose directly. Thus, Title IX essentially operates as a bilateral agreement in which educational institutions voluntarily agree to comply with the statute's nondiscrimination mandate in exchange for being eligible to partake in federal programs, such as student financial aid, that subsidize their operations. Private plaintiffs, however, are not part of this agreement, so institutions arguably lack notice of the fact that by accepting federal funding from the government, they could be liable to a third party. Out of concern for fairness to funding recipients, the Supreme Court has insisted that only their intentional misconduct can give rise to such liability because intentional misconduct—unlike accidents or vicarious liability—is entirely within the institution's power to prevent and control.²¹

17. Title IX protects male and female students alike. *See, e.g.,* *Yap v. N.W. Univ.*, 119 F. Supp. 3d 841, 849–52 (N.D. Ill. 2015) (refusing to dismiss claims that Northwestern failed to investigate allegations by a male plaintiff that he was sexually harassed by a professor).

18. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 647–51 (1999). The same goes for cases where harassment or assault is perpetrated by an institutional employee. *Franklin*, 503 U.S. at 73–76.

19. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 642.

20. U.S. CONST. art. I, § VIII.

21. When Congress exercises legislative authority under the Constitution's Spending Clause, it makes federal funding available on condition that the recipient agree to certain terms, such as agreeing not to engage in discrimination. *Pennhurst St. Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). The Court's explanation for limiting the scope of damages liability in such cases is that an institution that makes that deal with the government does not necessarily expect to be liable for damages to anyone else. *Franklin*, 503 U.S. at 74–75; *Davis*, 526 U.S. at 641–42. Therefore, to ensure that the liability for damages does not sneak up on an unsuspecting funding recipient, the remedy only applies to cases involving intentional discrimination, as opposed to liability based on negligence or agency principles.

In *Davis v. Monroe County Board of Education*,²² the Supreme Court held that an institution's *deliberate* failure to respond to known harassment is tantamount to intentional discrimination on the institution's part, and thus can be the basis of a plaintiff's claim for money damages. Since that time, lower courts have articulated the standard for institutional liability in cases of student-on-student sexual harassment and assault to require the plaintiff to prove (1) that an appropriate person, or someone with authority, had actual notice of sexual harassment or sexual assault, that (a) had occurred, (b) was occurring, or (c) was threatened; (2) notwithstanding such notice, that institution responded with deliberate indifference; and (3) the sexual harassment was "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."²³ As noted above, the third requirement is easily satisfied in cases involving sexual assault.²⁴ The first two require fuller explanation.

1. Actual Notice

There are two possible grounds on which a university may be liable to a plaintiff who was sexually assaulted by a peer or someone else under institutional control. One possibility is that a university's failure to respond to a student's report that sexual assault or other actionable harassment has occurred may give rise to liability not for the assault itself, but for emotional and economic damages occurring in its wake that are attributable to the university's nonresponse.²⁵ Alternatively—or in addition—a university may be liable for damages attributable to the sexual assault itself if the plaintiff demonstrates that the university disregarded an "obvious" threat or "substantial risk" that sexual misconduct would occur.²⁶ The threat need not be specific to the plaintiff; institutional knowledge of a respondent's prior rape of a student other than the plaintiff constitutes actual notice of the risk

22. 526 U.S. 629, 642 (1999).

23. *Williams v. Bd. of Regents of Univ. Sys. of Ga.*, 477 F.3d 1282, 1293 (11th Cir. 2007) (citing *Davis*, 526 U.S. at 633).

24. *Soper*, 195 F.3d at 854–55 (noting that rape "obviously qualifies as being severe, pervasive, and objectively offensive sexual harassment . . .").

25. *See, e.g., Kinsman v. Fla. St. Univ. Bd. of Trs.*, No. 4:15CV-MW/CASTrustees, 2015 WL 11110848, at *4 (N.D. Fla. Aug. 12, 2015) (alleging in complaint that "between January 22, 2013, and November 13, 2013, senior athletics officials took little, if any, action to investigate or respond to the alleged rape of a student by another student in their charge . . . plausibly alleges deliberate indifference.").

26. *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1153 (10th Cir. 2006) ("[H]arassment of persons other than the plaintiff may provide the school with the requisite notice to impose liability under Title IX."); *Delgado v. Stegall*, 367 F.3d 668, 672 (7th Cir. 2004) ("[I]n *Davis* the Court required knowledge only of 'acts of sexual harassment' by the [harasser], not of previous acts directed against the particular plaintiff.").

or threat to others.²⁷ Additionally, the threat need not be specific to the respondent, as knowledge of prior sexual misconduct committed by others may also constitute notice where the past and present incidents are connected by a program-specific pattern. For example, a university could be liable for rape committed by football recruits in light of its failure to respond to known, prior incidents of sexual abuse that occurred within the football recruiting program, even though the past incidents were perpetrated by different recruits.²⁸

2. *Deliberate Indifference*

Because it is the legal equivalent of intentional misconduct,²⁹ the deliberate indifference standard is a difficult one for plaintiffs to satisfy. Ordinary mistakes do not qualify, even if they cause injury, or further injury, to the plaintiff. Rather, the institutional response—or the lack of response—must be “clearly unreasonable” in light of the known circumstances.³⁰ The complete absence of any investigative or disciplinary response will often satisfy the standard,³¹ but not always. For example, one court determined that the deliberate indifference standard insulated a university that made no effort to address or investigate a student’s reported rape because of its good faith belief that doing so would hamper the ongoing efforts of law enforcement.³² Another court determined that deliberate indifference could not ex-

27. *Williams*, 477 F.3d at 1296 (finding a basis for institutional liability where plaintiff alleged that athletic officials at the University of Georgia knew about an athlete’s prior history of sexual misconduct when they recruited him to the football team and then failed to supervise him or take other precautions to address the threat of rape that athlete later committed against the plaintiff). In contrast, a university’s knowledge of the perpetrator’s abusive and intimidating tendencies towards his roommate generally did not qualify as actual notice of an obvious risk of sexual violence. *Frazer v. Temple Univ.*, 25 F. Supp. 3d 598 (E.D. Pa. 2014).

28. *Compare Simpson v. Univ. of Colo. at Boulder*, 500 F.3d 1170, 1180–81 (10th Cir. 2007), and *Doe v. Univ. of Tenn.*, No. 3:16-CV-199, 2016 WL 2595795, at *13 (M.D. Tenn. May 3, 2016) (denying the University of Tennessee’s motion to dismiss, where the plaintiff had alleged that university officials had “notice of a specific and concrete pattern of an ‘inordinate’ number of sexual assault allegations against members of specific teams within the UT Athletic Department.”), with *Doe v. Blackburn Coll.*, No. 06-3205, 2012 WL 640046, at *11 (C.D. Ill. Feb. 27, 2012) (determining that university did not have actual notice of threat to the plaintiff of being raped by an unknown perpetrator based on prior incidents of sexual assault that involved separate, known perpetrators).

29. *See Davis*, 526 U.S. at 642 (reasoning that deliberate indifference is intentional discrimination).

30. *E.g.*, *Ross v. Univ. of Tulsa*, No. 14-CV-484-TCK-PJC, 2016 WL 1545138, at *14 (N.D. Okla. Apr. 15, 2016).

31. *Jennings v. Univ. of N.C.*, 482 F.3d 686, 700 (4th Cir. 2007) (deliberate indifference could be satisfied by evidence that university official dismissed plaintiff’s complaint about sexual harassment by her coach, telling her that that coach was a “great guy and that she should work out her problems directly with him.”); *see also Univ. of Tenn.*, 2016 WL 2595795 (denying university’s motion to dismiss where plaintiff alleged nonresponse); *McGrath v. Dominican Coll. of Blauvelt, N.Y.*, 672 F. Supp. 2d 477 (S.D.N.Y. 2009).

32. *Moore v. Regents of the Univ. of Cal.*, No. 15-CV-05779-RS, 2016 WL 2961984 (N.D. Cal. May 23, 2016).

ist where the university's nonresponse to a known report of rape was justified by the plaintiff's failure to file a formal complaint.³³

Courts are unwilling to treat violations of university policy as tantamount to deliberate indifference.³⁴ Even violations of policies promulgated by the Department of Education that govern administrative enforcement of Title IX do not automatically qualify as deliberate indifference.³⁵ On the other hand, one plaintiff successfully alleged deliberate indifference by claiming that university officials downgraded a sexual assault sanction from expulsion to suspension because of the perpetrator's status as an athlete.³⁶ Thus, a university may be liable for an incomplete or insufficient response under circumstances from which a jury could infer that university officials deliberately watered down grievance procedures or the respondent's sanction.

As a result of the high burden that the deliberate indifference standard places on plaintiffs, private enforcement can only address the most egregious examples of institutional inaction. Litigation, therefore, has a limited ability to motivate institutions to address sexual assault, which may be difficult and costly to the institution's reputation. Importantly, however, as the next subpart explains, government regulators may enforce Title IX against a wider range of institutional misconduct—an effort to which the Department of Education has devoted considerable attention in the last five years.

33. *Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir. 2014); *see also Ross*, 2016 WL 1545138, at *14 (“Campus security officers and school administrators walk a fine line when they investigate a report of sexual assault by a victim who is unwilling to proceed or make any specific accusations. [Plaintiff] had one semester left of school and did not want any disruption of her life prior to her graduation. Interviewing [Plaintiff's friend and Respondent], and other members of the small University of Tulsa (TU) campus or ultimately taking action against [Respondent] would undoubtedly have caused this type of unwanted disruption. While perhaps not in accordance with Title IX best practices or the OCR's guidance in the DCL, TU's response [to Plaintiff's report] could not be deemed ‘deliberately indifferent’ in light of the nature of such report.”). *But see Butters v. James Madison Univ.*, 145 F. Supp. 3d 610 (W.D. Va. 2015) (denying motion to dismiss where university justified its alleged failure to respond on complainant's unwillingness to file a formal complaint).

34. *Facchetti v. Bridgewater Coll.*, 175 F. Supp. 3d 627 (W.D. Va. 2016) (concluding that plaintiff did not sufficiently allege deliberate indifference even though her complaint alleged that the university violated its own policy by deterring her from reporting the matter to the police, failing to advise her of her rights, preventing her from presenting witnesses, and excluding her from information about the disciplinary process); *Thomas v. Bd. of Trs. of the Neb. St. Colls.*, No. 8:12-CV-412, 2015 WL 4546712, at *14 (D. Neb. July 28, 2015), *aff'd*, No. 15-2972, 2016 WL 3564252 (8th Cir. July 1, 2016) (rejecting plaintiff's argument that university's failure to ensure that student accused of rape and murder completed sanctions for earlier acts of misconduct was deliberate indifference).

35. *Moore*, 2016 WL 2961984, at *7–8 (concluding that failure to provide housing or academic accommodations did not constitute deliberate indifference).

36. *Doe v. Univ. of Ala. in Huntsville*, No. 5:14-CV-02029-HGD, 2016 WL 1270605 (N.D. Ala. Mar. 31, 2016).

B. Administrative Enforcement of Title IX in Sexual Assault Cases

Because Title IX is a spending condition, the Department of Education enforces Title IX by leveraging an institution's federal funding, although the Department has never withdrawn funding from an institution for non-compliance. Generally, institutions found to be in violation of Title IX are motivated by the threat of funding withdrawal to enter into a resolution agreement with the agency that promises corrective action.³⁷ Unlike claims by private plaintiffs, government enforcement raises no concerns about the fairness of exposing funding recipients to third-party liability. Accordingly, the Supreme Court's insistence on an institution-friendly standard of liability, one that requires the plaintiff to prove intentional discrimination or its equivalent, deliberate indifference, does not apply. Because the Department of Education, in contrast, is focused on prospective relief, it has more leeway to impose obligations on an institution that go well beyond simply ensuring the absence of deliberate indifference.

To many, the Office of Civil Rights' (OCR) attention to campus sexual assault appears a recent development. In fact, the agency has long considered Title IX's prohibition on sex discrimination to cover sexual harassment, including sexual violence. In a 1997 guidance document, OCR addressed the requirement in its 1975 regulations that institutions adopt grievance procedures that provide for a "prompt and equitable resolution" of sex

37. As counterexamples to the voluntary resolutions that are commonplace today, federal funding recipients in the past have refused to cooperate with the efforts of the Department of Education and its predecessor to enforce Title IX, resulting in the adjudications by or attempted by the agency in an effort to terminate their federal funds. One group of recipients challenged the agency's jurisdiction to enforce Title IX on the basis of indirect funding received via student loan programs, as well as the application of Title IX to parts of the university beyond the federally funded program itself. *See* *Grove City Coll. v. Harris*, 500 F. Supp. 253, 256 (W.D. Pa. 1980) (overturning administrative law judge's findings that funding recipient failed to comply with agency's requirement to submit an assurance of compliance); *Hillsdale Coll. v. Dep't of Health, Educ. & Welfare*, 696 F.2d 418, 420 (6th Cir. 1982) (same); *Univ. of Richmond v. Bell*, 543 F. Supp. 321, 324 (E.D. Va. 1982) (enjoining agency from continuing enforcement proceeding against institution that failed to submit to agency investigation). Another group of institutions challenged the agency's authority under Title IX to regulate employment practices. *Romeo Cnty. Sch. v. U.S. Dep't of Health, Ed., & Welfare*, 438 F. Supp. 1021, 1026 (E.D. Mich. 1977) (enjoining agency from continuing enforcement proceeding); *Brunswick Sch. Bd. v. Califano*, 449 F. Supp. 866, 869 (D. Me. 1978) (same); *N. Haven Bd. of Educ. v. Califano*, No. N-78-165, 1979 WL 285, at *1 (D. Conn. Apr. 24, 1979) (same). All of the institutions in both groups successfully appealed or enjoined the agency's adjudication and thus preserved their federal funding. Notably, however, the arguments successfully advanced by the recipients in these cases are no longer viable today as a result of intervening legislation and case law. *See* *N. Haven Bd. of Educ. v. Bell* 456 U.S. 512 (1982) (confirming the agency's authority under Title IX to regulate employment practices; *Grove City Coll. v. Bell*, 465 U.S. 555, 573 (1984) (confirming that federal student aid programs constitute federal assistance to the institution but only subject the college's financial aid program to Title IX); Civil Rights Restoration Act of 1987, 20 U.S.C. § 1647 (2012); 42 U.S.C. § 2000 d-4a (2012) (amending Title IX to cover entire institutions and not only the specific program that receives federal funds).

discrimination complaints³⁸ and confirmed that this includes complaints about sexual harassment.³⁹ The guidance clarified institutions' obligations to respond to reports of sexual harassment by taking "immediate and appropriate steps" to investigate or otherwise determine what occurred, followed by "steps reasonably calculated" to end any harassment, eliminate a hostile environment if one has been created, prevent harassment from occurring again, and to remedy the effects of harassment on the affected individual.⁴⁰ OCR otherwise avoided imposing specific and uniform requirements on diverse educational institutions, preferring instead a case-by-case evaluation of "prompt and equitable" that maximizes institutions' flexibility to create procedures best suited to its needs.

Over the years, however, OCR has issued several guidance documents that clarify how it intends to exercise its authority to enforce the "prompt and equitable" requirement. In 2001, OCR reiterated this standard for determining noncompliance, confirming that it remained unchanged by the Court's then-recent adoption of a deliberate indifference standard for lawsuits seeking money damages.⁴¹ As the agency explained, the Court's desire to ensure that funding recipients were not penalized without notice of the risk of liability to third parties does not apply to government enforcement since OCR provides funding recipients with notice and the opportunity to take corrective action before terminating funding.⁴²

Ten years later, OCR expounded on the 2001 Guidance in a Dear Colleague Letter released on April 4, 2011.⁴³ In the wake of increased public attention to the problem of sexual assault on college campuses⁴⁴ and lackluster response by university officials, the Dear Colleague Letter was particularly focused on aspects of the prior guidance that were proving challenging to institutions in cases involving sexual violence. OCR's own enforcement efforts that preceded the Dear Colleague Letter addressed examples of universities improperly delegating their investigation responsibilities to lo-

38. 34 C.F.R. § 106.8(b) (2016). Other relevant regulatory provisions include 34 C.F.R. § 106.8(a) (2016) (requiring funding recipients to designate an employee responsible for Title IX compliance, including investigating internal complaints about sex discrimination) and 34 C.F.R. § 106.9 (2016) (containing specific requirements about the notice and dissemination of those procedures).

39. *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (1997), <https://perma.cc/6YEW-HQVZ> [hereinafter *Sexual Harassment Guidance*].

40. *Sexual Harassment Guidance*, *supra* note 39.

41. *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS (Jan. 2001), <https://perma.cc/82CH-2LRT> [hereinafter *Revised Sexual Harassment Guidance*].

42. *Id.* iii–iv.

43. *Dear Colleague Letter*, *supra* note 7.

44. Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NAT'L CRIMINAL JUSTICE REFERENCE SERV., xiii (Oct. 2007), <https://perma.cc/7DEK-9A9T>.

R

R

cal law enforcement; imposing watered-down or no sanctions on responsible parties; discouraging victims from filing complaints—sometimes by pressuring them into informal mediation; excluding victims from disciplinary hearings; imposing an evidentiary standard that overprotects perpetrators;⁴⁵ prohibiting victims from speaking about the matter; and failing to inform victims of investigation outcomes.⁴⁶

OCR addressed these and other patterns of noncompliance in the Dear Colleague Letter. The Letter clarified that a university’s duty to conduct an “adequate, reliable, and impartial” investigation⁴⁷ was not satisfied by the investigatory efforts of local law enforcement, which determines the possibility of a criminal response rather than protecting the victim’s civil rights.⁴⁸ Nor may a university altogether avoid investigation when the alleged victim refuses to file a complaint or openly participate in a disciplinary proceeding. Even though it is not appropriate to impose sanctions on an alleged perpetrator whose victim does not testify, the duty to respond to sexual assault extends beyond efforts to identify and discipline the perpetrator, as the university must pursue “other steps to limit the effects of the alleged harassment and prevent its recurrence.”⁴⁹ Such obligations include providing support and accommodations for the victim, as well as engaging the community in prevention and training efforts.⁵⁰

45. *E.g.*, Letter from Howard Kallem, Office for Civil Rights, to Jane E. Genster, Georgetown Univ., Re: OCR Complaint No. 11-03-2017 (Oct. 16, 2003) (“In order for a recipient’s sexual harassment grievance procedure to be consistent with Title IX standards, the recipient must draw conclusions about whether particular conduct rises to the level of sexual harassment using a preponderance of the evidence standard.”), available at <https://perma.cc/B5D9-MTSH>; see also Katherine K. Baker et al., *Title IX and the Preponderance of the Evidence: A White Paper*, 9–10, <https://perma.cc/3V54-CHK4> (last visited Oct. 27, 2016) (describing other examples of earlier enforcement actions that corrected institution’s erroneous use of standards of proof higher than preponderance).

46. Kristen Lomardi, *Sexual Assault on Campus Shrouded in Secrecy*, CENTER FOR PUBLIC INTEGRITY (Dec. 1, 2009), <https://perma.cc/VJ9B-Y9DH>.

47. *Revised Sexual Harassment Guidance*, *supra* note 41, at 20.

48. *Dear Colleague Letter*, *supra* note 7, at 10.

49. *Id.* at 5. The Letter also explains that in serious cases, an institution should not let the victim’s request for confidentiality limit the university’s response in ways that jeopardize the safety of the community.

50. *Id.* at 16–17. A subsequent guidance clarified this point even further. Examples include providing increased monitoring, supervision, or security at locations or activities where the misconduct occurred; providing training and education materials for students and employees; changing and publicizing the school’s policies on sexual violence; and conducting climate surveys regarding sexual violence. In instances affecting many students, an alleged perpetrator can be put on notice of allegations of harassing behavior and be counseled appropriately without revealing, even indirectly, the identity of the student complainant. A school must also take immediate action as necessary to protect the student while keeping the identity of the student confidential. These actions may include providing support services to the student and changing living arrangements or course schedules, assignments, or tests. See *Questions and Answers on Title IX and Sexual Violence*, DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, 20 (2014), <https://perma.cc/WQ5V-989R> (last visited October 27, 2016) [hereinafter *Questions and Answers on Title IX and Sexual Violence*].

The Dear Colleague Letter also addressed compliance with the regulatory requirement for a “prompt and equitable” response, including an equitable grievance procedure. For example, the Letter put institutions on notice of OCR’s expectation that Title IX-compliant institutions will employ a preponderance standard of evidence, which asks, “Is it more likely than not that sexual violence occurred?” The Letter noted that the preponderance standard is consistently used by courts and agencies in civil rights cases.⁵¹ Standards that heighten the institution’s burden of proof, such as a “clear and convincing” or “beyond a reasonable doubt,” increase the likelihood that sexual assault will not be adequately addressed and its recurrence prevented.⁵² Besides employing a preponderance standard, an equitable proceeding also ensures that both the complainant and the respondent have the same access to information used at the hearing, as well as the same opportunities to present evidence. The Dear Colleague Letter is agnostic as to the specific procedures that a grievance proceeding must employ; its emphasis is only on the symmetrical application of those procedures to the respondent and complainant.⁵³ Other aspects of the Letter provide a sixty-day guideline for the prompt completion of an investigation,⁵⁴ clarify the institution’s obligation to take interim measures to protect the complainant while the investigation and grievance procedure is pending,⁵⁵ and suggest possible steps that institutions might take to “address the effects” of sexual harassment.⁵⁶

In the wake of the 2011 Dear Colleague Letter, the number of complaints to OCR regarding a college or university’s response to sexual violence has risen considerably with every year.⁵⁷ The agency has resolved

51. *Id.* at 10–11.

52. *Id.* at 11.

53. *Id.* at 11–12 (“For example, a school should not conduct a pre-hearing meeting during which only the alleged perpetrator is present and given an opportunity to present his or her side of the story, unless a similar meeting takes place with the complainant; a hearing officer or disciplinary board should not allow only the alleged perpetrator to present character witnesses at a hearing; and a school should not allow the alleged perpetrator to review the complainant’s statement without also allowing the complainant to review the alleged perpetrator’s statement.”). Though the DCL applies that same agnosticism to the question of whether institutions should permit parties to be represented by attorneys, the regulations implementing the Campus SaVE Act prohibit them from restricting parties’ access to the representative of their choice.

54. *Id.* at 12 (“Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.”).

55. *Id.* at 15–16 (suggesting a no-contact order, for example, and that any required changes in housing or class schedule minimize disruption to the complainant).

56. *Id.* at 16–17 (suggesting counseling and academic accommodations as examples).

57. Here are the number of complaints challenging colleges’ and universities’ response to sexual violence that OCR has received in each fiscal year since 2009 (the year OCR began keeping track of complaints pertaining to specifically sexual violence).

only a fraction of these complaints, however.⁵⁸ In so doing, the agency has uncovered and addressed violations based on egregious delay in conducting investigations and concluding the disciplinary process;⁵⁹ excluding the complainant from participating in the appeal;⁶⁰ restricting the complainant's, but not the respondent's, opportunity to submit character evidence;⁶¹ failing to use the preponderance standard;⁶² failing to investigate a student's complaint of ongoing sexual assault by a professor;⁶³ failing to address harassment or retaliation directed at complainants;⁶⁴ failing to pursue a non-disciplinary response after a disciplinary response was precluded by the vic-

FY '09	11
FY '10	11
FY '11	16
FY '12	16
FY '13	33
FY '14	106
FY '15	164

Delivering Justice: Report to the President and Secretary of Education Fiscal Year 2015, DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, 11 fig.9 (2016), <https://perma.cc/MV3C-BNQS>.

58. *Title IX: Tracking Sexual Assault Investigations*, CHRONICLE OF HIGHER EDUC., <https://perma.cc/AQG2-KFE6> (last visited Oct. 27, 2016). The Chronicle of Higher Education is tracking OCR's enforcement efforts and reports that the agency has resolved 55 of the 336 investigations into universities' response to sexual assault since the Dear Colleague Letter's release in April 2011.

59. *Harvard Law School Found in Violation of Title IX, Agrees to Remedy Sexual Harassment, including Sexual Assault of Students*, U.S. DEP'T OF EDUC. (December 30, 2014), <https://perma.cc/C4P5-X59T> (Harvard Law School); Letter from Meena Morey Chandra, Director, U.S. Dep't of Educ. Office for Civil Rights, Region XV, to Kristine Zayko, Deputy General Counsel, Office of the General Counsel, Michigan State University, *Re: OCR Docket # 15-11-2098 and #15-14-2113*, 16 (Sept. 1, 2015), available at <https://perma.cc/F2FR-D4YV> (Michigan State University) [hereinafter Letter from Meena Morey Chandra]; *Princeton University Found in Violation of Title IX, Reaches Agreement with U.S. Education Department to Address, Prevent Sexual Assault and Harassment of Students*, U.S. DEP'T OF EDUC. (Nov. 5, 2014), <https://perma.cc/K5XP-J9J4> (Princeton University).

60. Letter from Joel J. Berner, Regional Director, U.S. Dep't of Educ. Office for Civil Rights, Region I, to Martha C. Minow, Dean, Harvard Law School, *Re: Complaint No. 01-11-2002*, 10–11 (Dec. 30, 2014), available at <https://perma.cc/235K-2G3G> (Harvard Law School) [hereinafter Letter from Joel J. Berner].

61. Letter from Timothy C.J. Blanchard, Director, U.S. Dep't of Educ. Office for Civil Rights, New York Office, to Christopher L. Eisgruber, President, Princeton University, *Re: Case No. 02-11-2065*, 10 (Nov. 5, 2014), available at <https://perma.cc/533A-HRX8> (Princeton University) [hereinafter Letter from Timothy C.J. Blanchard].

62. *Id.* at 11.

63. Letter from Adele Rapport, Regional Director, U.S. Dep't of Educ. Office for Civil Rights, Region V, to Dr. Steven Shirley, President, Minot State University, *Re: OCR #05-14-2061*, 15 (July 7, 2016), available at <https://perma.cc/D4UL-49KH> (Minot State University).

64. Letter from Meena Morey Chandra, *supra* note 59, at 3; Letter from Taylor D. August, Regional Director, U.S. Dep't of Educ. Office for Civil Rights, Region VI, to Dr. R. Gerald Turner, President, Southern Methodist University, *Re: OCR Case Nos. 06-11-2126, 06-13-2081, and 06-13-2088*, 10–13 (Dec. 11, 2014), available at <https://perma.cc/8Y8P-SKZ2> (Southern Methodist University) [hereinafter Letter from Taylor D. August].

R

tim's noncooperation;⁶⁵ failing to provide interim measures to ensure the complainant's safety;⁶⁶ and failing to post or disseminate a Title IX-compliant policy and grievance procedure.⁶⁷ As noted above, the agency has yet to withdraw federal funding from institutions that have violated Title IX, but the agency has instead used its enforcement authority to extract compliance agreements from those universities. Such agreements require training, policy revision, memoranda of understanding with local law enforcement, climate checks, reviewing past complaints, and taking necessary action to assist complainants.

By increasing its level of oversight over the last five years, OCR has motivated colleges and universities to engage in more thorough, comprehensive, and balanced responses to the problem of sexual assault on campus. Many more institutions today comply with the requirement to identify an employee responsible for the institution's Title IX compliance than have in the past.⁶⁸ Reporting mechanisms are easier for victims to find and understand, and complainants understand their rights to participate in any disciplinary process, to accommodations and support, and to protection from further harassment and retaliation. A likely result of this may be that victims are reporting sexual assaults with increasing frequency,⁶⁹ causing an increase in the number of disciplinary proceedings and the number of stu-

65. Letter from Alice B. Wender, Regional Office Director, U.S. Dep't of Educ. Office for Civil Rights, Region XI, to Teresa A. Sullivan, President, University of Virginia, *Re: OCR Review No. 11-11-6001 Letter of Finding*, 19 (Aug. 31, 2015), available at <https://perma.cc/X8CC-ND67> (University of Virginia); Letter from Thomas J. Hibino, Regional Director, U.S. Dep't of Educ. Office for Civil Rights, Region I, to Anthony P. Monaco, President, Tufts University, *Re: Complaint No. 01-10-2089*, 10 (Apr. 28, 2014), available at <https://perma.cc/W8RY-PEVL> (Tufts University) [hereinafter Letter from Thomas J. Hibino].

66. Letter from Thomas J. Hibino, *supra* note 65, at 10 (Tufts University).

67. Letter from Joel J. Berner, *supra* note 60, at 10 (Harvard Law School); Letter from Alice B. Wender, Regional Office Director, U.S. Dep't of Educ. Office for Civil Rights, Region XI, to Teresa A. Sullivan, President, University of Virginia, *Re: OCR Review No. 11-11-6001 Letter of Finding* 7, 22 (Sept. 21, 2015), available at <https://perma.cc/U3BH-W6Y5> (University of Virginia); Letter from Meena Morey Chandra, Regional Office Director, U.S. Dep't of Educ. Office for Civil Rights, Region XV, to Dr. Michael V. Drake, President, Ohio State University, *Re: OCR Docket #15-10-6002*, 1, 9 (Sept. 11, 2014), available at <https://perma.cc/TYV6-X5XR> (Ohio State University); Letter from Anurima Bhargaya, Chief, U.S. Department of Justice, Civil Rights Division, Educational Opportunities Section, and Gary Jackson, Regional Director, U.S. Department of Education, Office for Civil Rights, Seattle Office, to President Royce Engstrom, President, the University of Montana, and Lucy France, Esq., University Counsel, the University of Montana, *Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001*, 7–10 (May 9, 2013), available at <https://perma.cc/6SL7-PMV9> (University of Montana); Letter from Taylor D. August, *supra* note 64, at 2 (Southern Methodist University).

68. See, e.g., Jake New, *Title IX Coordinators Required*, INSIDE HIGHER EDUC. (Apr. 27, 2015), <https://perma.cc/ARP6-MZTL>.

69. See, e.g., Monica Wang, *Title IX Report Shows Highest Ever Number of Complaints*, YALE DAILY NEWS (Feb. 15, 2016), <https://perma.cc/56DU-9LGA>; Yoffe, *supra* note 5 (describing the increase in reporting on campus sexual assault and attributing it to "a greater willingness on the part of women to make complaints, not an increase in incidence").

R
R

R

R

dents disciplined for sexual assault. Given that disciplined students have a long history of challenging the processes and outcomes by which they were suspended or expelled for misconduct, including sexual assault, it is not surprising that the number of cases brought by disciplined students, as well as the number of cases won, appears to have increased as well.⁷⁰ The next Part examines the role that Title IX is playing in these cases.

III. TITLE IX'S APPLICATION TO STUDENT DISCIPLINE

Title IX not only obligates federally funded educational institutions to respond to complaints of sex discrimination, including sexual harassment and sexual violence, it also prohibits them from discriminating against students on the basis of sex when imposing discipline for violations of university policy, including sexual misconduct.⁷¹ Historically, OCR has not had much opportunity to enforce this aspect of Title IX. Rather, the federal courts have served as the primary venue for challenges to alleged sex discrimination against students disciplined for sexual assault. Most of the judicial decisions in disciplined-student cases have occurred in the wake of the 2011 Dear Colleague Letter. This trend is likely explained, at least in part, by increased reporting of sexual assault and the corresponding increase in the number of students disciplined, which is itself a result of universities suspending earlier practices (such as those discussed above)⁷² that did not comply with the clarifications to Title IX that the Dear Colleague Letter contained. Courts have considered disciplined students' Title IX claims using a variety of theories of liability. The two most widely used are the erroneous outcome and selective enforcement frameworks developed by the Second Circuit in an early case called *Yusuf v. Vassar College*.⁷³ Less frequently, courts have considered frameworks labeled deliberate indifference and disparate impact.

No plaintiff has prevailed on a Title IX claim against a university defendant in a student discipline case. In contrast, many university defendants have prevailed on motions to dismiss the plaintiff's claim for insufficient pleading, though courts have permitted disciplined-student plaintiffs' Title IX claims to proceed to the discovery phase. Plaintiffs who have survived a motion to dismiss may be in a position to procure a settlement, as Dezmire

70. Jake New, *Court Wins for the Accused*, INSIDE HIGHER EDUC. (Nov. 5, 2015), <https://perma.cc/53SS-G2JK>.

71. 20 U.S.C. § 1681 (2012). Student discipline is not expressly mentioned, but the statute's general ban on sex discrimination in educational programs covers student discipline.

72. See *supra* Part II.B.

73. 35 F.3d 709, 715 (2d Cir. 1994).

Wells did in his case against Xavier University.⁷⁴ On the other hand, university defendants have prevailed on summary judgment in Title IX cases on the grounds that the plaintiff did not produce sufficient material evidence in support of his allegations to warrant a trial.⁷⁵

A. *Erroneous Outcome*

In erroneous outcome cases, the plaintiff argues that gender bias in the disciplinary process produced mistaken results. There are two elements to an erroneous outcome case: error and bias.

1. *Error*

A plaintiff in a disciplined-student case must first cast doubt on the outcome of the disciplinary proceeding by identifying a procedural or substantive error.⁷⁶ Examples of successfully alleged errors include: that the adjudicator, whether an investigator, hearing panel, or reviewing dean, reached conclusions that ran contrary to the weight of the evidence;⁷⁷ that the plaintiff (then “respondent”) had an unduly limited opportunity to present his case to the adjudicator;⁷⁸ that the respondent was not provided access to evidence that would be raised in the hearing or other information about his procedural rights at the hearing;⁷⁹ and that the investigator omitted exculpatory evidence from the investigator’s report or failed to follow potentially exculpatory leads.⁸⁰ If a plaintiff potentially reached a jury on an

74. Collin Binkley et al., *Few rights for either side in college judicial procedures*, THE COLUMBUS DISPATCH (November 25, 2014, 9:45 AM EDT), <https://perma.cc/E74D-EFAT> (noting the settlement between Wells and Xavier University).

75. *E.g.*, *Mallory v. Ohio Univ.*, 76 F. App’x 634, 639 (6th Cir. 2003); *Xiaolu Peter Yu v. Vassar Coll.*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015).

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

77. *Compare Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 194 (D.R.I. 2016), *and Doe v. Columbia Univ.*, 831 F.3d 46, 52–53 (2d Cir. 2016), *with Prasad v. Cornell Univ.*, No. 5:15-CV-322, 2016 WL 3212079, at *15–16 (N.D.N.Y. Feb. 24, 2016).

78. *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 769 (D. Md. 2015) (finding that alleged limits placed on the respondent’s opportunity to question the complainant could, if proven, call the proceeding’s outcome into doubt); *Doe v. Univ. of Mass.-Amherst*, 2015 WL 4306521, at *8–10 (D. Mass. July 14, 2015) (finding that alleged limits placed on the respondent’s ability to cross-examine witnesses, as well as the decision to exclude some documentary evidence he wished to introduce, could, if proven, call the proceeding’s outcome into doubt). *But see Yu*, 97 F. Supp. 3d at 465 (rejecting plaintiff’s argument that cutting short his cross-examining led to an erroneous outcome, where hearing officer had testified in deposition that he would cut off Yu’s questioning where answers to those questions had already been given and further questioning would be redundant).

79. *Columbia Univ.*, 831 F.3d at 50 (failing to inform the respondent of his procedural rights); *Salisbury Univ.*, 123 F. Supp. 3d at 766 (withholding witness lists and witness statements from respondent).

80. *Columbia Univ.*, 831 F.3d at 52; *Prasad*, 2016 WL 3212079, at *15–16; *Univ. of Mass.-Amherst*, 2015 WL 4306521, at *8–10; *Salisbury Univ.*, 123 F. Supp. 3d at 766. Even when the investigator

erroneous outcome claim, errors like these are capable of convincing a jury to doubt the outcome of the process by which the plaintiff was disciplined.⁸¹

2. *Bias*

Secondly, a plaintiff in an erroneous outcome case must also prove that the procedural or substantive error was the result of gender bias. As in other discrimination cases, the gender bias element of an erroneous outcome claim can be established by direct evidence, such as discriminatory remarks made by administrators who participated in the disciplinary process. The gender bias element can also be established through circumstantial evidence, such as dissimilar treatment of male and female respondents or a pattern in which men who are accused of sexual assault are “invariably found guilty.”⁸²

In some recent cases, plaintiffs have failed to support allegations of gender bias, resulting in dismissal for failure to state a claim.⁸³ In other cases, however, courts have addressed the question of what constitutes a sufficient allegation of gender bias. In *Yusuf*, the leading Second Circuit decision established and applied the erroneous outcome framework to conclude the plaintiff’s allegation that men are “invariably found guilty” by

is not assigned an adjudicatory role, plaintiffs have successfully alleged that investigator error calls the outcome into doubt, in circumstances where the respondent’s opportunity to question the report at the adjudicatory hearing was limited. *E.g.*, *Prasad*, 2016 WL 3212079, at *16 (concluding that because Cornell’s disciplinary hearing process provides little opportunity for a respondent to challenge the findings in the investigators report, the plaintiff’s claim that the report was deficient called the proceeding’s outcome into question). On the other hand, one plaintiff was unable to support his allegations of investigation errors and omissions with evidence, leading to his case’s dismissal on summary judgment. *Yu*, 97 F. Supp. 3d at 466 (“Yu claims that the Investigator Report (i) ‘cherry pick[ed]’ statements from each witness without providing their full context; (ii) took [Complainant’s] statements as true; (iii) glossed over [Complainant’s] unexplained inconsistencies; and (iv) framed the statements in a way that reflected his own biased decision that [Yu] was guilty Yu points to no specific facts, however, to support these conclusory allegations.”).

81. However, courts are unwilling to hold even demonstrable errors against a university if the plaintiff neglected to exercise a right of appeal, which would have presumably given the university the opportunity to correct those errors in the first place. *Peloe v. Univ. of Cincinnati*, No. 1:14-CV-404, 2015 WL 728309, at *14 (S.D. Ohio Feb. 19, 2015).

82. *Univ. of Cincinnati*, 2015 WL 728309, at *14; *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 250 (2d Cir.1995).

83. *Yu*, 97 F. Supp. 3d at 485; *Doe v. Univ. of S. Fla. Bd. of Trs.*, 8:15-CV-682-T-30EAJ, 2015 WL 3453753 (M.D. Fla. May 29, 2015); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356 (S.D.N.Y. 2015), *vacated*, 831 F.3d 46 (2d Cir. 2016); *Marshall v. Ohio Univ.*, 2:15-CV-775, 2015 WL 1179955 (S.D. Ohio Mar. 19, 2015); *Sterrett v. Cowan*, 85 F. Supp. 3d 916 (E.D. Mich. 2015), *vacated* (Sept. 30, 2015), *appeal dismissed* (Oct. 1, 2015) (though the plaintiff was able to continue to litigate part of his due process claim); *Blank v. Knox Coll.*, 14-CV-1386, 2015 WL 328602 (C.D. Ill. Jan. 23, 2015); *Harris v. St. Joseph’s Univ.*, 2014 WL 1910242 (E.D. Pa. May 13, 2014) (though the plaintiff was able to continue to litigate his defamation claim); *Doe v. Univ. of the S.*, 687 F. Supp. 2d 744 (E.D. Tenn. 2009) (though the plaintiff eventually prevailed on negligence and breach of contract claims).

Vassar's disciplinary process was a sufficient allegation of gender bias, and therefore the plaintiff should have had the opportunity to prove that it was true.⁸⁴

Since the 1994 decision in *Yusuf*, however, the Supreme Court has clarified the pleading standard for civil rights plaintiffs. In its 2009 decision *Ashcroft v. Iqbal*,⁸⁵ the Court made clear that a complaint must include more than “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” Rather, a plaintiff must plead specific facts sufficient to support a plausible inference that the defendant is liable for the alleged misconduct.⁸⁶ Citing *Iqbal*, some contemporary courts in erroneous outcome cases have dismissed plaintiffs' complaints alleging bias by invoking the “men are invariably found guilty” language that was sufficient when the Second Circuit decided *Yusuf*.⁸⁷ Other courts, however, have taken the opposite view, concluding that allegations identical to Yusuf's create a plausible inference of discrimination that is sufficient at the pleading stage.⁸⁸ These decisions are arguably bolstered by a recent Second Circuit decision that reinstated an erroneous outcome claim against Columbia University. In *Doe v. Columbia University*,⁸⁹ the court reconciled the *Iqbal* pleading standard with the 1973 Supreme Court decision *McDonnell Douglas v. Green*,⁹⁰ which allows plaintiffs alleging discrimination with minimal, circumstantial evidence to benefit from a temporary presumption of the defendant's discriminatory motive.⁹¹ Reading *Iqbal* together with *McDonnell Douglas*, the Second Circuit concluded that a plaintiff could survive a motion to dismiss where the complaint *specifically* alleged facts that support a “minimal plausible inference” of discriminatory intent.⁹² The Second Circuit did not have an opportunity in the *Columbia*

84. 35 F.3d at 713.

85. 556 U.S. 662, 678 (2009); *see also* *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007).

86. *Iqbal*, 556 U.S. at 678.

87. *Tanyi v. Appalachian St. Univ.*, 5:14-CV-170RLV, 2015 WL 4478853 (W.D.N.C. July 22, 2015) (specifically noting that allegations like Yusuf's do not satisfy today's higher standard for more specific pleading in the wake of *Twombly* and *Iqbal*).

88. *Columbia Univ.*, 831 F.3d at 53–56; *see also* *Brown Univ.*, 166 F. Supp. 3d at 189 (denying the university's motion to dismiss and reasoning that requiring the plaintiff to allege anything more specific than “men are invariably found guilty” at the pleading stage would be to prematurely impose the burden tantamount to the summary judgment standard); *Prasad*, 2016 WL 3212079, at *17 (finding that plaintiff's allegation that men are “invariably found guilty”—in combination with other allegations of bias—plausibly establish gender bias required of an erroneous outcome claim).

89. 831 F.3d 46 (2d Cir. 2016).

90. 411 U.S. 792 (1972).

91. *Columbia Univ.*, 831 F.3d at 54 (“The ‘minimal evidence suggesting an inference that the employer acted with discriminatory motivation’ can be satisfied by as little as a showing that the position sought by the plaintiff remained open after plaintiff's rejection and that the employer continued to seek applicants from persons of plaintiff's qualifications.” (citing *McDonnell Douglas*, 411 U.S. at 802)).

92. *Id.* at 49–50.

case to say whether a complaint that alleged “men are invariably found guilty” satisfies this standard, but such an outcome seems likely in the Second Circuit.⁹³ On the other hand, the “invariably found guilty” allegation would not be sufficient if the case itself presents an example of the university not finding a male respondent responsible for sexual assault.⁹⁴ Additionally, if the plaintiff is unable to support an allegation of a pattern of anti-male decisions with evidence, the erroneous outcome claim is vulnerable to dismissal later in the case.

In the *Columbia* case, the plaintiff’s allegations of gender bias attributed certain procedural errors to the investigator, the hearing panel, and the dean, who were all allegedly motivated by anti-male bias stemming from an effort to “refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students’ charges of sexual assaults by male students.”⁹⁵ The court agreed that the alleged procedural errors—which included the failure of the investigator and the panel to seek out potential exculpatory witnesses that the plaintiff suggested, failure to comply with University procedures designed to protect accused students, and rendering of conclusions contrary to the weight of the evidence—created a plausible inference of bias, though not necessarily gender bias.⁹⁶ However, the complaint contained additional allegations that the university was motivated to scapegoat a male student in order to counter the public criticism that the university faced prior to and during the disciplinary hearing that it had not taken seriously complaints of female students alleging sexual assault by male students. The court reasoned that these allegations satisfied the pleading standard as they were both sufficiently specific to put the defendant on notice of the basis for the plaintiff’s claim of gender bias, and, if proven true, could serve as the minimum amount of evidence from which a jury could infer bias.⁹⁷ Similarly, another court rejected the idea

93. Specifically, he had alleged that Columbia was biased against men in the wake of negative publicity over its mishandling of a female student’s earlier complaints of sexual assault and that procedural errors that occurred during the disciplinary process and the absence of evidence to support the finding against are demonstrative of bias.

94. *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586 (S.D. Ohio 2016) (Nor is the case that males are “invariably found guilty” by the university disciplinary process, as even in the case at hand, one of the plaintiffs was found not responsible of one of the counts against him.).

95. *Columbia Univ.*, 831 F.3d at 56.

96. *Id.* at 57 (“The alleged fact that [the investigator], and the panel and the Dean, chose to accept an unsupported accusatory version over Plaintiff’s, and declined even to explore the testimony of Plaintiff’s witnesses, if true, gives plausible support to the proposition that they were motivated by bias in discharging their responsibilities to fairly investigate and adjudicate the dispute.”).

97. *Id.* at 57–58 (“The Complaint alleges that after Columbia was severely criticized by the student body and the press for toleration of sexual assault of female students, the University was motivated in this instance to accept the female’s accusation of sexual assault and reject the male’s claim of consent, so as to show the student body and the public that the University is serious about protecting female students from sexual assault by male students—especially varsity athletes. There is nothing implausible

that gender bias could plausibly be inferred from the university's ramped-up efforts to prevent and address sexual assault, given that the announcements for its awareness and prevention claims were presented in a "gender-neutral tone, addressed to all students, and published to improve campus safety for both men and women."⁹⁸

In contrast to the Second Circuit's opinion, other lower courts (including the lower court in the *Columbia* case)⁹⁹ rejected the idea that evidence of a university's bias against those who are accused of sexual assault could qualify as evidence of bias against men.¹⁰⁰ As one court explained, the institution "is not responsible for the gender makeup of those who are accused by *other students* of sexual misconduct."¹⁰¹ This court and others have refused to permit the category of "respondent" to serve as a proxy for "male" in light of the fact that universities do not limit membership in that category to just one sex.

or unreasonable about the Complaint's suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults.").

98. *Salisbury Univ.*, 123 F. Supp. 3d at 766–76. Similarly, funding a sexual assault prevention program with a grant from the Avon Fund for Women did not suggest gender bias because the program was advertised "for all students." In contrast, however, if a university's sexual assault prevention program is amenable to allegations that it promotes gender stereotypes about rape, a complaint that asserts such allegations will survive a motion to dismiss, as evidenced by the ruling in *Doe v. Washington and Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996 (W.D. Va. Aug. 5, 2015). There, the plaintiff alleged that gender bias could be attributed to the Title IX officer who presented the case against him, as evidenced by her public endorsement of the idea, expressed by a guest speaker, that "sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express." Because the plaintiff's case "parallels of the situation it describes and the circumstances under which Plaintiff was found responsible for sexual misconduct" and because the Title IX officer wielded "considerable influence" in the proceedings, it is possible, the judge reasoned, for a jury to find evidence of gender bias. *Washington and Lee Univ.*, 2015 WL 4647996, at *10.

99. *Columbia Univ.*, 101 F. Supp. 3d at 371 (concluding that any favoritism towards the complainant "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.").

100. *King v. DePauw Univ.*, 2:14-CV-70-WTL-DKL, 2014 WL 4197507, at *10 (S.D. Ind. Aug. 22, 2014); *Sahm v. Miami Univ.*, 110 F. Supp. 3d 774, 778 (S.D. Ohio 2015) (rejecting plaintiff's allegation that a campus safety officer encouraged a (presumably exculpatory) witness not to testify constituted an allegation of bias, noting "[t]hese facts pleaded against [the officer] do not suggest a gender bias against males so much as against students accused of sexual assault."); *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586 (S.D. Ohio 2016) (rejecting plaintiff's claim that the university's sensitivity to the complainant's trauma indicated gender bias, given the possibility that the university has only ever received complaints that name male students as perpetrators of sexual assault, and the possibility that women are more likely than men to report sexual assault); *Salau v. Denton*, 139 F. Supp. 3d 989, 999 (W.D. Mo. 2015) ("Even if the University treated the female student more favorably than the Plaintiff, during the disciplinary process, 'the mere fact that Plaintiff is male and [the alleged victim] is female does not suggest that the disparate treatment was because of Plaintiff's sex.'").

101. *King*, 2014 WL 4197507, at *10.

On the other hand, the Second Circuit's decision is consistent with one lower court ruling that accepted a plaintiff's allegation of gender bias which incorporated a version of a scapegoat narrative. In *Wells v. Xavier University*,¹⁰² a plaintiff alleged that errors in the process which led to his suspension were motivated by gender bias stemming from an ongoing investigation by the Department of Education into claims that the university responded inadequately to female students' reports of sexual assault. Specifically, he claimed that university officials denied him procedural rights "in order to demonstrate to the OCR that Defendants would take action, as they had failed to in the past, against males accused of sexual assault."¹⁰³ The court agreed that if the plaintiff could prove this was true, it would be a plausible basis for the jury to find that Xavier University violated Title IX.¹⁰⁴ But rather than continue to litigate the case, the parties agreed to a settlement of undisclosed terms.¹⁰⁵

Thus, whether a plaintiff can survive a university's motion to dismiss by alleging the university's rush to judgment against students accused of sexual assault may depend on the jurisdiction in which the plaintiff files the erroneous outcome claim. Jurisdictions bound or persuaded by the Second Circuit's reasoning in *Columbia* or the federal district court decision in *Wells* will view allegations of bias against students accused of sexual assault as capable of supporting an inference of gender bias, while other jurisdictions may continue to refuse to conflate anti-respondent and anti-male bias.¹⁰⁶

Even if a plaintiff initially alleges the elements of an erroneous outcome claim to the court's satisfaction, it must eventually support those claims with evidence. At this time, there are far fewer summary judgment decisions evaluating plaintiffs' evidentiary support for erroneous outcome claims than opinions deciding motions to dismiss claims for insufficient pleading. One such decision was *Mallory v. Ohio University*,¹⁰⁷ in which the plaintiff argued that a hearing panel erred when it considered the complainant's intoxication as evidence that sexual contact between them was "unwanted" under the university's definition of sexual assault. The plaintiff alleged this error was the product of "antiquated notions" that men are al-

102. 7 F. Supp. 3d 746 (S.D. Ohio 2014).

103. *Id.* at 751.

104. *Id.*

105. Amanda Lee Meyers, *Dez Wells, Xavier Settle Suit*, CINCINNATI INQUIRER (Apr. 24, 2014), available at <https://perma.cc/QZ6Z-38R6>.

106. *See, e.g.*, *Austin v. Univ. of Oregon*, No. 6:15-CV-02257-MC, 2016 WL 4708540, at *9 (D. Or. Sept. 8, 2016) ("I decline to extend the Second Circuit's reasoning because Plaintiffs make no similar allegations of an atmosphere of scrutiny and, even had they done so, there remains no plausible inference that a university's aggressive response to allegations of sexual misconduct is evidence of gender discrimination.").

107. 76 F. App'x 634, 639 (6th Cir. 2003).

ways the aggressors.¹⁰⁸ The court did not determine whether the university erred in applying its sexual assault policy, because even if it had, there was no evidence of the bias the plaintiff alleged, such as an example of female respondent benefitting from a different interpretation.¹⁰⁹ Similarly, in a more recent case against Vassar College, the court rejected the plaintiff's attempt to prove bias based on an inference that only anti-male bias could explain why the hearing panel weighed the evidence in the way that it did.¹¹⁰ As of this writing, there are no cases in which erroneous outcome claims have been litigated past summary judgment.

B. Selective Enforcement

Unlike erroneous outcome claims, plaintiffs in selective enforcement claims do not need to argue that they were disciplined in error, just that they were singled out for punishment because of their sex. Essentially, if the plaintiff is male, he must show either that the institution does not discipline women or that it disciplines them less severely for the same conduct.¹¹¹ For example, a male plaintiff was allowed to pursue a Title IX claim based on the allegation that his law school considered a female complainant's charges against him but disregarded his complaint of assault against another student.¹¹² Yet, institutions often prevail on motions to dismiss selective enforcement cases because plaintiffs rarely have examples of a female comparator.¹¹³ Even in a case where the plaintiff did produce evidence of a female student who had been accused of sexual assault but not suspended or expelled, the university prevailed on a motion for summary judgment because of dissimilarities other than gender roles that warranted the different outcomes.¹¹⁴

108. *Id.* at 639.

109. *Id.*

110. *Yu*, 97 F. Supp. 3d at 477 (“Aside from broadly stating that ‘the [p]anel was wrong’ to discount the Facebook messages, *Yu* points to no evidence suggesting that such discounting was due to gender bias. *Yu* argues that gender bias is the only explanation for how the Interpersonal Violence Panel could have believed Complainant’s version of events given the Facebook messages, but this ignores the corroborating testimony of Student A and Student B as to Complainant’s incapacitation, as well as Complainant’s own explanation for writing the Facebook messages.”).

111. This is like the requirement in a Title VII case for the plaintiff to show those outside the protected class were treated more favorably.

112. *Vaughn v. Vt. L. Sch.*, 2:10-CV-276, 2011 WL 3421521 (D. Vt. 2011), *aff’d*, 489 Fed. App’x 505 (2d Cir. 2012).

113. *Prasad*, 2016 WL 3212079, at *18 (“Having failed to allege factual support for the proposition that female students who were accused of sexual misconduct at Cornell were treated more favorably than male students under similar circumstance, Plaintiff’s Title IX selective enforcement claim is dismissed.”); *Univ. of Mass.-Amherst*, 2015 WL 4306521, at *9 (same); *Austin v. Univ. of Or.*, 2016 WL 4708540, at *7; *Doe v. Regents of the Univ. of Calif.*, No. 2:15-CV-02478-SVW-JEM, 9 (C.D. Cal. July 25, 2016).

114. *Mallory*, 76 F. App’x at 640.

In another case, a court refused to dismiss a plaintiff's selective enforcement claim upon concluding that his allegation of "selective, gender-based enforcement" met the minimum requirements for pleading a complaint.¹¹⁵ Specifically, he complained that the university failed to investigate a reported sexual assault that he claimed was committed against him by a female student. The court agreed that if proven, this theory would support a Title IX claim based on selective enforcement.¹¹⁶ As with erroneous outcome claims, however, no selective enforcement claims have yet survived motions for summary judgment.

C. Disparate Impact

Disparate impact discrimination occurs when the application of non-discriminatory practices negatively affects one group, such as men, more often than its counterpart, such as women. Given that men are over-represented among students accused of sexual assault, procedures that impair the rights of respondents arguably have a disparate impact on men. Yet, it seems reasonably clear after *Alexander v. Sandoval*¹¹⁷ that disparate impact claims are outside the scope of a plaintiff's right of action under Title IX.

In *Sandoval*, the Supreme Court considered plaintiffs' argument that a state's English-only driver's license test had a disparate impact on immigrants and thus violated Title VI, a federal law that prohibits federally funded programs from discrimination based on race, color, and national origin.¹¹⁸ The plaintiffs cited the Department of Justice's regulations implementing Title VI, which prohibit disparate impact discrimination and had been upheld by an earlier Court as a valid agency interpretation of the statute.¹¹⁹ The Supreme Court nevertheless concluded that disparate impact claims are outside the scope of Title VI's implied right of action.¹²⁰ As a result, while the Department of Justice is free to bring enforcement actions based on its disparate regulations, private plaintiffs have no such enforcement power.

Title IX was modeled on Title VI and, like its counterpart, contains an implied right of action that permits private enforcement. Thus, many lower courts have concluded that *Sandoval*, by extension, forecloses a private

115. *Marshall v. Ind. Univ.*, 170 F. Supp. 3d 1201, 1210 (S.D. Ind. 2016).

116. *Id.*

117. 532 U.S. 275 (2001).

118. *Id.* at 279.

119. *Id.* at 281 (citing *Guardians Assoc. v. Civ. Serv. Comm'n*, 431 F. Supp. 526, 539–40 (S.D.N.Y. 1977), *vacated and remanded*, 562 F.2d 38 (2d Cir. 1977)).

120. *Id.* at 285.

right of action for disparate claims under Title IX as well.¹²¹ In one case, however, without addressing the impact of *Sandoval*, a federal district court considered the plaintiff's evidence in support of his disparate impact claim, which it determined was insufficient to create a triable fact for the jury. Specifically, the court refused to acknowledge the plaintiff's claim that the college's procedures produced a pattern of negative outcomes for men when the college had found male respondents "not responsible" in two of the previous six disciplinary matters, and in another, had refrained from expelling a respondent who was found responsible.¹²²

Thus, the most likely outcome for a plaintiff's disparate impact claim is dismissal at the pleading stage. As the example above shows, even a plaintiff who convinced a court to recognize his disparate impact claim would still face the daunting burden of proving that such a pattern existed. The mere fact that only men had been accused of sexual assault was not enough in light of the diverse outcomes in their cases.

D. Deliberate Indifference

In rare cases, courts consider the possibility that an institution is liable under Title IX for failing to address the plaintiff's alleged procedural errors on the grounds that such failure amounted to deliberate indifference. For example, in *Wells v. Xavier University*, a court determined that the plaintiff had sufficiently pled a deliberate indifference claim by alleging university officials had actual notice of the allegedly defective hearing that it failed to remedy.¹²³ Conversely, other courts have rejected deliberate indifference claims that do not include an allegation of sexual harassment or other unofficial conduct.¹²⁴

Courts that consider deliberate indifference claims in the context of disciplined-student cases mistakenly incorporate a framework developed to address misconduct—namely sexual harassment—that does not “involve official policy of the recipient entity.”¹²⁵ The Ninth Circuit recognized the

121. *Univ. of S. Fla. Bd. of Tr's*, 2015 WL 3453753, at *3; *Tsuruta v. Augustana Univ.*, 4:15-CV-04150-KES, 2015 WL 5838602, at *3 (D.S.D. Oct. 7, 2015); *Ludlow v. N.W. Univ.*, 79 F. Supp. 3d 824, 832–33 (N.D. Ill. 2015).

122. *Bleiler v. Coll. of Holy Cross*, CIV.A. 11-11541-DJC, 2013 WL 4714340, at *8 (D. Mass. Aug. 26, 2013).

123. 7 F. Supp. 3d 746, 751–52 (S.D. Ohio 2014).

124. *Brown Univ.*, 166 F. Supp. 3d at 190–91; see also *Univ. of the S.*, 687 F. Supp. at 757–58 (“The facts pled by Plaintiffs, however, do not contain the critical component of any Title IX claim necessary to make a finding under the deliberate indifference standard, namely that the University's alleged actions constituted sexual harassment.”).

125. See Part II.A.2 (deliberate indifference standard in sexual harassment cases); see also *Gebser*, 524 U.S. at 290–93; *Ohio Univ.*, 2015 WL 1179955, at *8 (“It is unclear as to how exactly this [deliberate indifference] claim applies to the facts of this case, as usually, this claim is asserted by a victim against a school or university official who failed to protect him or her from harassment or otherwise

limits of the deliberate indifference framework when it corrected a lower court's erroneous application of that standard to a case challenging inequitable distribution of a university's athletic opportunities. Unlike acts of sexual harassment committed by students or employees, "Universities' decisions with respect to athletics are 'easily attributable to the funding recipient and . . . always—by definition—intentional.'"¹²⁶ The conduct and outcome of a disciplinary hearing reflects intentional, institutional conduct in the same way that a decision to allocate athletic resources is an intentional decision attributable to the institution. In disciplined-student cases, the existing frameworks for erroneous outcome and selective enforcement are sufficient frameworks for analyzing the possibility of intentional bias. It is unnecessary to stretch the deliberate indifference framework, developed for distinguishable situations of sexual harassment, onto disciplinary cases as well.

In conclusion, disciplined students are frequently incorporating various Title IX claims into their lawsuits challenging their expulsion or suspension for sexual assault. Even as erroneous outcome claims have found a foothold in some jurisdictions, neither these claims nor other Title IX claims have exposed educational institutions to liability other than one settlement of an undisclosed amount. In contrast, other sources of law, discussed in the next Part, are more useful safeguards for the procedural rights of disciplined students.

IV. OTHER SOURCES OF LAW IN DISCIPLINED-STUDENT CASES

As Part III illustrates, Title IX has played a minimal role in ensuring that students accused of sexual assault are treated fairly, as Title IX's narrow role is to ensure that the disciplinary process and its outcomes do not impose disparate treatment on male and female students. The statute is agnostic on the question of whether the university treated an accused student fairly based on his status as a respondent, as opposed to his gender. Other sources of law besides Title IX are far more effective at securing substantive rights of students accused of misconduct, including the Constitution's Due Process Clause, administrative law, and contract law.

A. *Due Process*

The Fourteenth Amendment prohibits states, including state universities, from infringing on an individual's right to liberty or property without

address the alleged misconduct—actions that [Ohio University] officials undisputedly took to protect the alleged victim from [the accused student].").

126. *Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 968 (9th Cir. 2010).

adhering to the minimum procedural protections.¹²⁷ The Supreme Court's leading case on the application of due process to student discipline is *Goss v. Lopez*.¹²⁸ There, the Court held that due process requires educational institutions to hold some kind of hearing before subjecting high school students to lengthy suspensions on charges of misconduct.¹²⁹ As demonstrated in *Lopez*, a procedural due process analysis has two parts: first, that the state has impaired a constitutionally protected interest in life, liberty or property; and second, that additional procedural protections were warranted by the weighing of the benefit of additional procedures to the plaintiff against the cost of providing them. On the first question, the Court determined that high school students have a property interest at stake because state law created an entitlement to public education.¹³⁰ It also recognized that students have a protected liberty interest in continuing their education and professional lives free from the reputational harm that comes from an unwarranted disciplinary decision.¹³¹ Many courts have recognized that like the high school students in *Lopez*, college students also have a property interest in their state-school educations.¹³² While there are no state laws that create an entitlement to higher education, a property interest in higher education is rooted in the contract (express or implied) between a university, which agrees to allow the student to complete their education, and the student, who agrees to meet academic standards and adhere to the code of conduct.¹³³ As for liberty interests, college students face at least as great a risk as high school students do of reputational harm resulting from discipline interfering with continued education and professional pursuits.¹³⁴

But the fact that procedural due process applies does not resolve the question of how much process is due. In *Lopez*, the Court ruled that, at a

127. U.S. CONST. amend XIV.

128. 419 U.S. 565 (1975).

129. *Id.*

130. *Id.* at 573–74.

131. *Id.* at 574–75.

132. See, e.g., *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 12 (1st Cir. 1988) (holding that “a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process”); *Doe v. Alger*, 175 F. Supp. 3d 646, 658 (W.D. Va. 2016) (finding universities policies create entitlement in continued enrollment that is a constitutionally protected property interest); *Brown v. Univ. of Kan.*, 16 F. Supp. 3d 1275, 1288 (D. Kan. 2014) *aff’d*, 599 F. App’x 833 (10th Cir. 2015) (“Plaintiff contends that he possessed a property interest in his continued education at the School of Law. Plaintiff paid his tuition and ultimately went through two semesters of law school. Accordingly, the Court concludes that he had a property interest in his continued enrollment which entitled him to procedural due process.”); *Zwick v. Regents of Univ. of Mich.*, No. CIV. 06-12639, 2008 WL 1902031, at *5 (E.D. Mich. Apr. 28, 2008) (finding “the arguments in favor of a property interest to be persuasive” in Michigan).

133. E.g., *Barnes v. Zaccari*, 669 F.3d 1295, 1304–05 (11th Cir. 2012); *Manolov v. Borough of Manhattan Cmty. Coll.*, 952 F. Supp. 2d 522 (S.D.N.Y. 2013).

134. E.g., *Doe v. Rectors & Visitors of George Mason Univ.*, No. 1:15-CV-209, 2016 WL 775776 (E.D. Va. Feb. 25, 2016).

minimum, due process requires that schools provide students “notice of the charges against [them]” and an “opportunity to tell [their] side of the story.”¹³⁵ Because the suspension that the students in *Lopez* were facing was short (under ten days), the Court read these requirements as satisfied by an “informal give and take.”¹³⁶ But the Court also recognized that “more formal procedures” would be warranted in situations involving longer or more permanent forms of discipline.¹³⁷ College students challenging discipline for sexual assault have typically been suspended for a quarter, a semester, or longer, or in some cases, expelled.¹³⁸ Therefore, the Court’s analysis in *Lopez* does not offer much guidance on the question of what process is due, other than to identify the concepts of notice and the opportunity to be heard.

Lower courts agree that colleges and universities need not provide accused students the same procedural rights that criminal defendants receive, though they do not always agree on the particular rights a student must receive. For example, courts disagree about whether due process entitles students the right to know the identity of the accuser, to cross-examine the accusers and other witnesses,¹³⁹ and to counsel,¹⁴⁰ though courts are more likely to require such procedural protections when the student is facing expulsion or long suspensions. Notably, no court has ever held that more than a preponderance of evidence of a student’s misconduct is constitutionally

135. *Lopez*, 419 U.S. at 581.

136. *Id.* at 584.

137. *Id.*

138. *E.g.*, *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712 (E.D. Va. 2015) (challenging expulsion); *Alger*, 175 F. Supp. 3d at 658 (challenging five-and-one-half year suspension); *Sterrett*, 85 F. Supp. 3d at 927, *vacated* (Sept. 30, 2015), *appeal dismissed* (Oct. 1, 2015) (challenging three-year suspension).

139. *Compare* *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 594 F.2d 699, 700 (8th Cir. 1979) (high school student expelled for an indefinite period was “denied procedural due process of law by the refusal of school officials to allow him to call the accusing teacher as a witness during his expulsion hearing in order to help resolve disputed issues of fact”), *and* *McGhee v. Draper*, 564 F.2d 902, 911 (10th Cir. 1977) (right to cross-examine “those whose word deprives a person of his livelihood . . . [and when that decision is] based partly on undisclosed reports, which might stain a reputation and threaten a livelihood”), *with* *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (college student not permitted to cross-examine or have a right to counsel in determining length of suspension after engaging in fight), *and* *Gorman*, 837 F.2d at 16 (student disciplined by university “had the opportunity to cross-examine his accusers as to the incidents and events in question, and there is no evidence that any [such] limitation on . . . [the student’s right to cross-examine his accusers on his allegations of bias] prevented him from eliciting the truth about the facts and events in issue [and thus] [u]nder the circumstances presented,” was not deprived of procedural due process).

140. *Compare* *Osteen*, 13 F.3d at 225 (college student not permitted right to counsel in determining length of suspension after engaging in fight), *with* *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir.1978) (due process requires universities to permit respondents to be represented by counsel when they are facing simultaneous criminal charges), *and* *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 23 (Me. 2005) (restricting the active participation of counsel did not violate due process).

required to suspend or expel that student from school.¹⁴¹ In fact, some courts have endorsed an even lower standard of proof: substantial evidence.¹⁴² As a result, a university's constitutional obligation to provide due process to disciplined students does not conflict with any specific requirements it faces under Title IX to conduct a "prompt and equitable response" to reported sexual assault.

Plaintiffs who have challenged disciplinary outcomes for sexual assault in recent years have seen mixed results in efforts to litigate due process claims. Here are some examples.

Example 1: George Mason University. A disciplined student's recent case against George Mason University provides a particularly compelling example of a due process claim because the uncontroverted facts permitted the plaintiff to win on summary judgment.¹⁴³ In this case, the plaintiff discovered evidence that conduct he was punished for was outside the scope of the notice of the charges against him, violating a basic tenet of due process. Additionally, the evidence supported a second due process violation during the appeal process when the assistant dean who heard the disciplined student's appeal held separate, closed meetings with the individual members of the disciplinary panel, the complainant, and the respondent without informing the respondent about the content of those meetings and not providing him an opportunity to respond. Lastly, evidence in the record demonstrated that the assistant dean had "made up his mind so definitively that nothing [the] plaintiff might have said [in the appeal process] could have altered his decision"—a rare example of decision maker bias severe enough to warrant a due process violation on its own.¹⁴⁴ The court later ordered the plaintiff reinstated with a clean record and enjoined the university from retrying him for the same alleged misconduct for which he was initially expelled (though it did permit the university to conduct a disciplinary process on other grounds that were not previously adjudicated).¹⁴⁵

The university's procedural errors in this case in no way resulted from requirements of Title IX. George Mason University could have engaged in the required "prompt and equitable response" to the charges against the plaintiff while still providing thorough notice of the charges, permitting both parties the opportunity to respond to the testimony presented in the other's closed-door meeting, and removing the biased decision maker. None

141. See Baker, *supra* note 45.

142. Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence As the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1634 (2012).

143. Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602 (E.D. Va. 2016).

144. *George Mason Univ.*, 149 F. Supp. 3d at 620.

145. *Id.* at 625.

of these efforts to protect the plaintiff's right to due process would have run afoul of any requirements in the Dear Colleague Letter.

Example 2: University of Michigan. Because due process claims do not require plaintiffs to allege and ultimately prove gender bias, such claims often survive motions to dismiss where Title IX claims fail. In one recent example, a plaintiff was permitted to litigate some of his due process claims after his Title IX claim against the University of Michigan was dismissed.¹⁴⁶ There, the court agreed with the university that the disciplinary hearing itself did not impair the plaintiff's right to due process, even though it did not provide him with an opportunity to cross-examine his accuser, the complainant. Yet the court was concerned with the allegation that the investigator interviewed the now-plaintiff for a report without providing him notice of the charges against him and did not allow him a meaningful opportunity to participate in the report's creation. The court permitted his due process claim to go forward on these grounds.¹⁴⁷

In this case, the University of Michigan, like many universities, elected to adopt a so-called "investigator model" of sexual assault response, in which a trained investigator rather than a hearing panel is responsible for gathering and presenting evidence to the decision maker. Even though the court in this case found aspects of the university's approach under this model to potentially violate due process, the court's decision was hardly an indictment of the investigator model overall. The court simply confirmed that universities must deploy this model in a manner that respects respondents' due process rights. Additionally, it illustrates how an investigator must inform the respondent of the charges prior to the initial interview and must give the respondent some opportunity for input on the report's findings prior to finalizing the report. Notably, the court took no issue with the other aspects of the investigator model, such as the absence of the respondent's opportunity to confront witnesses and the complainant directly. With minor adjustment, the university could have engaged in its preferred method of sexual assault response and ensured that the respondent received the process that was due.

Example 3: Appalachian State University. Like the University of Michigan case, the case against Appalachian State also serves as an example of a plaintiff surviving a motion to dismiss his alleged due process violations while having his reverse discrimination Title IX claims dismissed. In this case, the court allowed a plaintiff to proceed in litigating a due process challenge to having been suspended for twenty days for sexual assault

146. Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. Feb. 4, 2015).

147. *Id.* at 931.

before a hearing panel ultimately exonerated him on appeal.¹⁴⁸ Specifically, the court held that the university violated the plaintiff's right to due process by holding a second hearing on charges of sexual misconduct after the first hearing panel found him not responsible. The university did not invoke appropriate reasons for holding a second hearing, such as a finding that the first panel's decision contravened the clear weight of the evidence or egregious procedural error. Without such standards, the court was concerned that the university "could simply order a new misconduct trial whenever the university did not prevail—which is exactly what is alleged here."¹⁴⁹ The court's opinion denying the university's motion to dismiss on this aspect of the plaintiff's due process claim expressly laid to rest any concern that its ruling created a conflict with Title IX when it rejected the university's argument that it was compelled to conduct the second hearing by the Dear Colleague Letter.¹⁵⁰ While the Dear Colleague Letter does require that the right to appeal must be equally available to both parties,¹⁵¹ an appeal is distinguishable from a second hearing. A due process-compliant standard for rehearing—one that is limited to situations where the findings contravene the clear weight of the evidence or involve egregious procedural error—would comply with Title IX as long as that opportunity for rehearing was available to respondents and complainants on equal terms.

In this same case, the court found the plaintiff's allegation that the university notified him of a second charge of sexual harassment less than twenty-four hours before the hearing also properly alleged a violation of due process. On this issue as well, the court's ruling creates no conflict with Title IX. Even under the requirement to engage in a "prompt and equitable response," the university remained free to provide the plaintiff with earlier notice of the sexual harassment charge or to delay the hearing in order to provide him with adequate time to prepare his defense.¹⁵² Notably, the court dismissed several aspects of his due process claim, including: his representation by a graduate student while the complainant had a lawyer; the university's failure to tell him about potential witnesses that could have helped his case; the exclusion of a potential witness who would have testified about the complainant's sexual history; the hearing panel's inclusion of a member who had found against his co-respondent in a prior matter; and

148. *Tanyi v. Appalachian St. Univ.*, 5:14-CV-170RLV, 2015 WL 4478853, at *6–7 (W.D.N.C. July 22, 2015).

149. *Id.* at *6.

150. *Id.* at *7.

151. Dear Colleague Letter, *supra* note 7, at 12 ("OCR also recommends that schools provide an appeals process. If a school provides for appeal of the findings or remedy, it must do so for both parties.").

152. *Tanyi*, 2015 WL 4478853, at *5–7.

the fact that no one informed him of his right to have a separate hearing from that of his co-respondent.

As these examples show, courts are open to disciplined-student plaintiffs' procedural due process claims. On these claims, plaintiffs can survive motions to dismiss, and even win outright, without the unnecessary step of linking procedural error to gender bias. Moreover, because universities' due process obligations do not conflict with those under Title IX, litigation on due process grounds can hold universities accountable for procedural fairness without weakening the university's sexual assault response or exposing the university to a risk of liability under Title IX.

B. "Basic Fairness" (Due Process for Private Schools)

Though the Constitution's Due Process Clause does not bind private colleges, courts have in many cases insisted that private universities have an obligation not to treat students unfairly or with malice.¹⁵³ Such requirement is sometimes rooted in the contract doctrine of good faith and fair dealing. By way of recent example, a federal court in Massachusetts relied on what it called the "basic fairness" doctrine to permit a plaintiff to litigate his claim alleging that Brandeis University failed to provide sufficient notice of the charges against him, which arose out of conduct over the course of a long-term relationship between the plaintiff and his ex-boyfriend.¹⁵⁴ The court reasoned that, given the span of time in question, the university's failure to provide notice made it particularly difficult for the plaintiff to surmise and thus defend against the precise misconduct that was under scrutiny. Additionally, Brandeis University allegedly denied the plaintiff the right to counsel, denied him any opportunity to cross-examine the complainant, prohibited his access to the investigator's report as well as the statements of witnesses and other evidence against him, and permitted the same official who investigated the complaint against the plaintiff to also adjudicate it in the first instance, while also limiting the plaintiff's right to appeal.¹⁵⁵

Importantly, none of these alleged violations conflict with the university's obligations under Title IX and the Dear Colleague Letter to respond promptly and equitably to reported sexual assault. In fact, the Dear Colleague Letter's requirement for symmetrical procedures implicitly endorses the respondent's right to receive a copy of the investigator's report and to

153. *Bleiler v. Coll. of Holy Cross*, CIV.A. 11-11541-DJC, 2013 WL 4714340, at *5 (D. Mass. Aug. 26, 2013) ("A private university, college, or school may not arbitrarily or capriciously dismiss a student.") (citing *Coveney v. Coll. of Holy Cross*, 445 N.E.2d 136 (Mass. 1983)).

154. *Doe v. Brandeis Univ.*, No. CV 15-11557-FDS, 2016 WL 1274533, at *33-34 (D. Mass. Mar. 31, 2016).

155. *Id.* at *34-37.

have access to appeal, as long as those rights are provided to the complainant as well.¹⁵⁶ Furthermore, nothing in the Dear Colleague Letter prohibits the separation of function between the investigators and adjudicators. And while the court also described the university's use of the preponderance of evidence standard, which is a requirement of Title IX according to the Dear Colleague Letter, as "particularly troublesome in light of the elimination of other basic rights of the accused," this expression of concern does not isolate the preponderance standard as independent grounds for concluding that Brandeis University's process may lack basic fairness.¹⁵⁷

In *Brandeis University*, the court also concluded that "basic fairness" extends to the substance of the decision as well as the procedure by which the decision was reached, and on this ground, the court permitted the plaintiff to litigate his claims that the university's decision against him employed an unfair definition of consent when the investigator failed to take into account that some of the sexual conduct that the plaintiff was punished for occurred in the context of a long-term relationship, which often incorporates implied consent.¹⁵⁸ Nothing in Title IX precludes universities like Brandeis from considering a respondent's argument about implied consent. All the OCR has said on this matter is that the respondent should not automatically win on this ground.¹⁵⁹

C. Administrative Law

Some plaintiffs in recent cases have successfully argued that the procedural and substantive unfairness of disciplinary decisions rendered by state universities violates their state's administrative procedure act. In one well-known case, a state court in Tennessee invalidated the University of Tennessee at Chattanooga's expulsion of a male student and wrestler for sexual assault after concluding that the university improperly shifted the burden of proof by effectively requiring the respondent to prove that he had obtained

156. As one commentator points out, some aspects of the Dear Colleague Letter's requirement of symmetrical procedure operates to increase respondents' procedural rights in many cases, such as one in which a state supreme court upheld the suspension of a student who was denied certain procedural rights that were granted to the complainant. Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. EDUC. & L.J. 143, 165 (2013).

157. See William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 209 (2016) (arguing that the preponderance of evidence standard is constitutionally permissible in combination with other procedural safeguards).

158. *Brandeis Univ.*, 2016 WL 1274533, at *19–20, 39–40. Specifically, the court criticized the investigator for automatically concluding that the plaintiff had not obtained consent to kiss the complainant in his sleep, on the grounds that sleep is incapacitation.

159. *Questions and Answers on Title IX and Sexual Violence*, *supra* note 50, at 38 ("Further, a school should recognize that the mere fact of a current or previous consensual dating or sexual relationship between the two parties does not itself imply consent or preclude a finding of sexual violence.").

the complainant's consent.¹⁶⁰ Notably, this conduct would be improper under Title IX as well. Even though universities are required to prohibit sexual contact that occurs without consent,¹⁶¹ the Dear Colleague Letter makes clear that the preponderance standard applies to the university's burden of proof, which includes the burden of proving that consent was not or could not have been granted.¹⁶²

In another case, a California superior court set aside the University of California at San Diego's decision to suspend a student for sexual assault after finding that the university failed to use fair procedures and evidence-based decision making, as required of state agencies (including state universities) as a matter of administrative law.¹⁶³ One of the procedural errors in this case occurred when the chair of the disciplinary hearing board limited the respondent's right to cross-examine the female student who had accused him of sexual assault by only asking nine of the thirty-one questions he submitted. The court took no issue with the university's practice of routing cross-examination through an intermediary and the weeding out of irrelevant and redundant questions that only serve to traumatize potential victims of sexual assault. However, the university in this case redacted a whole series of questions about ostensibly exculpatory text messages exchanged by the parties after the alleged assault.¹⁶⁴ In so doing, the university denied the plaintiff a meaningful opportunity to present a material aspect of his defense. Notably, no university is required by Title IX to limit a respondent's right to conduct a meaningful cross-examination. As explained above, OCR is agnostic on the question of whether to permit cross-examination of witnesses and parties, insisting only that the rights of both parties be the same in that regard.

As these two examples show, state administrative law provides meaningful opportunities for plaintiffs to challenge unfairness in university disciplinary proceedings. These legal protections are consistent with universities' obligations under Title IX to conduct a "prompt and equitable" response to reported sexual assault.

160. *Mock 'wins' his appeal against UT-Chattanooga*, THE NEWS & OBSERVER (Aug. 14, 2015, 5:49 PM), <https://perma.cc/3HZX-D2CE>, (last accessed Nov. 11, 2016).

161. 34 C.F.R. § 668.46(k). This requirement is part of the Clery Act. It is cited in the Dear Colleague Letter, *supra* note 7, at 11.

162. *Dear Colleague Letter*, *supra* note 7, at 1; *see also* Brett Sokolow & Daniel Carter, *Corey Mock v. The University of Tennessee, Chattanooga*, THE NATIONAL CENTER FOR HIGHER EDUCATION RISK MANAGEMENT, <https://perma.cc/AHP7-LTVG> (last accessed Jan. 1, 2017).

163. *Doe v. Regents of the Univ. of Cal. at San Diego*, No. 37-2015-00010549-CU-WM-CTL (San Diego Cnty. Super. Ct. July 10, 2015), *available at* <https://perma.cc/LK9Q-JT97>.

164. *Id.*

D. Breach of Contract

Students disciplined for sexual assault have successfully litigated breach of contract claims to challenge procedural errors in a private university's grievance process.¹⁶⁵ As one district court explained:

When a student is admitted to a university, an implied contract arises between the parties which states that if the student complies with the terms prescribed by the university, he will obtain the degree he seeks. The rights and obligations of the parties as contained in the university's bulletins, circulars and regulations made available to the student, become a part of this contract.¹⁶⁶

Public universities often succeed in dismissing breach of contract claims and other state-law claims on sovereign immunity grounds.¹⁶⁷ But in cases against private universities, students disciplined for sexual assault have prevailed on breach of contract claims because sovereign immunity does not apply. In fact, the results of one empirical study suggest that breach of contract claims against private institutions have a comparable rate of success to due process claims against public institutions, dispelling the misperception that private university students are categorically disadvantaged when seeking recourse of procedural errors.¹⁶⁸

In one early case, a district court granted summary judgment to a plaintiff who was disciplined for a violation ("disrespect of persons") for which he did not receive notice.¹⁶⁹ This constituted a violation of the university's contractual obligation to "state the nature of the charges with sufficient particularity to permit the accused party to prepare to meet the charges," per the university's student handbook.¹⁷⁰ More recently, a federal court concluded after a bench trial that Brown University violated its contract with a student suspended for sexual assault by employing a definition of consent that was not in its policies at the time of the alleged misconduct.¹⁷¹ The new definition clarified that that consent could not be obtained through "manipulation," and the charge in Doe's case was that he had manipulated another student to have sex.¹⁷² As an aside, he had admitted to

165. See K.B. Melear, *The Contractual Relationship Between Student and Institution: Disciplinary, Academic, and Consumer Contexts*, 30 J.C. & U.L. 175, 182–88 (2003) (discussing early cases).

166. *Nungesser v. Columbia Univ.*, 169 F. Supp. 3d 353, 369–70 (S.D.N.Y. 2016) (citing *Vought v. Teachers College, Columbia U.*, 511 N.Y.S.2d 880, 881 (N.Y. App. Div. 2d Dep't 1987)).

167. *Univ. of Mass.-Amherst*, 2015 WL 4306521, at *5; *Sahm v. Miami Univ.* 1:14-CV-698, 2015 WL 93631, at *4 (S.D. Ohio Jan. 7, 2015).

168. Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—As Compared with Public—Institutions of Higher Education: A Glaring Gap?*, 83 Miss. L.J. 863, 893 (2014).

169. *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 243–47 (D. Vt. 1994).

170. *Id.* at 246–47.

171. *Doe v. Brown Univ.*, No. CV 16-017 S, 2016 WL 5409241 (D.R.I. Sept. 28, 2016) (finding of fact and conclusion of law).

172. *Id.* at *18.

such “manipulation” in an incriminating text message.¹⁷³ The court determined that prior to the amended policy, a reasonable student would not have expected that sexual activity to which another had been manipulated to consent violated the university’s policy, since the new policy “on its face . . . make[s] any use of manipulation a violation, everything from a bribe to the old school use of presents and flattery.”¹⁷⁴ Therefore, the application of the new definition breached the contract that existed between the university and the student at the time.¹⁷⁵

In this case, the university’s desire to retroactively apply its new definition of consent could be seen as a reasonable calculation to ensure that it was satisfying its responsibility to the complainant to protect her civil rights under Title IX. However, the plaintiff’s contractual rights and the complainant’s civil rights were not necessarily in conflict in this case for several reasons. First, as the court itself acknowledges, a panel could possibly have found the plaintiff responsible even while applying the university’s earlier, informal definition of consent.¹⁷⁶ The earlier definition incorporated “prevailing community standards” rather than an express definition of consent.¹⁷⁷ The panel could have found a lack of consent under the earlier definition since community standards presumably prohibit some, but possibly not all, conduct that might otherwise be labeled “manipulative.” Second, while the Department of Education does insist that educational institutions employ a definition of consent that includes certain key concepts (for example, providing that consent cannot be obtained from a person who is incapacitated as a result of alcohol or drugs¹⁷⁸ and clarifying that consent cannot be inferred from prior sexual acts¹⁷⁹), it does not require universities to adopt a specific definition of consent or to define it as broadly as Brown University has chosen to do. Third, while OCR has found universities in violation of Title IX for not using policies and procedures that comply with the Dear Colleague Letter, the agency’s broad enforcement power, compared to judicial enforcement, is rooted in the premise that it is prospective in nature.¹⁸⁰ Thus, even in the most compelling of such cases in which

173. *Id.*

174. *Id.* at *19.

175. *Id.* at *20.

176. *Id.*

177. *Doe v. Brown Univ.*, No. CV 16-017 S, 2016 WL 5409241 (D.R.I. Sept. 28, 2016).

178. *Dear Colleague Letter*, *supra* note 7, at 1.

179. Resolution Agreement between Tufts University and the U.S. Dep’t of Educ., Office for Civil Rights (OCR), No. 01-10-2089, (Apr. 17, 2014), *available at* <https://perma.cc/33EA-D9YE>.

180. *See supra* Part II.B. Consistent with its prospective focus, in enforcement actions where the Department of Education has found universities to violate Title IX in their failure to adequately secure the civil rights of sexual assault complainants, the agency has not insisted that universities re-apply Title IX-compliant procedures to earlier-decided cases. The fact that it refrains from imposing such a requirement—even as it requires the institution to correct erroneous withholding of academic accommodations,

conduct occurred prior to the university's adoption of a Title IX-compliant policy and procedures, a university does not risk loss of federal funding by applying an existing policy where a contract so requires. It only risks such loss when it fails to change its policy and apply the changes going forward.

V. HARMONIZING TITLE IX AND RIGHTS OF STUDENTS ACCUSED OF SEXUAL ASSAULT

As the preceding Parts illustrate, the handful of cases in which plaintiffs have succeeded on the merits—the cases against George Mason University, University of California at San Diego, University of Tennessee at Chattanooga, and Brown University—have done so on grounds unrelated to reverse discrimination. One of two elements of the erroneous outcome Title IX claim is a material procedural error, which itself can be the basis for a due process, administrative law, or breach of contract claim. Therefore, plaintiffs should be more likely to succeed¹⁸¹ on the “lesser included” claim than in the reverse discrimination claim that involves an extra, and more challenging, step of pleading and proving gender bias.

Not only do plaintiffs not benefit from including reverse discrimination claims, they may be harming themselves as well. In one case, a plaintiff's attorney's focus on a Title IX claim apparently distracted the attorney from pleading that the procedural errors alleged as part of the erroneous outcome claim also constituted violations of due process.¹⁸² Additionally, federal courts routinely refuse to exercise supplemental jurisdiction over state-law claims once federal Title IX claims have been dismissed.¹⁸³ The process of refiling these claims in state court adds to the overall time and cost of litigating these claims that could be avoided if they had been the plaintiff's priority in the first place. Finally, the decision plaintiffs often make to lead with Title IX claims draws the courts' and the litigants' focus

counseling, and other elements of a non-disciplinary response—demonstrates the agency's concern for procedural fairness to the respondent; *e.g.*, Resolution Agreement between Tufts University and the U.S. Dep't of Educ., Office for Civil Rights (OCR), No. 01-10-2089, (Apr. 17, 2014), *available at* <https://perma.cc/33EA-D9YE>; Resolution Agreement between Princeton University and the U.S. Dep't of Educ., New York Office for Civil Rights (OCR), No. 02-112025, (Oct. 12, 2014), *available at* <https://perma.cc/DP2H-KJZP>.

181. Or at least successfully plead, as plaintiffs did in the cases against Brandeis, Appalachian State, and the University of Michigan.

182. *Univ. of Mass.-Amherst*, 2015 WL 4306521, at *1 n.1 (preventing the plaintiff from advancing due process arguments “advanced for the first time in an opposition to a defendant's motion to dismiss”).

183. *See Mallory*, 76 F. App'x at 641 (“The usual course is for the district court to dismiss state law claims without prejudice if all federal claims are disposed of on summary judgment.”); *Ludlow v. N.W. Univ.*, 125 F. Supp. 3d 783, 793–94 (N.D. Ill. 2015) (refusing to exercise jurisdiction over state law claims once Title IX claims had been dismissed); *see also Blank v. Knox Coll.*, 14-CV-1386, 2015 WL 328602 (C.D. Ill. Jan. 23, 2015) (same).

to what is often the weakest argument in the case and away from stronger arguments rooted in procedural fairness.

Thus, the seemingly routine inclusion—and in many cases, foregrounding—of a Title IX claim is not only unhelpful, but potentially harmful to disciplined students. Robust litigation on matters of procedural fairness, unencumbered by the distraction of a reverse discrimination narrative, is essential to ensuring that university grievance processes are, and are perceived as, valid and trustworthy. This is not only important to students facing discipline, but also to those students whose civil rights universities are striving to protect. Victims of sexual assault have an important stake in procedural fairness because its absence exposes the disciplinary outcome to internal and judicial appeals, which delay the process and risk overturning a potentially valid disciplinary outcome that was reached by a flawed process. Moreover, individual cases in which disciplinary outcomes are overturned because of procedural errors contribute to the misperception that disciplinary processes in general are biased and promulgate negative stereotypes about the veracity of complainants.

Additionally, disciplined-student plaintiffs' emphasis on Title IX claims contributes, perhaps by design, to anti-feminist backlash. Because Title IX's application to sexual assault is destabilizing to those who participate in and benefit from the cultural association of masculinity with power that stems from rape, it may be the case that some disciplined-student plaintiffs find particular satisfaction in attacking the university with the same weapon that resulted in their expulsion in the first place. They may seek to impeach Title IX in the political arena by arguing that the statute is inherently contradictory and biased in favor of one sex. Such an approach, if intentional, is consistent with examples in the past of reverse discrimination litigation backlash to efforts to address gendered violence.¹⁸⁴ Other disciplined-student plaintiffs, however, may lack such a political agenda and prefer to simply win their case with the arguments that most directly apply to procedural fairness. Such plaintiffs may be harmed when their cases are weaponized against Title IX, rather than being mere zealous litigation on claims better fit for the issues at play. In any event, it is important for the

184. For example, in 2000, men's rights activists sued state agencies in Minnesota that administered state and federal money allocated for domestic violence shelters and other services for battered women, claiming that such efforts constituted sex discrimination against men in violation of the Constitution's Equal Protection clause. These plaintiffs supported their claims with discredited allegations that men and women are similarly situated with respect to their potential to become victims of domestic violence. Similarly, the reverse discrimination explanation for why men are disciplined for sexual assault at disproportionately higher rates seeks to obscure the fact that men *commit* sexual assault at disproportionately higher rates. See Molly Dragiewicz, *Equality with a Vengeance: Men's Rights Groups, Battered Women, and Antifeminist Backlash*, 42.3 CONTEMPORARY SOCIOLOGY: A JOURNAL OF REVIEWS 384–85 (2011) (describing the litigation in *Booth v. Hvass*, 302 F.3d 849 (8th Cir. 2002)), <https://perma.cc/AN4U-VTAJ>.

public to recognize that reverse discrimination claims do little more than contribute to a distracting myth of Title IX's inherent contradictions. So contextualized, reverse discrimination claims lose their power to undermine the statute and its potential to motivate civil rights protection without abridging the procedural rights of the accused.

Reverse discrimination claims aside, disciplined-student plaintiffs should continue to challenge violations of their procedural rights as such. Regardless of whether the problem of procedural unfairness to students accused of sexual misconduct is widespread or isolated, it is essential that students have available legal recourse by which to challenge errors in the disciplinary process when they occur. As illustrated in this Article, cases in which disciplined students have prevailed both demonstrate that universities can comply with Title IX while still ensuring fairness to the accused and how a university can accomplish such. The accountability achieved through litigation improves the reliability of disciplinary outcomes going forward and decreases the possibility that a valid disciplinary outcome will later be overturned on procedural grounds. It also mitigates the potential for Title IX opponents to deploy examples of procedural error in an attempt to demonstrate the statute's incompatibility with adjudication.

As a matter of civil rights, Title IX mandates that federally funded educational institutions must address reports of sexual assault. Before the recent wave of enforcement on this issue, the only effective litigation and liability colleges and universities had to fear came from lawsuits by disciplined students.¹⁸⁵ Now there is an effective threat of administrative enforcement against colleges and universities that fail to protect the civil rights of complainants. Together, the accountability mechanisms on both sides work to ensure that colleges and universities chart a course up the fair and workable middle.

185. See *supra* Part II.A (discussing the possibility for litigation by victims of sexual assault but noting the high burden—deliberate indifference—for imposing liability).