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Hannah Walsh  
*Notre Dame Law School*

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# FURTHER HARM AND HARASSMENT: THE COST OF EXCESS PROCESS TO VICTIMS OF SEXUAL VIOLENCE ON COLLEGE CAMPUSES

*Hannah Walsh\**

*There are men and women, boys and girls, who are survivors, and there are men and women, boys and girls who are wrongfully accused . . . [T]he rights of one person can never be paramount to the rights of another . . . Due process is the foundation of any system of justice that seeks a fair outcome. Due process either protects everyone, or it protects no one.*

—Betsy DeVos, U.S. Secretary of Education<sup>1</sup>

## INTRODUCTION

In the spring of 2011, the campus sexual assault crisis in the United States began receiving unprecedented media attention.<sup>2</sup> At the same time, the Office for Civil Rights (OCR) within the Department of Education (DOE) promulgated new Title IX enforcement policies via the “Dear Colleague” letter in an effort to curb gender-based violence on campuses nationwide.<sup>3</sup> The letter required<sup>4</sup> universities receiving federal funding to lower

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\* Candidate for Juris Doctor, Notre Dame Law School, 2021. Bachelor of Business Administration in Business Honors, Texas A&M University, 2018. I would like to thank Professors Jennifer Mason McAward and Patricia O’Hara for their feedback and encouragement, and my colleagues on the *Notre Dame Law Review* for their diligent editing and support. All errors are my own.

1 Betsy DeVos, U.S. Sec’y of Educ., Address at George Mason Univ. (Sept. 7, 2017) [hereinafter DeVos Address]. For a transcript of the address, see *Read Betsy DeVos’ Speech About Changing Obama-Era Policies on Campus Sexual Assault*, TIME (Sept. 7, 2017), <https://time.com/4932283/betsy-devos-title-ix-sexual-assault-speech-transcript/>.

2 See Eilene Zimmerman, *Campus Sexual Assault: A Timeline of Major Events*, N.Y. TIMES (June 22, 2016), <https://www.nytimes.com/2016/06/23/education/campus-sexual-assault-a-timeline-of-major-events.html>.

3 “Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y, Office for Civil Rights, U.S. Dep’t of Educ. 2 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Dear Colleague Letter]. The scope of this Note will not include an evaluation of the Title IX policies or policymaking processes of the Obama-era Department of Education.

4 The guidelines in the 2011 Dear Colleague letter were not issued pursuant to formal notice-and-comment rulemaking and thus technically did not add requirements to applicable law. However, the letter was issued as a “significant guidance document” under the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Prac-

the standard of proof in sexual assault proceedings to a preponderance of the evidence and recommended that they implement appeals processes and shorten timeframes for adjudications to sixty days.<sup>5</sup> The new guidelines also “strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing.”<sup>6</sup> As a result of the increased attention to the issue, the complaints received by the Education Department annually about how campuses handle sexual violence more than tripled during the Obama administration.<sup>7</sup> Under threat of losing federal funding and facing escalating public relations crises, universities nationwide rapidly undertook steps to comply.<sup>8</sup>

Gradually, the entire zeitgeist surrounding gender-based violence, sexual harassment, and male-female power imbalances began to shift, culminating in the rapid spread of the #MeToo movement in 2017. During that same time period, the resistance to this burgeoning feminist effort, once reserved only for those on the fringes of society, progressively became more mainstream.<sup>9</sup> President Trump, addressing the nation, referred to this period as “a very scary time for young men in America.”<sup>10</sup>

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tices. Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007). OCR stated in the letter that the guidelines were intended to “provide[ ] information and examples to inform recipients [of federal funding] about how OCR evaluates whether covered entities are complying with their legal obligations.” 2011 Dear Colleague letter, *supra* note 3, at 1 n.1. Thus, universities perceived themselves to be at risk of losing federal funds if they failed to comport with the letter’s guidelines.

5 2011 Dear Colleague Letter, *supra* note 3, at 10–12.

6 *Id.* at 12.

7 Libby Nelson, *Sexual Assault on Campus*, Vox (Oct. 15, 2014), <https://www.vox.com/2014/10/15/18088608/campus-sexual-assault-title-ix>.

8 See, e.g., Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvements in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL’Y 49, 58 (2019) (noting that in April 2011, thirty-nine of the nation’s top 100 colleges did not use a preponderance standard in sexual misconduct adjudications but by 2016, all of them did).

9 For a discussion of extremist viewpoints gaining traction due to high-profile false accusations of sexual violence against women, see Reeves Wiedeman, *The Duke Lacrosse Scandal and the Birth of the Alt-Right*, N.Y. MAG (Apr. 14, 2017), <http://nymag.com/intelligencer/2017/04/the-duke-lacrosse-scandal-and-the-birth-of-the-alt-right.html>.

10 Nanette Asimov, *#MeToo Movement Spurs #HimToo Backlash: ‘People Don’t Want to Believe,’* S.F. CHRON. (Oct. 13, 2018), <https://www.sfchronicle.com/nation/article/MeToo-movement-spurs-HimToo-backlash-People-13304270.php> (describing the “male-as-victim movement,” largely promoted by the families of male students accused of sexual assault in university proceedings). For an argument that popular concerns regarding the perceived unjust treatment of the “villains” of the #MeToo movement have been overblown, see Richard Beck, *#MeToo Is Not a Witch Hunt*, Vox (Jan. 11, 2018), <https://www.vox.com/identities/2017/12/21/16803206/metoo-not-sex-moral-panic> (noting that of the highest-profile accusations of sexual harassment resulting from the movement, the accusations had been largely corroborated or gone un rebutted, while the “punishment” faced by those accused was appropriate: public shaming by the media and termination of employment).

All this resistance coupled with the watershed policy changes, increased oversight from the OCR, and rushed university overcompliance<sup>11</sup> led to a rise in concern for the rights of those accused of sexual harassment and assault on college campuses. Critics, including academics,<sup>12</sup> men's rights activists,<sup>13</sup> civil rights groups,<sup>14</sup> and the popular media,<sup>15</sup> became more vocal about the pattern of overcorrection they saw among universities in the aftermath of the 2011 Dear Colleague letter, citing concerns about fairness to respondents and the legitimacy of the disciplinary processes as a whole. During this time period, universities saw an increase in suits from students accused of sexual harassment alleging they were deprived of their Fourteenth Amendment

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11 See STOP ABUSE & VIOLENT ENV'TS, LAWSUITS AGAINST UNIVERSITIES FOR ALLEGED MIS-HANDLING OF SEXUAL MISCONDUCT CASES 1 (2016), <http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf> [hereinafter 2016 SAVE REPORT] (“[M]any colleges implemented changes that went well beyond the requirements of the Dear Colleague Letter, such as relying on a single investigator to adjudicate the case and imposing interim sanctions before the investigation was completed.”).

12 See, e.g., Open Letter from Members of the Penn Law Sch. Faculty on Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities (Feb. 18, 2015), [http://online.wsj.com/public/resources/documents/2015\\_0218\\_upenn.pdf](http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf); Elizabeth Bartholet et al., Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (publicizing an open letter signed by twenty-eight Harvard Law School professors criticizing the university's new Title IX policy as going significantly beyond the OCR requirements).

13 See, e.g., Gordon Finley, *Rescind “Dear Colleague” Letter*, WASH. TIMES (May 29, 2017), <https://www.washingtontimes.com/news/2017/may/29/letter-to-the-editor-rescind-dear-colleague-letter/> (urging President Trump to rescind the Obama-era guidelines on the grounds that the “fabricated” campus rape crisis was part of a progressive effort to continue a “war on men”). Gordon Finley is a National Coalition for Men (NCFM) adviser. NCFM reprinted Finley's *Washington Times* opinion on its website. *NCFM Advisor Gordon Finley Ph.D., Rescind “Dear Colleague” Letter*, NAT'L COALITION FOR MEN (May 30, 2017), <https://ncfm.org/2017/05/news/discrimination-news/discrimination-against-men-news/ncfm-adviser-gordon-finley-ph-d-rescind-dear-colleague-letter/>. For another example of men's rights activists' involvement, see also SAVE OUR SONS, <https://helpsaveoursons.com> (last visited Feb. 16, 2020) (tracking antimale state legislation, publicizing male plaintiff victories in due process litigation against universities, uncovering the “campus rape frenzy,” and connecting male students who have been falsely accused of campus sexual misconduct with legal assistance).

14 See, e.g., *Campus Due Process Litigation Tracker*, FOUND. FOR INDIVIDUAL RTS. EDUC., <https://www.thefire.org/research/campus-due-process-litigation-tracker/> (last visited Feb. 7, 2020) (tracking due process litigation arising from disciplinary processes on college campuses).

15 See, e.g., Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/> (demonstrating the negative impact of overly restrictive Title IX policies on respondents); see also Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES MAG. (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html>.

right to procedural due process during Title IX disciplinary hearings.<sup>16</sup> Ultimately, this litigation would culminate in First<sup>17</sup> and Sixth<sup>18</sup> Circuit holdings suggesting that a respondent in a Title IX hearing at a public university is entitled to some form of examination of their complainant.

Meanwhile, on September 7, 2017, Secretary of Education Betsy DeVos, on behalf of the Trump administration, announced the DOE would be rescinding the 2011 Dear Colleague letter guidance and instead initiating a formal notice-and-comment rulemaking procedure to “replace the current approach with a workable, effective, and fair system.”<sup>19</sup> These changes, including a live hearing requirement, a directive to presume a respondent’s innocence, and a mandate to provide an opportunity for live cross-examination via an agent of the parties, would constitute a significant departure from the priorities of the Obama-era DOE and indicate a shift toward adopting procedural safeguards typically reserved for criminal trial in the setting of educational disciplinary hearings.

This Note<sup>20</sup> argues that in employing the *Mathews v. Eldridge*<sup>21</sup> test to formulate the constitutional minimum process necessary to satisfy the Fourteenth Amendment in a Title IX university disciplinary hearing, federal courts have failed to adequately weigh the inevitable harm to survivors that will result from allowing one accused of sexual assault to personally cross-examine their accuser as part of the government interest at stake. Furthermore, this Note contends that any institution permitting the practice of respondents cross-examining their complainants commits sex discrimination in violation of Title IX by directly inflicting harm on its female students. Part I will provide an overview of how federal courts’ interpretation of Title IX evolved to protect students against sexual violence and harassment from their classmates and how courts have applied the Fourteenth Amendment to disciplinary hearings at public institutions of higher education. Part I will then largely focus on two recent appellate court decisions diverging on the

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16 See 2016 SAVE REPORT, *supra* note 11, at 2 (citing *Title IX Legal Database*, TITLE IX FOR ALL, <https://www.titleixforall.com/#section-legal-risk-management> (last visited Feb. 16, 2020)).

17 *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69–71 (1st Cir. 2019) (holding that respondent’s due process rights were not violated by the university’s denying him the opportunity to cross-examine the complainant because the “inquisitorial” nature of the questioning conducted by the university satisfied due process).

18 *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018) (holding that “if a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser”).

19 DeVos Address, *supra* note 1.

20 For clarity and convenience, female pronouns (she, her, hers) will be ascribed to accusers (complainants), while male pronouns (he, him, his) will be ascribed to those accused (respondents) throughout this Note. This author recognizes that people of all genders may be perpetrators or victims of sexual harassment and assault but notes that the vast majority of cases of assault on campuses are committed against women. See *Campus Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/campus-sexual-violence> (last visited Feb. 16, 2020).

21 424 U.S. 319 (1976).

degree of a respondent's entitlement to cross-examination in these hearings. Part II will then examine the psychological effects of the retraumatization victims face when forced to confront their attackers in proceedings, the gender bias that may result, and how these considerations effect the *Mathews* analysis. Finally, Part III will assess the proposed rule offered by the Department of Education for its fairness and ability to prevent systemic gender-based bias and will offer an alternative solution for protecting the due process rights of the accused.

## I. BACKGROUND

### A. *The Breadth of Title IX and Its Expansion to Include Student-on-Student Sexual Assault and Harassment*

Title IX of the Education Amendments Act of 1972 dictates that “[n]o 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.”<sup>22</sup> The statute was originally passed to expand the protections of the Civil Rights Act of 1964<sup>23</sup> into the sphere of education in the face of rampant gender discrimination. “[A]lthough gender-neutral sounding in today’s parlance,” the term “on the basis of sex” was originally intended to provide equal access to education for female students and educators.<sup>24</sup>

It was not until 1979 that the Supreme Court found the statute contained an implied private cause of action, allowing individuals who had been discriminated against by educational institutions based on their gender to sue for injunctive relief.<sup>25</sup> With the passage of the Civil Rights Remedies Equalization Amendment of 1986, Congress formally abrogated the immunity of states under the Eleventh Amendment for damages actions under Title IX.<sup>26</sup> After the Civil Rights Restoration Act of 1987<sup>27</sup> was passed, virtually all institutions of higher education (both private and public) must be compliant with Title IX.<sup>28</sup> The prohibition on gender discrimination applies

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22 20 U.S.C. § 1681(a) (2012).

23 42 U.S.C. § 2000e-2(a)(1) (2012) (making it unlawful for an employer to discriminate against an employee because of the employee’s “sex”).

24 Penny Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling “Due Process” Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN’S RTS. L. REP. 126, 132 (2018).

25 *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979) (noting that in passing Title IX, Congress sought to accomplish two objectives: (1) “to avoid the use of federal resources to support discriminatory practices” and (2) “to provide individual citizens effective protection against those practices”).

26 42 U.S.C. § 2000d-7.

27 Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 20 U.S.C. §§ 1681, 1687–1688, 29 U.S.C. §§ 706, 794, and 42 U.S.C. §§ 2000d-4a, 6107).

28 The vast majority of “private” colleges and universities receive substantial funding from the federal government in federal student loans, Pell grants, research grants and

to schools' admissions processes, access to financial aid, student services and counseling, and athletics, and disallows any form of retaliation against a student or employee for reporting violations.<sup>29</sup>

Though today the statute is largely recognized as a tool to combat the epidemic of gender-based violence on campuses, the text of Title IX makes no mention of sexual assault or harassment, and for more than twenty years after its enactment, no such suits were brought under the statute.<sup>30</sup> However, in 1986, the Supreme Court ruled that sexual harassment did amount to *workplace* discrimination on the basis of sex, in violation of Title VII.<sup>31</sup> In *Meritor Savings Bank, FSB v. Vinson*, the Court held that sexual harassment, even in the absence of tangible economic loss to a plaintiff, could impact the terms, conditions, or privileges of employment and therefore amount to an "arbitrary barrier to sexual equality" in violation of Title VII.<sup>32</sup>

Finally, in 1992, the Court endorsed this view of sex discrimination in the context of education in *Franklin v. Gwinnett County Public Schools*.<sup>33</sup> There, a student at a public high school who had been subject to continual sexual harassment and coercive sexual acts from her coach sued her school for money damages under Title IX.<sup>34</sup> Writing for the Court, Justice White explicitly invoked *Meritor Savings Bank*, drawing an analogy between a supervisor in a workplace and a teacher in a school.<sup>35</sup> Though OCR guidelines had previously categorized it as such, this was the first time the Court explicitly determined that sexual harassment could amount to discrimination in an educational setting under Title IX.

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tuition tax credits. Only a handful of private colleges reject all federal funding. See Nick Anderson & Danielle Douglas-Gabriel, *Hillsdale College, Subject of Senate Debate, Is Known for Rejecting Federal Funds*, WASH. POST (Dec. 15, 2017), [https://www.washingtonpost.com/local/education/hillsdale-college-subject-of-senate-debate-is-known-for-rejecting-federal-funds/2017/12/04/126f94ca-d91b-11e7-b1a8-62589434a581\\_story.html](https://www.washingtonpost.com/local/education/hillsdale-college-subject-of-senate-debate-is-known-for-rejecting-federal-funds/2017/12/04/126f94ca-d91b-11e7-b1a8-62589434a581_story.html).

29 U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1–2 (2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

30 Diane Heckman, *Tracing the History of Peer Sexual Harassment in Title IX Cases*, 183 EDUC. L. REP. 1, 2 (2004).

31 *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66–67 (1986). During that time period, the Supreme Court further expanded its interpretation of workplace discrimination based on sex under Title VII. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (recognizing "sex stereotyping" as a form of gender discrimination). For an analysis of how Title IX legislative history and judicial interpretation borrowed from, in many ways, that of other civil rights legislation, see JOHN D. SKRENTNY, *THE MINORITY RIGHTS REVOLUTION* 231–32 (2002).

32 *Meritor Sav. Bank*, 477 U.S. at 67 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

33 503 U.S. 60 (1992).

34 *Id.* at 63–64.

35 *Id.* at 75 ("[W]hen a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex'. We believe the same rule should apply when a teacher sexually harasses and abuses a student." (quoting *Meritor Sav. Bank*, 477 U.S. at 64) (citation omitted)).

However, doubt as to whether a school could be held liable for student-on-student sexual harassment remained until *Davis v. Monroe County Board of Education* reached the Supreme Court in 1999.<sup>36</sup> In her complaint, Aurelia Davis alleged that the defendants, her daughter's middle school principal, superintendent, and school board, created "an intimidating, hostile, offensive and abus[ive] school environment" by acting with deliberate indifference toward the "persistent sexual advances and harassment" of a classmate, undermining her daughter's Title IX rights.<sup>37</sup> Davis further argued that "Title IX's 'unmistakable focus on the benefited class,' rather than the perpetrator . . . compel[led] the conclusion that the statute works to protect students from the discriminatory misconduct of their peers."<sup>38</sup>

Though an institution cannot be held liable under either an agency or a negligence theory in Title IX actions, the Court ruled that there was evidence that it was the defendants' *own* actions that ultimately caused Davis' daughter to be subject to discriminatory harassment.<sup>39</sup> The linchpin in favor of finding that a cause of action existed was the degree of authority the defendants could exercise over both the context of the harassment and the harasser himself.<sup>40</sup> Writing for the Court, Justice O'Connor stated that in order to be actionable, student-on-student harassment must be "so severe, pervasive, and objectively offensive" as to "undermine[ ] and detract[ ] from the victims' educational experience, [so] that the victim-students are effectively denied equal access to an institution's resources and opportunities."<sup>41</sup>

Though the events in *Davis* occurred at a public middle school, where administrators obviously retain significant control over the conduct of their minor students throughout a structured school day, the extension of Title IX protection to student victims of classmate sexual harassment applies in the university setting as well.<sup>42</sup> As directives to adequately respond to reports of sexual assault and harassment and duties to take preventative measures were incorporated into the DOE's requirements regarding Title IX, universities began implementing robust procedures to hear and adjudicate related claims. As these processes became more formalized under OCR guidance

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36 *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 635–36 (1999).

37 *Id.* (alternation in original).

38 *Id.* at 639 (citation omitted) (quoting *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691 (1979)).

39 *Id.* at 640, 642, 652–54 (finding that the defendants' actions caused Davis's daughter to be subject to discriminatory harassment where multiple classmates were blatantly and continually harassed by the same perpetrator, those classmates told the principal, and the board made no effort to either investigate the allegations or put an end to the harassment).

40 *Id.* at 646.

41 *Id.* at 651 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986)).

42 For an argument that institutions of higher education bear many of the hallmarks of "closed systems," including exercising control over the daily activities of their students, thus subjecting their students to unique potential for harm, see Hannah Brenner, *A Title IX Conundrum: Are Campus Visitors Protected from Sexual Assault?*, 104 IOWA L. REV. 93, 107 (2018).



and the court of public opinion became more powerful, questions gradually began to arise regarding the rights of those accused in Title IX disciplinary hearings.

### B. *Current Fourteenth Amendment Requirements*

The Fourteenth Amendment demands that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>43</sup> Fundamentally, procedural due process requires notice and the opportunity to be heard,<sup>44</sup> but it is also inherently “flexible” and “calls for such procedural protections as the particular situation demands.”<sup>45</sup> Because of the significant interest a student has in pursuing higher education, particularly as it relates to reputation and future economic opportunities, courts have found that students have procedural due process rights in proceedings affecting their ability to continue to attend classes and participate in university activities.<sup>46</sup> Notably, the Fourteenth Amendment does not apply to proceedings at private universities.<sup>47</sup>

Universities are given significant leeway in determining how best to handle the misconduct of their students.<sup>48</sup> Furthermore, courts have repeatedly warned against requiring public universities to conform to the rules applying in courts of law.<sup>49</sup> However, where the most serious deprivations are at stake, such as suspensions of significant length or permanent expulsion, courts

43 U.S. CONST. amend. XIV, § 1.

44 See *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005).

45 *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

46 Courts of appeals are split as to whether students have property interests in pursuing public higher education. See *Doe v. Purdue Univ.*, 928 F.3d 652, 659 n.2 (7th Cir. 2019) (noting that though the First, Sixth, and Tenth Circuits recognize a generalized property interest in higher education and both the Fifth and Eighth Circuits have assumed as such without deciding, the Second, Third, Fourth, Seventh, Ninth, and Eleventh Circuits instead examine state law to determine whether there exists a legally protected entitlement to continued education at the university). Nonetheless, every circuit recognizes that a public university may violate a student’s due process through unfair disciplinary hearings.

47 Instead, suits against private universities are usually state breach of contract cases in which plaintiffs allege that their university failed to follow its own internal rules of procedure. See, e.g., *Doe v. Trs. of Bos. Coll.*, 942 F.3d 527 (1st Cir. 2019). In that case, the district court imported *Haidak’s* holding that an opportunity for “quasi-cross-examination” was required by the Fourteenth Amendment into the elements of a state contract claim for “basic fairness.” *Id.* at 533. The First Circuit rejected that argument, reminding the plaintiff that “[Boston College] is not a public university or a government actor and is not subject to due process requirements.” *Id.* Furthermore, the court refused to conflate constitutional requirements with the state law “basic fairness” elements on the basis of federalism concerns. *Id.* at 535 (“Federal courts are not free to extend the reach of state law.”).

48 See *Wood v. Strickland*, 420 U.S. 308, 326 (1975) (“It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.”).

49 See, e.g., *Flaim*, 418 F.3d at 635 (“[D]isciplinary hearings against students and faculty are not criminal trials, and therefore need not take on many of those formalities . . .”).

have found the Fourteenth Amendment to require additional process.<sup>50</sup> To determine what specific predeprivation process is due, courts balance the three factors laid out in *Mathews v. Eldridge*.

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>51</sup>

Courts have repeatedly recognized that, though students are not entitled to public higher education in the same way they are to primary and secondary schooling, students have a paramount interest in completing their education, particularly in avoiding mistaken exclusion from learning opportunities.<sup>52</sup> Additionally, as social pressures have mounted, universities have begun punishing rape more severely; the potential for social stigma and reduced career opportunities for those accused has correspondingly increased.<sup>53</sup> Accused students have strong personal and economic interests in avoiding these negative consequences (which can often have profound and lasting impacts, regardless of whether the respondent was ultimately found responsible for misconduct or not).<sup>54</sup>

On the other hand, universities have an important interest in protecting themselves from financial liability, as failure to comply with OCR Title IX requirements could result in a complete loss of federal funding for the institution.<sup>55</sup> Universities also have a strong interest in balancing the need for fair discipline against the need to allocate resources toward promoting the primary function of the institutions: education.<sup>56</sup> Finally, courts have found that educational institutions have strong interests in creating safe learning

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50 See, e.g., *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (“Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures.”).

51 *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

52 See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988).

53 Tamara Rice Lave, *READY, FIRE, AIM: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 701 (2016).

54 Stigma alone is not sufficient harm to result in a violation of the Fourteenth Amendment. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

55 Note, however, that no school has ever lost federal funding for violating Title IX. See R. Shep Melnick, *The Strange Evolution of Title IX*, 36 NAT'L AFFS. 19, 21 (2018) (“Exercising this ‘nuclear option’ is simply too administratively cumbersome and politically perilous.”). Furthermore, the DOE currently has no legal mechanism to levy fines against Title IX violators, though a bill to allow the DOE to do so has been introduced in the House. Hold Accountable and Lend Transparency (HALT) on Campus Sexual Violence Act, H.R. 3381, 116th Cong. § 4(5) (2019) (allowing the DOE “to impose a civil penalty to be paid by an institution of higher education that has violated a law under the jurisdiction of the Office for Civil Rights, the amount of which shall be determined by the gravity of the violation, and the imposition of which shall not preclude other remedies available under Federal law”).

56 See *Gorman*, 837 F.2d at 14–15.

environments by protecting their students from harm inflicted by those whose behavior violates the basic values of the school.<sup>57</sup>

In balancing the interests of those accused against those of educational institutions, the federal courts have made clear distinctions between the procedural due process rights one would have in a court of law and those constitutionally required in a university proceeding. The Supreme Court held in *Goss v. Lopez* that students are entitled to “effective notice” and an “informal hearing” prior to the implementation of a serious sanction, just as plaintiffs are entitled to in criminal courts and most administrative proceedings.<sup>58</sup> Unlike in a criminal trial, in which the rules of evidence are designed to err on the side of the defendant, DOE guidance has consistently provided that any right granted to one party must be provided to the other.<sup>59</sup> Furthermore, under the 2011 Dear Colleague letter, the standard of proof in Title IX hearings was a preponderance of the evidence, a far cry from the criminal trial standard of beyond a reasonable doubt.<sup>60</sup> Notably, the Supreme Court has never found that either a respondent or a complainant in a university disciplinary proceeding is entitled to legal representation, and multiple courts of appeals have affirmatively stated that students do not possess such a right.<sup>61</sup> In contrast, a defendant in a criminal trial possesses a constitutional right to legal counsel.<sup>62</sup>

In criminal trials, the Sixth Amendment’s Confrontation Clause mandates that a defendant has a right “to be confronted with the witnesses against him.”<sup>63</sup> Though there is often corroborating extrinsic evidence available, frequently the only witness who can testify to the actual events that

57 See *Doe v. Miami Univ.*, 882 F.3d 579, 599 (6th Cir. 2018).

58 *Goss v. Lopez*, 419 U.S. 565, 583 (1975). Several circuits have adopted the Fifth Circuit’s holding that sufficient notice necessitates providing the accused with information about the charges alleged and a description of the evidence that would, if proven, justify the sanction, and a proper hearing requires an opportunity to present a defense. See *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158–59 (5th Cir. 1961); see also Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN. ST. L. REV. 1001, 1003 (2016).

59 OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 4 (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

60 See 2011 Dear Colleague Letter, *supra* note 3, at 10–11.

61 See *Gorman*, 837 F.2d at 16.

62 *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963).

63 U.S. CONST. amend. VI. The Confrontation Clause was incorporated against the states in *Pointer v. Texas*, 380 U.S. 400, 407–08 (1965). Note that this right to cross-examination in criminal trials is not unlimited. See *Maryland v. Craig*, 497 U.S. 836, 849 (1990) (holding that while live cross-examination is strongly preferred, in special circumstances public policy may call for alternative means); *Smith v. Illinois*, 390 U.S. 129, 132–33 (1968) (quoting *Alford v. United States*, 282 U.S. 687, 692–94 (1931)) (holding that a trial judge has both the discretion to determine when cross-examination has been exhausted as well as the duty to protect witnesses from questions exceeding the proper bounds of cross-examination meant solely to harass, annoy, or humiliate them). For further explanation of how these limitations, particularly accommodations for child victims and other susceptible witnesses, are justified largely by the Court’s desire to “ensure truthful and unencumbered

occurred in a sexual assault case is the complainant herself, rendering victim testimony essential to any finding of fact.<sup>64</sup> Therefore, in a criminal trial, a defendant has a constitutional right to cross-examine his accuser. In such a situation, unless the defendant was pro se, questioning would occur indirectly via defendant's counsel. However, respondents in university disciplinary hearings currently have no right to an attorney, and schools have the discretion to determine whether or not to permit parties to have third-party agents represent them in Title IX proceedings.<sup>65</sup> Thus, if procedural due process granted respondents in Title IX hearings the same right to cross-examination that defendants have in criminal trials, under current rules, such a right would seem to include questioning of the complainant by the respondent personally. However, until 2018, a circuit court had yet to issue an opinion on the matter.

### C. *The Circuit Split over a Respondent's Right to Cross-Examination in Title IX Disciplinary Hearings*

In issuing its guidance for Title IX investigations and hearings, the Obama-era DOE's Dear Colleague letter provided: "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment."<sup>66</sup> Many universities nationwide immediately took steps to comply with OCR's suggestion.<sup>67</sup>

#### 1. Sixth Circuit: *Doe v. Baum*

One such school was the University of Michigan. John Doe, a junior, became the subject of a Title IX investigation when a female freshman accused him of sexually assaulting her after she became extremely intoxicated at a party.<sup>68</sup> Based on conflicting statements of the respondent, complainant, and their witnesses, the investigator concluded there was insufficient evidence to support either party's theory and recommended the

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testimony," see Alanna Clair, "An Opportunity for Effective Cross-Examination": Limits on the Confrontation Right of the Pro Se Defendant, 42 U. MICH. J.L. REFORM 719, 732 (2009).

64 The fact that the victim is likely the only person who can testify as to the events in question is not unique to cases of sexual assault. For example, muggings and physical assaults commonly occur in private or isolated spaces. For an argument that rhetoric suggesting otherwise originated in misogynistic English common law practices whose influence lingers today in the form of the concept of "he said, she said," see Allison Leotta, *I Was a Sex-Crimes Prosecutor. Here's Why 'He Said, She Said' Is a Myth*, TIME (Oct. 3, 2018), <https://time.com/5413814/he-said-she-said-kavanaugh-ford-mitchell/>.

65 Under the proposed rule, universities would be compelled to allow both parties to be represented by an "agent" but would also be permitted to limit the involvement of that agent in formal proceedings.

66 2011 Dear Colleague Letter, *supra* note 3, at 12.

67 See *supra* note 7 and accompanying text.

68 *Doe v. Baum*, 903 F.3d 575, 578–79 (6th Cir. 2018).

case be closed.<sup>69</sup> The complainant appealed, and after two closed sessions that involved only a paper review of the investigator's report, the three-person appeals board reversed, finding the complainant's narrative "more credible" than Doe's.<sup>70</sup>

Doe sued the university, alleging that his due process rights had been violated during the disciplinary proceedings.<sup>71</sup> Because the decision to sanction him ultimately turned on a determination of the credibility of the witnesses involved, he claimed he was entitled to live cross-examination of his accuser and other adverse witnesses.<sup>72</sup> The district court dismissed this claim, reasoning that the university's failure to provide an opportunity for cross-examination was "immaterial."<sup>73</sup>

On appeal, the Sixth Circuit affirmed the lower court in a split decision, ultimately holding that where the outcome of a Title IX case hinged on a question of competing narratives, "the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."<sup>74</sup> Deploying the *Mathews* test, the majority emphasized what was at stake for Doe in the proceeding:

Being labeled a sex offender by a university has both an immediate and lasting impact on a student's life. The student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled.<sup>75</sup>

In contrast, the opinion noted that the costs of implementing a process including an opportunity for cross-examination would be low, particularly because the university already provided such an option in all misconduct cases other than those involving Title IX.<sup>76</sup> Throughout the majority opinion, the court reiterated that *live* cross-examination was essential to attack a witness's credibility, particularly to identify inconsistencies in a witness's story, test his memory and intelligence, detect any existing ulterior motives, and allow the fact-finder to observe the witness's demeanor.<sup>77</sup>

According to the Sixth Circuit, live cross-examination, however, need not entitle accused students to *personally* question their complainant. The majority reasoned that a university's "legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment"

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69 *Id.* at 580.

70 *Id.*

71 *Id.*

72 *Id.* at 581.

73 *Id.*

74 *Id.* at 578.

75 *Id.* at 582 (citations omitted) (citing *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018)).

76 *Id.*

77 *Id.*

could easily be furthered by allowing a respondent's agent to conduct any cross-examination on his behalf.<sup>78</sup>

In his partial dissent, Judge Gilman questioned the repercussions of this holding, believing that although the accused has a constitutional right to at least a "circumscribed form" of cross-examination, allowing for the unfettered questioning by a representative was "a bridge too far."<sup>79</sup> Judge Gilman also questioned the practicality of the majority's allowance of an agent to perform the questioning, wondering who that representative would be, how the representative would be paid for, and what additional procedural protections would need to be in place.<sup>80</sup>

## 2. First Circuit: *Haidak v. University of Massachusetts-Amherst*

In 2019, the question about a respondent's entitlement to cross-examination arose in the First Circuit.<sup>81</sup> There, James Haidak, the plaintiff, was accused of assaulting and harassing his on-again-off-again girlfriend.<sup>82</sup> The University of Massachusetts-Amherst ultimately found Haidak responsible for assault and failure to comply with no-contact orders after conducting a live hearing.<sup>83</sup> Haidak did not have the opportunity to cross-examine the complainant in the hearing but was permitted to submit questions to the hearing board in advance.<sup>84</sup> The board did not ask any of Haidak's questions word for word, but many of their inquiries were designed to elicit similar information.<sup>85</sup> Haidak sued the university, arguing that by failing to accord him the opportunity to question his complainant directly, the hearing board violated his right to procedural due process.<sup>86</sup> The district court rejected that claim, relying on First Circuit precedent that declined to find cross-examination to be an "essential requirement of due process" in the context of school disciplinary hearings.<sup>87</sup>

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78 *Id.* at 583 (citing *Maryland v. Craig*, 497 U.S. 836, 857 (1990) (holding that where forcing the accuser to testify in the physical presence of the defendant in a criminal case may result in trauma, the court could ensure reliability through alternative procedures which employed cross-examination and ensured that the accused could be observed by the judge, jury, and defendant)).

79 *Id.* at 589 (citing *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. 2016)).

80 *Id.* (noting that a respondent has no constitutional right to an attorney, using a university-sponsored representative would impose additional burdens on the university, and that complications would arise should schools begin instituting rules of procedure and evidence).

81 *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68 (1st Cir. 2019).

82 *Id.* at 61–62.

83 *Id.* at 64.

84 *Id.*

85 *Id.*

86 *Id.* at 68.

87 *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 266 (D. Mass. 2018) (quoting *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988)), *aff'd in part, vacated in part, and remanded*, 933 F.3d 56.

On appeal, the unanimous First Circuit affirmed, noting that, though they can serve as a useful benchmark, “the rules that govern a common law trial need not govern a university disciplinary proceeding.”<sup>88</sup> Since an accused student has no right to legal counsel in institutional disciplinary hearings, the panel reasoned that Haidak essentially must have been demanding to question opposing witnesses himself.<sup>89</sup> The First Circuit then conducted a *Mathews* analysis and found that, particularly when conducted by “a relative tyro,” cross-examination can quickly “devolve into more of a debate,” thus rendering its probative value marginal, if not negative, and having no effect on the risk of erroneous deprivation.<sup>90</sup> The majority explicitly rejected the holding in *Doe v. Baum* and instead stated it would permit the questioning of a complaining witness by a neutral party, rather than by the respondent or his agent, as long as the inquisitorial approach employed by the school was adequate to uphold the respondent’s procedural due process rights.<sup>91</sup>

The court expressed concern that the costs imposed on the university by requiring trial-type procedures would outweigh the effectiveness of live cross-examination by the respondent or his counsel, and that mandating such a procedure would lead to a slippery slope, ultimately requiring the presence of counsel for both parties, further formalizing the process.<sup>92</sup> In the case at hand, the majority found that the university’s questioning procedure was “reasonably calculated to get to the truth” because Haidak had opportunities to be heard after the complainant spoke and the questions asked were “reasonably calculated to expose any relevant flaws in [the complainant’s] claims.”<sup>93</sup>

Thus, though both the First and Sixth Circuits agree that a respondent in a Title IX disciplinary hearing is entitled to *some* form questioning his complainant, a circuit split exists as to whether the scope of this right demands live cross-examination. Both courts of appeals emphasized the importance of employing a method that would improve the accuracy of the outcome in coming to their respective conclusions. Though the courts in both *Baum* and *Haidak* acknowledged that a complainant may be harmed by cross-examination, neither court devoted much time in its *Mathews* analysis to fully address the subject, particularly considering how such harm impacts the stated interest the universities have in conducting fair disciplinary hearings and protecting their students from harm.

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88 *Haidak*, 933 F.3d at 67.

89 *Id.* at 69.

90 *Id.*

91 *Id.* at 69–71.

92 *Id.* at 69–70.

93 *Id.* at 71.

## II. THE PERILS OF LIVE CROSS-EXAMINATION IN THE TITLE IX SETTING

In the wake of *Baum*, the University of Michigan changed its policy to allow both claimants and respondents to directly cross-examine one another in a Title IX hearing.<sup>94</sup> In response, the American Civil Liberties Union of Michigan wrote to the university's president:

While cross-examination is essential, this form is not. It is especially susceptible to abuse, will deter some students who have experienced sexual assault or harassment from filing complaints in the first instance, will undermine the equitable resolution of sexual harassment complaints, and risks contributing to a hostile environment on campus.<sup>95</sup>

This Section will attempt to explain why these effects will come to fruition by exploring the nature of the harm complainants would be susceptible to if forced to be subjected to cross-examination in a disciplinary hearing. Then, this Section will explore how permitting a respondent accused of sexual assault to cross-examine his complainant would amount to sex discrimination in violation of Title IX itself. Finally, this Section will explain why the First and Sixth Circuits' cursory consideration of these harms as part of a university's interest was inadequate in their performance of the *Mathews* balancing test.

### A. *The Psychological Effects of Sexual Assault on Complainants and the Impact of Victim Retraumatization on the Credibility of Testimony*

The Supreme Court has referred to cross-examination as the “greatest legal engine ever invented for the discovery of truth.”<sup>96</sup> Assuming such a powerful tool for accurately ascertaining the veracity of a claim exists, it makes perfect sense not only why an innocent respondent would want to employ it, but also why institutions of higher education would universally permit it: the ultimate purpose of a hearing is to determine the truth of the allegations in order to punish a culpable respondent and ensure that a safe,

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94 UNIV. OF MICH., THE UNIVERSITY OF MICHIGAN INTERIM POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 31–33 (2019), <https://studentsexualmisconductpolicy.umich.edu/files/smp/SSMP-Policy-PDF-Version011519.pdf> (“A typical hearing may include . . . questions posed by the hearing officer to one or both of the parties . . . and follow-up *questions by either party to any witness* (typically with the Respondent questioning the witness first).” (emphasis added)).

95 Letter from the Am. Civil Liberties Union Women's Rights Project & Am. Civil Liberties Union of Mich., to Mark S. Schlissel, President, E. Royster Harper, Vice President for Student Life & Timothy Lynch, Vice President & Gen. Counsel, Univ. of Mich., Re: Interim Policy and Procedures on Student Sexual and Gender-Based Misconduct and Other Forms of Interpersonal Violence (Sept. 5, 2019), [https://www.aclumich.org/sites/default/files/field\\_documents/2019.9.5\\_aclu\\_letter\\_to\\_university\\_of\\_michigan.pdf](https://www.aclumich.org/sites/default/files/field_documents/2019.9.5_aclu_letter_to_university_of_michigan.pdf).

96 *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1367, at 29 (3d ed. 1940)).



nondiscriminatory learning environment exists for the complainant. Neither of these goals is furthered by introducing inaccurate testimony.

However, cross-examination is, in reality, an imperfect mechanism which incentivizes respondents to undermine a witness' credibility in the eyes of the trier of fact, regardless of the truth of the testimony.<sup>97</sup> This invariably has collateral consequences for the witness, particularly in cases of sexual assault violence, where victims commonly experience lingering physical and psychological effects. Such consequences weaken the power of witness testimony and undermine the true purpose of cross-examination by interfering with the accuracy of the testimony provided.

Sexual assault itself frequently has both short- and long-term psychological, emotional, and physical effects on a survivor. The aftermath of experiencing sexual assault may manifest in a variety of ways, including but not limited to: post-traumatic stress disorder (PTSD), eating disorders, sleeping disorders, self-harm, dissociation, flashbacks, sexually transmitted infections, pregnancy, suicidal thoughts, and substance abuse.<sup>98</sup> Contrary to popular misconceptions, sexual harassment in the absence of physical violence can also be traumatizing for victims. Survivors are frequently diagnosed with depression or anxiety,<sup>99</sup> which can have huge effects on their personal relationships as well as their capacity to form healthy future sexual and romantic attachments.<sup>100</sup> Furthermore, experiencing an assault is detrimental to a survivor's performance in school.<sup>101</sup> Resulting depression and anxiety "may diminish the energy a woman has to commit to academic work or decrease

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97 See Abbe Smith, *Representing Rapists: The Cruelty of Cross Examination and Other Challenges for a Feminist Criminal Defense Lawyer*, 53 AM. CRIM. L. REV. 255, 276 (2016) ("You cannot make a mistake at a preliminary hearing by asking [the victim] too many questions or the 'wrong question.' You want it all—helpful testimony and damaging testimony—in order to counsel the client about his options, and because you never know what you might uncover.").

98 See *Effects of Sexual Violence*, RAINN, <https://www.rainn.org/effects-sexual-violence> (last visited Feb. 18, 2020); see also Elyssa Barbash, *Overcoming Sexual Assault: Symptoms & Recovery*, PSYCHOL. TODAY (Apr. 18, 2017), <https://www.psychologytoday.com/us/blog/trauma-and-hope/201704/overcoming-sexual-assault-symptoms-recovery> (noting that ninety-four percent of female rape victims experience symptoms of PTSD within two weeks of the attack and that thirty-three percent of female rape victims contemplate suicide).

99 See Nicole Spector, *The Hidden Health Effects of Sexual Harassment*, NBC NEWS (Oct. 13, 2017), <https://www.nbcnews.com/better/health/hidden-health-effects-sexual-harassment-ncna810416>.

100 It is often challenging for survivors to reorient themselves to consensual sex after trauma. See generally Nicole M. Lozano, *The Impact of Sexual Violence on Intimate Relationship Dynamics: A Grounded Theory Study* (Oct. 2015) (unpublished Ph.D. dissertation, University of Nebraska-Lincoln), <https://digitalcommons.unl.edu/cehsdiss/271/> (positing that healing from experiences of sexual violence while in a new intimate relationship requires disclosure from the survivor; a healthy, supportive, communicative relationship; and a strong social network).

101 See generally Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA VIOLENCE & ABUSE 191 (2014).

her ability to engage with other students.”<sup>102</sup> These psychological and physical effects, compounded by a survivor’s probable fear of interacting with her attacker on campus, lead to changes in regular behaviors and routines, often decreasing class attendance.<sup>103</sup> Women experiencing such distress are significantly more likely to drop out of college than their peers.<sup>104</sup>

In addition to the initial trauma experienced during the event and its immediate aftermath, survivors also commonly experience retraumatization. Retraumatization is the “reliving [of] stress reactions experienced as a result of a traumatic event when faced with a new, similar incident . . . [in which a] current experience is subconsciously associated with the original trauma, reawakening memories and reactions, which can be distressing.”<sup>105</sup> Symptoms of retraumatization can include flashbacks, dissociation, trouble concentrating, anxiety, and intense feelings of distress.<sup>106</sup> People often report losing their ability to control their emotions, practicing “[a]voidance of people, places, and situations related to the traumatic event,” or being in denial of past traumatic events.<sup>107</sup> These experiences frequently lead a survivor to experience intensified feelings of “[s]hame, blame, and . . . social isolation . . . creat[ing] a significant barrier to receiving much needed social support” and increasing the feeling of lack of safety, ultimately “keeping her in a protracted state of anxiety and fear.”<sup>108</sup>

In order to combat these symptoms, survivors are often encouraged to take steps to protect themselves, including seeking counseling and avoiding triggers. Survivors may be triggered by “anything in the most literal sense that is a reminder of the sexual assault,” including a location, smells, food, doctor’s exams, people who look like the attacker, an anniversary date, and even seemingly innocuous statements like comments or jokes.<sup>109</sup> Increased public dialogue on the topic of sexual violence as a result of the #MeToo

102 *Id.* at 197.

103 *See id.* at 193 (citing Angela Frederick Amar & Susan Gennaro, *Dating Violence in College Women: Associated Physical Injury, Healthcare Usage, and Mental Health Symptoms*, 54 *NURSING RES.* 235–36 (2005)).

104 *Id.* (noting that these effects are more pronounced for historically underserved students, specifically racial and ethnic minorities and first-generation college students). (;

105 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., *TIPS FOR SURVIVORS OF A DISASTER OR OTHER TRAUMATIC EVENT: COPING WITH RETRAUMATIZATION 1* (2017), <https://store.samhsa.gov/file/23777/download?token=LwOvj0Vv&filename=SMA17-5047.pdf&sku=SMA17-5047>.

106 *Id.* at 3.

107 *Id.*

108 LORI HASKELL & MELANIE RANDALL, DEP’T OF JUSTICE CAN., *THE IMPACT OF TRAUMA ON ADULT SEXUAL ASSAULT VICTIMS I*, 11 (2019), [https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma\\_eng.pdf](https://www.justice.gc.ca/eng/rp-pr/jr/trauma/trauma_eng.pdf).

109 Zerlina Maxwell, *If You’re Not Careful, You Could Be a Trigger, Too*, *WASH. POST* (May 28, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/05/28/if-youre-not-careful-you-could-be-a-trigger-too/> (quoting Monika Johnson Hostler, executive director of the North Carolina Coalition Against Sexual Assault, discussing possible triggers).

movement has created constant, painful reminders for survivors.<sup>110</sup> Of course, no stimulus spurs a more powerful reaction than being face to face with the attacker himself.

The credibility of a complainant's testimony is essential to an ultimate finding of guilt in a Title IX case; thus, if cross-examination is permitted, a respondent is incentivized to undermine this credibility, regardless of the truth of the testimony, in order to defend himself. Abbe Smith, a criminal defense attorney who frequently cross-examines rape victims in her practice, writes that defense attorneys usually begin cross-examination by "finding out everything about the central witness" through "thorough, detailed questioning."<sup>111</sup> Then, "[t]he witness's answers—memorialized in a transcript—become grist for later 'impeachment' in case he or she is at all inconsistent."<sup>112</sup>

Impeaching a witness involves attacking one or more of the following: a witness's perception, memory, or sincerity. Traumatic experiences themselves have detrimental effects on one's perception, impeding one's ability to give accurate testimony. "While witnessing normally proceeds 'from seeing to saying', this order can be reversed when the witness is traumatized: irretrievable experience is reinvented in recounting."<sup>113</sup> In the eyes of a trier of fact, this inability to recall details or confusion surely undermines a witness's credibility.

During live cross-examination, a complainant's sincerity could be called into question if she made any inconsistent statement or displayed a nervous demeanor. Because Title IX proceedings often hinge on witness credibility, any perceived insincerity on the part of the complainant could obviously be fatal to her case, regardless of whether it was caused by actual malice, bias, mistake, the physical effects of the assault, or the confrontation with the respondent himself. In the presence of the respondent, there is no real meaningful way to discern what caused a fault in the complainant's testimony. Thus, live cross-examination of a victim of sexual violence is inherently flawed, particularly in the presence of the accused, and cannot fulfill its purported purpose: to distinguish between truth and fiction.

### B. Gender Bias

In *Cannon*, the Supreme Court made it clear that the "unmistakable focus [of Title IX was] on the benefited class" rather than the perpetrator,<sup>114</sup> and the legislative history of the statute makes it obvious that the statute was

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110 Alison Bowen, *Harm from a Sexual Assault Can Continue for Years. The Triggers Are All Around.*, CHI. TRIB. (Sept. 27, 2018), <https://www.chicagotribune.com/lifestyles/sc-fam-how-assault-lingers-1002-story.html>.

111 Smith, *supra* note 97, at 256–57, 273.

112 *Id.* at 273 ("The cross-examination is full of verbal fencing—and fear[.]").

113 Claudia Welz, *Trauma, Memory, Testimony*, 27 SCRIPTA INSTITUTI DONNERIANI ABOENSIS 104, 105 (2016).

114 *Cannon v. Univ. of Chi.*, 441 U.S. 677, 691 (1979).

intended to secure equal access to education for women.<sup>115</sup> According to the Department of Justice, ninety-one percent of rape victims are women and nearly ninety-nine percent of their rapists are men.<sup>116</sup> Thus, it stands to reason that a majority of the complainants that are being subject to cross-examination by their alleged assaulters, and thus experiencing the harmful effects of retraumatization, will be women. The motive of many pro-respondent attorneys and men's civil rights groups reflects this gender disparity, as evidenced by the backlash to Obama-era guidelines, which is steeped in subtly sexist rhetoric.<sup>117</sup>

In *Davis*, the Court reasoned that it was fair to hold schools liable for student-on-student sexual harassment where the school exerts "substantial control over both the harasser and the context in which the known harassment occurs."<sup>118</sup> In Title IX hearings, it cannot be disputed that universities have complete control over the process or that the risk of harm to complainants that will result from cross-examination is obvious. By pursuing adjudication via university disciplinary process, complainants, who could have otherwise pursued law enforcement avenues or not reported the misconduct at all, become dependent on such procedures. Therefore, where schools themselves directly expose their students to harm by permitting respondents to conduct live cross-examinations of complainants, schools themselves are directly "subject[ing] [persons] to discrimination" under its "program[s] or activit[ies]" and thus are in violation of Title IX.<sup>119</sup>

Instituting cross-examination in disciplinary hearings will, at the very least, deter survivors from pursuing disciplinary outcomes for their attackers, and, at most, deter disclosure altogether. Evidence has shown that survivors are deterred from reporting upon hearing anecdotes of failed complaints or traumatic administrative procedures, ultimately resulting in a cycle of unreported cases.<sup>120</sup> Thus, by deterring disclosure and directly subjecting complainants to harm as a result of being victims of sexual violence, schools permitting live cross-examination of complainants are directly violating Title IX.

### C. *What This Means for the Mathews Balancing Test*

In determining the minimum procedures required to satisfy the Fourteenth Amendment in university disciplinary hearings for sexual misconduct

115 Venetis, *supra* note 24, at 132–33.

116 LAWRENCE A. GREENFELD, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 2 (1997), <https://bjs.gov/content/pub/pdf/SOO.pdf>.

117 See generally Annaleigh E. Curtis, *Due Process Demands as Propaganda: The Rhetoric of Title IX Opposition*, 29 YALE J.L. & HUMAN. 273 (2017).

118 *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

119 20 U.S.C. § 1681(a) (2012).

120 See LAUREN J. GERMAIN, CAMPUS SEXUAL ASSAULT: COLLEGE WOMEN RESPOND 75–78 (2016).

matters, courts have hardly paid lip service to the extent of a university's interest in protecting survivors of sexual assault at the hands of their peers.

The *Mathews* test to determine what additional predeprivation measures are required involves a balancing of an individual's interest against the government's.<sup>121</sup> The court in *Baum* reasoned that it would simply cost the university "very little" to implement a live hearing with an opportunity for cross-examination.<sup>122</sup> In *Haidak*, the court succinctly summed up the two interests being balanced: the respondent faced "a substantial suspension and complete expulsion," while the university "had probable cause to believe that he had used undue physical force on another student and continued to harass her."<sup>123</sup> Furthermore, in reasoning that a respondent had no due process right to personally cross-examine his complainant, the court looked not to the obvious harm a survivor may be subject to but instead to the administrative costs of imposing trial-like procedures.<sup>124</sup> These analyses completely overlook the purpose of Title IX: to ensure that students receive equal access to educational activities and programs, regardless of their gender. The government's undeniable interest in ensuring that taxpayer dollars are not funneled into programs that permit discrimination and protecting students from gender violence has seemingly been completely ignored by the courts.

Instead of focusing on the harms that would be inevitably inflicted on complainants in a live cross-examination, institutions of higher education have been expressly permitted by the courts to place emphasis solely on minimizing exposure to financial liability from Title IX suits<sup>125</sup> and the costs of implementing additional formalized procedures. This failure to account for the lived experiences of female students ultimately amounts to what Carly Parnitzke Smith and Jennifer J. Freyd refer to as an "institutional betrayal,"<sup>126</sup> or an institution's "failure to prevent or respond supportively to wrongdoings by individuals . . . committed within the context of the institution."<sup>127</sup> This

121 See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

122 *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018).

123 *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 66 (1st Cir. 2019).

124 *Id.* at 69 ("To impose . . . even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness." (omission original) (quoting *Goss v. Lopez*, 419 U.S. 565, 583 (1975))).

125 See UNITED EDUCATORS, LARGE LOSS REPORT 2019, at 1 (2019), <https://www.ue.org/uploadedFiles/Large-Loss-Report-2019.pdf> (noting an increase in damage awards and settlements worth more than \$250,000 in the wake of the #MeToo movement and cases against educational institutions).

126 Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOLOGIST 575, 575 (2014).

127 Jennifer J. Freyd, *Addressing Sexual Violence Through Institutional Courage*, PROJECT ON INSTITUTIONAL COURAGE., <https://www.jjfreyd.com/project-on-institutional-courage> (last visited Feb. 19, 2020).

phenomenon *further* dehumanizes victims and leads to deterrence of reporting, creating a vicious cycle of abuse without accountability.<sup>128</sup>

Thus, courts have failed to recognize that sexual assault and harassment are more than just an obstacle for victims pursuing an education—for many, they can be absolutely debilitating, impeding every aspect of the college experience. Universities, who have a special relationship with their student body, must be said to have an interest in preventing the furtherance of the harm caused by gender-based violence and harassment on campuses.

### III. EVALUATING THE DEPARTMENT'S PROPOSED RULE AND OFFERING A MORE JUST SOLUTION

Secretary of Education Betsy DeVos announced the impending rescission of the Obama-era Dear Colleague letter on September 7, 2017.<sup>129</sup> The following November, the proposed rule was published in the federal register.<sup>130</sup> If the rule were to go into effect,<sup>131</sup> institutions of higher education

must provide for a live hearing. At the hearing, the decision-maker *must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions*, including those challenging credibility. Such cross-examination at a hearing must be conducted by the party's advisor of choice, notwithstanding the discretion of the [university] . . . to otherwise restrict the extent to which advisors may participate in the proceedings. If a party does not have an advisor present at the hearing, the [school] must provide that party an advisor . . . . At the request of either party, the [school] must provide for cross-examination to occur with the parties located in separate rooms with technology enabling the decision-maker and parties to simultaneously see and hear the party answering questions.<sup>132</sup>

Advocates for enhanced procedural due process protections in Title IX hearings herald the holding of *Baum*<sup>133</sup> and its codification in the proposed rule. However, the new rule would unnecessarily *exceed* the protections advo-

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128 See Brooke Mascagni, *Rape, Apology, and the Business of Title IX Compliance*, 5 POL., GROUPS & IDENTITIES 182, 188–90 (2017) (“Rather than engaging in damage control, silencing . . . survivors of sexual violence, . . . [schools should] recognize [ ] the utility of institutional apology and reconciliation.”).

129 DeVos Address, *supra* note 1.

130 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 35 C.F.R. pt. 106).

131 For purposes of this Note, we will assume that, although not yet legally binding, institutions of higher education have begun to take efforts to conform to all the requirements and recommendations laid out in the proposed rule, as they did with the 2011 Dear Colleague letter.

132 Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61,474–75 (emphasis added).

133 See, e.g., Comment of the Found. for Individual Rights in Educ. in Support of the Department of Education's Proposed Regulations on Title IX Enforcement 34–35 (Jan. 30, 2019), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/01/30173030/FIRE-Comment-Title-IX-Enforcement-Appendicies.pdf>.

cated for by the circuit courts at the expense of complainants: the Sixth Circuit only required “some form” of cross-examination,<sup>134</sup> while the First Circuit expressly disapproved of any university practice that would permit a respondent to directly question a complainant.<sup>135</sup>

The proposed rule purports to exclude any unnecessary questioning about the complainant’s sexual history.<sup>136</sup> However, even practicing attorneys with ethical obligations violate professional rules when it comes to questioning witnesses while defending their clients for one simple reason: “[T]he use of unethical forms of cross-examination . . . are the most effective from a trial advocacy perspective.”<sup>137</sup> If we cannot trust attorneys in actual courts to protect the rights of witnesses against their clients, why should we trust them in less formal university proceedings to do the same? Let alone, how we could trust a nonattorney “agent” of the respondent whose interests are “closely aligned” with that of the accused to do so? Furthermore, schools are still permitted to ban parties from bringing in agents on their behalf during official proceedings under the proposed rule.<sup>138</sup> Thus, where universities wanted to avoid the additional expense of providing representation or training laypeople as representatives, or (sensibly) were suspect of the benefits of introducing an additional, likely biased third party into the disciplinary process, direct cross-examination would be required.

Furthermore, the proposed rule’s broad attempt to codify *Baum*’s interpretation of the Fourteenth Amendment leaves a crucial question: Why hold private universities to the same standard? Title IX is a Spending Clause statute, but the Fourteenth Amendment only applies to public universities.<sup>139</sup> Unlike primary and secondary education, the Supreme Court has long held that one is not legally entitled to pursue public higher education, let alone *private* higher education.<sup>140</sup> Though private universities may be at risk of a

134 *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

135 *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68–70 (1st Cir. 2019).

136 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,475 (“All cross-examination must exclude evidence of the complainant’s sexual behavior or predisposition, unless such evidence about the complainant’s sexual behavior is offered to prove that someone other than the respondent committed the conduct . . . or if the evidence concerns specific incidents of the complainant’s sexual behavior with respect to the respondent and is offered to prove consent.”).

137 Todd A. Berger, *The Ethical Limits of Discrediting the Truthful Witness: How Modern Ethics Rules Fail to Prevent Truthful Witnesses from Being Discredited Through Unethical Means*, 99 MARQ. L. REV. 283, 286 (2015).

138 *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 83 Fed. Reg. at 61,474.

139 For an argument that the distinction between private and public colleges should be eliminated and that the Constitution should apply with equal force to so-called “private” universities, see Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2018), <https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities/#25fcc3357bc>.

140 *See Bd. of Trs. of Univ. of Miss. v. Waugh*, 62 So. 827, 830–31 (Miss. 1913), *aff’d*, 237 U.S. 589 (1915).

breach of contract suit for departing from policies laid out in student handbooks, private institutions are not instruments of the state (thus lacking the same coercive power as the state) and thus are not held to more stringent constitutional standards.<sup>141</sup> That is not to say that private universities *shouldn't* comport to due process standards in an effort to promote fairness and preserve the perceived legitimacy of their processes, but rather, it seems to be a choice that a private university should have the leeway to make for itself by weighing its own values.

Instead, the DOE should deploy official notice-and-comment rulemaking to expressly prohibit the live cross-examination of victims of serious gender-based violence from either the respondent or his agent. Rather, the DOE should mandate the approach employed by the University of Massachusetts-Amherst in *Haidak*: a neutral factfinder asks questions of the complainant submitted by the respondent with the discretion to alter or eliminate questions as appropriate for the circumstances. This discretion could be constrained to purposes related to the impact on the complainant, perhaps based on the severity of the incident as well as the symptoms experienced by the particular complainant.

The rules could also instruct university hearing boards to meet directly with both the complainant and respondent separately to ensure the board has the opportunity to assess the demeanor of each party in answering questions. This would satisfy the Sixth Circuit's stated preference for *live* testimony, allowing triers of fact to assess witness demeanor for sincerity or irregularities, without subjecting the complainant to the harms of retraumatization that would likely follow from a direct confrontation between her and her attacker. Furthermore, such a procedure would serve the ultimate purpose of cross-examination, to ascertain the truth in a situation in order to ensure a just result, by tempering the effects of retraumatization on the testimony. Finally, the DOE could compel universities to provide each party with a transcript of the other's testimony. Where the respondent felt his questions had been inappropriately altered, the transcript could be used as evidence upon appeal or ultimately in a suit against the university.

#### CONCLUSION

In modern America, higher education remains a privilege, not a right. In assessing what due process rights are owed in Title IX hearings, courts have failed to recognize that they are not just weighing a respondent's interest in avoiding stigma and receiving an education against the interest of an

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141 *But see* Doe v. Rhodes Coll., No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019) (order granting in part and denying in part plaintiff's request for a temporary restraining order and preliminary injunction). There, the district court granted a temporary restraining order for the plaintiff, who had been expelled from the private university as a result of Title IX proceedings, which allowed him to return to campus (but not to graduate). Though the court conceded that the due process protections in the Fourteenth Amendment do not bind private institutions and cannot be invoked in a state breach of contract claim, Judge Fowlkes inferred that due process rights were guaranteed via Title IX itself.



institution bearing the marginal costs of providing additional process. Courts must instead remember that the stakes are much higher: the dignity, health, and opportunity to receive an education of complainants are on the line, not to mention the legitimacy of the disciplinary process in the eyes of an entire gender. If Secretary DeVos is correct that “rights of one person can never be paramount to the rights of another,”<sup>142</sup> we must demand university disciplinary processes that incentivize victims to come forward, protect them from further harm at the hands of the institution, and effectively combat the epidemic of gender-based violence on campuses. Though providing a fair forum for respondents is imperative, particularly to preserve the legitimacy of the process in the eyes of victims and the public at large and to ensure respondents are not subject to sham procedures (that would likely amount to a separate violation of Title IX), this cannot come at the expense of the ultimate goal of Title IX: to ensure that women receive equitable access to higher education.

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142 DeVos Address, *supra* note 1.