Dear Colleague

The Weaponization of Title IX

Teresa R. Manning

Dear Colleague

The Weaponization of Title IX

How a Federal Law Aimed at Equal Access to Education Organized the Campus Sex Police and Authorized Campus Bureaucrats To Create a New Gender Hierarchy

A report by the

NATIONAL ASSOCIATION *of* SCHOLARS

420 Madison Avenue, 7th Floor
New York, NY 10017

Authored by

Teresa R. Manning
Director of Policy

Published October 28, 2020

Cover Design by Beck & Stone
Interior Design by Chance Layton

About the National Association of Scholars

Mission

The National Association of Scholars is an independent membership association of academics and others working to sustain the tradition of reasoned scholarship and civil debate in America's colleges and universities. We uphold the standards of a liberal arts education that fosters intellectual freedom, searches for the truth, and promotes virtuous citizenship.

What We Do

We publish a quarterly journal, *Academic Questions*, which examines the intellectual controversies and the institutional challenges of contemporary higher education.

We publish studies of current higher education policy and practice with the aim of drawing attention to weaknesses and stimulating improvements.

Our website presents educated opinion and commentary on higher education, and archives our research reports for public access.

NAS engages in public advocacy to pass legislation to advance the cause of higher education reform. We file friend-of-the-court briefs in legal cases defending freedom of speech and conscience and the civil rights of educators and students. We give testimony before congressional and legislative committees and engage public support for worthy reforms.

NAS holds national and regional meetings that focus on important issues and public policy debates in higher education today.

Membership

NAS membership is open to all who share a commitment to its core principles of fostering intellectual freedom and academic excellence in American higher education. A large majority of our members are current and former faculty members. We also welcome graduate and undergraduate students, teachers, college administrators, and independent scholars, as well as non-academic citizens who care about the future of higher education.

NAS members receive a subscription to our journal *Academic Questions* and access to a network of people who share a commitment to academic freedom and excellence. We offer opportunities to influence key aspects of contemporary higher education.

Visit our website, www.nas.org, to learn more about NAS and to become a member.

Our Recent Publications

Corrupting the College Board. 2020

Critical Care. 2020.

The Lost History of Western Civilization. 2020.

Social Justice Education in America. 2019.

Separate but Equal, Again: Neo-Segregation in American Higher Education. 2019.

Beach Books 2010-2019. [NAS's annual study of college common reading programs.]

The Irreproducibility Crisis of Modern Science. 2018.

Outsourced to China. 2017.

Making Citizens. 2017.

Cont

ents

Introduction and Acknowledgments

Controversy surrounding sex discrimination and sexual misconduct in higher education has existed now for over 50 years. This may have been inevitable in the wake of the sexual revolution and the women's movement of the 1960s: Both challenged traditional sex roles and wanted change, forcing many to ask if these roles had developed because of prejudicial notions that women were not capable of, or did not belong in, high level academic or professional work.

Title IX, the federal law banning sex discrimination in schools receiving federal funds, was a product of this moment and enjoyed considerable support when it was enacted in 1972, stating that "no person in the United States shall, on the basis of sex, be excluded from ... any education program or activity receiving federal financial assistance." It was, simply put, an equal access law for education.

At the same time, many single-sex schools were voluntarily "going co-ed," which meant primarily that all-male institutions were deciding to admit females.

Once this desegregation was underway, leaders had to address the question of how women might experience sex discrimination on campus and how this could be prevented using Title IX. The most obvious instance of sex discrimination was the conditioning of a woman's advancement on sexual favors or what is now called the *quid pro quo* proposition. Very few dispute the noxious and discriminatory nature of such action.

Shortly thereafter, however, the idea that a "hostile environment" could constitute sex discrimination advanced in the courts and elsewhere, creating an entirely new area of sex-based civil rights law that tried to define which type of environment was "hostile"—and therefore discriminatory—and which was not.

This Report examines the evolving understanding of sex discrimination in higher education over the years, as well as the mechanisms that developed to find and punish it with Title IX. The story is familiar to those in policy and law—called mission creep in the military, or overreach in administrative agencies. Slowly but surely those who were advocating more expansive definitions of hostile environment sex discrimination wrote these expansions into Education Department guidance documents directed at schools. They were also able to mandate the hiring of more numerous enforcement personnel in the campus Title IX office.

The most notable such extension of Title IX came in 2011, when the Obama Education Department issued a Dear Colleague Letter stating that all sexual violence was a form of sex discrimination prohibited by Title IX. By this stroke of a pen, an educational equal access law was transformed into a campus sex crimes law.

The transformation of the crime of sexual assault into a form of sex discrimination seems very odd. It is as if the government suddenly decided that attacking someone with a hammer should be treated as a form of slander, since it implies that the victim is a nail. The larger form of abuse is swallowed by the metaphorical extension. The reality is that sexual assault may sometimes be connected to what most people understand to be sex discrimination, but the combination is relatively rare. Sexual discrimination, in the form of denying women opportunities afforded to men, usually occurs outside any context of sexual assault, and *vice versa*. One has to engage in strenuous theoretical argument to construct a hypothetical bridge that turns every sexual assault into a form of sex discrimination.

Once the Dear Colleague Letter was issued, the effort to build this hypothetical bridge simply stopped. It was assumed that the Office for Civil Rights in the Department of Education had done the job, and the hypothetical bridge was now open for heavy traffic. Title IX would henceforward be used to prosecute cases of sexual assault.

Suddenly the conflation of sexual assault with sex discrimination seemed unquestionable, and fighting sexual assault on campus became a top priority at the highest political level. Repeating the unsupported statistic that one in five women on campus has experienced sexual assault, President Obama promised, "If they [Congress] won't act" to correct this, "I will." Few understood that "assault" had been redefined to include sexual relations that seemed consensual at the time but were later regretted. In short order, the campus Title IX office felt entitled to involve itself in any imperfect student sexual encounter; that is, it became the campus sex police.

Responding to the political moment and to show they were tough on sexual assault, Title IX proceedings became skewed to find guilt by skimping on basic due process protections for those accused of sexual misconduct (protections such as the presumption of innocence, the right to respond to accusations, and the right to confront one's accuser). Wrongly accused students, mostly male, then began taking their schools to court, successfully claiming due process violations or breaches of student conduct code guarantees of fairness by Title IX kangaroo courts.

As with other instances of overreach, this extension did not simply happen. Campus culture, heavily influenced by feminism, has long been hostile to conventional dating and traditional sex roles. It saw in Title IX a useful means to scrutinize and reshape social mores: current Title IX offices now hardly ever mention "discrimination" or equal access to education. Attention is instead focused on sexual misconduct, sexual politics, and re-education.

This Report starts with the background of Title IX—why it was enacted and how it was first implemented—and then shares findings from six campus visits and surveys made during the 2019-2020 academic year. It presents conversations with Title IX administrators and staff as well as with students, and it analyzes current university policies and practices to see what Title IX means in operation.

Research for this Report was carried out at the very same time that the Trump Education Department's Office for Civil Rights ("OCR")

began to review and revise federal Title IX policy. The Report therefore describes this initiative and the new Title IX regulations promulgated by Education Secretary Elisabeth DeVos, as well as subsequent court challenges to them. The Report ends with a discussion of findings and recommendations for the future.

Not discussed is the "Me Too" movement of recent years whereby female professionals—especially in journalism, government, and Hollywood—have reported sexual misconduct by male colleagues, often their superiors or by those in a position to make or break their careers. The case of film mogul Harvey Weinstein is probably the most well-known, but the list of those accused is long and the impact of such accusations cannot be overstated (most of the accused men have lost their jobs or worse).

The focus of the National Association of Scholars, however, is American higher education. This Report focuses on college campuses and does not address sexual misconduct in the workplace. That said, the "Me Too" moment has undoubtedly affected talk on campus about sexual malfeasance such as Harvey Weinstein's; and that is probably a good thing.

NAS hopes that readers of this Report will come away with a solid understanding of how Title IX has evolved in American higher education, and how best to discuss it as we move forward.

Part I: Background

Part I: Background

I. What is Title IX? Equal Access to Education for Women

The topic of this Report is the federal ban on sex discrimination in schools receiving federal funds. Known as "Title IX," the policy was enacted by Congress as part of a general education bill, the Education Amendments of 1972.[1] Its exact wording is: No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

The amendments were passed with clear majorities in the House of Representatives and in the Senate,[2] and signed into law by President Richard Nixon, suggesting considerable agreement, even in 1972, that women should have the same educational opportunities as men. The impetus for such legislation in 1972 was the transformation of American higher education that was already underway. Single-sex male colleges in the 1960s had in most cases begun admitting women by 1972, and the few holdouts were making plans to switch to co-education. Overall enrollment figures reflect the quickly closing gap. According to 1972 Department of Education figures, women comprised about 43% of undergraduate students at American colleges and universities. But there were greater disparities in graduate programs, including medical and legal education.[3] That said, a much smaller percentage of Americans overall—male as well as female—pursued formal education after high school in the early 1970s when compared with today: In 1970, only 14.1%

1 Pub. L. No. 92-318, 86 Stat. 373 (1972) (codified at 20 U.S.C. sec. 1681) https://codes.findlaw. com/us/title-20-education/20-usc-sect-1681.html.

2 Congressional Record, June 8, 1972 at https://www.govinfo.gov/content/pkg/GPO-CRECB-1972-pt16/pdf/GPO-CRECB-1972-pt16-2.pdf.

3 R. Shep Melnick, "The Strange Evolution of Title IX." *National Affairs*, 36 (Summer 2018) at https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix; Melnick, *The Transformation of Title IX* (Washington: The Brookings Institution, 2018), 3.

of college-age males attended college (and 8.2% of women) while today, more than 35% of both men and women do.[4] The average age for women to marry was also younger then, with most marrying within 3 years of high school graduation in 1970, compared with a 10-year delay, typically, today.[5] The reasons why more Americans attend college now, why so many are women, and why marriage is now more delayed are complex. Sexual discrimination before 1972 may have been a factor, but almost certainly a minor one by that time. Women who wanted to go to college in 1972 faced few actual barriers beyond their own aspirations. But in the years that followed 1972, higher education successfully marketed itself as the only practical gateway to a successful career, and the American Women's movement successfully marketed the idea that all women should pursue careers.

This did not mean a quick equilibration of men and women in every field. Some fields have striking imbalances of men and women. One line of explanation for this is continued sex discrimination, but that claim is strongly disputed by those who see the imbalances as the product of personal preferences among men and women, many of whom hold disparate interests and career goals. The evidence for the latter view includes the persistence of imbalances even where non-discrimination policies are well developed. In Scandinavian countries, for example, the law bans sex discrimination at work and school, requires generous family leave policies at major companies, and provides subsidized day care. Scandinavian women comprise almost half the workforce and more than half of higher education students. Nevertheless, certain fields remain predominantly female (nursing, teaching), while

"Persistent male-female imbalances such as this, even where nondiscrimination norms are so advanced, suggest something other than sexual discrimination is responsible..."

4 https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/

5 United States Census Bureau, Figure MS-2, Median Age of First Marriage 1980- present https://www.census.gov/content/dam/Census/library/visualizations/time-series/demo/families-and-households/ms-2.pdf.

others remain predominantly male (engineering, computer science). Persistent male-female imbalances such as this, even where nondiscrimination norms are so advanced, suggest something other than sexual discrimination is responsible.[6]

Still, where sexual discrimination plays a role in denying women opportunities, or in conditioning opportunities or advancement on the basis of sex, policy makers overwhelmingly agreed, and still agree, to ban it. This includes first and foremost the practice of the *quid pro quo* proposition, where admission, grades, or scholarships are based on sexual favors;[7] but it also includes the study or work environment that is so hostile to women—originally, where vulgar, suggestive or sexual language was used, or where pornography was displayed—such that the intent to harass, intimidate, and exclude women was easily inferred. This second category of conduct is now called hostile environment sexual harassment, or hostile environment sex discrimination. It is this second category of conduct—not the *quid pro quo* proposition, but the hostile environment type of sexual harassment—that has generated the most discussion, debate and disagreement, because its demarcations are not clear. What, exactly, constitutes a hostile environment that jeopardizes or denies women access to opportunities because of their sex? Mere vulgar comments? Or graphic pornographic displays?

Because of questions like these, agreement about Title IX since 1972 has withered while controversy has flourished—and also, perhaps, because Title IX's original goals have largely been achieved. Male:female ratios in higher education, for example, have now flipped. According to the most recent data compiled by the Department of Education, women now outnumber men enrolled in college and graduate school,[8] and

6 Claire McLoughlin, "What about women in the workplace in Scandinavia?" *Scandinavian Standard*, March 8, 2018, https://www.scandinaviastandard.com/what-about-women-in-the-workplace-in-scandinavia/; Judi Lembke, "Study says Swedish students choose careers based on gender roles.", *Culture Trip*, November 8, 2017https://theculturetrip.com/europe/sweden/ articles/swedish-teens-choose-careers-based-on-gender-roles-according-to-science/.

7 "Academic advancement conditioned upon submission to sexual demands [by professors] constitutes sex discrimination in education."J. Edward Lumbard, *Alexander v. Yale*, 459 F. Supp 178 (2d Cir. 1980) (affirming district court), https://www.leagle.com/decision/ 1980809631f2d1781757; Stuart Taylor, Jr. and K.C. Johnson, *The Campus Rape Frenzy: The Attack on Due Process at America's Universities* (New York: Encounter Books, 2017).

8 "Degrees Conferred by Degree Granting Institutions, by level of degree and Sex of Student: Selected Years, 1869-70 through 2021 -22.", National Center for Education Statistics, June 2012, https://nces.ed.gov/programs/digest/d12/tables/dt12_310.asp.

comprise almost 50% among students in medical and legal education. The professoriate tells the same story. "Women hold about half of all professorships."[9] So where does Title IX stand now and why is it so controversial?

II. The First Cleavage: Equal Access to Education or Parity in Athletics?

Title IX's first controversy concerned its application to intercollegiate athletics, starting in the 1970s with the then Department of Health, Education, and Welfare ("HEW"), and persisting through the 1990s under the Clinton Administration's Department of Education ("DOE"), resulting in several court cases.[10] All dealt with the interpretation of Title IX as requiring schools to financially support female athletics as much as they supported male athletics. The approach ultimately adopted by courts and agencies was to fund women's sports in proportion to their numbers on campus instead of in proportion to their numbers in athletics—what is now called the parity standard or the proportionality standard, in contrast to the relative interest and ability standard.[11]

"Title IX's first controversy concerned its application to intercollegiate athletics..."

Since female students already outnumbered male students on most campuses, this new standard resulted in the unprecedented expansion of female sports at colleges and universities—lacrosse, basketball, and soccer, for example—and a corresponding diminution of sports for college men—wrestling, baseball, and track, to name a few.[12] The latter

9 Jon A. Shields, "The Disappearing Conservative Professor." *National Affairs*, 37 (Fall 2018), https://nationalaffairs.com/publications/detail/the-disappearing-conservative-professor.

10 See, for example, the case of *Cohen v. Brown University* brought by female gymnasts against Brown University and claiming the discontinuation of this and other women's teams violated Title IX (original complaint filed in April of 1992), https://www.clearinghouse.net/detail.php?id=13910; Melnick, *Transformation* (Chapters 5 through 7).

11 *Ibid*. Melnick, 89.

12 Linda Flanagan and Susan H. Greenberg, "How Title IX Hurts Female Athletes." *The Atlantic*, February 27, 2012, https://www.theatlantic.com/entertainment/ archive/2012/02/how-title-ix-hurts-female-athletes/253525/.

development was especially noticeable since those male sports were generally well liked and well supported. College football programs, however, which are better liked and also expensive to run, competed directly for the newly limited resources. This meant that these other male sports were cut despite their relative popularity.[13] The new Title IX sports mandate applied to scholarships, facilities, tuition remission, transportation, and stipends.

"...the extension of Title IX from educational opportunity to athletic participation spelled the end of the general agreement regarding its goals."

Opinions vary on whether this development was good or bad: Some hail the new and numerous athletic opportunities for college women, while others decry the elimination of beloved male teams and, in some cases, the pressures on female athletes in high school to secure scholarships.

Whatever one's view, the extension of Title IX from educational opportunity to athletic participation spelled the end of the general agreement regarding its goals.

What's more, though HEW issued formal regulations interpreting Title IX in 1975, subsequent clarifications and interpretations were not through these accountable, democratic channels: Instead of a Congressional enactment, or a formal regulation issued by the executive branch pursuant to the Administrative Procedure Act ("APA"), extensions and clarifications were made through "guidance" documents from the Education Department's Office for Civil Rights—for example, a 1996 guidance document, *A Clarification of Intercollegiate Athletics Policy Guidance*, purporting to clarify a 1979 policy statement, *A Policy Interpretation: Title IX and Intercollegiate Athletics*.[14] Such guidance papers are sometimes called sub-regulatory instruments, but this term connotes a formality and legitimacy that does not really exist. The use of

13 Gary L. Galemore, *Title IX and Sex Discrimination in Education: An Overview* (Congressional Research Service, March 4, 2003), https://digital.library.unt.edu/ark:/67531/metadc855767/m2/1/high_res_d/RS20710_2003Mar04.pdf.

14 *Federal Register*, 44, no. 239 (Dec. 11, 1979): 71413 - 71419 (Dec. 11, 1979) https://www.govinfo.gov/content/pkg/FR-1979-12-11/pdf/FR-1979-12-11.pdf; Feder *Title IX*,2.

guidance to effect major policy changes has been heavily criticized as unconstitutional overreach by administrative agencies, which increasingly seem engaged in substantive lawmaking without the procedural safeguards of the APA. Such safeguards are intended to ensure that only Congress enacts policy, not executive agencies.[15] The use of such sub-regulatory documents was not limited to athletic parity or to the Education Department; other parts of the administrative state have also engaged in the practice. But in the case of Title IX, the practice continued its extension into areas more controversial than the law's original goal of equal educational access. The most recent such example is the extension of Title IX to apply to sexual misconduct in the educational setting.

III. Law by Redefinition: Sexual Misconduct as a Title IX Violation and the Ever-Changing Definition of Hostile Environment

By the later 1990s, the idea of sex discrimination began to include *sexual harassment,* not just discouraging or excluding women from professional and educational fields, or conditioning their advance on sexual matters rather than on merit.[16] In effect, the hostile environment category began to grow.

"By the later 1990s, the idea of sex discrimination began to include *sexual harassment*..."

As Boston University Law Professor Katherine Silbaugh has noted, this development required a substantial journey and was not the original understanding of Title IX or the understanding

15 Melnick, *Transformation*, 16.

16 Katharine Silbaugh, "Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault," *Boston University Law Review* 95, no. 3 (May, 2015): 1049 – 1051 http://www.bu.edu/bulawreview/files/2015/05/SILBAUGH.pdf.

of sex-discrimination laws in other contexts, such as employment. Silbaugh explains:

> "[T]he journey that our understanding of sex discrimination traveled to include sexual harassment is substantial... that sexual assault or harassment could be framed as sex discrimination wasn't yet contemplated... At that time, sexual harassment and imposition were still not viewed as sex discrimination... There was still little to no discussion of rape or sexual assault as a mechanism of institutional inequality in workplaces or educational settings at the time Title IX was enacted. As Title VII [the federal ban on sex discrimination in employment] shaped the concept that sexual imposition can be sex discrimination, Title IX followed."[17]

This new idea - that sexual harassment could be considered sex discrimination—was limited, however, even as it evolved. In the workplace under Title VII, the limit was a requirement of an adverse employment action; in the educational setting under Title IX, the limit was the question of pervasiveness and access—that is, hostile environment harassment based on sex was only discrimination under Title IX if it was so pervasive as to effectively deny someone educational opportunities.[18]

It's worth pausing to clarify how this development occurred—how sexual discrimination came to include sexual harassment—and also to understand that while the two overlap, they remain distinct: That is, sexual harassment or other forms of sexual misconduct can be a form of sex discrimination prohibited by Title IX, but it can also fall outside of the scope of Title IX. This follows from the purpose of Title IX as a law *preserving access to education* (an "equal access" law) rather than a criminal statute banning physical assault, or verbal abuse, of women. (Criminal offenses such as these are also a matter of state, not federal

17 *Ibid.*

18 The Supreme Court added "severe" and "objectively offensive" to the "pervasive" requirement in the 1999 *Davis* case (see below) but the focus remained on access.

law. "Regardless of one's views of how expansively state law should define the crime of rape... [the Violence Against Women Act] is an overt attempt to substitute the judgment of Congress for those of state legislatures...")[19] Where such harassment or assault interferes with access to education, Title IX applies; where it does not have this effect, Title IX does not apply.[20]

The 1990s brought an increased awareness of sexual harassment in part because of the national publicity given in 1991 to the sexual harassment allegations against Supreme Court nominee Clarence Thomas by his former staff attorney, Anita Hill. She maintained that at various points during their professional relationship, Thomas had used vulgar and sexually explicit language. ("She said he would talk about sex in vivid detail, describing pornography he had seen involving women with large breasts, women having sex with animals, group sex and rape scenes... [she said] he once mentioned a pornographic film whose star was called 'Long Dong Silver...'")[21] Her claims arose from employment rather than education, and therefore had more direct implications for Title VII rather than Title IX. (Because both laws ban sex discrimination, they are often discussed together.)

These different contexts—employment versus education—matter, of course, since different relationships and conditions give rise to different legal responsibilities and liabilities. In the employment context, for example, courts eventually found that *employers* could be liable for Title VII sex discrimination if *a supervisor* sexually harassed *a subordinate employee* on the grounds that the supervisor could be considered an agent of the employer (acting on the employer's behalf).

Such principles of agency do not, however, transfer easily to educational settings, including colleges and universities. Students accused

19 Kathleen F. Brickey, "Criminal Mischief: The Federalization of American Criminal Law," *Hastings Law Journal* 46: 1135.

20 *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)); see also DOE commentary in *Federal Register* 83, no. 230 (Thursday, Nov. 29. 2018): 61463 https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

21 Julia Jacobs, "Anita Hill's Testimony," *New York Times*, September 20, 2018.

of student-on-student harassment cannot be considered agents of their universities, for example.

The "hook" for Title IX school liability in cases of student-on-student harassment was articulated in the 1999 United States Supreme Court case of *Davis v. Monroe County Board of Education*, where a fifth-grade girl was subjected to sexually explicit comments and actions by a male classmate.[22] The Court clarified that schools can be held responsible for such student behavior *only* when: 1) the school is "deliberately indifferent" to known acts of student-on-student sexual harassment; 2) the harasser is under the school's disciplinary authority; and 3) the behavior is "so severe, pervasive and objectively offensive that it denies its victims the equal access to education that Title IX is intended to protect."[23]

As sexual harassment (or misconduct) *as sex discrimination* advanced as a legal concept in both employment and education, courts remained mindful of the different contexts and relationships. In Title IX cases, the central question was: Was educational access or opportunity denied?[24] That said, in recent years, these distinctions - between work and school, and, more critically, between denied educational access (as the touchstone of hostile environment sex discrimination) versus shifting definitions of hostile environment—have often been lost, confused or deliberately conflated—especially in the higher education setting and by campus Title IX offices.

As a result, the understanding of Title IX as an equal access law has, over time, been obscured by those who see it and use it, instead,

"...the understanding of Title IX as an equal access law has, over time, been obscured by those who see it and use it, instead, as a means to achieve other goals, including top-down reform of dating behavior."

22 The Petitioner, Davis, was the mother of the girl, LaShonda. Comments included, "I want to get in bed with you" and "I want to feel your boobs," which remarks continued for many months. The harassing student also allegedly rubbed his body against LaShonda, whose grades dropped and who eventually could not concentrate at school and then wrote a suicide note. *Davis v. Monroe County Board of Education.*

23 *Ibid.*

24 The focus in criminal law has yet other purposes, including public safety.

as a means to achieve other goals, including top-down reform of dating behavior.[25] This type of conflation is easiest to see in the attempt to expand or blur definitions of prohibited conduct in school nondiscrimination policies.

Because Title IX is an equal access law, the *Davis* Supreme Court opinion focused on harassing behavior that was so bad—that is, "so severe, pervasive and objectively offensive"—that it effectively denied educational access in violation of the law's guarantee. The *Davis* Court described how sexual misconduct could rise to the level of discrimination and therefore legitimately involve Title IX.

But many schools have expanded the definition of sexual harassment to include less severe conduct that may not affect educational access at all, and they have then proceeded to treat such conduct as falling under the authority of the campus Title IX Office.

By so doing, schools have extended the reach of Title IX beyond what the Supreme Court has authorized. As one friend-of-the court brief in recent Title IX litigation put it, "Despite almost uniform precedent instructing otherwise, universities have continued to adopt overbroad policies... *erroneously in the name of Title IX*. [emphasis added]"[26]

Worse, many school definitions of hostile environment sexual harassment seem to mimic the language of *Davis*—close to word for word reproductions - but then veer off track, always in a way that broadens the kind of conduct that can be characterized as a Title IX concern. In the process, school definitions of sex discrimination, harassment, and Title IX offenses appear to defer to court standards even as they exceed—or violate—them.

It should be clarified here that schools are always free, in their own Student Conduct Codes, to ban all sorts of conduct they deem

25 See discussion, text *infra*. (Virginia Polytechnic Institute and State University – or "Virginia Tech" - contracts with Catharsis Productions for campus sex education. Catharsis Director, Gail Stern, advocates a "top down" approach to promoting hook-ups in higher education. See also remarks by Women's Center Co-Director Christine Dennis Smith about changing the culture.) See also Melnick, *Transformation*, 5 ("The 2016 Republican platform devoted a separate section to Title IX, charging that the original purpose of the law had been perverted "by bureaucrats … to impose a social and cultural revolution upon the American people.") also found here https://medium.com/@Brookings/the-transformation-of-title-ix-36815d4c1585.

26 Brief of Texas and 14 other states as *amici curiae* in support of defendants in *Commonwealth of Pennsylvania, et. al. v. Elisabeth DeVos*, in the United States District Court for the District of Columbia, filed July 15, 2020, 6.

problematic (e.g. spitting, hand holding, shouting, loitering, etc.), including sexual misconduct of any type. The issue here is whether they are free to claim *that Title IX bans such conduct* even when the Supreme Court does not agree.

The policies of two Virginia universities illustrate the "re-definition" phenomenon: James Madison's Policy 134029 is called "Sexual Misconduct" and stated plainly in its first provision on Purpose: "One form of sex discrimination is sexual misconduct."[27] This statement makes no reference to access as the central issue, the way the *Davis* Court did. In fact, the 24-page policy never uses the word access in relation to educational programs or opportunities. JMU therefore considers all sexual misconduct to be discrimination based on sex, a quiet but enormous expansion of behavior deemed discriminatory. In the same vein, the Policy's Definition section explains "sex discrimination" as follows, "To take an adverse action or provide unequal treatment based on a person's sex, sexual orientation, gender or gender identity when such action deprives a person of a privilege or right… or otherwise adversely affects the person."Sex discrimination specifically includes instances of sexual misconduct of any type.[28]

Again, instead of preserving educational access, the policy asserts that "sexual misconduct of any type" now constitutes sex discrimination. This immeasurable expansion virtually guaranteed that the university's Title IX Office would become what many now call the "campus sex police." What's more, instead of the *Davis* standard of denied access, the definition of sex discrimination at JMU included "adverse action" based on a person's sex (or identity, or orientation), etc. that may "adversely affect the person." To state the obvious, adversely affect is well beyond denied access.

JMU's hostile environment definition then nods to *Davis* creating the impression that the Policy is observing a Supreme Court standard,

27 JMU's old 1340 policy, Section 1, "Purpose", https://web.archive.org/web/20180908120756/http://www.jmu.edu/JMUpolicy/policies/1340.shtml.

28 *Ibid.* Section 3, "Definitions," "Sexual Discrimination."

even as the Policy goes beyond the legal limit. That definition reads, in relevant part, as follows:

> "A hostile environment may be created by oral, written, graphic or physical conduct that is sufficiently severe, persistent or pervasive and objectively offensive that it interferes with, limits or denies the ability of a person's ability [*sic*] to participate in or benefit from the institution's educational programs, services, opportunities or activities…"[29]

The definition sounds similar to the one in *Davis* ("sufficiently severe, persistent or pervasive") except it uses the phrase "persistent or pervasive" and includes "oral" conduct (speech), raising free speech issues. The concept of *denied* access has become "interferes with" or "limits," both of which broaden the type of conduct that can trigger Title IX while sounding like the Supreme Court standard, and even while many other provisions have ignored the Court altogether.

Again, while schools are free to ban any conduct they deem problematic (in accordance with laws), they are not free to claim Title IX bans such conduct—but there is no mistaking that Policy 1340 is, nevertheless, enforced by JMU's Title IX Office as if everything therein were a Title IX concern. The November 8, 2019 page of "Title IX at JMU" begins "The Title IX Office at JMU receives, responds to and address [sic] all reports of sexual misconduct involving members of the university community."[30]

In sum, JMU's Title IX Office now involves itself in every allegation of sexual misbehavior, however slight, even if no claim is made about an effect on educational access.

Likewise, George Mason University's Policy Number 1202 forbids "conduct [that] occurs outside the context of [the University]… but has *continuing adverse effects on*, or creates a hostile environment

29 *Ibid.*

30 https://web.archive.org/web/20200110050648/https://www.jmu.edu/access-and-enrollment/titleIX/index.shtml.

for Students…"[31] Hostile environment harassment is then defined as: "Unwelcome conduct based on Protected Status that is *so severe, persistent or pervasive* that it *alters the conditions of education*, employment or participation in a University program or activity, thereby creating an environment that a reasonable person in similar circumstances and with similar identities would find hostile, intimidating or abusive [emphasis added]."[32]

Again, while the definition initially sounds like the *Davis* standard when it states "severe, persistent, or pervasive" (though even this is a variation on the original *Davis* wording, which was "sufficiently severe, pervasive and objectively offensive"), the word "access" does not appear, much less the idea that such access is *denied*; and, "objectively offensive" has been dropped. Instead, the Policy introduces a new idea and a new standard when the definition mentions not denied access but altered "conditions of education," an almost limitless category. The Policy then pretends to limit this definition by reference to "a reasonable person" and then transforms that phrase from its normal, objective meaning ("the reasonable person standard") into a subjective standard that reads, "thereby creating an environment that a reasonable person in similar circumstances and with similar identities would find hostile, intimidating or abusive."[33]

"In sum, JMU's Title IX Office now involves itself in every allegation of sexual misbehavior, however slight, even if no claim is made about an effect on educational access."

One can debate whether GMU's standard is good or bad. The point is that it seems to follow Supreme Court precedent while actually deviating from it—in other words, both GMU and JMU's policies pretend that Title IX prohibits conduct that it does not prohibit. In the case of

31 University Policy Number 1202, *Sexual and Gender Based Harassment and Other Forms of Interpersonal Misconduct*, at I (3) Scope https://web.archive.org/web/20170903033908/http://universitypolicy.gmu.edu/policies/sexual-harassment-policy/. This definition already seems unreasonably far-reaching as it appears to cover conduct that could occur long before a student is ever on campus, provided the conduct has "continuing adverse effects" on campus.

32 *Ibid.* at VI. E (a) Definition of Harassment (i) Hostile Environment Harassment.

33 *Ibid.*

GMU, for instance, merely dating someone on campus "alters the conditions of education;" and a hurtful break-up might be viewed as hostile. Accordingly, the GMU Title IX Office can involve itself in such situations, even though neither development has anything to do with educational access and therefore should not trigger Title IX.

The Clinton Education Department also played a role here. In both 1997 and 2001, its Office for Civil Rights produced Guidance documents (again, guidance rather than formal regulation requiring public input) which imposed expanded definitions of hostile environment sex discrimination on recipient schools. For instance, one such document stated that "conduct of a sexual nature" creates a hostile environment and consequently violates Title IX, if the conduct is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate" in educational programs, and it encouraged consideration from both a subjective and objective perspective.[34] It maintained that a hostile environment might exist even without a tangible injury to a student and even without a specific student or students as offender(s).When the 1999 *Davis* Supreme Court decision rejected this expansion, the Clinton Office for Civil Rights (OCR) did not change course. Instead, it maintained this broader definition in its departing guidance of January 2001, despite the conflict with the Court. The day before the inauguration of President George Bush, it published a short notice of final guidelines including the newly expanded hostile environment definition, insisting that it could deviate from the *Davis* definition on the grounds that the Supreme Court was outlining standards for Title IX litigation (lawsuits against a school or "private causes of action" seeking "money damages"), while the OCR was outlining standards for Title IX administrative enforcement.

"...both GMU and JMU's policies pretend that Title IX prohibits conduct that it does not prohibit."

34 U.S. Department of Education, *Sexual Harassment Guidance*, (Office of Civil Rights, 1997), 4 www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.

This distinction and its rationale were never formally tested or contested, however. No school ever challenged the expanded definition, and therefore no court ever reviewed it.[35]

Officials in the Obama Office for Civil Rights later stretched the definition of hostile environment sexual discrimination even more to include any unwelcome conduct of a sexual nature instead of behavior that is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to educational opportunity or benefit."[36]

The result of these conflicting standards—from the courts and the federal agencies—has been unchecked and varied definitions by schools themselves. Laura Kipnis, a film studies professor at Northwestern University who was herself accused of a Title IX violation in 2015 for an article she wrote on the topic, described the development of school policies by administrators as follows:

"A lot of this happens behind closed doors. There's no accountability in the Title IX field; some of these people have gotten drunk with power"

> "They are enlarging the sense of what sexual misconduct is on a capricious and arbitrary and *ad hoc* basis, so it's very much up to individual Title IX offices and schools—such as undergraduate deans—to decide on what constitutes an offense…

> A lot of this happens behind closed doors. There's no accountability in the Title IX field; some of these people have gotten drunk with power because there's no accountability

35 Melnick, *Transformation.*

36 *Davis v. Monroe County Board of Education.*

> and no oversight. They have an inflated sense of power because there are no checks and balances."[37]

In sum, the expansion of "discrimination based on sex" to include all perceived sexual misconduct has stretched Title IX to address conduct it was never meant to cover. This expansion means that Title IX offices get involved in matters well beyond the goal of preserving educational opportunities for women, and instead often use their position to enforce vague, changing, and arbitrary behavioral rules, usually against accused men.

IV. Law by Dear Colleague Letter (2011-2020): From the 2011 "Dear Colleague Letter" Undermining Due Process to the DeVos Final Rule Restoring Balance

The Obama Administration (2008 to 2016) extended Title IX even further: It asserted that Title IX banned not only *quid pro quo* propositions and conduct creating a hostile environment but also all sexual misconduct—including sexual violence.

In 2011, Obama's Office for Civil Rights issued a guidance letter now known as the "Dear Colleague Letter" (referenced as the "DCL") announcing that sexual violence is a form of sex discrimination prohibited by Title IX. The DCL went on to require all schools receiving federal funds to take prescribed steps to investigate, find, and punish sexual violence—with no reference to educational access—via their Title IX offices, or lose funding. It was yet another unprecedented expansion of a discrimination law to cover not only minor *faux pas* but also violent

37 Laura Kipnis, interview by Dave Rubin,*Rubin Report*, October 11, 2017, video, https://www.bing.com/videos/search?q=youtube+Laura+Kipnis+Rubin+Report &docid=608035096943264794&mid=CAB92D-61128495D9E962CAB92D61128495D9E962&view= detail&FORM=VIRE.

criminal offenses formerly handled almost exclusively by prosecutors, judges, and juries.

The 2011 DCL quickly became controversial as yet another instance of illegal agency law-making. But most concerning were the DCL's features favoring complainants at the expense of the accused—that is, the DCL eroded traditional protections afforded those accused of misconduct, such as the presumption that one is innocent until proven guilty.

Such protections are often called the rights of *due process*; they serve as guarantees of fundamental fairness for individuals up against powerful actors (often state actors) to protect against arbitrary and capricious conduct. This bundle of rights includes not only the presumption of innocence but other familiar yet hard won protections such as the right to be notified of charges in all their particulars (time, place, specific facts), the opportunity to respond, the right to counsel, the right to see and rebut all evidence, the right to impartial decision-makers, the right to make counter-claims, the right to confront, question, and cross-examine witnesses and accusers, and, finally, the right to appeal.

These protections are most frequently invoked in criminal proceedings where the stakes are high—in criminal court, for example, when the state can take a person's liberty and even a person's life; but they also apply in other proceedings where significant rights and interests are implicated: hearings with administrative agencies, for example, or student and faculty disciplinary adjudications.

The DCL very noticeably abridged many of these traditional due process protections. For example, it lowered the standard of proof for a finding of fault from clear and convincing evidence to a preponderance of evidence standard. This meant that a campus official could find a student responsible for sexual misconduct if it were merely more likely that the misconduct had occurred than that it hadn't. This is a much lower standard than clear and convincing and is dramatically lower than beyond a reasonable doubt, the standard of proof in criminal cases. Given the seriousness of any allegation of sexual violence, the dramatically lowered standard of proof was quickly seen as problematic.

Many groups—the Foundation for Individual Rights in Education, the Heritage Foundation, and even the left-of-center American Association of University Professors—were quick to denounce it.

Others noted that the DCL discouraged cross-examination, viewed as one of the most valuable and basic tools of civil and criminal defense. It is often the only opportunity to probe evidentiary inconsistencies, and frequently provides the best chance to determine the truth of allegations. The DCL also allowed "double jeopardy," where the accused could be tried for the same offense twice: once at an initial adjudication hearing on campus, and then again, on appeal. In criminal court, double jeopardy is forbidden by the Fifth Amendment to the United States Constitution. Title IX has, therefore, been transformed from an uncontroversial policy of nondiscrimination and equal opportunity for women to a highly controversial sub-regulatory initiative used to influence sexual behavior and erode longstanding guarantees of fundamental fairness.

What's more, for NAS and like-minded groups, the concern for due process is on top of –perhaps of a piece with—problems such as the politicization of higher education in an unfair and often harmful feminist direction, a direction which is now both overtly anti-male ("toxic masculinity") and also opposed to robust character formation in students. For example, instead of students' developing virtues such as patience, prudence, and self-restraint—or even discussing such virtues—students are encouraged to politicize, even weaponize, such ideals, and to see virtually everything through the lens of politics and power, especially dating, the primary source of most Title IX allegations of sexual misconduct.[38]

NAS therefore joined DCL critics citing not only the concerns outlined above but also the consequent mushrooming of Title IX bureaucracies on campus (with scant legal training of staff) as well as the

38 "Written Remarks for EO 12866 Meeting," (NAS, 1/14/2020) https://www.nas.org/blogs/article/written-remarks-for-eo-12866-meeting.

resulting invasive, divisive, and social engineering type work now undertaken on campus in the name of Title IX equity.[39]

The DCL also epitomized administrative overreach. (See exchange between Tennessee United States Senator Lamar Alexander and former DOE Office for Civil Rights Attorney Catherine Lhamon on this point. Lhamon concedes the DCL is not binding law but also acknowledges that OCR told recipient schools it was.)[40] However, the DCL policy changes found fertile soil in recipient schools and quickly took root. Within a few years of the letter's issuance, thousands of Title IX officials were hired on college campuses.[41] The DCL explicitly required a main point of contact within each Title IX Office, the "Title IX Coordinator," but other positions proliferated as well—"Deputy Coordinators," "Deputy Assistant Coordinators" along with investigators, adjudicators, and officers.[42] As these names suggest, campus Title IX offices became quasi-legal or juridical entities, even though their staff had little to no real world legal training or court experience. This duplication or parallel track—that Title IX offices were essentially going to assume the functions of prosecutors and courts—should probably have caused some alarm or discomfort among staff. (Those new to the study of Title IX routinely ask: "Isn't this a matter for the criminal justice system?")[43] The fact that campus personnel did not seem phased by these weighty responsibilities was already a bad sign.[44]

39 *Ibid.*

40 "Sexual Assault on Campus: Working to Ensure Student Safety," U.S. Senate Committee on Health, Education, Labor & Pensions, 6/26/2014, https://www.help.senate.gov/hearings/sexual-assault-on-campus-working-to-ensure-student-safety (minute 50); Susan Kruth "Senators Ask Key Questions at Hearing on Campus Sexual Assault," FIRE, June 30, 2014, https://www.thefire.org/senators-ask-key-questions-at-hearing-on-campus-sexual-assault/.

41 The main professional association for Title IX personnel is the Association of Title IX Coordinators, or ATIXA, which reports that since 2011 the field has grown to more than 25,000 people: "ATIXA was formed in 2011 to promote professional development and foster collaboration in what is actually a field of more than 25,000 people who all do the same job – assuring Title IX compliance in our schools, colleges and universities." https://atixa.org/about/; Jacquelyn D Wiersma-Mosley and James DiLoreto, "The Role of Title IX Coordinators on College and University Campuses," *Behavioral Sciences* 8, no. 4 (April 2018): 38 https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5946097/.

42 Catherine Lhamon, "Dear Colleague Letter on Title IX Coordinators" (OCR, 4/24/2015) https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf.

43 Silbaugh, "Reactive to Proactive", 1072 (Title IX and criminal justice practice).

44 *Ibid.*

In retrospect, Title IX developments since the 2011 DCL now seem almost predictable: From 2011 to 2020, more than 500 lawsuits were filed challenging the lawfulness of what are now called Title IX kangaroo courts on campus: Most filings are by male students contesting findings of fault for sexual misconduct.[45] (Many cases originate in what Laura Kipnis describes as "usually drunken encounters that someone decides later was [sic] not consensual."[46]) They claim that campus officials violate due process protections for the accused, or violate student conduct codes regarding fairness, or even that they violate the Title IX law itself because they exhibit bias against men.

In almost half of these cases, courts have ruled in favor of such male plaintiffs, with a number of school transcripts featuring statements or misdeeds by campus administrators which confirm one's worst fears of both sexist bias and professional incompetence. For example, the Title IX Coordinator of Ohio's Miami University, Susan Vaughn, has served as both investigator and adjudicator of sexual assault allegations—already a due process red flag, since such key roles should remain separate—and once told an accused student,"I bet you assault female students all the time."[47]

Here are some statements from students who were accused of sexual misconduct after the 2011 Dear Colleague Letter; they appear in the Appendix of the friend-of-the-court brief (or *amicus* brief) filed by the non-profit FACE (Families Advocating Campus Equality) in pending litigation.[48]

45 Samantha Harris and K.C. Johnson, "Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications," *New York University Journal of Legislation and Public Policy* 22, no. 1 (2020): 49 https://nyujlpp.org/wp-content/uploads/2019/12/Harris-Johnson-Campus-Courts-in-Court-22-nyujlpp-49.pdf.

46 Kipnis, interview.

47 Jeremy Bauer-Wolf, "A Title IX Victory for the Accused," Inside Higher Ed, February 12, 2018, https://www.insidehighered.com/news/2018/02/12/title-ix-lawsuit-against-miami-university-has-new-traction.

48 Brief of Families Advocating for Campus Equality ("FACE") as *amicus curiae* in Opposition to Plaintiffs' Motion for Preliminary Injunction, in *Commonwealth of Pennsylvania, et. al. v. Elisabeth D. DeVos*, in the United States District Court for the District of Columbia, filed July 9, 2020 https://static1.squarespace.com/static/5941656f2e69cffcdb5210aa/t/5f39711ed689050994af9771/1597600121981/FACE+DC+Amicus+%2B+Appendix.+pdf.pdf.

"A no-contact order was delivered to John Doe in the middle of the night. The next morning [John Doe] met with Associate Dean of Students [and] Deputy Title IX Directors, in his office. The dean said, 'you are being charged with sexual misconduct and you can make a statement at a later date...' He then explained to John there was 'inappropriate touching' and 'he did not get affirmative consent.'

Shortly after this meeting John was abruptly pulled out of his lab class and told he was suspended. He was escorted to his room by three security men to gather his belongings, while signs were being hung on buildings all over the campus that there had been a sexual assault. A mass email was also sent to everyone on campus, asking them to report.

That night the assault was on the news and in the newspaper. John was treated as guilty from the moment he was accused.

Imagine how you would feel, your friends watching you being escorted away like a criminal. You don't even know why this is happening, you only know an accusation has been made and no one wants to hear your side of the story.

The day after the alleged incident, Jane texted her roommate: 'I was teasing him earlier that day and I did kiss him and stuff. Does this count as sexual assault?' Roommate: 'According to the Department of Justice: Sexual Assault is any type of sexual contact or behavior that occurs without the explicit consent of the recipient. Falling under the

definition of sexual assault.' Jane: 'So, Yes?' Roommate: 'Honestly, yes, I think it would count.'

John and his father were allowed to return to campus to pick up more belongings two days after the accusation. They spoke with the Title IX director... [who] stated, 'There was a lot of pressure from the Federal Government, and this is just how things work.'"

- Student #4, drafted July 2020

"I was falsely accused of sexual assault during my senior year of college... despite overwhelming evidence supporting my innocence, I was eventually found 'Responsible' for sexual assault and suspended from school for the rest of the year.

While I was eventually able to prove my innocence in a court of law after spending thousands of dollars, the impact of this ordeal on my life and my psyche cannot be overstated. After I was found Responsible and removed from campus, I quickly descended into... the all-too-familiar pattern for those falsely accused: isolation from friends and family, loss of reputation, depression, substance abuse, and a suicide attempt. It took five long years to clear my name... One spurious allegation and a small handful of complicit university administrators was all it took...

[T]he allegation against me was made in relation to a sexual encounter that occurred hundreds of miles from campus, over the summer break, with a girl who was not even a student at my university... In my case, the accuser submitted fabricated evidence to the hearing panel in order to bolster

her false claims. Unfortunately, that fabricated evidence was withheld from me until the very last minute...

My accuser claimed that she was unable to consent due to incapacitation. However, throughout the entire disciplinary process, there was not a single piece of evidence presented to corroborate this claim. There were roughly a dozen witnesses who interacted with my accuser in the moments leading up to our encounter, and every single one testified that nothing in my accuser's behavior / demeanor indicated that she was blacked out, incapacitated, or otherwise unable to consent. However, despite this total dearth of corroborating evidence, I was still found 'Responsible' on nothing more than the accuser's word."

- Student #5, drafted July 2020

"My son went through the TIX process while he was a college student and the experience has forever changed our entire family. Compared to other accused students we have come to know, he was one of the fortunate ones. It was the process that was the most devastating...

My son was on the track and cross-country teams. In September of 2016, he received an email from the TIX coordinator that she had gotten notice that he may have been involved in a sexual assault involving another male student (a person my son has never met and my son is not gay). He had no idea what this was about and thought it must be some mistake...

The [alleged] incident took place in 2014—OVER TWO YEARS FROM THE TIME HE GOT THIS NOTICE. My son

was told that he needed to meet with the TIX coordinator... The coordinator was an employee of the school's Women's Center and a victim advocate....

I called a local attorney... he told me that schools care about losing hundreds of thousands of dollars more than they do about the students...

We were extremely fortunate that the accuser did not show up at the hearing and we learned that he was not even a student at the college at the time...

[My son was also not at the school the semester of the hearing.

We found out later from emails... (from August 2016) that the Women's Center staff member pressured my son's accuser to file a complaint. The accuser didn't even want to file anything!

The original letter to my son was from one of the coordinators who was a 'gender-based violence prevention specialist.' What's that?

It was a no-contact order and a gag order—we were not supposed to talk to anyone about the allegations.

My son has had issues with anxiety.

We could not believe this.]"[49]

- Student #7

49 Bracketed portions of this Statement are quotes are from a phone call in March of 2020.

"It began with an early morning phone call with our son in tears. His coach texted him to say he was suspended from this team for a sexual harassment complaint and that he could not tell him any more information.

The people at the university that handled the situation were all interim; we never knew what was going on, when he met with 'the investigator'... the advocate assigned on his behalf told him he was 'screwed'... when it came down to the final 'hearing' the people on the panel had not even read the investigator's report."

- Student #8

"The Title IX offices have been staffed with people and have educated people to presume guilt. Our son's hearing panel included two young female employees of the university who had been trained with presumption of guilt. They chose not to look at evidence they had access to that was exculpatory for our son."

- Student #1

"The investigator did not pursue available physical evidence that would have corroborated our son's testimony or follow up or pursue numerous inconsistencies in the complainant's testimony and version of events."

- Student #2

"I was not permitted to present evidence or witnesses without arbitrary administration approval (the administration had no criteria and they provided no explanation), I was not

> allowed to question my accuser or any of her witnesses personally or through an advisor, I was not allowed to question parts of my accuser's story and the university refused to provide any details of the accusation until after the investigation concluded."
>
> *-Student #3*

Female students have also sued—often when the conduct of student athletes is at issue; these claims allege that schools, or athletic departments within them, improperly protect star athletes for the sake of a team or a program's reputation (discussed more fully below).

Public interest groups have also been formed, most notably by parents who have found school adjudications to be not only unfair but often dramatically so. In many cases, male students have been summarily ejected from campus after merely being notified of a complaint, with no opportunity to explain or respond.[50] In such instances, bans on returning to campus can last months or even years, significantly interrupting an academic and professional trajectory. The most well-known such groups include: "SAVE" (Stop Abusive and Violent Environments), "FACE" (Families Advocating for Campus Equality), Save our Sons, and "CJC," the Campus Justice Coalition.

In light of this turbulence, scrutiny of Title IX policies by the Trump Administration was not surprising. After the new Secretary of Education, Elisabeth ("Betsy") DeVos, conducted a months-long listening tour to hear from universities, policy groups, students, and parents, she formally rescinded the Obama 2011 DCL in September of 2017. The Office for Civil Rights then posted an informal "Question and Answer" document while the Administration formulated new policy. In November of 2018, it proposed new regulations pursuant to the Administrative Procedure Act and they received public comment through February 2020.The new, final rule was issued on May 4, 2020.[51]

50 "Ex-student Says He Was Falsely Accused," ABC News, October 18, 2018, https://abcnews.go.com/Politics/student-falsely-accused-sexual-harassment-denied-due-process/story?id=58592962.

51 Final Rule, Office of Civil Rights, Department of Education, "Nondiscrimination on the Basis of Sex in Edu-

V. The Final Rule and Due Process

Though not perfect, the Trump Administration's new regulations help restore balance and due process protections in Title IX cases where sexual misconduct is alleged.

From the start, in commentary accompanying the proposed rules, the Trump Office for Civil Rights clarified that Title IX obligations are of a contractual nature between the federal government, via federal funds, and a school, which is receiving those federal funds (the "recipient").

Title IX does not and cannot impose legal obligations on other parties such as students or faculty. As the Supreme Court explained, Title IX is a statute "designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner."[52]

Only the actions of a recipient school are at issue in a Title IX case. And the school cannot violate the regulations unless it has actual knowledge of potentially discriminatory conduct, has authority over the alleged offender, and is also deliberately indifferent to the situation.[53] The proposed regulations and explanations took 30 pages in the Federal Register while the Final Rule consists of 25 pages, plus almost 2,000 pages of comment. For the purposes of this report, the following issues are most noteworthy.[54]

A. The focus of Title IX is access to education secured by recipient schools, not sexual crimes as such.

The proposed regulations repeatedly clarified, and the Final Rule confirms, that the focus of Title IX is access to education, not sexual harassment, sexual assault or sexual misconduct as such. Notes accompanying the proposed rule explained:

cation Programs and Activities Receiving Federal Financial Assistance," 34 C.F.R. Part 106, RIN 1870-AA14 https://www.federalregister.gov/d/2020-10512

52 *Federal Register*, 83, no. 230 (Nov. 29, 2018): 61466. https://thefederalregister.org/83-FR/Issue-230

53 *Ibid.*, 61468.

54 Other issues include the difference between a response and a formal investigation and the difference between "actual knowledge" (when reports are made to the official in a position to institute correction, such as the Title IX Coordinator) and "imputed knowledge" (when reports are not made to such an official).

> "Thus, the proposed regulations set forth clear standards that trigger a recipient's obligation to respond to sexual harassment, *including defining conduct that rises to the level of Title IX as conduct serious enough to jeopardize a person's equal access to the recipient's education program or activity*... [emphasis added].

> Because the purpose of Title IX is to prohibit a recipient from subjecting individuals to sex discrimination in its education program or activity, *the definition of sexual harassment under Title IX focuses on sexual conduct that jeopardizes a person's equal access to an education program or activity* [emphasis added].

> *Such sexual harassment includes conduct that is also a crime (such as sexual assault) but Title IX does not focus on crimes per se*."[55] [emphasis added]

The Final Rule reaffirmed, "[T]he way a school, college, or university responds to allegations of sexual harassment in an educational program or activity *has serious consequences for the equal educational access* [emphasis added] for complainants and respondents."[56]

Both clarifications remind observers that Title IX is not a broad and roaming tool to fight sexual misconduct or sexual violence. It is, instead, simply a guarantee of equal access to education for both sexes at schools receiving federal money.

B. The Final Rule defines three types of sexual misconduct, returning to an objective and education-related standard for "hostile environment."[57]

55 Proposed Rule, *Federal Register*, 83, no. 230: 61465, 61467.
56 Final Rule, 34 C.F.R. Part 106 , RIN 1870-AA14.
57 *Ibid.*, 2014.

The Final Rule recognizes three categories of sexual misconduct as constituting sexual harassment and therefore as potentially discriminatory conduct under Title IX.

> "The Final Rule defines sexual harassment broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: 1) Any instance of *quid pro quo* harassment by a school's employee; 2) any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal education access; 3) any instance of sexual assault (as defined in the Clery Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women's Act (VAWA)."[58]

The first category of sexual harassment (as discrimination under Title IX) is the "*quid pro quo*" proposition where benefits - grades, classes, credit, etc. - are conditioned on sexual favors. No one disputes that this constitutes sex discrimination.

The second hostile environment category returns to the more objective and education-related definition of sexual harassment, as articulated in the *Davis* opinion, to qualify as sex discrimination under Title IX.[59]

Commentary again emphasized the question of access:

> "The Department defines 'sexual harassment' to mean... unwelcome conduct on the basis of sex that is so severe, pervasive and objectively offensive that it effectively denies

58 *Summary of Major Provisions of the Department of Education's Title IX Final Rule*, US Department of Education, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf.

59 *Federal Register*, 83, no. 230 (Nov. 29, 2018): 61463.

> a person equal access to the recipient's education program or activity.

> [T]he text of *Title IX prohibits only discrimination that has the effect of denying access* [emphasis added] to the recipient's educational program or activities. *Accordingly, Title IX does not prohibit sex-based misconduct that does not rise to that level of scrutiny*."[60] [emphasis added]

The third category is more problematic.

C. The Final Rule's third category is problematic.

NAS views the third category of conduct outlined as "sexual harassment" discrimination to be problematic since it suggests that sexual assault, dating violence, domestic violence, and stalking intrinsically deny access to education. The Summary of Provisions released with the Final Rule explained it this way.

> "Clery Act/ VAWA offenses are not evaluated for severity, pervasiveness, offensiveness, *or denial of equal educational access* [emphasis added] because such misconduct is sufficiently serious to deprive a person of equal access."[61]

The commentary accompanying the Final Rule said this about the third category.

> "These final regulations continue the withdrawn 2011 Dear Colleague Letter's express acknowledgment that sexual violence is a form of sexual harassment; the difference is that

60 *Ibid*, 61466.

61 *Summary of Major Provisions*, US Department of Education.

> these regulations expressly define sex-based violence by reference to Clery and VAWA."[62]

Asserting that sexual violence is intrinsically discriminatory under Title IX, without any regard for the effect on educational opportunity, runs contrary to almost all the commentary surrounding both the proposed regulations and the final rule, which recognized that not all acts of sexual misconduct deny educational access and trigger Title IX—only those that "rise to that level of scrutiny."[63] The Summary says that this "misconduct is sufficiently serious to deprive a person of equal access;" but by this reasoning many other behaviors that involve sex or dating and are sufficiently serious could also be said to deprive a person of equal access and therefore fall under the jurisdiction of Title IX - blackmail, trespass, bribery, etc.

The risk here is that Title IX offices will continue to see Title IX primarily as a sex crimes law, rather than an equal access law, which means that they will continue to act as the campus sex police—that is, as sex monitors, not educational access monitors.

D. The recipient's Title IX materials must include the presumption of innocence.

The Final Rule, section 106.45(b)(1)(iv), requires the recipient's grievance procedures to state the presumption of innocence for any accused:

> "A recipient's grievance process must… include a presumption that the respondent is not responsible for the alleged

62 Final Rule, 34 C.F.R. Part 106, RIN 1870-AA14.

63 *Federal Register*, 83, no. 230 (Nov. 29, 2018): 61465.

> conduct until a determination regarding responsibility is made at the conclusion of the grievance process."[64]

E. The right to a live hearing, to question witnesses, and to counsel

Finally, the Final Rule specifically mandates live hearings at the college level and the right to question the accuser and witnesses, as well as the right to outside advisors, who may be attorneys, for both the complainant and the respondent. The role of the advisor may be limited, however, provided it is limited in the same way for both parties:

> For postsecondary institutions, the recipient's grievance procedure must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must arrange for the live hearing to occur with either party in separate rooms...Only relevant cross examination or questions may be asked of a party or witness.... the decision-maker(s) must first determine whether the question is relevant...If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party,

64 Final Rule, 34 C.F.R. Part 106, RIN 1870AA14, 30577.

> an advisor of the recipient's choice, who may be, but is not required to be, an attorney,...[65]

F. Both Clear and Convincing and Preponderance of Evidence Standards Allowed

The Final Rule also addresses the burden of proof by allowing schools to use the more stringent standard of clear and convincing (in place before the Obama Administration), but also allowing them to select the preponderance of evidence standard if they have the latter standard also for all formal complaints of sexual harassment, including those against employees, such as faculty.[66]

VI. Continuing Concerns

Other concerns remain, however, and NAS notes these continuing issues:

A. Unclear Metrics for Emergency Removal

Of all the due process violations, the summary ejection from campus of those accused stands out. Many students report learning of an accusation and being ousted from their dorms at the same time—with no opportunity to respond or make counterclaims.

While the presumption of innocence (aka not responsible) contained in section 106.45(b)(1)(iv) should address this, along with the guaranteed opportunity to respond codified in section 106.45(b)(2)(i)(A) and (B) ("Notice of Allegations"—"a recipient must provide... sufficient time to prepare a response before any initial interview..."[67]), the regulations

65 *Ibid.*
66 Final Rule, 34 C.F.R. Part 106, RIN 1870-AA14, 30575.
67 *Ibid.*, 30576.

still allow for emergency removal of the accused without clarifying the considerations which would justify such an extreme action.

> Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or individual arising from the allegation of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.[68]

The number of court opinions finding in favor of male students wrongly accused under Title IX is a sober reminder of how false accusations can unfairly upend the educational and professional paths of respondents.

Additionally, Title IX guarantees educational access for males as well as females (although the original focus was clearly on women); emergency removal therefore risks a violation of Title IX rights of equal educational access for the accused male student who is summarily removed.

Given these stakes, NAS thinks schools and Title IX policies should be clearer about the metrics and considerations that can be used to justify such a drastic move as to summarily bar an accused student from campus. Here are a few relevant factors.

- Has the student threatened violence?
- Does the student have a history of violence such as a criminal record?
- Does the student have a medical history that might indicate a threat to safety?

68 *Ibid.*, 30575.

Title IX regulations might also include inquiries about the history of the complainant.

- Is there a history of false accusations?
- Does the medical history of the complainant include medications or conditions that might color judgment, memory or decision-making?

B. Reasonably Prompt Time-frames but no Statute of Limitations and no Good Faith Requirement

The Final Rule requires prompt and equitable resolution of complaints and that a recipient must respond promptly as well as reasonably prompt time frames for the completion of the grievance process rather than the 60-day default period commonly used between 2011 and 2017; but no deadlines are imposed for bringing complaints.[69]

For most legal proceedings, deadlines govern the ability to seek legal remedies for fairly obvious reasons: As time passes, memories fade, evidence is harder to obtain and any alleged physical injury is harder to verify. For these reasons, statutes of limitations exist.

What's more, a number of accused students have claimed that accusations have been timed to impose maximum damage on the accused—for example, claims have been filed just before important sporting events (when the accused is a member of a team), so that he will be suspended from play.

Accordingly, NAS has advocated that reasonable time-frames include a statute-of-limitations-type provision as well as a good faith requirement to prevent vindictive behavior and to protect against the other complications that come with the passage of time.[70]

69 *Ibid.*

70 For the Education Department's rationale excluding such a statute of limitations requirement, *ibid.*, 30127.

C. Need for Outside Due Process Professionals

Education Department commentary has noted that recipient schools have "unique knowledge of the school culture and student body and are best positioned to make disciplinary decisions" such that the Education Department will not second guess Title IX case outcomes or determinations without cause (such as clearly unreasonable school responses).[71]

The Education Department's trust is, in many cases, misplaced. The campus authorities know more about the kind of campus they would like to create than they know about the actual behavior of students. NAS has long documented the leftward politicization of America's colleges and universities, including the political profile of professors, the overt political content of classes offered, and also the leftward bias evident in most faculty publications.[72] Administrators such as Deans, Associate Deans, or Diversity Officers and Title IX Coordinators, as a rule, conform to this general orientation.

For this reason, NAS is very wary of the ability of any campus office to instigate disciplinary proceedings against a student and especially wary for matters as politically charged as sexual misconduct allegations. But the Final Rule allows for just that. "*Formal complaint* means a document filed by a complainant or signed by the Title IX Coordinator…"[73]

For this reason, NAS reiterates its support for the involvement of outside professionals in Title IX proceedings, and in particular professionals skilled in due process advocacy and criminal defense.

71 *Federal Register*, 83, no. 230 (Nov. 29, 2018): 61468.
72 "NAS Written Remarks" (NAS, 1/14/2020).
73 Final Rule, 34 C.F.R. Part 106, RIN 1870-AA14, 30574.

VII. New Regulations Challenged in Court

In May and June of 2020, Complaints were filed in four federal district courts to challenge the legality of the Final Rule. The cases are 1) *Know Your IX v. Elisabeth D. Devos*[74] in Maryland, 2) *State of New York v. Elisabeth Devos*[75] in New York State, 3) [*Attorneys General of 18 states] v. Elisabeth Devos*[76] in the District of Columbia, and 4) *Victim Rights Law Center, et. al. v. Elisabeth DeVos*[77] in Massachusetts.

The four cases overlap in both their factual assertions (that sexual assault is under-reported, for example) and in their allegations of illegality. Paragraphs 16 and 17 of the first Complaint filed in Maryland aptly summarize the argument.

> "16. The provisions of the [new] Rule that Plaintiffs challenge are contrary to Title IX, unreasonable departures from longstanding [Education Department] policy and practice, and create an arbitrary, capricious and insufficiently explained double standard, [emphasis added] enable institutions to ignore sexual harassment and assault that they could not ignore if the same alleged harassment were based on race, national origin or disability. They also fail to address alarming evidence presented during the comment period about the impact these provisions would have on survivors of sexual harassment and assault and their educations.

> 17. The [new regulations] *dramatically reduce schools' responsibility to respond to sexual harassment* [emphasis added] and should be declared invalid. By promulgating them, the Agency has thwarted its mandate to ensure that every

74 Filed May 14, 2020 with representation in part by the American Civil Liberties Union (ACLU).
75 Filed June 4, 2020.
76 Filed June 4, 2020.
77 Filed June 10, 2020.

> student has equal educational opportunity regardless of sex."[78]

Specifically, the overlapping allegations claim that the new regulations improperly:

1. Create a different level of school responsibility for Title IX than for other laws such as Titles VI and VII of the Civil Rights Act of 1964, which address discrimination based on disability, race, color, or national origin. (In Title IX, the claim goes, the recipient school is only responsible to address discrimination allegations when it has *actual knowledge* of a possible violation, for example, whereas in these other areas, recipient schools are responsible also for possible violations of which they *should have known*. Also, under the new regulations, the conduct triggering Title IX's application must be "so severe, pervasive and objectively offensive" that it effectively denies a person equal access to education while in other areas, such as Title VII, the standard is "severe, pervasive or objectively offensive". See *Commonwealth of Pennsylvania, et. al. v. DeVos*, Complaint for Declaratory and Injunctive Relief, filed June 6, 2020, at p. 28.)
2. Limit the scope of Title IX to conduct that is "against a person in the U.S.", so that it does not apply to study abroad programs.
3. Narrow the conduct triggering Title IX to behavior that is "severe, pervasive and objectively offensive" so that one-time incidents would not trigger Title IX.
4. Limit the pool of complainants to those who are participating, or attempting to participate, in the school's education program or activity at the time the complaint is made.

78 Complaint, *Know Your IX v. Elisabeth D. Devos*, in the United States District Court, Maryland, filed May 14, 2020.

5. Risk traumatizing complainants with the requirement that a live hearing be held at the college level, and, additionally, fail to explain why only post-secondary institutions have this requirement.
6. Chill reporting with this same live hearing requirement.
7. Violate the Administrative Procedure Act because the final regulations differ from those proposed.
8. Impose an undue burden on schools with the effective date of August 14, 2020, by not allowing enough time for schools to prepare for compliance.

It is worth noting that "longstanding [Education Department] policy and practice" consists of changing guidance documents issued over a 15-year period under three different administrations.

Also, the new regulations specifically require affirmative support for any student claiming sexual misconduct, regardless of the accuracy or merit of the claim, which will mitigate the impact on a survivor of sexual harassment.

Last, it should be noted that the period for public notice and comment for these regulations was more than 4 times as long as the average time-frame for other rules subject to the Administrative Procedure Act, with 2,000 pages of explanatory content. This undermines claims that the Agency's actions were arbitrary and capricious.

A review of these lawsuits reveals some disturbing flaws in legal reasoning and even an attempt to undermine well established legal canons.

A. All the complaints assert that sexual misconduct on campus is under-reported.
B. The lawsuit brought in Massachusetts by advocacy groups such as the Victim Rights Law Center *challenges the presumption of innocence*: "[Par. 137]. Section 106.45(b)(1)(iv) will require schools to establish a presumption of non-responsibility for all complaints of sex-based harassment. That is schools will be required to presume that the reported

incident did not occur. The presumption of non-responsibility is based in sex discrimination and exacerbates the myth that women and girls often lie about sexual assault."[79]

C. This litigation tests the traditional limits of "standing," the idea that only those directly and recognizably harmed by allegedly illegal action can sue to enjoin it in court. In the context of Title IX, the logical entities to challenge the new regulations would be either schools or students since the law imposes duties on recipient schools for the benefit of students. Any interests of a state attorney general or of public policy groups are, by comparison, much more distant. (Students who are either making or answering a Title IX complaint are the parties most likely to mount a legal challenge, since they have the most to gain or lose from the rule's application.)

The district courts in New York and the District of Columbia held hearings on requests to delay the effective date of the Final Rule, set for August 14, 2020 (that is, the plaintiffs requested preliminary injunctive relief). Both courts, however, denied this request on the grounds that the rule would not cause irreparable harm, and that the agency lawfully promulgated the regulations with no arbitrary and capricious action.[80]

79 *Victim Rights Law Center v. DeVos*, Complaint for Declaratory and Injunctive Relief in the United States District Court for the District of Massachusetts, filed June 10, 2020, 57. https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2020/07/2020-07-02-Amended-Document-dckt-12_0.pdf

80 *Commonwealth of Pennsylvania, et al., v. DeVos, Civil Action No. 1:20-cv-01468*, Memorandum Opinion, August 12, 2020, https://www.courtlistener.com/opinion/4774600/ commonwealth-of-pennsylvania-v-devos/; *State of New York v. United States Department of Education*, Opinion and Order, 20 -CV- 4260, August 9, 2020.

Part II: Findings

Part II: Findings

Title IX On The Ground: Campus Visits & School Case Studies

The Report now turns to findings on how Title IX operates on campus and on how its effects are perceived. It documents the attitudes, opinions, backgrounds, and actions of students and administrators, and shares information drawn from campus publications, billboards, and other resources.

Selection of Schools

America boasts over 4,000 colleges and universities. In-depth study and personal visits to each one, or even to a large sample, is not possible. How, then, does one get a sense of campus trends, given the large number of institutions trying to comply with Title IX?

Since state universities are answerable to the public, at least in theory, and in particular to the states they are supposed to serve, this Report focuses on state schools. Virginia's schools present some variety in terms of setting: George Mason University is situated in the larger, metropolitan area of Washington, DC, while Virginia Polytechnic Institute ("Virginia Tech" or just "Tech") is in the small college town of Blacksburg. James Madison University is a medium-size state university in a medium-sized college town.

Reaching beyond the American south, this Report also examines two institutions in New York State, both of them SUNY (State University of New York) schools: one from a small college town in a rural area (SUNY Geneseo), and the other a larger state University in a medium-sized city (SUNY Buffalo).

Finally, Iowa State University is included to look beyond the East coast, to feature a large state school in the Midwest, and to include an institution recently in the news for its scrutiny of Title IX training materials.[81] Any selection of schools has limits. The small sample we examine is meant to be illustrative. We expect the results would be similar elsewhere, but we cannot know for certain.

Even so, the findings presented here provide a glimpse into Title IX practice, and may serve to inform a discussion about where things stand now, and where they're headed.

Areas of Study

Section A of this Part II examines current attitudes toward sexual mores and sexual assault. It presents interviews with students and administrators regarding opportunities and participation levels of women in classes, clubs, teams and other activities, to see if any barriers exist, or are perceived to exist, for women who seek access to educational or extracurricular programs of any kind. It also includes data from the schools themselves: online resources (such as Annual Reports on Safety), and surveys published pursuant to legislation (such as the Clery Act).[82] Section A also examines cultural matters such as campus politics, social life and dating, including a discussion of the hook-up culture and the "rape epidemic" to get an on-the-ground view of complaints of sexual misconduct, which constitute the majority of the work done by campus Title IX offices. As the name implies, hook-up refers to an impersonal and transient sexual encounter outside of a committed relationship.

In recent years, many programs have developed in response to complaints about the hook-up culture and the excessive partying on campus;

81 "Training for Title IX Investigators Lacks Tested, Effective Techniques, Iowa State University News Service, October 28, 2019, https://www.news.iastate.edu/news/2019/10/28/titleix.

82 The *Jeanne Clery* Disclosure of Campus Security Policy and Campus Crime Statistics *Act* or *Clery Act* was enacted in 1990 in response to the violent rape and killing of the undergraduate student Jeanne Clery at Bethlehem College in Pennsylvania. It requires post-secondary schools to keep and publish statistical data on violent crime on campus.

such programs serve as an alternative to hook-ups and heavy drinking. The most well-known of these are *The Love and Fidelity Network* at Princeton University and *The Dating Project* at Boston College. We looked for and asked about such programs on campus.

Section B contains tables with information on the following topics: 1) Title IX staff (female, male ratio; professional background; relevant legal experience); 2) programs to prevent acts of discrimination prohibited by Title IX, usually sexual misconduct; 3) school policies on sex discrimination and definitions of prohibited conduct; 4) training materials; and 5) due process components of disciplinary procedures.

A few additional preliminary matters should be mentioned.

Insurance company policies and recommendations. Given that nearly half of the cases brought to court by wrongfully accused students have had rulings in their favor, and some with very large settlements, the liability carriers of post-secondary schools will probably assume a more active role in a school's Title IX practices and policies. An in-depth look at that development is, however, beyond the scope of this Report.

Convictions as the measure of success. Observers and critics of the criminal justice system have long noted that prosecutors tend to measure their success by the number of convictions they obtain. This is a tragic and profound misunderstanding of their job. As Alex Kozinski, former Ninth Circuit Court of Appeals Judge, explained:

> "The government is not an ordinary litigant whose interest lies in winning at all costs. Rather the government's legitimate interest lies in convicting only those defendants who are proven guilty beyond a reasonable doubt. If the government has evidence that casts doubt on the defendant's guilt,

> it has every interest in producing that evidence for the jury to consider in reaching its decision."[83]

Yet the mentality persists and is of note here since a similar mindset could easily afflict Title IX staff members, especially since the 2011 DCL.

The *Bostock* decision of the United States Supreme Court. In the summer of 2020, the United States Supreme Court issued a controversial opinion in *Bostock v. Clayton County*,[84] a consolidation of three cases brought pursuant to Title VII, the federal law banning sex discrimination in employment. One question put to the Court concerned the definition of sex—specifically, does the definition include different sexual identities, such as bisexual or transgender or transvestite individuals? The Court found that it does. This means that Title VII now bans employment discrimination against such groups (if the discrimination is because of their sexual identity status). While this case was not brought pursuant to Title IX, those two laws are often discussed together, so a development in one area can affect the other.

Section A—Current Attitudes

American postsecondary schools[85] present more variety than any other nation in terms of size, programs, public vs. private ownership, and religious, or non-religious, orientation. According to the DOE, the number of students matriculating to these institutions is approximately 35% of the college-age population, although variety exists here as well, in terms of age, full or part-time status, marital status, and also level of study - undergraduate or graduate. That said, some industry trends are discernible, including the higher number of women on campus since the late 1970s (reaching a majority in 1979). According to the National Center

83 Sidney Powell, *Licensed to Lie* (Dallas: Brown Books, 2014), Preface.

84 140 S. Ct. 1731https://www.supremecourt.gov/opinions/19pdf/17-1618_hfci.pdf.

85 "Fast Facts: How many educational institutions exist in the United States?" U.S. Department of Education, National Center for Education Statistics, https://nces.ed.gov/fastfacts/display.asp?id=84 (this figure includes both 2 and 4-year institutions).

for Education Statistics' *Digest of Education Statistics*, more women than men now pursue degrees in almost every field of study:

> "[W]omen in US higher education… have been the majority gender at America's colleges and universities by enrollment for the last 40 years since 1979, and have been awarded the majority of bachelor's degrees since 1982 and the majority of master's degrees since 1987."[86]

In fact, the female:male ratio in higher education is now so favorable to women that some groups are challenging single-sex scholarships (typically for women only) as a violation of Title IX's prohibition against sex discrimination.[87]

Female Students Report No Barriers Anywhere

"I don't think barriers exist for women…" "I would say we get equal access to everything" "Maybe if I were in a different field, like engineering, I would have found sexism, but it wasn't in the com school." "I love Tech! There are tons of opportunities here" "[F]or engineering… because there's so few females, that when there's a female that applies, [she] gets a little bit of leverage"

Numbers may not tell the full story, of course. As legal complaints and cases show, negative experiences or discrimination can lie behind favorable statistics: *Quid pro quo* propositions are possible in departments where women and men are equally represented, as are more subtle forms of bias such as less attention and support from academic supervisors, less prestigious research opportunities, or less time devoted to female professional development overall.

86 "[Y]ou could make a much stronger case that the male underrepresentation in higher education illustrated above that has persisted and grown for 40 years deserves the attention today that the female underrepresentation in the 1960s rightfully, but no longer, deserves." Mark J. Perry, *The Remarkable Story of Female Success in US Higher Education*, American Enterprise Institute, August 29, 2019.)

87 "Colleges and Universities are Failing to Meet Their Obligations to Male Students," SAVE, August 19, 2019, http://www.saveservices.org/2019/08/colleges-and-universities-are-failing-to-meet-their-title-ix-obligations-to-male-students/.

The questions, then, are these. Do female students report that such problems exist on campus? Do they report that their access to programs, majors, or other campus activities, both extra-curricular and academic, is ever denied to them, or compromised, because of their sex?

The following quotes show reactions to that question.

> "I don't think barriers exist for women... but Geneseo promotes STEM instead of the social sciences. My field is criminal justice which is more social science... I think more women go into the social sciences so Geneseo may end up supporting women less because the school is focused on STEM."
>
> *—Second Year Student, Female, SUNY Geneseo, February 14, 2020*

> "I'm a math major. It's majority guys but no barriers to women, I don't think so. But my advisor is not very good—about internships and stuff like that. But I don't think it's because I'm a woman—she's a woman! I'll ask my boyfriend in Buffalo if his advisor is better."
>
> *—First Year, Female, SUNY Geneseo, February 14, 2020*

> "My major is human development. I love Tech! There are so many opportunities here—internships, jobs, guidance. My roommate, she's in engineering and she feels the same way. We don't see any barriers. She visits elementary schools sometimes to talk to girls about fields open to them. Human

Development is more women dominated, unlike engineering, but there are tons of opportunities here."

"There are also hundreds of clubs here—we hold events on the center field and there's so much to pick from. Both professional and fun stuff. You get to meet tons of people."

—Senior Female, Virginia Tech, February 28, 2020

"I'm in communications. The only bias is one I have against myself! That's a carry-over from high school. Maybe if I were in a different field, like engineering, I would have found sexism, but it wasn't in the com school. My advisor—she was great, a great advocate. But there was another guy advisor and he was great too..."

—Female Graduate, Virginia Tech, Spring 2019

"I'm in electrical engineering... I feel like for engineering, at least—because there's so few females, that when there's a female that applies, [she] gets a little bit of leverage... so they can meet their quotas... The University? Engineering-wise it's very male oriented but, like, they're not going to discriminate based on your being female here... all the engineering girls would like just get together you know and there's like only 5 of us... we stick together"

—Third-Year Female Student, Virginia Tech, Spring 2020

> "I would say we [female students] got equal access to everything... I never experienced anything negative... I felt completely comfortable..."
>
> —*Female Graduate, Virginia Tech, Spring 2020*

As the statements above indicate, some female students not only see no barriers to educational programs and activities but also report "we get equal access to everything," and "there are tons of opportunities"; some female students even want to report this to girls in elementary school.

Significantly, the second-year Geneseo student mentioned her school's focus on and promotion of STEM fields (and how this might hurt women, asserting, "more women go into the social sciences so Geneseo may end up supporting women less because the school is focused on STEM"). This raises the possibility that efforts to recruit women into STEM fields or similar areas where they do not wish to go may, in fact, be perceived as less supportive of women, since such efforts risk fewer resources devoted to the fields they do choose to study.

Similarly, one female graduate of Virginia Tech speculated that barriers might exist in those other STEM fields ("like engineering"), but she herself had not experienced problems in her area of study. The female engineering student interviewed, however, reported that the minority status of women ("there's so few females") actually gave females leverage, adding, "they're not going to discriminate based on your being female."

Aside from academics, did students feel they had opportunities in extracurricular activities—such as sports or clubs or the arts? Among those interviewed, the answer was yes:

> "[M]y first semester I took a dancing class and met a lot of different people. I'm really glad I did that. You know, I discovered later that there were opportunities to meet people

> other than the frat scene, like at coffee houses and open mikes, but, you know, they weren't well publicized so the party scene sort of takes over your first year."
>
> *—Female graduate, Virginia Tech, Spring 2019*

> "I was on the rowing team; it was co-ed—well, we had practices together and then separated for matches. I loved it—a lot of team cohesion, so there were no problems there. We all supported each other. It was great."

> "The school had activities the first week or two, like a movie on the quad and a concert outside the library. I also remember grocery bingo and stuff in the zone—the bowling alley - but after that, first years are focused on work and then they party. You find out later there are more things to do on campus."
>
> *—Female graduate, Virginia Tech, Spring 2020*

Given that both the numbers and the attitudes of female students point to an absence of barriers to education and activities, and by implication an absence of sex discrimination for purposes of Title IX, what is the mood or culture on campus with respect to women's educational opportunities or potentially discriminatory experiences, including sexual misconduct? Do students feel that sexual violence leading to reduced educational opportunity is a problem? (And, if not for themselves, maybe for others?)

SUNY GENESEO: "He's showing up at events where I am & it's really creeping me out. Is this stalking? I'm reporting it." "Assault?... It's not a problem here."

SUNY Geneseo is located in the small town of Geneseo in upstate New York, approximately 30 miles south of Rochester. So the setting is rural, but city life is not far away. Geneseo is considered relatively competitive as far as SUNY schools go—*i.e.*, it is not a "party school"– and therefore boasts a more serious student body. Many conversations concern the main library's closure because of asbestos.

But none of the students approached could recall an incident of sex discrimination or sexual assault on campus during their time at Geneseo. The February 7 and February 14 editions of the student newspaper, *The Lamron*, contained no articles addressing either sex discrimination or sexual violence (only media stereotypes of homosexuals).[88] The comments of a third-year female student were typical:

> "I don't think [sexual assault] is an issue on this campus... There are, like, big blue light things around campus so if you're ever in trouble, that alerts UPD [University Police] right away... I don't know of anyone that has had experience with that... You hear about [misconduct] incidents like... once every few years..."
>
> —*Third-Year Student, Female, Geneseo, February 14, 2020*

With respect to the dating culture on campus, the concern was not violence, consent, abuse, or injury, but the different goals of male and female students:

> "Yes, I think students are having sex a lot. I know my roommate wants to be in a relationship but instead is doing

88 Aliyha Gil, "Portrayal of homosexual romance on TV is Toxic, Flawed," *The Lamron*, 2/7/20, 6 https://www.thelamron.com/posts/2020/2/6/portrayal-of-homosexual-romance-on-tv-is-toxic-flawed/.

> hookups. I think that's fairly common, you know, that girls want a relationship but guys just want sex."
>
> *—First Year, Female, SUNY Geneseo, February 14, 2020*

Even outside the Title IX office, where two female students are waiting to report incidents, both are unguarded, unemotional, and fairly matter-of-fact:

> "Yeah. This guy asked me out and I said no. Now he's showing up at events where I am and it's really creeping me out. I'm not sure. Is this stalking? I'm reporting it."

On the topic of opportunities and socializing, she offers this:

> "I sort of wish I had transferred after my first year. Did you hear about the library? There's an asbestos problem and it's closed until 2024. But I've met most people through my dorm and then at clubs. I'm a member of a lot of clubs. So you meet a lot of people."

As for discrimination and assault, she reassures us:

> "No, assault's not a big problem. Maybe every few years. There was an incident near the Wal-Mart in town. The Administration should have told students about that. But you know, as long as you stick together in groups, it's fine. It's not a problem here."

The second student nods and smiles in agreement—especially about the library—but she has a scheduled appointment with the Title IX Coordinator, so she talks less, but chimes in with head nods and "yeah"s.

The tone of the signage, brochures, and flyers around the Title IX Office, however, is exactly opposite.

A bright yellow bulletin board next to the Title IX Coordinator door states MEET THE PERSON RESPONSIBLE FOR YOUR ABUSE and features a photograph of Brock Turner, the Stanford swimmer who was found guilty of raping an unconscious girl who attended a house party.[89] Silvered-side-out mirrors cover the bulletin board above the next sentence: YOUR ABUSE IS NEVER YOUR FAULT; IT'S THEIR WORDS, THEIR ACTIONS, THEIR INJURIES. The upper-left hand corner contains a quote from Stacy Malone, an attorney who wrote an essay entitled *The Power of Survivor Defined Justice*, "True healing for victims and real accountability for perpetrators can only happen when a victims (*sic*) gets to define justice."

"A bright yellow bulletin board next to the Title IX Coordinator door states MEET THE PERSON RESPONSIBLE FOR YOUR ABUSE..."

Another wall is bright red—a bulletin board of red flags with student-written indicators of abuse:

> "He doesn't text back."

> "Racist, homophobic, trans-phobic, sexist language & behavior."

> "It happened ONCE; he said he would never do it again"

> "manipulates you into not using a condom during sex;"

> "doesn't recognize you as a person."

> "Asks to see texts with others"

89 Turner's case received international attention when he was sentenced to only 6 months in jail and months on probation; the sentence was perceived as a slap on the wrist for a favored, suburban student.

The door of the Title IX Coordinator's Office is similarly decorated: It features a picture of a fist—"Nevertheless, She Persisted"- as well as a rainbow heart: "I may not be gay, lesbian, transgender, bisexual, pansexual, intersexual, asexual, etc.... I just support this wacky idea that everyone should have equal human rights."

Nearby is a pamphlet holder with the following fifteen publications.

1. *Geneseo LGBTQ*;
2. *Prescription Drugs: What You Need to Know* (mental health medications);
3. *Legal Assistance of Western New York* (for sexual violence);
4. *Choosing to Drink? Know the Signs of Overdose—PUBS—Puking, Unconscious; Breathing slowly; Skin is cold*;
5. *Sex Under the Influence (for Men Only)*;
6. *Sex Under the Influence (for Women only)*;
7. *Enough is Enough (New York is a national leader in the fight against sexual assault)*
8. *RESTORE—Sexual Assault Services—Where healing begins*
9. *Sexual Assault and Interpersonal Violence Support Services*
10. *RESTORE—Sexual Assault Services—(LGBTQ)*
11. *Do Ask, Do Tell: Talking to Your Healthcare Provider about Being LGBTQ*
12. *Life After Loss*
13. *What is an Eating Disorder?*
14. *Healthy Relationships: Building Foundations of Caring and Respect*
15. *Employee Assistance Program*

Near the pamphlet holder are couches and tables with a basket of free condoms—called the self-care corner with advice such as "go sniff candles at TJ Maxx." None of the materials appear to address access to programs or to educational opportunity.

The SUNY Geneseo Title IX Coordinator is Tamara Kenney. She has spent over two decades as a university administrator there. Her background is in "social justice", and she is a social worker by training. She reports that half her time as Title IX Coordinator is spent processing

complaints, with the other half spent on education. When asked how she ended up in an area as sensitive as Title IX, she responds, "I have no idea!" She then guesses her longstanding service to the university has inspired trust, and confidence in her ability to serve in this role.

As for efforts to prevent Title IX violations, including sexual misconduct, Ms. Kenney was not aware of healthy relationship programs at other schools such as The Love and Fidelity Network at Princeton University or the Dating Project from Boston College. She thinks the school's bystander intervention approaches are effective, that her office is getting more reports than it used to, though sexual assault reporting is still "an uphill battle," and "there is still a lot of work to do." How prevalent does she think sexual assault is? "Very," she confirms, "it happens a lot, on every campus. It's everywhere—not just here."

Throughout the campus, poles with blue lights and emergency phones are easy to find: Most American campuses have adopted this "Blue Light System" to make travel to evening classes safer and calls to campus security easier. The current prevalence of cell phones and their flashlights, however, may soon render this system obsolete.

JAMES MADISON UNIVERSITY: "Need Bulk Condoms?" The Safer Sex Corner, "A person with a penis or a person with a vagina"

Virginia's James Madison University is also in a small town, Harrisonburg, though it's more mountain town than rural. The student body is almost 22,000, mostly from in-state, and its most popular majors are speech communication, rhetoric, and liberal arts. The campus and the town overlap so students do not feel socially distanced, but the buildings are sufficiently close together to create a campus feel.

The Student Success Center—the main student center, with eateries, administrative offices, and the Health Center—is crowded with students eating or waiting to eat, or studying at chairs and tables and smiling at the JMU mascot (Duke Dog)—making the rounds. Both students

and staff are friendly, and everyone approached reports liking their school and their classmates.

> "Oh yeah, I love it here! We all do. But parking is a total pain."
>
> —*Female Sophomore, James Madison University, February 2020*

> "I feel much less lost here at JMU than I did at my first school. I think I've become a more rounded person."
>
> —*Senior, James Madison University, Summer 2020*

Political signs are few and far between, though the Health Center includes a Lavender Lounge ("Hang Out/Relaxation Space - The Lavender Lounge (located in SSC 1310) is a space for the safe and comfortable expression of LGBTQ+ identities and is for JMU students to hang out and meet new people.")[90] The Title IX Offices, however, along with their partner, The Student Wellness Center ("The Well"), while also bright, clean, and pleasant, have clear political indicators. The office of the Assistant Title IX Coordinator is full of rainbow flags, for example, and The Well, inside the Student Success Center and part of the Student Health Center, boasts a "Safer Sex Center" near its entrance, with a sign: Need Bulk Condoms? Beneath are 12 bins of colored condoms with different features—textured, vegan, and glow-in-the-dark.

The Well's staff members include "sexual health counselors" and "survivor counselors." The receptionist explains that sexual health is their focus, not so much drugs and alcohol. She was not familiar with any healthy relationship programs to help the students avoid problems with dating or socializing.

90 "LGBTQ Services," James Madison University, 2020, https://www.jmu.edu/healthcenter/TheWell/LGBTQ/services.shtml

The pamphlets on display, near the condom corner, address sexual violence, sexual assault, and also eating disorders; nothing appears to address drinking, drugs or pornography.

The receptionist retrieves a sexual health counselor, Jordan McCann, whose formal title is Assistant Director of Health Promotion. Jordan confirms the focus on sexual health, and says the only program they use to prevent sexual misconduct is a bystander intervention called Green Dot. McCann often meets with students who have had confusing sexual encounters. She reviews their sexual history, encourages them to get tested for STDs (sexually transmitted diseases), and always recommends that they use condoms.

Veronica Whelan, the Associate Director of Health Promotion and Well-Being, later joins the conversation from behind the receptionist's desk. She says female students are not generally aware of STD risks. When asked about healthy relationship skills, Veronica stresses the number of student organizations at JMU: "There's something for everyone here." McCann confirms their satisfaction with student well-being. "Here, we are really all about student autonomy and pleasure, whether you're a person with a penis or a person with a vagina."

"Here, we are really all about student autonomy and pleasure, whether you're a person with a penis or a person with a vagina."

VIRGINIA TECH: Title IX Office and The Women's Center, Planned Parenthood, Ms. Magazine, ERA YES! Flavored Condoms

The home of Virginia Tech Polytechnic University—Virginia Tech or just Tech, to locals—is Blacksburg, another mountain town, about 100 miles south of Harrisonburg in the southwest corner of Virginia.

Tech is the fastest growing of all Virginia's state universities. With a student body now over 36,000, it may soon surpass George Mason

University as the state's largest public 4-year institution. Known for its programs in engineering, agriculture and architecture, it is ranked alongside the University of Virginia as one of the state's most competitive schools.

Like the students at Geneseo and James Madison, the Tech students are friendly, approachable, and pleased with their school. "I love it here," is not an uncommon remark. Socializing, while reportedly always difficult the first year, gets easier thereafter, especially because of the number of student clubs, organizations and, for better or worse, fraternities and sororities. "You just have to put yourself out there," said a fourth-year human development major. She added that the campus was exceedingly safe—"You can walk around at 3 AM and not feel at risk."

> Tech is not a party school—you know, it's not like Alabama or anything. We work hard and then play hard. You know, most students buckle down and take studying seriously. But we also like to have a good time...

> It's true that the easiest way to meet people & socialize is by joining a sorority or a frat. I did that my second semester, though my first semester I took a dancing class and met a lot of different people. I'm really glad I did that.
>
> *—Female Graduate, Virginia Tech, Spring 2019*

> I didn't know a single person when I got here! But it was pretty easy to meet people—in the halls, in the dorm, and other students had siblings here... Nobody ever went anywhere alone; nobody would want to. We looked out for each other.

> The school had activities the first week or two, like a movie on the quad and a concert outside the library. But first years

> are focused on work and then they party. You find out later there are more things to do on campus.

> As for student safety, I never felt at risk... I have a strong group of male friends and I always felt safe and protected. To be honest, if something along those lines (of sexual misconduct) were to happen to me, I wouldn't have even known where to go—the first step. But I never really heard of this as an issue. I don't think any of my friends ever had an issue with this. We always felt safe.

—Female Graduate, Virginia Tech, Spring 2020

The Title IX staff at Virginia Tech are part of the larger Office of Equity and Accessibility; they also partner with The Women's Center[91] when formal complaints of sexual misconduct discrimination are filed. In fact, the Women's Center staff report that they are required to support complainants and be involved in the campus Title IX process.[92] The Women's Center Co-Director of Services, Christine Dennis Smith, says she has been a frequent participant in Title IX hearings. The Women's Center is staffed exclusively by women and, like other Title IX offices and their partner entities, distributes brochures and pamphlets, published mostly by the Virginia Sexual and Domestic Violence Action Alliance, an advocacy and lobbying organization involved in state and local lawmaking, and also by Planned Parenthood, best known for leading the world in abortion advocacy and practice. A few other pamphlets are published by the University Health Center.

The Action Alliance titles include *But I Haven't Been Hit* and *I Didn't Want It to Happen*. The Planned Parenthood titles are Co*nsidering Abortion*, *What You Should Know About Emergency Contraception, Your*

91 The Women's Center mission is "to promote a Virginia Tech community that is safe, equitable and supportive for women and that celebrates their experiences, achievements and diversity." "Women's Center at Virginia Tech," Virginia Polytechnic Institute and State University. 2020, https://www.womenscenter.vt.edu. As mentioned earlier, sex-specific initiatives and resources such as this are now being challenged as violations of Title IX as discrimination against men.

92 No policy requiring the Center's involvement was found, however.

Birth Control Choices, *What You Should Know About Consent*, and *What You Should Know About LGBTQ Sexual Health*.

The Women's Center waiting area also has magazines and newspapers, including the magazine, *Ms.* (the winter 2020 edition is titled, "ERA—YES!"). Additionally, the University Health Center publication, titled *Safer Sex Center Resource Guide,* is present, and features questions and comments such as:

> "What is a flavored condom used for?"

> "If something's flavored, it's meant to be tasted!"

> "Sexually transmitted infections can be transmitted via oral sex…"

Co-Director Christine Denny Smith has been part of Tech for 18 years. Her work involves support for complainants alleging sexual misconduct, so she is "very careful about messaging." Historically, she explains, efforts to prevent relationship problems were always directed at women.

At Tech, she reports, they strive to change the culture, not women's behavior:

> "I focus on what we can do as a culture: What does the community need to do to prevent this? It's never the victim's fault."

When asked about the absence of materials in the Center on alcohol use and abuse, she explains:

> "Women are told not to drink. But they do and then something happens. I never want them to feel at fault. It's not their fault. We are teaching people not to take advantage of

> someone like that. If you're really drunk, you can't consent. We have affirmative consent."

Is this true if the alleged offender is drunk? (That the offender is also not capable of giving consent or being responsible for actions taken when drunk?)

> "Well, that depends..."

Smith speaks positively about a company called Catharsis Productions, which creates videos and trains speakers, called teachers and educators, to visit campuses. Catharsis programs include "Sex Signals," The Hook Up, and Beat the Blame Game, among others. Tech recently brought in the *Hook Up* program:

> "It's all about the hook-up. They do a workshop about what men are taught—"you need to go after the hook-up," while women are taught, "you know, if you do that you're a slut..." so it gets students to recognize that and identify that... How do you reconcile that? How do you communicate about that?"

Does Catharsis discourage hook-ups?

> "No... It encourages healthy hook-ups."[93]

Video clips of parts of these programs are online and feature young adults speaking to college students: "We're going to talk today about SEX! A LOT"

93 What is a healthy hook-up? "When both people want to engage in some kind of sexual activity and they do that. We're talking about affirmative consent - where both people are affirmative about it… if you're really drunk you can't consent …"

> "What do you call a girl who has lots of sex?"
>
> "A Ho! Yup. When you're too lazy to say WHORE…"
>
> "What about men who have sex? Gimme that! Swinger magic stick?? I've never heard that!"

The program encourages audiences to distinguish between consensual hook ups and nonconsensual ones—the "bad hook-up." Gail Stern, the Founder and Director of Catharsis Productions, explains: "Our teachers can ask a group of students—'So… What does a healthy hook-up look like?" The video quickly cuts to a teacher, "You get an orgasm! And you get an orgasm! And you get an orgasm! It's like Oprah—under your chairs."

Another teacher exhorts: "Go! Go hook up with people! And have a good time! And know that people have your back. If I have your back and you have my back, then we're all gonna be good."

Ms. Stern tries to summarize: "So the Hook-Up [program] really breathes life into the complexity of [consent v. non-consent] while still restoring clarity about what good, consensual hooking up looks like. And then it also talks about bystander intervention." In a separate statement, Stern discusses the need for top-down cultural reform within higher education specifically: "I'm hoping that universities and colleges start taking the lead… and doing a top-down approach where all levels of university leadership will really take the lead on understanding this issue."[94]

GEORGE MASON UNIVERSITY: "Every 2 minutes in the United States someone is raped or sexually abused…"

94 Dr, Gail Stern, interview by Erica Hill, "On The Story with Erica Hill," CNN, 10/28/2016, https://www.bing.com/videos/search?q=youtube+Catharsis+Productions+Hook+Up+culture&&view=detail&mid=AA830894926AF9366997AA830894926AF9366997&&FORM=VDRVRV.

Virginia's George Mason University (GMU) is next to Washington, DC, and has a distinctly modern and urban feel. The campus is surprisingly quiet, however, and students and staff seem professional and business-like. A popular major is politics or pre-law, and many of the students benefit from internship opportunities in the capital nearby.

Like many Title IX Offices, GMU's Title IX Coordinator holds mandatory seminars for faculty, students, and staff to teach the university community about Title IX's purpose and goals, as well as the role employees must play in the Title IX mission—whether as mandatory reporters of possible Title IX violations, or as support personnel for a possible victim.

Outside the classroom where the November 2019 seminar is being held on the Arlington campus, a 5-foot-tall sign stands by the doorway:

> "WE PLEDGE TO END SEXUAL VIOLENCE in order to begin the real practice of FREEDOM and LEARNING at George Mason University."

> "EVERY 2 MINUTES IN THE UNITED STATES SOMEONE IS RAPED OR SEXUALLY ABUSED."

> "SIGN THE PLEDGE—SSAC.GMU.EDU"

> "STUDENT SUPPORT AND ADVOCACY CENTER."

Like the Women's Center at Virginia Tech, the Student Support and Advocacy Center (SSAC) at George Mason University appears to be a close partner with the campus Title IX Office.

GMU's current Title IX Coordinator is Angela Nastase, though she is new in this role, having arrived at GMU just three months earlier. She has worked for years in the field, however, having previously served as the Deputy Title IX Coordinator for Creighton University in her home state of Nebraska. The high turnover rate among Title IX coordinators and staff is well known, and Angela is quick to explain, "It's all the

scrutiny Title IX gets! Much more than other areas of discrimination. And so few resources." She clarifies: George Mason continues to grow, but the Title IX office is relatively small, especially when compared with the University of Virginia.

Like the SSAC sign outside the door, the focus of the seminar is not so much on sex discrimination and / or access to education as it is on sexual misconduct and relationship problems. Nastase opens by discussing the responsibility of all schools to address sexual misconduct—that is, to respond to reports and make efforts to prevent such misconduct. She shares the statutory language of Title IX in her power point presentation, and explains that courts have decided that all sexual harassment is a form of sex discrimination "because it interferes with education." No mention is made of the variety of administrative definitions over the years, or of the most recent Supreme Court standard of denied access, articulated in the 1999 *Davis* case. The impression one gets is that any and all sexual misconduct is a matter for Title IX, and is therefore prohibited by GMU's sex-discrimination policies, overseen by the Title IX Office.

But, she concedes, students often don't understand what actually constitutes prohibited conduct, and much of the work of the Title IX Office is to try to explain it to them:

> "We really try to talk to [students] about Title IX… What the prohibited conduct is…"

> "They oftentimes come to us; they don't understand the prohibited conduct; that they can be removed from the residence hall if they're creating a hostile environment, by sexually harassing students or you know, continuously making fun of somebody's LGBTQ status to the point where, you know, they don't feel safe. So all these things, we try to

> educate them on - because sometimes they just come to us and they don't understand consent…"

> "Again, healthy relationships, drinking responsibly, programs with bystanders - how do you be a good by-stander? How do you keep one another safe? How do you create distractions? Anything to keep students safe…"

The session turns to the responsibility of employees to report incidents, then to efforts to prevent sexual misconduct (found in Appendix E of the Non-Discrimination Policy "Programs to Prevent Sexual Violence"). Titles of the lectures presented include *Turn Off the Violence*, *Take Back the Night*, *Survivor Space*, *The Goddess Diaries*, *Intimate Partner Violence Panel Discussion*, *Denim Day*, ("sexual assault is NEVER the fault of the victim"), and *Fear 2 Freedom* (providing AfterCare kits to local hospitals for victims of sexual assault).

Appendix E mentions alcohol only once, and only as an optional component to a workshop sponsored by the SSAC on consent. The phrase "healthy relationship" is also used only once, and no program focuses on this.

SUNY BUFFALO and IOWA STATE UNIVERSITY (in person visits not possible)

In-person Visits to SUNY Buffalo and to Iowa State were not completed because of the COVID-19 restrictions imposed in spring 2020.

Section B—Staff, Policies, Procedures, and Practices

This Section B takes a closer look at Title IX offices - their staff, their nondiscrimination policies ("prohibited conduct") and their investigatory procedures and practices. The information is presented as a series of tables with the following metrics, here formulated as questions:

Table 1: The Title IX Office

Who staffs Title IX offices? What is the background of most Title IX Coordinators, Investigators, or Adjudicators? Are officers mostly male or female? Given the number of investigations conducted and hearings held, does anyone on staff have a relevant legal background, such as courtroom experience or criminal defense work? Are there any red flags with respect to ideological orientation or bias, including a bias against males?

Table 2: Prevention Programs

What prevention programs are sponsored by Title IX offices? On the cultural side, do they do anything to promote healthy relationships, healthy dating, and healthy opportunities for socializing such as Princeton's *Love and Fidelity Network* or Boston College's *The Dating Project*?

Do Title IX offices have materials on alcohol or drug use or abuse? Or are prevention efforts limited to bystander intervention when an incident may be about to happen? Is there any policy to prevent or ameliorate pornography addiction?

Legalistic Guardrails: Do any Title IX offices take a legalistic approach to mitigating risks of sexual assault with checks such as sign-in sheets in dormitories, or special protocols for dorms after-hours, when most sexual misconduct would probably take place? Are there any security cameras in dorms, or breathalyzer machines?

Common-sense Guardrails: Do Title IX offices recommend more simple, common-sense measures such as "the buddy system" when students socialize and attend parties?

Or do Title IX offices accept, or even promote, the hook-up culture as a form of recreation or self-expression, or simply as a source of pleasure, with such practices presupposed to not pose any risk, provided "protection" is used?

Table 3: Policies and Definitions of Prohibited Conduct

Do definitions of Title IX prohibited conduct in school nondiscrimination policies follow the Supreme Court *Davis* standard of denied access? Does the word "access" appear in the school policy on sex discrimination (or at least the idea of preserving educational access or opportunity)? Is the definition of Title IX prohibited conduct objective and education-related, or subjective and broad?

Table 4: Training Materials

The findings for this metric were more limited than expected: Many Title IX observers are concerned about the training of Title IX staff, in large part because they have had negative experiences with the office or have heard of the bad experiences of others. Yet training material on a school's website invariably means the type of training the Title IX office offers to students and employees, not the training that staff members themselves receive.

Concern about such training has only heightened in recent years because a new approach to Title IX investigations was introduced—called the "trauma informed" method. As its name implies, trauma informed investigatory practice tends to presume that a Title IX complainant has experienced trauma and that therefore the complainant's testimony may be erratic or even contradictory. By this standard, a changing story by the accuser can be viewed as proof of credibility rather than evidence of non-credibility.[95] Needless to say, the approach has generated controversy for those concerned about the due process rights of the accused.

Training materials were also one of the first controversies following the publication of the Trump Final Rule: The new regulation requires that staff training materials not contain sex stereotypes, promote

95 For a fuller discussion of the debate about trauma-informed investigation techniques, see "Fallacies of Trauma-Informed Investigations," SAVE, 2020, http://www.saveservices.org/ sexual-assault/investigations/.

impartial proceedings, and be publicly available on the school's website. Early reaction to this last requirement included objections that such material could be copyrighted and therefore need not be posted, prompting the Office for Civil Rights to post a clarification stating that even copyrighted materials must be posted publicly.[96]

The research for this Report located only two schools posting online material about Title IX staff training. One of those schools, Virginia's University of Mary Washington, was dropped from the Report for other reasons. Table 4 features those materials—specifically, from University of Mary Washington's March 2019 Conference entitled "Evolving Practices," and also some content from George Mason University, but this Table is more limited in scope than NAS had hoped it would be.[97] We asked these questions about the training materials. Is the language balanced or skewed? For example, is the term complainant used, or does the material say victim / survivor? Respondent / accused? Or perpetrator / predator? Are "affirmative consent" standards or "trauma informed" methods of investigation employed? Are there any other noteworthy aspects, including preparation for the new regulations?

Table 5: Due Process Components

Due Process policies. Do school policies clearly state the following due process components?

1. The presumption of innocence.
2. Timely notice of charges, and the opportunity to respond and make a counter-claim.
3. The right to counsel, or advisors.
4. The right to confront one's accuser and cross-examine witnesses.

96 "If a school's current training materials are copyrighted … the school must still comply with the Title IX Rule." Office for Civil Rights Blog, May 18, 2020, https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html

97 To date, such training material is still not prominently displayed on school websites but that may change with the effective date of August 14, 2020, unless a court prevents the Final Rule from taking effect.

5. Impartial decision-makers: separate and independent investigators, adjudicators, and coordinators.
6. The right of access to all evidence (including exculpatory evidence) and communications (*i.e.*, no *ex parte* communications).
7. A guarantee of a timely resolution.
8. A statute of limitations.
9. The right to appeal a finding of guilt or responsibility.

TABLE 1: THE TITLE IX OFFICE

School Name	Female—Male Ratio	Professional Background	Indicators of Political Background	Relevant Experience
GEORGE MASON UNIVERSITY More Title IX staff at "Compliance, Diversity & Ethics" page: 5) Anna Maria Nields, JD—Assoc. Dean of Student Affairs; 6) Kristi Giddings - Dep. Athletic Dir. & 7) Kent Zimmerman, JD, Dir. Student Success	3 to 1 in main office; 5 to 2 overall (1 male, K. Zimmerman, at GMU Korea) 1) Angela Nastase, JD—Title IX Coordinator; 2) Emily Gleason –Title IX Investigator; 3) Lamar Bell –Title IX Investigator; 4) Kendall Valente –Title IX Intake Coordinator.	University Admin. Coord. was former Deputy TIX Coord. at U of Nebraska; also Student Retention Coordinator, Equity Compliance trainer. Intake Coord. was former Community Dir. at Georgetown Univ. & Resident Dir. at Univ. of Redlands.	"Go Ask Alice" Sex Advice Column (later replaced by covid 19 content, now incl. "self-love") https://ssac.gmu.edu/personal-wellness/ (free condoms) linked from Title IX page Outside Title IX Office: Fourth Estate: Mason's Annual Drag (Queen) Show 4/1/19 (student newspaper)	No courtroom experience 3 of 7 have JDs but no courtroom or criminal defense experience. Dir. of Student Success teaches business law https://diversity.gmu.edu/about/meet-our-staff https://diversity.gmu.edu/title-ix/who-can-i-call
JAMES MADISON UNIVERSITY Partners w/ the Student Conduct & Advocacy Office, the Student Wellness Center, "The Well," & Student Health Center Title IX Office also called Equal Opportunity Office	6 to 0 1) Amy Sirocky-Meck-Title IX Coordinator; 2) Barbara Hetzel -Assist. Title IX Coordinator; 3) Lisa Schneider-Title IX Operations Assist.; 4) Marilou Johnson- Title IX Officer for Faculty; 5) Taryn Roberts-Title IX Officer, Global Engagement; 6) Jenn Phillips-Athletics Off.	University Admin. Coord. was former career counselor & academic advisor. Asst. Coord. was former Dir. of Staff at Centenary College. Operations Asst. was former Athletic Dir. at Western Kentucky Univ. Global Officer was Dir. of Study Abroad.	"Need bulk condoms?" "Queers & Coffee" (Safer Sex Center in "The Well") Sexual Health Counsel Jordan McCann: "person with a penis / vagina" https://www.jmu.edu/healthcenter/TheWell/healthy-sexuality/sexual-health-coaching.shtml	No courtroom experience Health Center staff: 13 females; 2 males. https://www.jmu.edu/healthcenter/TheWell/about-us-the-well.shtml (most have background in health services or admin.) The Well's focus is "student autonomy & enjoyment"—J. McCann
VIRGINIA TECH Partners w/ Equity & Accessibility Office & Women's Center Additional staff: 6) Christina Chatman-Investigator; 7) Samantha Freeburn, JD –Investigator; 8) Shara Penermon—Investigator.	8 to 0 1) Katie Reardon- Polidoro, JD- Title IX Coordinator; 2) Nikeshia Arthur—Dep. Coordinator; 3) Sharika Adams—Investigator & Gender-based Violence Prevention Specialist; 4) Kristin Barnett - Compliance Investigator; 5) Lily Murad- Case Mgr.	University Admin. & "Gender based violence" specialists Coord. was former TIX Investigator; also worked at Student Affairs & on "gender-based violence issues." Investigator "has more than 20 years" in higher ed. Program Administration" https://vtnews.vt.edu/articles/2017/09/equity_and_accessibility_titleIX_units.html - *Virginia Tech Daily* 10/26/17.	"ERA YES!" (*Ms.* Winter 2020); Women's Center has 5 Planned Parenthood brochures re: abortion, flavored condoms ("If something is flavored, it's meant to be tasted!") Birth control info & finger condoms ("finger cot") dental dams (see photos)	No courtroom experience At least 2 JDs on staff (Polidoro, Freeburn) but experience is in university administration or non-profits, not in legal practice (no courtroom or legal defense experience)

SUNY - GENESEO https://www. Geneseo.edu/titleix/title-ix-office-staff See also staff at Office of Diversity & Equity: https://www. geneseo.edu/diversity-equity/office-diver sity-and-equity-staff	3 to 0 in Title IX Office; 13 to 1 in ODE Office 1) Tamara Kenney—Title IX Coordinator; 2) Carrie Johnson - Prevent (*sic*) Coord.; 3) Nicole Zwicki - Investigator & Affirmative Action Compliance Spclst	University Admin. Coord. has been at SUNY Geneseo for most of her career. Prevention Coord. worked as consultant in affirmative action & was a project manager.	Title IX bulletin board—"The Power of Survivor-Defined Justice" "True healing for victims & real accountability for perpetrators can only happens when a victims *(sic)* define justice."– S. Malone, Rainbows, condom bowls, raised fist images	No courtroom experience No JDs in Title IX Office. 2 of 3 staff members have social work degrees (Kenney & Johnson)
SUNY BUFFALO Equity, Diversity & Inclusion Office: http://www.buffalo.edu/equity/our-staff.html Q & A http://www.buffalo.edu/ubnow/stories/2014/October/qa_nolan_weiss.html	8 to 0 1) Sharon Nolan Weiss—Title IX Coordinator; 2) Kesha Poster—Assoc. Dir.; 3) Jessica Coram- Asst. Dir.; 4) Faren Wilson—EEO Specialist; 5) Frances Fiscus—Workforce Data Analyst; 6) Mark Greenfield—Web Accessibility Officer; 7) Kimberly Behun—Admin. Asst.; 8) Madonna Gehen - Secretary	University Admin. Coord. has a JD but has been in UB administration for at least 5 years. EEQ Specialist was former Human Resources Dir. at a nonprofit & also at public schools.	Follows Obama Administration campaign "It's on us" Coord. spoke at Violence Against LGBTQI in Athletics: http://www.buffalo.edu/content/shared/university/news/news-center-releases/2018/06/007.html	No courtroom experience 1 staff member has JD but no indication of courtroom experience
IOWA STATE UNIVERSITY Title IX Office is the "Office of Equal Opportunity" https://www.eoc.iastate.edu/about-us/about-us 15 "Equal Opportunity Councilors" available as support staff—13 females to 2 males (In Resource Guide for Respondents, last page has 7 Deputies listed, 6 female to 1 male)	6 to 3 1) Margo Foreman, Asst. Vice President for Div. & Inclusion & Equal Opportunity; 2) Amber Davis—Admin. Asst. to VP; 3) A. Lyles, JD—Assoc. Dir. of EO; 4) Julie Reilly—EO Specialist; 5) Jazzmine Brooks—Equity & Inclusion Services Coord.; 6) Elliott Florer - EO Specialist; 7) David Konopa—EO Specialist; 8) Sean Nelson, J.D. –Extension EO Specialist; 9) Regenea Hurte, JD—EO Specialist	University Admin & academia / law Coord. worked in affirmative action Asst. VP taught philosophy at ISU& St. Mary's College E & I Coord. was Resident Dir. at Univ. of Pittsburgh. EO Specialist is former HS principal. Ext. EO Specialist—recent JD; admin. law EO Hurte, JD, public defender & in DA's office	Follows Obama Administration campaign "It's on us" Asst. VP—also was Exec. Director of Social Justice Services Resources page: https://www.eoc.iastate.edu/title-ix/Title%20IX%20Resources Title IX page links to Feminist Advocacy Groups' content: "Know Your IX" video Women's Law Center Fact Sheet	Yes One staff member has criminal defense experience as a public defender & also in prosecutorial work in the county attorney's office (8) Regenea Hurte—EO Specialist The 2 other JDs on staff do not have any courtroom experience.

TABLE 2: PREVENTION PROGRAMS

School Name	Healthy Relationship Programs	Drug & Alcohol Abuse Programs	Anti-pornography programs	Guardrails (buddy system, cameras, sign-in sheets, etc.)
GEORGE MASON UNIVERSITY Appendix E: "Training, Prevention & Awareness Programs:" https://universitypolicy.gmu.edu/wp-content/uploads/2013/01/Policy-1202-Appendix-E-Training-Prevention-and-Awareness-Programs-12.17.pdf	No healthy relationship programs Appendix (App.) E" includes "Take Back the Night," "Survivor Space" & "Goddess Diaries" "healthy relationship" mentioned once; "assault" 12 times; "violence" 39 times	No focus on alcohol In App. E, "alcohol" appears once as an optional component to a program on consent through the Student Support & Advocacy Center (SSAC): "SSAC offers a variety of free programming options... [including] consent (with or without an alcohol component)"	None found	None found
JAMES MADISON UNIVERSITY https://www.jmu.edu/access-and-enrollment/titleIX/training-and-classes/training.shtml (short videos)	No healthy relationship programs Instead Green Dot (onlookers intervene): "power-based personal violence will not be tolerated"	Not found The Well & Student Health Center focus on sexually transmitted infections & eating disorders (brochures)	None found	None found
VIRGINIA TECHNICAL INSTITUTE	No healthy relationship programs "Women's Center Initiatives": https://www.womenscenter.vt.edu/initiatives.html Women's March, "Thru Feminist Eyes" Middle School Visits, Survivor Programs	Not found	None found	None found
SUNY GENESEO	No healthy relationship programs Instead: Title IX Town Hall "to reduce interpersonal & sexual violence" Mar 10, 2020 (postponed due to pandemic)	None found	None found	None found

IOWA STATE UNIVERSITY * Procedures at p. 16 recognizes, however, "the majority of sexual assaults... involve... alcohol" "The university is committed to reducing alcohol use… through comprehensive programs, including bystander intervention" https://www.policy.iastate.edu/sites/default/files/resources/223/PAG-SMP%202020-02-17%20updated.pdf	No healthy relationship programs Resources page: https://www.eoc.iastate.edu/title-ix/Title%20IX%20Resources Obama Administration "It's on Us" Short videos by feminist groups, e.g. "Know Your IX"	No focus on alcohol* One mention of alcohol in Women's Law Center "Nine Fast Facts" (in definition of sexual assault - includes where "one cannot consent due to alcohol:" https://www.eoc.iastate.edu/sites/default/files/uploads/New/Resource-NWLC_Nine-Fast-Facts-About-Sexual-Assault-and-Title-IX.pdf But see Procedures at p.16	None found	None found.

TABLE 3: SCHOOL POLICIES & DEFINITIONS OF PROHIBITED CONDUCT

School Name	Policy Defining Prohibited Conduct	Does Policy follow *Davis* standard of denied access?	Scope of Application	Other (unless noted otherwise, policies also refer to local & federal non- discrimination law)
GEORGE MASON UNIVERSITY Policy No. 1202 https://www.printfriendly.com/p/g/ZPvm7m Appendices A—E address procedures, resources, training & prevention: https://universitypolicy.gmu.edu/policies/sexual-harassment-policy/	University Policy No. 1201 is "Non-Discrimination Policy"(umbrella ban on discrimination based on sex, race, etc.); Policy No. 1202 is "Sexual & Gender-Based Harassment & Other Forms of Interpersonal Misconduct" (bans "sex or gender" discrimination) Policy No. 1204 is "Consensual Relationships" 1202 (II) commits to "a safe & non-discriminatory" environment	No - Policy 1202 (19 pages) mentions "access" to education twice; it mentions "assault" 10 times, "violence" 13 times & "consent" 29 times Policy 1202's definition of "hostile environment" replaces *Davis* standard of conduct that denies access to education with conduct that "alters the conditions of education," creating a "hostile, intimidating or abusive environment" 1202 (VI, E, a, i)	Broad- "Prohibited conduct" includes sexual misconduct without reference to educational access Applies to "guests &... 3d parties" 1202 (I) Applies to conduct "outside" university context which has *"continuing adverse effects"* for students" (on campus) 1202 (I) (3) Applies to off-campus conduct (online, study abroad)(1202 (I) (2))	Policy 1202's "hostile environment" definition mimics *Davis* language but creates its own standard (conduct which alters conditions of education) (VI, E, a, i) Policy 1202 includes "affirmative consent" (1202,VI, A, 3), forbids sex stereotypes &"applies to "electronic conduct" (1202 VI,E, b, 2 & 3))
JAMES MADISON UNIVERSITY Policy 1340: https://www.jmu.edu/JMUpolicy/policies/1340.shtml **But see 1340 6.2.3: "If a report concerns sex discrimination (but not sexual misconduct)," [refer matter to DEO."	Policy No. 1340 is "Sexual Misconduct" Equates sexual misconduct "of any type" with sex discrimination ** Policy No. 1324 is "Harassment & Discrimination (Other than Sexual Harassment & Misconduct)" & Policy No. 1302 is Equal Opportunity	No—Policy 1340 never uses the word "access" in relation to education or educational opportunities Policy 1340's definition of "hostile environment" replaces *Davis* standard of conduct which denies access to education with conduct which "interferes with, limits or denies" person's ability to participate in or benefit from educational programs"	Broad- "Sex discrimination" "specifically includes instances of sexual misconduct *of any type"* (1340 (3) & (4) Applies to off campus incidents that cause "continuing effects on campus" & to visitors (1340 (3) Any "adverse action" based on [sex, gender, sexual orientation, identity, etc.] which "adversely affects the person." (1340 (3))	1340 mimics *Davis* language but broadens standard "Sex Discrimination" definition includes any "adverse action" based on sex that "adversely affects the person." 1340 (3) "Sexual Harassment" definition is extremely broad - "unwelcome" conduct, including jokes, gestures, stereotypes Complaints can be anonymous (6.6.2)
VIRGINIA TECH Policy No. 1025 https://policies.vt.edu/1025.pdf Procedures: https://www.stopabuse.vt.edu/content/dam/stopabuse_vt_edu/docs/investigation%20procedures.pdf	Policy No. 1025 "Harassment, Discrimination & Sexual Assault"—umbrella discrimination ban for age, color, disability, sex, gender, race, etc. Equates harassment w/ discrimination (1025(5))	No—Policy 1025 does not use the word "access" for education or opportunity Prohibited conduct is broader than *Davis*—focus is not denied access but conduct which *"unreasonably interferes with"* or "limits participation" 1025(5)	Broad Applies to 3d parties & to off-campus incidents that cause *continuing effects on campus* (1025 (3)) No separate policy for sex discrimination (1025 also addresses age, color, race, religion, etc.)	Policy 1025 does not follow *Davis* language. Instead it bans "conduct of any type," (based on protected category) that "unreasonably interferes w/[education] or creates a hostile environment, by a reasonable person's standards

SUNY GENESEO https://www.geneseo.edu/titleix/sexual-violence-response-policy	The Policy is called "Sexual Assault... & Violence Policy" (not discrimination). Sex discrimination is defined to include *all forms* of (sexual violence)	No Policy makes no reference to access to education or educa-tional opportunities. Policy's definition of "hostile environ-ment" sexual harass-ment replaces *Davis* standard with "unreasonably interferes"	Includes 3d parties & "whether or not incidents occur (on/off campus)"	Policy conflates sexual violence with sex discrimination, saying sex discrimination includes *all forms* of sexual violence instead of those forms which deny educational access Uses "affirmative consent" concept
SUNY BUFFALO http://www.buffalo.edu/administrative-services/policy1/ub-policy-lib/discrimination-harassment.html "Sexual Harassment:" Unwanted sexual advances... that have purpose or effect of unreasonably interfering w/ performance or creating a hostile environment: (in effect, this contains many standards)	"Discrimination & Harassment Policy" Umbrella policy banning discrimination not just on the basis of sex but also race, color, national origin, religion, age, gender, "domestic violence victim status" & "criminal conviction status" "A central element in the definition of sexual harassment is that the behavior is unwelcome" Materials also refer to "totality of circumstances"	Explicitly rejects Davis standard: "harassment... need not be severe or pervasive" to trigger Title IX) No reference to access in definition section; "access" mentioned in the Policy Statement "discrimination" defined as: "different treatment... that adversely affects... employment or academic status" Definition section & Appendix A use "un-reasonably interferes" & "alter conditions" of education	Broad—"applies to all members of the university community, including... visitors, guests" Also, definitions: "Sex discrimination also includes but is not limited to sexual harassment, sexual assault & sexual violence."	Harassment defined as "a form of discrimination consisting of oral, written graphic or physical conduct... that has the effect of subjecting the individual to inferior terms, conditions... or interferes with or limits" ability to participate in program or activity Time period to report sexual harassment is 7 years (other discrimination should be reported in one year)
IOWA STATE UNIVERSITY https://www.policy.iastate.edu/policy/students/sexualmisconduct https://www. policy.iastate.edu/ policy/discrimination Procedures, Appli-cations & Guidance ("Procedures") https://www.policy.iastate.edu/sites/default/files/resources/223/PAG-SMP%202020-02-17%20updated.pdf	"Discrimination & Harassment" Policy "Sexual Misconduct, Sexual Assault, Sexual Harassment, Stalking & Intimate Partner Violence Involving Students" 'Procedures, Applications & Guidance' Prohibited Conduct includes all sexual misconduct without reference to access. Procedures at. P.3	No Policy's definition of "hostile environ-ment" replaces *Davis* standard of denied access to education with conduct that is "sufficiently severe, persistent or pervasive that it unreasonably interferes with" [education] ("objectively offensive" dropped) Procedures at p.6	Broad—applies to 3d parties & also to off campus incidents "that affect a clear & distinct interest of the university regardless of location" applies also to applicants for admission (p.3 of Sexual Misconduct Policy)	Sexual harassment includes "verbal conduct that is oral, written or symbolic... "comments, jokes, questions, anecdotes, remarks"... "unwanted romantic attention"... (& gratuitous remarks about dress...)

TABLE 4: TRAINING MATERIALS

School Name	LANGUAGE—"complainant," "victim" "survivor" v. "respondent"	Affirmative Consent or Trauma Informed?	Preparation for new regulation?	Other
UNIVERSITY OF MARY WASHINGTON "Evolving Practices" Conference, March 2019: https://diversity.umw.edu/title-ix/2019-evolving-practices-conference/	Pustilnik, Parts 1 & 2: "survivor"—4 x "victim"- 2 x "complainant"—16 x "respondent"—12 x ("respondent" mostly used on risk factor page—prior arrests, prior threats, threatened force: "complainant," "survivor" & "victim" used to ensure support services)	Consent discussed, but not affirmative consent Trauma informed methods not found	"DeVos proposal is protecting institutions from being sued & attackers from being held accountable, & discouraging survivors from coming forward. Thank you." Angela Hattery, PhD., "Gender Based Violence on College Campuses" at http://diversity.umw.edu/title-ix/files/2019/04/Angela-Hattery.pdf	UMW's Policy—Palma Pustilnik, Part 2: "Ideal World: 1) Survivor would first seek medical attention... with a SANE nurse immediately following the assault" http://diversity.umw.edu/title-ix/files/2019/04/Palma-Pustilnik-Part-2.pdf
GEORGE MASON UNIVERSITY Sexual Assault & Interpersonal Violence Implementation Teach for Task Force Recommendations Matrix 2017 Update	Sub-committee - Spring Semester 2017 :Update to Task Force Recommendation Implementation "victim"—5 x "survivor—1 x "respondent"—0 (instead: "develop sanctions for individuals found responsible")	Affirmative Consent: Yes—"Vision & scope of project expanded to create entire campaign around sexual assault & interpersonal violence... during GMU's Take Back the Night Event in October... campaign changed direction to better align with the university's affirmative consent position" Trauma Informed: Yes: "additional training & focus will be provided on victim-centered responses... all investigators have received training with trauma informed interviewing..."	None found	Language of subcommittee documents is less neutral than official policies Task Force Report here: https://diversity.gmu.edu/sites/diversity/files/final_report_SATF_no-images.pdf

TABLE 5: DUE PROCESS COMPONENTS (PART 1)

School Name	1) Presumption of Innocence	2) Notice of Charges, Chance to Respond?	3) Counsel or Advisor	4) Live Hearing to Confront Accuser & Witnesses
GEORGE MASON UNIVERSITY 2-tiered process: single investigator in Title IX office; panel at Student Conduct Office App. A:Investigating & Resolving Reports of Prohibited Conduct https://universitypolicy.gmu.edu/wp-content/uploads/2013/01/Policy-1202-Appendix-A-Investigating-and-Resolving-Reports-of-Prohibited-Conduct-05142020.pdf	Yes, but not prominent in Policy Par c:"respondent is presumed to be not responsible" Par d: "at any point, respondent may admit responsibility" App. A at p.10 "admissions of responsibility" by Respondent mentioned 3 times (including as grounds for a formal investigation where complainant does not want one), pp.6,7,10.	Upon decision to investigate: Policy 1202.II. p. 3 (all parties "[afforded] notice...") "When a decision is reached to initiate an investigation... that impacts a Respondent, the TIX Coord. will ensure that the Resp. is notified, receives a written explanation of available resources & options..." & "The TIX Coord. will promptly inform Resp. of any action... & provide opportunity to respond..." App. A at 3, 8.	No counsel but an "advisor" who cannot speak Advisor allowed for students at meetings & interviews but advisor cannot speak or participate. App. A at p.11, par. g.	Not at Title IX stage but later if matter goes to Student Conduct Office 2-tiered process: Title IX stage is single investigator (no hearing); Student Conduct Office can assign matter for hearing Policy 1202 asserts "opportunity to present witnesses & evidence"(1202.II.p. 3) but this seems only if case referred to Student Conduct Office. App. E at p. 13.
JAMES MADISON UNIVERSITY 2-tiered process: Initial stage is called "Statement Collection," by single-investigator; then "Sexual Misconduct Case Review" (when "final investigative report is received from Initial Case Review") OSARP* handbook: https://www.jmu.edu/osarp/handbook/OSARP/sexual-misconduct-accountability-process.shtml	Yes - Policy 1340, 6.6.8.12: "The respondent is presumed to be not responsible unless sufficient evidence… proves a violation..." As of Feb. 2020: 1340(6.3)"the presumption is that no policy violation has occurred"	Unclear "The Responding Party will be notified of the beginning of the Sexual Misconduct Accountability Process to adjudicate policy violations." OSARP handbook at 6 (hereafter "OSARP HB")	No counsel but an "advisor" picked by school " 'Advisors' will be assigned...an advisor does not help either party prepare how to present their case; advisors are employed and or designated by OSARP." OSARP HB at 6.	At 2nd stage, the "Sexual Misconduct Case Review" "Witnesses relevant to the allegations will be determined by OSARP" (OSARP HB at 7) "The Sexual Accountability Process is separate & distinct from the Accountability Process" (OSARP HB at 4) *Sexual Misconduct Accountability Process in the Office of Student Accountability & Restorative Practices ("OSARP")
VIRGINIA TECH Investigative Procedures: https://www.stopabuse.vt.edu/content/dam/stopabuse_vt_edu/docs/investigation%20procedures.pdf	Not found: "If Coord. determines... a policy violation may have occurred" refer to Student Conduct " Procedures give wide discretion to Office, incl. initiating process; see Procedures, V.E at p. 11.	Not stated but implied in Title IX investigation; clear in Student Conduct hearing; Procedures, V.E. at p. 12. ("Only when [referred]l to Student Conduct";	Not counsel but an "advisor" who cannot speak Procedures, V. E(3) at p. 13 (broad investigator discretion; Procedure 14)	Unclear at Title IX Investigation stage; yes in Student Conduct Hearing– word "adjudication" is used in Procedures, V.E(6) at p.14

SUNY GENESEO Policy & Procedures https://www.geneseo.edu/titleix/sexual-violence-response-policy All quotes are taken from this online document (no page numbers)	Yes "including the right to a presumption that the accused/respondent is "not responsible" until a finding of responsibility is made"	Yes "right to an investigation .. that recognizes… due process including fairness, impartiality & a meaningful opportunity to be heard"	"Advisor of choice"	Unclear—hearing may be part of process but may not be mandatory "at any related hearing"
SUNY BUFFALO "EDI manages reports of discrimination: p.1 Discrimination & Harassment Policy: http://www.buffalo.edu/administrative-services/policy1/ub-policy-lib/discrimination-harassment.html	Yes—phrased "no presumption of wrongdoing" "No presumption of wrongdoing will be made absent factual evidence." D & H Policy at p. 3.	Yes "The Respondent is entitled to due process including knowledge of specific allegations against him or her & an opportunity to respond." D & H Policy at p. 3.	"Accompanying person" who may not impede investigation "A [party]... may be accompanied by a person of their choice; [who] may not impede or interfere with the [investigation]	Not found - No hearing mentioned, only "the investigation" "Complainants & respondents will each have notice of the evidence presented during the investigation" D & H Policy at p. 3.
IOWA STATE UNIVERSITY 2-tiered process: Investigation, then SCHP Procedures: https://www.policy.iastate.edu/sites/default/files/resources/223/PAG-SMP%202020-02-17%20updated.pdf Resource Guide for Respondents: https://www.eoc.iastate.edu/sites/default/files/uploads/Title%20IX%20RESPONDENT%20Resource%20Guide%20_%20updated.pdf	Not found "Respondent's acknowledgement of responsibility" Procedures at p.32 But: "the University does not take sides" Resource Guide at p.6	Yes Resource Guide at p.6 Step 2:"If a formal Complaint is initiated, a neutral investigator is appointed. Step 3: "The Respondent is notified and given an opportunity to respond"	Not counsel but "support person" who may not speak Procedures at p. 28	Not at investigation stage, later at Student Conduct Hearing Board ("SCHP") "The role of the SCHB is not to re-investigate the case, but to review, assess, & weigh the totality of the... evidence" Procedures at p. 37 "The full SCHB is comprised of 45 members of the university community... the SCHP for a specific matter is comprised of 5 members....

Table 5: Due Process Components (part 2)

School name	5) access to all evidence	6) impartial decision-makers	7) timely resolution & appeal - no double jeopardy	8) time limit / good faith requirement
George Mason University "the title ix review committee will evaluate every report of sexual assault." App. A at p. 4 App. A gives broad discretion to coord.	Yes— 1202.ii. P. 3: "afford all parties an opportunity... & to view [all] information..."	Impartial process, not decision-makers 1202.ii. P. 3: "provide... Impartial investigations" App. A at p. 10, par. A: "inform parties how to challenge... Investigator on the basis of bias or conflict of interest"	60-day resolution on paper but subject to extension app. A at p. 11 Either party can appeal but Complainant can also appeal decision against formal investigation (app. A at p. 9)	No time limit for reporting prohibited conduct (1202. V. D. 2. At p. 9) Bad faith is prohibited (1202.x. At p. 17); enforcement unclear
James Madison University	Yes but enforcement unclear 'the parties will be notified that [evidence] produced by either party will be shared with the other party." 6.6.4: "both parties will have access to case file." Osarp hb, 7	No reference to impartial decision-maker, bias or conflict of interest, only reference to impartial process Reference to an impartial process (6.6.4)	Process of statement collection should be concluded "in timely manner" 6.6.4 No appeal for students, only for faculty; no mention of double jeopardy.	No time limit for filing a formal complaint (policy 1340, 6.6.3) Good faith required (5.4); enforcement unclear
Virginia tech 3-tiered process: title ix "inquiry," then investigation," then referral to student conduct (office) for "adjudication"	Not in title ix investigation but in student conduct hearing	"[a]ny investigator chosen... Is expected to be impartial & free of conflicts of interest" Procedures at p.11 (e)		No time limit procedures at 7. Good faith requirement (enforceability unclear) procedures, iii. C(1) & (4) at p. 7 ("timeliness & "false reporting")
Suny geneseo Policy links to "survjustice," "pandora's project," gay alliance of genesee valley & glbtq domestic violence project (no links to due process groups)	Yes "[t]he right to offer evidence... And to review all available relevant evidence"	Impartial process, not decision-makers Procedures at "all students have rights to..."	Yes "right to access at least one level of appeal...before the dean of students or the appellate board, which may include one or more students, that is fair & impartial [w/ no conflicts of interest]	not found Right to adjudication in a "timely manner"

Suny buffalo	Yes "complainants & respondents will each have notice of the evidence presented during the investigation, as well as an opportunity to explain & respond to the evidence." D & h policy at p. 3	Only reference to impartial investigation, but: "in the event the investigatory process outlined in this policy may result in a conflict of interest, the university will [ensure process] is…impartial d & h policy at p. 3	No "there is no right to appeal an edi finding." D & h policy at p. 4	Other offenses must be reported within one year; but allegations of sexual harassment can be reported up to 7 years D & h policy at p. 2
Iowa state university	Yes Resource guide at p. 9	impartial investigation, not decision-maker Procedures at p. 28 But right to "request that any individual w/ a conflict of interest not participate" procedures at p. 28,33 "the assigned investigator acts as a neutral face-finder" procedures at p.6	yes, right to appeal, for complainant & respondent Procedures at p.6 "all parties have [right to] appeal determinations and sanctions"	No time limit "the university cannot guarantee a definite time frame for this process" Procedures at p.29

Part III: Discussion of Findings

Part III: Discussion of Findings

Many comments could be made about the data presented above. This Part highlights the most important findings for those seeking to understand current Title IX practice, and how an educational equal access law became the system it is today.

Sex Monitors, Not Education Monitors

As noted in Part I, the original purpose of Title IX was to secure equal access to education for women by banning sex discrimination at schools receiving federal funds.

This purpose appears to be completely lost on campus Title IX offices: They do not discuss educational access or educational opportunity, they do not distribute material addressing this topic, and they do not see preserving educational access as part of their mission, much less the central part. As Tamara Kenny stated, half her time is spent processing complaints of sexual misconduct and the other half is spent on "education." If the publications outside her office are any indication, that education is almost entirely about sexual assault, sexual violence and "LGBTQ" issues.

Because officials see their Title IX mandate as monitoring sex and potential misconduct, variously and broadly defined, it is no surprise that Title IX has been transformed from an equal access law into a sex monitoring law.

What's more, Catharsis Productions' Gail Stern (hosted by Virginia Tech) expressly wished for colleges and universities to "start taking the lead... and doing a top-down approach" to understanding issues of socializing, dating, and "hooking up."

One can't help feeling that romantic relationships on campus are either "healthy hook-ups" or sexual assault, with hardly anything in between.

Top Down Approach

One also cannot help but notice the difference in tone and outlook expressed by students (all female) and by Title IX administrators, as well as staff at partner offices (such as Student Health Centers, Women's Centers, and Student Advocacy Centers).

Overwhelmingly, students report no barriers to any educational opportunities at their schools. ("*I don't think barriers exist for women...*"). Many speak positively of their male classmates and professors and of their supervisors or mentors, and many are able to compliment and criticize even-handedly - that is, without regard to sex in a "gender blind" manner. ("*My advisor is not very good—about internships and stuff like that. But I don't think it's because I'm a woman—she's a woman*!")

What's more, students overwhelmingly report that sexual assault is not a problem on their campus and that they feel safe, even when walking around a college town at 3:00 in the morning.[98]

At Title IX offices, both the content and tone are wildly different: At Geneseo, the bright yellow bulletin board outside the Coordinator's office almost blares the word "abuse" and "victim," with both terms used repeatedly throughout the materials on display. Coordinators and other Title IX staff say that assault happens "all the time" "everywhere," and "on every campus." At George Mason University, the SSAC sign asserts that, "Every 2 minutes in the United States Someone is Raped or Sexually Abused."[99] What's more, figures such as this reverberate throughout academia and government, even at the highest levels. President Obama, for example, made such claims in 2014 –"an estimated one in five women has been sexually assaulted during her college years."[100] What explains the chasm between the perceptions of such high level officials—in both government and academia—and the real-life experiences of students?

98 See statement in Part II of fourth-year human development major explaining that with respect to the risk of sexual assault, the campus was exceedingly safe – "You can walk around at 3 AM and not feel at risk."

99 One notes that the scope of this claim is nationwide ("in the U.S."), not specific to the college experience much less to George Mason University. See comment by Laura Kipnis, text *infra*: "[E]verywhere you go … the message is assault and tending to characterize everything as assault."

100 Department of Justice, "Not Alone -The First Report of the White House Task Force to Protect Students from Sexual Assault," April 2014, v, https://www.justice.gov/archives/ovw/page/file/905942/download; Melnick, *Transformation*, 159.

Exaggerated Claims: Redefining Assault

The false claims of rampant campus sexual misconduct made by President Obama and others are explained and debunked below, showing how the term rape has been redefined by researchers: Rape is said to cover any action that later makes a woman feel violated, including encounters where she agreed to have sexual relations because of persistent advances, or because she didn't have the nerve to say no.[101]

But one still might ask how such exaggerations could gain so much currency as to be repeated by the President of the United States and so many others in government and academia.

The question is especially salient given the high profile cases of false rape accusations,[102] including the 2006 Duke Lacrosse case and later the "rape hoax" at the University of Virginia, reported in and subsequently retracted by *The Rolling Stone*. At Duke, where three white lacrosse players were falsely accused of raping Crystal Mangum, a black stripper hired to perform at a team party, faculty were quick to presume the worst of the accused students, with a "Group of 88" publicly siding with the "fear of many students who know themselves to be objects of racism and sexism" in a school newspaper advertisement that ran shortly after the rape allegation was made. Even after the case was dropped for lack of evidence and DNA exoneration of those accused, faculty members did not apologize for their rush to judgment. Instead, Professor Lee D. Baker, one of the 88, insisted: "It was never a rush to judgment; it was about listening to our students who have been trying to make their way in a not only racist and sexist campus but country."[103]

101 Stuart Taylor, Jr. and K.C. Johnson, *The Campus Rape Frenzy*, 63.

102 No national data base exists for false accusations of sexual misconduct but The Innocence Project, a non-profit organization dedicated to fighting for those wrongly accused and convicted of crimes, works on such cases and is a valuable resource. Merrill Matthews, "What the Innocence Project Can Teach Us About Sexual Assault Allegations," *The Hill*, October 3, 2018, https://thehill.com/opinion/judiciary/409613-what-the-innocence-project-can-teach-us-about-sexual-assault-allegations. ("[It] boasts of 362 DNA exonerations to date, people who spent years, and in many cases decades, behind bars because they were convicted of a crime — murder, rape, assault, etc. — they did not commit. … [it] helped identify 158 real perpetrators, who were later 'convicted of 150 additional violent crimes, including 80 sexual assaults.' ")

103 Christina Asquith, "Duke Professors Reject Calls to Apologize to Lacrosse Players," *Diverse*, January 17, 2007, https://diverseeducation.com/article/6902/.

K.C. Johnson, History Professor at Brooklyn College and co-author of *Until Proven Innocent: Political Correctness and the Shameful Injustice of the Duke Lacrosse Rape Case*, commented on the faculty's partiality:

> "It was unprecedented, the type of behavior we saw from the Duke faculty... they essentially chose to exploit their students' distress to advance a campus pedagogical agenda, to push their own ideological vision and to abandon any pretense of supporting fairness, due process and the dispassionate evaluation of evidence..." [104]

The predisposition of university faculty to see sexism and to side with accusers in sexual misconduct cases did not happen overnight: For many years, feminist ideology has advanced in the professoriate, so that conservatives, including conservative women, have effectively been purged. This has been well documented in legal education, for example: From one of the largest empirical studies of law faculty, Northwestern University James Lindgren found "... Republicans and Christians were more underrepresented [than other minorities]... Further... Republican women... were—and are—almost missing from law teaching."[105]

This dramatic imbalance - especially in legal education, which produces judges and scholarship influential in public policy - had consequences, starting with University of Michigan Law Professor Catherine MacKinnon, who first pioneered the idea that sexual harassment could be sex discrimination. Known as the intellectual Godmother of such legal doctrines, MacKinnon reduced culture and relationships to power structures that government could and should eradicate; she worked extensively with feminist activist Andrea Dworkin, who called attention "in an uncompromising way to the unequal power between men and women," a view that then became the basis not only of most feminist

104 KC Johnson, "Presumed Guilty: Due Process Lessons from the Duke Lacrosse case," FIRE, video, https://youtu.be/mqt9OX-oAtU.

105 James Lindgren, "Measuring Diversity: Law Faculties in 1997 and 2013," *Harvard Journal of Law & Public Policy*, 89-151, 2015.

scholarship but also of most Women's Studies programs, which began as new academic departments in the 1970s, and can now be found at virtually all colleges and universities.[106]

Distorting Dating

The campus focus on sexual violence, almost to the exclusion of healthy relationships, inevitably affects students: If most campus material on dating and socializing speaks of "violence," "abuse," "assault" and "rape," what type of outlook and attitudes will students develop?

Northwestern University film professor Laura Kipnis adds another point:

"I mean, everywhere you go the conversation is about, the message is assault and tending to characterize everything as assault. These are the messages aimed at women. This is almost a kind of encouragement to frame experiences as having been assault or non-consensual after the fact—like, many months later, 'I didn't consent.'"[107]

To be fair, the attitude of Title IX administrators may be understandable - many have also felt pressured by federal guidance to find such misconduct, and this focus can skew their view. Pediatricians who see sick children every day might also tend to see all children as sickly. But one is left to wonder about the real incidence of sexual assault in higher education - Is there really a college rape epidemic with sexual assaults every few minutes, as the GMU sign intimates?

106 Mark Honigsbaum, "Andrea Dworkin, Embattled Feminist, Dies at 58," *The Guardian*, April 12, 2005.
107 Kipnis, interview.

Conflicts of Interest

Before examining the data, however, the obvious should be stated. Because Title IX offices see their role as finding and fighting sexual misconduct (rather than guaranteeing equal access to education), they have a built-incentive to see sexual misconduct as a problem. After all, if there's no problem, there's no need for Title IX officials—in other words: No problem? No job.

Such conflicts of interest in the context of "administrative bloat"—the unnecessary and expensive "administrative class"—is now well recognized not just in the education system, but throughout government ("the administrative state") and other sectors.

NAS has written fairly extensively on this problem elsewhere, and considers it a serious threat:[108] Not only does administrative bloat increase cost (to students, tax payers, etc.), but it inevitably assumes functions outside its competence to justify its existence and its expansion (this phenomenon is also known as "mission creep"). Like a parasite, mission creep eventually weakens, or even destroys, host institutions.

"...if there's no problem, there's no need for Title IX officials—in other words: No problem? No job."

What do the Data Say?

Under a federal law called the Clery Act, institutions of higher education are required to keep statistics regarding sex offenses on campus. These statistics must be public and available to prospective students and their families.

In Virginia's state schools, these data are usually contained in what is called an Annual Security and Fire Safety Report. The most recent Report available from Virginia's schools is from 2019.

108 "Critical Care: Policy Recommendations to Restore Higher Education After the 2020 Coronavirus Shutdown," NAS, April 18, 2020 https://www.nas.org/reports/critical-care/full-report.

The Annual Report of James Madison University explains that the statistics are not from the judicial system—that is, they are not numbers of *convictions* of sex offenses, or even of findings of student responsibility for such misconduct. Instead, the numbers reflect "reported occurrences,"[109] also called "complaints received." These numbers may therefore be higher than the number of actual crimes.

The George Mason Annual Security Report, including incidents for over 37,000 students,[110] shows these Crime Statistics from 2016 to 2018. (VAWAO denotes Violence Against Women Act Offenses.)[111]

Offense	Arlington Campus	Science & Tech	Loudoun Campus	Smithsonian School	GMU Korea	Study Abroad
Rape	0	2	0	0	0	0
VAWAO	2	13	0	0	4	0

At Virginia Tech, a school of over 36,000 students[112] (undergraduate, graduate, and professional), annual statistics are reported as individual items.[113]

Offense	2016	2017	2018
Rape	11	20	12
Domestic Violence	3	4	1
Dating Violence	2	4	2
Stalking	0	5	1

At James Madison University, a university of over 21,000 students,[114] analogous annual totals are also reported.[115]

109 "2019 Annual Security and Fire Safety Report," James Madison University, 15, https://www.jmu.edu/publicsafety/clerycompliance/2019-Annual-Security-and-Fire-Safety-Report-Final10-1-2019.pdf.

110 "Student Population at George Mason University," at https://www.collegetuition compare.com/edu/232186/george-mason-university/enrollment/

111 George Mason University "2019 Annual Security and Fire Safety Report," George Mason University, at pp. 16-18, https://police.gmu.edu/wp-content/uploads/2019/10/FINAL-2019-Annual-Security-and-Fire-Safety-Report-updated-101719.pdf.; see https://police.gmu.edu/wp-content/uploads/2019/10/FINAL-2019-Annual-Security-and-Fire-Safety-Report-updated-101719.pdf

112 "Facts About Virginia Tech, 2020," Virginia Tech, at https://vt.edu/about/facts-about-virginia-tech.html.

113 Virginia Polytechnic Institute and State University, "2018 Jeanne Clery Act Report: The Annual Campus Security and Fire Safety Report," Virginia Polytechnic Institute and State University, September, 2019, at p. 51, also at https://police.vt.edu/ content/dam/police_vt_edu/clery-reports/2018%20Annual%20Campus%20Security%20and%20 Fire%20Safety%20Report%209%2018%2019.pdf.

114 "Student Population at James Madison University," College Tuition Compare, at https://www.collegetuition-compare.com/edu/232423/james-madison-university/enrollment/

115 James Madison University, "2019 Annual Security, Fire and Safety Report," James Madison University, Statistical Information 2016 – 2017- 2018 , Your Right to Know, October 1, 2019. https://www.jmu.edu/publicsafety/clerycompliance/2019-Annual-Security-and-Fire-Safety-Report-Final10-1-2019.pdf at pp. 15-18.

Offense	2016	2017	2018
Rape	6	8	8
Domestic Violence	3	3	1
Dating Violence	8	3	4
Stalking	9	17	6

To provide some context, here are the numbers of reported instances of other crimes at Virginia Tech during the same three years.

Offense	2016	2017	2018
Burglary	27	30	20
Liquor Infractions	591	560	530
Drug Arrests	74	89	104

Here are comparable statistics for James Madison University. (Note that "Liquor Infractions" for JMU include only those violations that resulted in disciplinary action, while "Drug Infractions" include all recorded drug abuse incidents. Thus these figures are not directly comparable to the Virginia Tech numbers, which include all reported liquor law violations, but only those drug infractions that resulted in an arrest being made.)

Offense	2016	2017	2018
Burglary	2 2	12	8
Liquor Infractions	872	686	678
Drug Infractions	72	101	81

As these figures show, the incidence of reported sex offenses is comparatively low, even in years with relatively large numbers, such as Virginia Tech's 20 instances of rape in 2017 (in a community of more than 36,000 students).

Since institutions might miss reports, cross-checking such statistics is advisable. (Feminists often claim, for example, that institutions may suppress numbers so their schools look safer.) According to Stuart Taylor, Jr., and K.C. Johnson, authors of *The Campus Rape Frenzy*, the National Crime Victimization Survey conducted every six months by the U.S. Census Bureau for the Justice Department's Bureau of Justice Statistics ("BJS") has long been recognized as the gold standard for

crime statistics. That data, compiled in the *Special Report: Rape and Sexual Assault Victimization Among College Age Females 1995-2013* by Lynn Langton, shows:

> "In 2014, BJS estimated that 0.61 percent of female college (and trade school) students, of whom 0.2 percent are raped, are sexually assaulted per year. Non rape sexual assaults include unwanted touching, attempted rape, and threats."[116]

According to the Education Department, approximately 10 million women are enrolled, either full or part-time, as undergraduates. If one in five women were actually being assaulted, that would amount to approximately 2 million women attacked while in college—or roughly 400,000 to 500,000 female students each year (2 million divided by 4 years).

That figure, however, is almost five times the number of total rapes reported for the entire country, according to Uniform Crime Reports maintained by the FBI.[117]

"In short, claims of rampant campus sexual assault and rape are not supported by statistical data..."

In short, claims of rampant campus sexual assault and rape are not supported by statistical data—not by Clery statistics compiled by individual schools, not by Justice Department data collected by its Crime Victimization Survey, and not by the Uniform crime numbers maintained by the Federal Bureau of Investigation.

There is some evidence suggesting a higher incidence of sexual assault among female college students derived from self -reporting at "elite" colleges:

116 Bureau of Justice Statistics, Special Report, https://bjs.gov/content/pub/pdf/rsavcaf9513.pdf., 4.

117 U.S. Department of Justice, Federal Bureau of Investigation, "Table 1: Crime in the United States by Volume and Rate per 100,000 Inhabitants, 1999-2018," https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-1. See also discussion in Stuart Taylor, Jr. and K.C. Johnson, *The Campus Rape Frenzy* (New York: Encounter Books, 2017), Chapter 2.

> "For instance, in 2014, one in every 181 female Ivy League undergraduates reported to their university that they had been raped, according to the Clery Act data base. That's well over three times the rate—one in 665—at nearby non-elite institutions..... According to [Dartmouth's] figures, a female undergraduate at Dartmouth is more likely to be a victim of violent crime than a resident of Memphis, Tennessee, which, according to the FBI, is the nation's most dangerous city."[118]

Such big numbers do not emerge, however, from schools outside the Ivy League (such as large state universities).

> "If American college campuses really were facing a sexual assault epidemic, why would there be far fewer reported sexual assaults at the University of Northern Iowa or the University of Northern Colorado than at Wesleyan or Dartmouth?"[119]

The authors then conclude that this "support" is not factual but, rather, politically induced:

> "The answer is there wouldn't. The difference in reporting rates is due to the fact that moral panic about sexual assault is most feverish at institutions where identity-politics activism is most prevalent. Occidental College in Los Angeles, for instance, reported 10 'sex offenses' in 2012. The next year, after a handful of faculty members and student activists portrayed the elite liberal arts college as dominated

118 *The Campus Rape Frenzy*, 48.
119 *Ibid.*

> by 'rape culture,' the number of reports of sex offenses skyrocketed, to 60."[120]

Inflated figures are also explained by new definitions of sex offenses. This "redefinition" phenomenon was detailed in the Introduction regarding conduct said to be prohibited by Title IX. But redefinition efforts are not limited to this area. Taylor and Johnson trace some of the re-definition techniques used to increase rape figures to feminist thinkers of the 1970s:

> "MacKinnon and Dworkin's campaign to expand definitions of rape became focused on sexual assault on college campuses. Pioneering a tactic that recent surveys have made into a ritual, Mary Koss refrained from asking her subjects whether they had been sexually assaulted. Instead, she explored particular behaviors, which she treated as evidence of sexual assault even when the law (or her subjects) did not..... She classified as 'sexual assault' incidents that 73 percent of her subjects did not consider to be sexual assault. This technique entitled her to declare that 25 percent of college women were victims of sexual assault. [emphasis added]

> Thirty years later, Koss asserted, 'I never believed that it was useful to restrict our research to rape. Universities still

120 *Ibid.*

> have to deal with acts that may not be crimes, but they're still violations.'
>
> In other words, in order to identify a rape epidemic, Koss, like MacKinnon and Dworkin, had changed the meaning of 'rape' to include many non-crimes."[121]

Taylor and Johnson go on to explain how numbers and ideas such as this became institutionalized in the 1980s and 1990s, especially as schools began to hire administrators to manage "student life" and "diversity:" "Many were ideologues who thought... women had always been, and still were, systematically oppressed."[122] By the 1990s, these new hires had begun to include in the category "sex offenses" actions or comments such as sexual teasing, remarks about clothing, or insults and jokes regarding an individual's sex or gender identity. It's worth pausing to reflect on this development—the expansion of "sex offense" to include teasing, insults or jokes.

The traditional understanding of rape places it among the most monstrous actions that one human being can take against another. Not only does it typically involve force, or even brutal physical violence but it is also among the most physically invasive of all possible violations. For these reasons, it has long been considered a capital crime, and even a war crime to the extent it has been used as a tactic to conquer and demoralize an enemy. The following case descriptions illustrate the gravity and brutality of this understanding. **The content is graphic.**

"I Will Kill You if You Scream Again"

> "The woman testified she was just three or four steps from the safety of her Fairfax City home when the nightmare

121 *Ibid.*

122 This included one assistant dean at Vassar College, Catherine Comins, who suggested male students could benefit from being falsely accused of sex crimes. Taylor and Johnson, *The Campus Rape Frenzy*, 26.

began. She heard footsteps from behind, and the powerful man lifted her off the ground 'like a baby.'

She screamed in terror as he dragged her to a grassy patch just a stone's throw from surrounding homes. The attacker beat her, laced his fingers around her neck, and then began sexually assaulting her as she fought back.

He said, 'I will kill you if you scream again,' the victim told a hushed Fairfax County courtroom Monday. He said, 'Let me do this, and I'll let you go.'

The woman's life was probably saved, she said, when her attacker suddenly ran off. She then rasped 'help me' to a man passing by. Naked from the waist down, she ran toward him slathered in mud and blood.

This harrowing account came on the opening day of the trial of Jesse L. Matthew Jr., 33, of Charlottesville, who could face life in prison if convicted in the 2005 Fairfax City sexual assault. The victim's testimony gave voice to allegations against a man who authorities believe is a serial offender, a predator who ambushes young, vulnerable women as they walk alone at night.

After she was dragged to the grass, the woman said, her attacker slammed her head into the ground, punched her in the face, and placed his hands around her neck and over her face. Morrogh said she fought 'like crazy,' punching and kicking the man. [emphasis added]

The woman testified that the attacker sexually assaulted her, then tried to rape her. She passed in and out of

consciousness. Then, she noticed a man walking by and began trying to yell at him, but she could barely get out a sound.

Mark Raul Castro said he came upon the victim while visiting the neighborhood to watch a televised heavyweight boxing match at a friend's house. Castro said he'd been walking through a parking lot when he saw a figure in the darkness from the corner of his eye.

Castro began shouting for the man who had assaulted her to come out, but he had gone. Castro said he knocked on doors in the neighborhood until he found someone who could call police.

The woman was transported to a hospital and examined by nurses who specialize in sexual assault. Photos taken in the hospital after the attack and displayed in court showed a swollen eye and marks around her neck. A sample of material was taken from beneath the woman's fingernails; it later produced a match with Matthew's DNA."[123]

123 Justine Jouvenal and T. Rees Shapiro, "Victim testifies Jesse Matthews said, 'I will kill you if you scream again' *Washington Post*, June 8, 2015, https://www.washington post.com/local/crime/jury-selection-underway-in-jesse-matthew-assault-trial/2015/06/08/ 1653df44-0df1-11e5-9726-49d6fa26a8c6_story.html.

"He Tried to Silence Her by Slashing Her with a Beer Bottle."

"A few days after Jeanne returned from spring break in 1986, the 19-year-old freshman was asleep in her dorm room after returning from a party.

Joseph Henry, a 20-year-old sophomore from Newark, N.J., who lived off campus, entered her dorm through a series of three doors that had been propped open by pizza boxes so students could easily pass through them.

Henry climbed the stairs and found the door to the second floor locked. He made his way to the third floor, where the women lived in the co-ed dorm. The first door he tried was Jeanne's. She had left the room unlocked for her roommate, who had misplaced her key.

Jeanne woke up as Henry rifled through her room. *He tried to silence her by slashing her with a beer bottle. He raped and sodomized her. Then he strangled her with a wire from a Slinky toy.* [emphasis added]

The crime was random. Henry had been out all night drinking after losing a student election that day. He entered the dorm to steal.

Henry was a former honors student who had flunked out of school before coming back. He had been fired from a restaurant job for being violent, but had no prior criminal record

other than being disciplined by the university for throwing a rock through a female student's window."[124]

"Women in Latin America Are Being Murdered at Record Rates"

El PLATANAR, El Salvador—"Andrea Guzmán was just 17, but sensed the danger. For weeks, the chieftain of a violent gang had made advances that turned to threats when she rebuffed him.

He responded by dispatching seven underlings dressed in black to the two-room house she shared with her family in this hamlet amid corn and bean fields. *They tied up her parents and her older brother, covered Andrea's mouth, and forcibly led her out into the night in her flip-flops.* [emphasis added]

Hours later, one of her abductors fired a shot into her forehead in a field nearby. [emphasis added] And once again, another woman had been slain, one of thousands in recent years in this violent swath of Central America, simply because of her gender.

'It is better not to have a daughter here,' [emphasis added] said her weeping father, José Elmer Guzmán, recounting how he had found his girl, wearing the shorts and a T-shirt she

124 Rob O'Dell, and Anne Ryman, " 'It means her life was not in vain': The tragedy that gave birth to the Clery Act," *Arizona Republic*, April 15, 2016, https://www.azcentral.com/story/news/local/arizona-investigations/2016/04/15/tragedy-that-gave-birth-to-clery-act/82811052/

> liked to sleep in, off the side of a road. 'I should have left the country with my children.'"[125]

It seems important to note how different the meaning of rape is when the word is used in the context of *campus rape epidemic*.

Weapons are rarely discussed in conversations of campus sexual assault, although Annual Reports from most schools do include data about weapons in the category "armed assault." For claims of sexual assault, those reports generally show that 0 such incidents have involved a weapon such as a gun or a knife in all reported years.

The absence of weapons does not mean that sexual assaults, including violent ones, do not occur. Obviously, the use of force sans weaponry can be as violent and brutal as an armed attack. But the absence of weapons is coupled with three other factors that dramatically change the image of most sex offenses on campus when compared to the traditional understanding of rape.

First, most of these encounters do not involve physical force or physical injury. In the vast majority of complaints, no physical injury is reported and no hitting, no beating, no pulling—no rough physical contact of any kind—is even alleged.

Instead, complaints of this kind assert that one party did not actually consent to whatever sexual activity is at issue; therefore, demonstration of authentic consent is usually the focus, not the use of force.

In recent years, consent has been re-named "affirmative consent" and has been made part of student conduct codes; it is often now part of the conduct allegedly required by Title IX. As the name affirmative consent implies, this standard demands that parties to sexual encounters request and demonstrate verifiable assent to each advancing stage of sexual intimacy.

125 Juan Forero, "Women in Latin America are Being Murdered at Record Rates," *Wall Street Journal*, December 19, 2018, https://www.wsj.com/articles/it-is-better-not-to-have-a-daughter-here-latin-americas-violence-turns-against-women-11545237843.

Problems with the Affirmative Consent Standard

An in-depth discussion of such a standard would be overkill. Here are four important observations. First, such a *modus operandi* for sexual intimacy does not exist; reducing sexual intimacy to miniature legal transactions where verbal consent is obtained at every stage—like a behavioral signature on the dotted line—would transform such intimacy into something else. The idea has been appropriately parodied and ridiculed, including on *Saturday Night Live* when affirmative consent was first publicized in 1991. And yet, the standard has made its way into many schools' policies.[126] Second, the standard guarantees that campus bureaucrats will continue to involve themselves in intimate relations among students, where the bureaucrats do not belong. In this regard, the standard is a license to meddle.

"...reducing sexual intimacy to miniature legal transactions.. would transform such intimacy into something else."

Third, as many have noted, the standard effectively shifts the burden of proof from the accuser to the accused. In any ordinary moral or legal complaint, the complainant must show or prove wrongdoing.[127] An affirmative consent standard shifts the burden to the accused, who must show that affirmative consent was obtained. Affirmative consent resembles the slogan "believe all survivors" from the "Me too" movement: If all accusers are believed, then all those accused of sexual misconduct are presumed guilty, demolishing the presumption of innocence. So both initiatives—the affirmative consent standard and the believe-all-survivors exhortation—turn cherished moral and legal traditions upside down. For these reasons, the criminal defense division of the American Bar Association has repeatedly rejected this new standard for the

126 For discussion, see Taylor and Johnson, *The Campus Rape Frenzy*, 219-220.

127 The *burden* of proof is simply to clarify which party shoulders the burden; the *standard* of proof clarifies how much the party must prove or how convincing the proof must be.

criminal justice system and, by implication, for the legal profession. Notably, the American Bar Association is known to be more left-of center than the American public. Its rejection of affirmative consent tends to confirm, therefore, how radical the concept is, despite its prevalence on campus.

Another facet of so-called campus sexual assault is that most complainants know the accused. The level of familiarity varies, but virtually no incidents on campus involve total strangers. Instead, incidents are between two people who are friends, or at least acquaintances.

Fourth, and perhaps most salient, almost all incidents giving rise to college sexual misconduct complaints involve the voluntary consumption of alcohol. Over 95% of such complaints implicate alcohol, usually in the context of a party-type atmosphere such as a house party, a fraternity party, bar, or a pub.

These particulars clarify what type of sexual misconduct is most at issue on campus. These are not back-alley attacks by armed strangers—the most frightening and savage image of a real rape. Instead, almost all alleged campus sexual misconduct occurs in the context of partying, dating, and other forms of socializing among male and female students.

Given this fact, one would think recipient schools would aim to prevent such incidents by evaluating student socializing, student dating, and other aspects of student life that might invite or give rise to sexual misconduct or sexual misunderstandings.

In fact, a few students remarked on how alternatives to the party scene were unknown to them their first few years on campus:

> "I discovered later that there were opportunities to meet people other than the frat scene, like at coffee houses and open mikes, but, you know, they weren't well publicized so the party scene sort of takes over your first year."
>
> *—Female graduate, Virginia Tech, Spring 2019*

> "First years are focused on work and then they party. You find out later there are more things to do on campus."
>
> —*Female graduate, Virginia Tech, Spring 2020*

These statements suggest students might, on some level, *want* an alternative to partying and hooking up, but they can't find it and only learn of alternatives in later years.

Significantly, no Title IX office in this study even mentions programs or activities that might give students a socializing alternative to bars or parties; and no Title IX office views the hook up culture—that gives rise to so many complaints—as a contributing factor to sexual misconduct, much less a risk factor. On the contrary, they approve of hook-ups—provided they're "healthy hook-ups."

"...no Title IX office in this study even mentions programs or activities that might give students a socializing alternative to bars or parties..."

Little Attention to Alcohol Abuse, Drug Abuse or Pornography, though Alcohol is Involved in over 95% of campus Title IX claims

Title IX offices also do not focus on alcohol abuse, despite the prevalence of alcohol as a universally recognized factor in Title IX complaints of sexual misconduct. Out of the six schools and Title IX offices scrutinized for this Report, only one pamphlet on alcohol was found (and two on drug use) and there was only one mention of alcohol in a prevention program. Even this latter reference was made in passing, with the alcohol component optional.[128] According to the United Educators (UE) Risk

128 The reference appeared in Appendix E to the George Mason University Policy 1202 on non-discrimination.

Retention Group, the liability insurance carrier for many American colleges and universities, alcohol is involved in over 95% of sexual assault reports. Given this correlation, the absence of attention to alcohol use and abuse is incomprehensible—even reprehensible.

As the material above indicates, many student life issues get attention from campus Title IX and health officials including eating disorders, sexual histories, and testing for sexually transmitted infections. But none of these areas cause as many Title IX complaints as alcohol does.

Similarly, some students claim that pornography has also become a factor in dating, socializing and sexual misconduct. At Notre Dame University, for example, male students took the lead to request filters at the school so students could not access online pornography quite so easily. James Martinson, President of Students for Child Oriented Policy, explains:

> "The overwhelming majority of contemporary pornography is literally filmed violence against women — violence somehow rendered invisible by the context. Eighty-eight percent of porn scenes include physical aggression (punching, choking, biting and spitting — and that's the short list), and 49 percent of scenes include verbal aggression. A recent trend on some college campuses is the photo and film documentation of actual sexual assault, posted afterwards in fraternity Facebook groups. Pornography is prostitution through the lens of a camera, but more abusive. It exploits the men and women involved, advances a twisted narrative about human sexuality and harms those who consume it.

> On the consumption end, pornography is associated with a host of issues: addiction, child sexual abuse, divorce, male fertility problems, sexual assault and the acceptance, normalization and sexualization of cruelty towards women.

> It contributes to prostitution, human trafficking and the proliferation of sexually transmitted diseases. It has been officially declared a public health crisis in five states. And yet, in a matter of seconds, anyone can access porn. And no one needs to know — a tab is easily closed.
>
> In the face of the massive violation of human dignity perpetuated by the production and consumption of pornography, many organizations worldwide have taken the simple, positive step of internet filtering. Unfortunately, Notre Dame has yet to take this step."[129]

This request for internet filtering was supported by female students, who emphasized not just the correlation with sexual assault but also the harm done to relationships. Sophomore Ellie Gardie wrote this:

> "The wide consumption of pornography does irreparable harm to relationships between Notre Dame men and women. This demeaning and often violent content encourages its users to place the selfish seeking of personal pleasure over the development of committed relationships. It makes people believe human connection consists of fleeting sexual intensity opened and closed as easily as a web browser. Thus, it essentially takes away the ability to love. It should not surprise us that infidelity rates dramatically increase and divorce rates skyrocket when one partner frequently uses pornography.
>
> In an era when sexual assault is pervasive and women fight to make their voices heard, we must face the fact that pornography use is often correlated with sexual assault. The Michigan State Police found that pornography was used or

129 James Martinson *et al.*, "The men of Notre Dame request a porn filter," *(Notre Dame) Observer*, October 23, 2018, https://ndsmcobserver.com/2018/10/the-men-of-notre-dame-request-a-porn-filter/

> imitated just prior to or during the crime in 41 percent of the 38,000 sexual assaults that occurred in Michigan from 1956-1979. In addition, the FBI's statistics demonstrate that in 80 percent of violent sex crimes, pornography was found at the home of the offender or the scene of the crime."[130]

Some studies claim that over 90% of males will see, if not use, pornography before the age of 18. Additionally, today's pornography is not your Dad's playboy magazine—observers now routinely discuss "violent porn" as part of more mainstream pornography use. Such violence includes choking. biting, slapping, hitting, punching, and other forms of physical force.[131]

But this topic, along with the use of alcohol, gets little attention from Title IX administration.

"Girls Want a Relationship but Guys Just Want Sex"

For better or worse, all educational institutions play a role in helping—or impeding—their students to develop socially and morally. Student Codes of Conduct are explicit expressions of the behavioral standards demanded of those who enroll. But other practices and customs—"soft" power or influence—also mold student conduct and character, and educational institutions have long recognized this.

As Mark J. Perry points out in his article *The Remarkable Story of Female Success in US Higher Education,* women have made tremendous strides in colleges and universities since the 1970s—so much so that it is easy to forget how many schools and programs used to be single-sex. It

130 Ellie Gardey *et al.*, "Women of ND response to men's request for filter," *(Notre Dame) Observer,* October 24, 2018, https://ndsmcobserver.com/2018/10/women-of-nd-response-to-mens-request-for-filter/

131 Whitney L. Rostad., *et al.*,"The Association Between Exposure to Violent Pornography and Dating Violence in Grade 10 High School Students" *Archives of Sexual Behavior,* 48 (2019): 2137 – 2147, https://link.springer.com/article/10.1007/s10508-019-1435-4.

is interesting to contemplate the rationale for single-sex institutions in the current climate of changing sexual mores and identities.

Whether co-ed or single-sex, most schools historically had rules in place for socializing between male and female students. As older alumni can attest, those policies included single-sex dormitories and bathrooms, blanket prohibitions on the opposite sex visiting in a dorm room, strict visiting hours, and, for members of the opposite sex (as opposed to parents), visits in common areas only. Dormitory curfews, dress codes (on campus and even for meals), and occasional requirements for even more formal attire were quite common. Alcohol consumption was strictly forbidden anywhere on campus, often under threat of expulsion.

These austere conditions existed, however, alongside planned socializing opportunities including mixers, coffee houses, weekly gatherings at the local pub, and formal meals and dances throughout the academic year.

Arguably, these guardrails, coupled with visiting rules, expressed caution regarding dating and romance, and also inculcated patience, restraint, and self-discipline when it came to sexual ethics. Such qualities (patience, restraint, and self-discipline) have long been viewed as positive virtues worth inculcating in young people. And this remains true today with regard to goal setting in areas such as academics, athletics, the arts, and even the professions. Quite notably, however, these virtues are no longer the norm when it comes to dating, socializing, and sexual mores, whether on or off campus.

"...while self-discipline is recognized as a virtue in every other area of human activity, in the arena of sexual ethics, it has been discarded."

In this sense, socializing and sexual mores are *exceptional.* That is, while self-discipline is recognized as a virtue in every other area of human activity, in the arena of sexual ethics, it has been discarded.

Bowling Alone, Eating Alone

Under-discussed and hidden costs may result from this asymmetry—that discipline is expected everywhere except in sexual ethics—such as dwindling opportunities for other kinds of socializing and reduced practice in developing different sets of social skills: If students are given no alternative to the party scene and are therefore effectively thrown into the hook-up culture, with campus officials supporting that outcome (provided it's "healthy"), other learning opportunities may be cut short.

> I am mostly talking with those of the opposite sex at gatherings that involve drinking/dancing so not a great place to meet people.
>
> *—Female, Iowa State University, Sophomore, 2019*

Interestingly, even the most mundane such opportunity—having meals together, for example—has disappeared as many campus cafeterias no longer have set mealtimes. Instead, they offer around-the-clock food—availability on demand—with the predictable result that most students eat alone:

> I just eat on my own most days. There isn't time in between classes, you know.
>
> *—Female, Iowa State University, Sophomore, 2019*

> There are two main dining halls at GMU; they're open 24/7—go whenever, eat whenever! I sat mostly by myself.
>
> *—James Madison University transfer student, Senior Summer 2020*

Technology

Technology, of course, also deserves mention: The omnipresence of social media platforms is now a fact of life, and its benefits for sharing information, improving coordination, and enhancing communication are unprecedented and undeniable. Its long-term effects on young people, however, and on their relationships, are yet to be seen and fully appreciated.

Campus officials ought to pay more attention to technology's effects on young people.

Simple Deterrents are Missing

Aside from the larger cultural questions of romance, dating, and socializing, the material cited above also shows a curious absence of rather simple measures that could be taken to reduce the risk of Title IX complaints of sexual misbehavior. Some of these measures, such as strength in numbers or "not going alone" or what was called "the buddy system" are actually implemented by students themselves ("Nobody ever went anywhere alone; nobody would want to. We looked out for each other.") rather than by campus officials.

Other simple measures that were not found include:

1. Sign In / Sign Out sheets at dormitories;
2. Cameras at building entrance or exit points; and
3. Designated peer chaperones modeled after the designated driver programs devised to combat drunk driving.

Interestingly, the George Mason University Police Department does offer the Cadet Escort Service, where escorts walk with students, staff, or faculty from one point on campus to another. This service is available 24 hours a day, 7 days a week, 365 days a year. The Department also offers Crime Prevention Services, such as orientation seminars informing community members about safety procedures and alcohol and drug

awareness. Another program is its "Rape Aggression Defense System" (RAD), which teaches realistic self-defense tactics and techniques for women.[132]

These programs are not part of the GMU Title IX Office, however, and no mention or link appears on the Title IX web page.

Due Process is the Most Discussed Topic

For almost 10 years,[133] the controversy surrounding Title IX has concerned its formal campus proceedings when a female complainant has alleged sexual misconduct on the part of a fellow male student, typically in the context of a hook-up or a party. The female complainant says the sexual activity happened without her consent, while the male student says she agreed (aka "he said, she said" cases).

Given the prevalence of such encounters, these incidents provided Title IX offices with the most numerous opportunities to show that they were tough on sexual assault, as much of the OCR guidance seemed to exhort.

Accused male students have now successfully argued, however, that this zeal translated into unfairness toward them in the form of the due process violations described in Part I: summary ejections off campus based on mere allegations; no opportunity to know of specific charges and no chance to respond; partisan investigators and decision-makers prejudiced in favor of female complainants; and bias favoring complainant's witnesses and stories.

Because hundreds of male students have now prevailed in court with such claims, it seems undeniable that sham trials are taking place all too often. And, in response, observers have understandably focused on, and demanded, basic procedural fairness in Title IX adjudications.

132 Flyer, George Mason University Police Cadet Program and R.A.D., rad@gmu.edu

133 Dating to the 2011 DCL.

President Trump's Final Rule represents a significant step forward in this regard.

The contents of this Report, however, suggest that those basic protections will only go so far. While the language of each school's materials showed a clear emphasis in favor of complainants, the materials did also mention the interests of the accused, though less prominently. Basic due process protections such as the presumption of innocence and access to evidence existed on paper, even while due process horror stories proliferated.

In policy circles it is often said that personnel is policy. That adage has some application here. Given the current staff at most Title IX offices—not only overwhelmingly female, but from administrative backgrounds with feminist or left-wing worldviews, and determined to change American culture along these lines ("I focus on what we can do as a culture. What does the community need to do to prevent this? It's never the victim's fault.") The chances of restoring due process guarantees are slim without personnel changes.

Like much of the rest of campus, Title IX offices are awash in overtly anti-male content *(*"He doesn't text back." "It happened ONCE; he said he would never do it again"*)* and disproportionate support for the claimant *(*"True healing for victims and real accountability for perpetrators can only happen when a victims [*sic*] gets to define justice.") What's more, university administrators as a group have been found to be even more ideological and conformist than university faculty—that is, they are considered politically extreme even by politically extreme professors.

One can discuss how unhealthy a situation this is. The main point here, however, is that due process protections on paper probably cannot come to life in practice unless some personnel in the Title IX office ensure that it does.

Crimes in Athletic Departments—"Special Rules for Special People"

This Report has focused on the evolution of Title IX since 1972 as it has developed in law (court opinions and agency actions) and in practice on campus. Cases of false accusation and due process violations have also been discussed such as the Duke Lacrosse injustice, the reactions of wrongly accused students and their families and the litigation that has vindicated them.

This focus does not mean that real criminality on campus, or in school programs, never happens. It does. Michigan State's turning a blind eye to serial offender Larry Nassar, the gymnastics trainer who violated hundreds of the school's female gymnasts over a period of years, is an outrage that should infuriate decent people everywhere. Lucrative athletic programs, especially at larger state schools or known sports powerhouses, seem prone to the same see-no-evil phenomenon, as exemplified at Penn State by Jerry Sandusky, an assistant football coach who was convicted of sexually abusing young athletes participating in his "Second Mile" program for disadvantaged youth for almost 15 years.

"Criminal conduct by student athletes is similarly unacceptable and all too frequent..."

Criminal conduct by student athletes is similarly unacceptable and all too frequent; repeated offenses have been documented at Baylor University in Texas, University of Tennessee at Knoxville, Florida State University and University of North Carolina at Chapel Hill.[134] One of the more egregious cases occurred at Baylor.

> "In April 2013, a female volleyball player told her coach that she was gang-raped by five Baylor football players in 2012. The volleyball coach shared the names of the players

134 Jake New, "The 'Black Hole' of College Sports," *Inside Higher Ed*, February 9, 2017, https://www.insidehighered.com/news/2017/02/09/baylor-not-alone-shielding-athletes-accused-misconduct-punishment.

> with Briles [the football coach], who, according to the filing, replied, 'Those are some bad dudes. Why was she around those guys?' The female athlete's mother later met with an assistant football coach, providing the same list of names. Nobody ever reported the alleged gang rape to any university officials outside the athletic department or to police. At the time, Baylor did not have a full-time Title IX coordinator.
>
> Ian McCaw, the university's athletic director at the time, was notified of the 2012 gang rape, but allegedly—and incorrectly—told the volleyball coach that if his player did not press charges, then the athletic department could do nothing.
>
> In a 2013 text message conversation between McCaw and Briles, McCaw was informed about a player who had been arrested for assaulting and threatening to kill another student. A football staff member attempted to talk the victim out of pressing criminal charges, Briles texted, and local police agreed to keep the incident out of public view. 'That would be great if they kept it quiet,' McCaw replied, according to the court filing.
>
> McCaw resigned from Baylor in May after being sanctioned by the university."[135]

Such cases raise the issue of special protection of student athletes by important sports programs such as college football, called "Special rules for people with special talents."[136] It could also be characterized as a turf war between disciplinary offices: the Student Affairs office, the

135 *Ibid.*
136 *Ibid.*

Title IX office, and the Athletic Department. And there's little doubt that baser motives, such as reputation and money, play their part, arguably putting student safety and well-being at risk.[137]

These problems inevitably lead to the much larger discussion regarding the role of sports in higher education and the attention and support given to student athletes. That discussion is beyond the scope of this Report.

"...criminal wrongdoing belongs in the criminal justice system."

That said, a few relatively obvious points can be made. First, the subject here is criminality. As the word itself makes clear, criminal wrongdoing belongs in the criminal justice system. It cannot be properly handled on campus by Title IX offices, which are supposed to be addressing discrimination, a civil rights matter, not crimes. While it is true that legal terms can overlap—speeding can be both a crime and a traffic violation, for example—it is also true that each office still has its primary purpose. Mission creep is harmful since officers are hired and trained for their original purpose, and are ill-equipped to address subjects outside their expertise and authority.

Not coincidentally, many school sexual harassment and Title IX policies include "safety" as a goal. While no one wants an unsafe campus, such inclusions invariably—perhaps intentionally—blur just such lines regarding an office's primary purpose and responsibility, almost always aggrandizing its power and jurisdiction in the process. Sexual discrimination and harassment policies should explain that such concerns are not the primary mission of Title IX or of a school's harassment rules, and that those matters fall to campus police and security. If the Title IX offices do not qualify such statements, they should be seen as attempted overreach.

Second, while the turf war initially appeared among student disciplinary offices, the real responsibility may lie with the Admissions Department, which should know as a part of the application process

137 See also: https://www.urbandictionary.com/define.php?term=cleat%20chaser.

if any student has a history of unethical conduct or a criminal record. Prospective students and their parents should make it a point to find out about such screening procedures (and if they exist).

Last, America has almost 20 million students in college or university.[138] These cases of criminality therefore represent a minuscule fraction of the college student population and brings to mind the legal adage "hard cases make bad law." Broad policies regarding sexual misconduct, or sex discrimination generally, cannot be made on the basis of bad apple athletes.

By and large the American college campus remains a truly privileged place and also an extraordinarily safe one. As Heather MacDonald, author of *The Burden of Bad Ideas,* has pointed out, "American college students are the most privileged human beings in history simply by virtue of their access to vast educational opportunities..."[139; 140]

On the question of campus safety:

> "Let's put that number [the claim that '1 in 5 college women experience sexual assault'] in perspective... Our most violent city, Detroit, when you look at all four of the FBI's violent index felonies — that includes murder, rape, aggravated assault and robbery — all four of those combined gets you a violent felony rate of 2 percent. So 20 to 25 percent [campus rape victims] would be a catastrophe.

> ... [S]uch a 'sexual holocaust,' if it were really going on, would prompt a stampede of women *away* from college campuses,

138 "National Center for Education Statistics, "Back to School Statistics," 2019, https://nces.ed.gov/fastfacts/display.asp?id=372.

139 Tim Hains, "Heather MacDonald: American Colleges Today are 'Hatred Machines,' " *Real Clear Politics,* August 14, 2018, https://www.realclearpolitics.com/video/2018/08/14/heather_macdonald_american_colleges_today_are_hatred_machines.html.

140 Heather Mac Donald, *The Burden of Bad Ideas: How Modern Intellectuals Misshape Our Society* (Chicago : Ivan R. Dee, 2000).

> yet the opposite is true, females are now the majority on them."[141]

Prior generations of Americans could only dream of the luxury of four years of higher education during adulthood. That many of today's college students characterize that experience as sexist, oppressive or unsafe, when the facts indicate the opposite, suggests that college may not be the best use of these young people's time.

141 Jennifer Kabbany, "Video: Heather Mac Donald Defends Due Process and Debunks 1 in 5 Rape Stat as Hostile Crowd Shrieks in Protest," *The College Fix*, February 24, 2020, https://www.thecollegefix.com/video-heather-mac-donald-defends-due-process-debunks-1-in-5-rape-stat-as-hostile-crowd-shrieks-in-protest/

Part IV: Recommendations

Part IV: Recommendations

Where do we go from here? What policy or cultural actions can be taken to improve matters on campus with respect to equal access to education, and also to mitigate the risk of sexual misconduct?

Equal Access To Education Has Been Achieved

Not a single female student interviewed for this Report complained of obstacles or barriers to educational opportunity. On the contrary, statements were emphatic and enthusiastic. "I would say we have access to everything!"

And while these statements can be dismissed as anecdotal, the data supporting them cannot. The work of Mark Perry has shown that for most educational metrics, women now fare better than men—in fact, much better. Perry has presented his findings in tabular form to look more closely at specifics and calls one such table, "For every 100 girls / women...." followed by the number of males who lag behind females in different categories.[142] So, for example, he finds that 1) a mere 54 boys (compared to 100 girls) take high school honors classes in arts and music; 2) only 63 boys / men earn associates' degrees; 3) just 74 earn a bachelors' degree; 4) no more than 74 men earn a graduate degree, etc.

"...it is men who are falling behind, not women."

Yet despite these numbers, public attention continues to focus on females and their supposed need for support in education, in professional life, and also in other areas such as medical care and mental health. Yet on all these fronts, it is men who are falling behind, not women. A more in-depth treatment of this topic can be found in the works

142 Mark J. Perry, "Chart of the Day: For every 100 girls / women ....," *Carpe Diem* (blog), American Enterprise Institute, December 23, 2019, https://www.aei.org/carpe-diem/chart-of-the-day-for-every-100-girls-women/

of Christina Hoff Sommers (The War Against Boys) and Warren Farrell (The Boy Crisis).[143]

Given these developments, plus the fact that women have outnumbered men on campus since the late 1970s, it is time to recognize that the goal of equal educational opportunity for women has been achieved.

In fact, Mark Perry now uses Title IX to file lawsuits alleging that Women's Centers, Women's Lounges and other programs specifically for female opportunity and achievement violate Title IX's guarantee of equal access *for men.* As he explains:

"I found that it's men, not women who are being denied access to educational programs or activities in higher education. And that that is a real problem both legally and ethically...

I've now filed more than 100 Title IX complaints for universities violating Title IX by offering single-sex, female-only programs, scholarships, awards, fellowships, funding, camps, etc. that illegally discriminate against boys and men based on their sex.

As a result of those 100+ complaints, there are now more than 40 federal investigations of civil rights violations and another 40 or more complaints being reviewed. About a dozen cases have been resolved in my favor."[144]

What's more, the accomplishment of equal educational access may help explain how Title IX got sidetracked and became focused on sexual misconduct and the hook-up culture in the first place. With its original objective met, it had to go somewhere else.

Even so, given the popularity of and attention to "women's issues," the public is probably not aware of women's educational gains. Publicizing this development is, therefore, an important first step for any discussion of Title IX reform.

143 Warren Farrell, *The Boy Crisis: Why Our Boys are Struggling and What We Can Do About It* (Dallas: BenBella Books, 2018).

144 Email correspondence with Mark Perry, February 20, 2020.

Feminists Control Title IX & Will Continue to Fight Reform

The current litigation against the DeVos regulations reveals the real battle lines dividing American higher education. On the one side are feminist groups who effectively control most campuses. On the other side are those who have just recently been able to mount a defense against them, including many who are only just beginning to understand the extent of feminist power in programs such as Title IX. The feminist groups have the advantage in this contest for many reasons.

First, these feminist groups view campus as their territory, and they will no doubt vehemently oppose any attempt to check or reduce their power. Reform of Title IX is seen as just such an attempt.

Second, as Kathryn Silbaugh's law review article explains, and others have confirmed, these same feminist groups purposely created the current Title IX regime to "fill the gap" in criminal justice practice. Specifically, they decried the fact that prosecutors would often decline sexual misconduct cases, or move on them more slowly, because of proof problems and other complications. As noted above:

"Title IX is [now] requiring colleges, appropriately, to address an array of serious sexual assaults that prosecutors' offices often decline to prosecute –even when they are reasonably convinced this serious crime has occurred. If it is sexism that drives prosecutors' offices to take a pass on sexual assault prosecutions, then there's no problem with Title IX eliminating that discretion."[145]

Northwestern University film professor Laura Kipnis also said as much.

"One of the reasons that the [sexual misconduct] guidelines moved to campus is that, at the legal level, the district attorneys were not taking these cases… because in a lot of these situations there isn't much evidence; you know, a person comes forward later… at an evidence level,

145 Silbaugh, "Reactive to Proactive," 1049.

you know, the case doesn't rise to the necessary legal level so these were taken on campus because there was a gap in the legal system on sexual assault... or it would take years for a case to go forward. So part of the idea was to have a system in place that would rectify what was not happening in criminal court."[146]

Most sexual misconduct cases involve private conduct with no witnesses—the "he said / she said" problem—and often this means that the available evidence cannot overcome the high threshold for a criminal conviction (guilt beyond a reasonable doubt).

Title IX was therefore seen as a vehicle to address this perceived obstacle. Feminists could make up for prosecutorial ambivalence in court by rewriting the rules to their advantage on campus—by lowering the standard of proof and discouraging cross-examination.

Since personnel both in DC and on campus were of the same feminist mold, this plan was easy enough to execute and, in time, took hold. In the words of the Title IX staff member responding to Student #4, "this is just how things work."[147] To feminist thinking, the current Title IX regime is, therefore, a net plus. Any miscarriages of justice along the way (and any injustices built into the process) can easily be rationalized as insignificant, especially when compared to perceived injustices previously suffered by women. Such miscarriages might even be viewed as payback for unrectified wrongs of the past.

"Feminists could make up for prosecutorial ambivalence in court by rewriting the rules to their advantage on campus..."

Consequently, Title IX reform will be an uphill battle and will take time.

146 Kipnis, interview.

147 Brief of Families Advocating for Campus Equality ("FACE") as *amicus curiae*.

Schools Must Publicize Due Process Protections

In the meantime, the best way to stop the bleeding is to support the new regulations and pressure schools to disclose due process protections to the students who need them. The easiest way to do this would be to integrate such information into first-year orientation and then to tack such content on to any class, program or seminar that discusses Title IX and sexual misconduct. As the visit to George Mason University confirmed, schools often have mandatory events on Title IX for both students and employees.

Title IX Offices Need Criminal Defense Experience

Title IX offices are now staffed almost exclusively by women from a university administration background and a feminist mindset. They do not have any courtroom experience with due process rights, which often means they neither appreciate nor respect them. This imbalance should be cured by insisting that Title IX offices hire staff members with criminal justice experience.

Preventing Sexual Misconduct

Because self-discipline is the key to success in almost every endeavor, schools should re-think their support of the hook-up culture, the only aspect of campus life where self-indulgence is promoted and glamorized. Students manage to restrain and govern themselves when studying, eating, exercising, working, paying rent, and countless other

activities. Why must passion trump prudence when it comes to human sexuality?

Sound public health policy argues against numerous transient and impersonal sexual encounters, given the risks of sexually transmitted diseases, not to mention the emotional hardship for those who find the detachment of casual sexual liaisons impossible to bear. And while the SUNY Geneseo student remarked that "girls want a relationship, but guys just want sex," men as well as women might prefer relationships if they had more opportunities to build them—more socializing at regular meals or other campus events, and fewer fraternity parties.

"Here we're all about pleasure and autonomy," offered James Madison's sex health counselor Jordan McCann. But hedonism packaged as freedom (or "autonomy") is really the opposite. Even the ancient world knew that blindly pursuing pleasure and succumbing to appetites were forms of slavery. True freedom requires that reason govern passion. That today's universities have lost sight of that ancient wisdom may be the more fundamental problem, not just with Title IX administration, but with campus and popular culture generally. One wonders: Who is benefiting from the mindless sexualization of young people? Both ideological and financial interests are probably in play.[148]

Finally, the absence of precautionary steps to prevent sexual misconduct should be rectified: Programs on alcohol abuse and healthy relationships should be much more common and prominent, and basic safety measures such as the buddy system, sign-in sheets at dormitories, and special late night protocols should be implemented (*e.g.*, video cameras at entrances and exits).

However problematic a law may become, it will always have a small constituency who benefits from it and who fights to further distort in their favor a law intended to support equality and impartiality. In the case of Title IX, two or three such constituencies are apparent. Title IX officers in colleges and universities will fight for Title IX on both ideological grounds and because of self-interest. Campus feminists will also

148 Miriam Grossman, *Unprotected: A Campus Psychiatrist Reveals How Political Correctness in her Profession Endangers Every Student* (New York: Sentinel, 2007).

fight for the perpetuation of Title IX as being key to their power and influence. They will be backed by the broader feminist movement, which is heavily invested in maintaining the idea that women are victims. And college and university administrators will favor keeping Title IX as a *bona fide* of their commitment to "social justice." We must reclaim Title IX for its intended purpose—equality under the law.

Conclusion

The Title IX law written and passed by Congress is a splendid statement of principle that is of abiding worth to our nation:

> "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

But this simple and clear declaration of principle has, over the last four-plus decades, been transformed via activist lawyers, short-sighted court decisions, edicts from administrative agencies, and willful misinterpretation by campus bureaucrats. Collectively they have turned Title IX into an instrument that has often promoted discrimination on the basis of sex, instead of preventing it, and that has itself perpetrated acts of injustice. Rescuing Title IX from its ardently misguided champions is the task that lies before us. This rescue has begun with new regulations that took effect in August 2020, but this is only a first step towards a larger renovation. This renovation can be accomplished without discarding Title IX itself, which is sound legislation. We will benefit as a nation, however, if Congress clarifies the meaning of a law that began in an effort to overcome discrimination but that, through hard usage, became a tool of discrimination.

Appendix

GOVERNMENT ACTION INCLUDING RULE-MAKING BY AGENCIES

Branch of Government	Actions	Work Product	Examples	Other
Legislative Nationally: United States Congress State: State Legislatures e.g. General Assembly of New York State in Albany, NY	"Legislating" "Passing" "Enacting" (passing binding laws)	"Legislation" "Statutes" "Enactments" "Authorizing legislation" State Statutes	Title IX of the Education Amendments of 1972 The Administrative Procedure Act The Americans with Disabilities Act New York's "Enough is Enough" law.	US Constitution vests all national legislative power in Congress. Administrative agencies such as the Department of Education ("DOE") act pursuant to authorizing legislation passed by Congress. Federal statutes are first enacted as Public Laws ("P.L.") & then are codified in the United States Code ("U.S.C."). State statutes appear in the state code.
Executive Nationally: Presidential Administrations comprised of the Cabinet & Executive Agencies State: Gubernatorial Administrations	The President signs or vetoes bills passed by Congress The President Issues Executive Orders Promulgating Rules and Regulations (pursuant to the APA) to effect legislation (binding) Providing guidance on legislation in absence of formal rules (while formal rules are being devised, for example) (non-binding)	"Legislation" "Statutes" "Enactments" "Executive Orders" "Regulations" "Final Rule" or "Rules" Resolution Agreement (binding) "Guidance" "Dear Colleague Letters" Q & A (non-binding)	Title IX of the Education Amendments of 1972 The Administrative Procedure Act The Americans with Disabilities Act OCR DOE Final Rule to implement Title IX issued Mary 14, 2020, "RIN 1870-AA14" (34 CFR Part 106) (binding) 2011 Dear Colleague Letter Q & A issued or posted while new regulations were proposed & devised	The Administrative Procedure Act (the "APA") governs agency action & the rule-making process. It requires the publication of a proposed rule in the Federal Register, time for public comment & publication of a Final Rule in the Code of Federal Regulations ("C.F.R.") Agency action is illegal if it violates the APA or if it contradicts or goes beyond the authorizing legislation (overreach) or is arbitrary & capricious. Congress reviews rules before publication.
Judicial Nationally: Federal Courts (trial/ district, appellate (circuit) & Supreme State: State Courts (trial, appellate & final)	"Deciding" "Ordering" "Finding" "Restraining" (in temporary restraining orders (TRO) or injunctions, for example)	Decisions Opinions Findings (of fact & law) Orders	*Davis v. Monroe County Board of Education* (1999) *Gebser v. Lago Vista Independent School District* (1998)	Court decisions bind parties to a case. However, opinions often announce rules for like cases; those rules are binding on like cases in that jurisdiction & are authoritative elsewhere. Opinions appear in "Reporters."

TITLE IX CASES & LITIGATION

LITIGATION ON ATHLETICS	U. S. SUPREME COURT DECISIONS ON TITLE IX SEXUAL MISCONDUCT	OFFICE FOR CIVIL RIGHTS ("OCR") Investigations	OTHER	RECENT CASES ON DUE PROCESS
Grove City College v. Bell (1984) Compliance with Title IX is necessarily only within individual school programs that receive federal funding (Congress overturned this decision with the Civil Rights Restoration Act of 1987 which clarified that recipient schools must comply with civil rights laws, not just individual programs within recipient schools.) *Cohen v. Brown University* (1993 and 1996, 1st Circuit Court of Appeals) Litigation throughout the 1990s establishing the "parity" or "proportionality" standard for women's collegiate athletics (recipient schools must support female athletes in proportion to their numbers on campus)	*Franklin v. Gwinnett County Public Schools* (1992) Authorized lawsuits under Title IX for money damages if a school does not respond to notice of sexual harassment (case involved sexual abuse of a student by a high school teacher / coach) *Gebser v. Lago Vista Independent School District* (1998) Damages can only be awarded in a Title IX case of **teacher-on-student harassment** if the school has **actual notice** of conduct & is **in a position to correct** it **but shows deliberate indifference** *Davis v. Monroe County Board of Education* (1999) Authorized damage awards under Title IX **in cases of student-on-student harassment** where school official had **actual notice** of misconduct & had **authority over offender** but was **deliberately indifferent;** conduct must be so "severe, pervasive & objectively offensive" as to deny access to education	University of Montana (2012 -) Formal investigation & compliance reviews by Obama Justice Department (DOJ) & Education Department (DOE) after female students complained the school inadequately responded to claims of sexual assaults by male student-athletes. Investigations were also completed by a former state supreme court justice and the Board of Regents Amherst College (2012) Former student A. Epifano filed OCR complaint stating school inadequately responded to sexual misconduct allegations. Amherst then appeared on a list of 50 institutions to be investigated by OCR for Title IX compliance https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations	*Alexander v. Yale* (2d Cir. 1980) Affirming district court holding that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education." *Yusuf v. Vassar Coll.* (2d Cir. 1994) "Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline."	*Doe v. Baum* (6th Cir. 2018) The Due Process Clause requires **public university** (U. of Michigan) to include hearing & cross-examination in Title IX sexual misconduct cases where outcome depends on credibility or competing narratives *Doe v. University of Sciences* (3d Cir. 2020) Fairness guarantees in student handbook, state jurisprudence & state administrative code require a live hearing & cross examination in sexual misconduct disciplinary proceedings **at private school** *Schwake v. Arizona Board of Regents* (9th Cir. 2020) Procedural irregularities (e.g. confidence breaches), plus evidence of school being pressured to act on stereotypes ("even minimal evidence") supports inference of sex discrimination against accused male student