

Under the Guise of “Due Process”: Sexual Harassment and the Impact of Trump’s Title IX Regulations on Women Students of Color

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DOI: <https://doi.org/10.15779/Z38JM23G9Z>

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INTRODUCTION

Betsy DeVos, the Trump administration’s Secretary of Education, vowed in 2017 to replace the “failed system” of adjudicating campus sexual harassment¹ claims under Title IX of the Education Amendments of 1972 (Title IX).² In a speech announcing her proposed changes, DeVos lamented allegedly insufficient rights for the accused and university bias in favor of survivors.³ She argued that any perceived slight might lead to a full Title IX investigation under the existing system and exclaimed that “if everything is harassment, then nothing is.”⁴ DeVos’s remarks made the Trump administration’s goals for addressing campus sexual harassment claims at institutions of higher learning clear: narrowed investigatory requirements, heightened evidentiary standards, and expanded rights for the accused. Accordingly, under the guise of “due process,” DeVos has spent the past two years crafting the narrative that universities have “reacted [to Title IX requirements] with panicked overcompliance” and are failing their students.⁵

Supporters of DeVos’s plans suggest her changes are necessary to mitigate the disproportionate number of school expulsions and scholarship losses for Black male students under the Obama administration’s guidance for addressing campus sexual harassment.⁶ This professed concern for racial justice may have little foundation in reality as the claim lacks statistical support and relies heavily on evidence that is anecdotal at best.⁷ Furthermore, while DeVos advocated for changes to campus sexual assault adjudication, she also quietly oversaw the

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1. This Article will generally use the term “sexual harassment” to refer to any form of sexual conduct that is considered unwelcome by the target of the conduct. Throughout the Article, however, I specifically reference “sexual assault” when making points relevant to those incidents. When discussing another author’s work, I try to use the same terms used in their research.
 2. Susan Svrluga, *Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devos-remarks-on-campus-sexual-assault/> [<https://perma.cc/5MJS-CTMS>].
 3. *Id.*
 4. *Id.*
 5. Jeannie Suk Gersen, *Assessing Betsy DeVos’s Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school> [<https://perma.cc/QQP9-6BPR>].
 6. Erika Sanzi, *Black Men, Title IX, and the Disparate Impact of Discipline Policies*, REAL CLEAR EDUC. (Jan. 21, 2019), https://www.realcleareducation.com/articles/2019/01/21/black_men_title_nine_and_the_disparate_impact_of_discipline_policies_110308.html [<https://perma.cc/BLW9-322F>].
 7. See Emily Yoffee, *The Question of Race in Campus Sexual Assault Cases: Is the System Biased Against Men of Color?*, ATLANTIC (Sept. 11, 2017), <https://www.theatlantic.com/education/archive/2017/09/the-question-of-race-in-campus-sexual-assault-cases/539361/> [<https://perma.cc/RAS8-2D7Z>] (“Since there are no national statistics on how many young men of any given race are the subject of campus-sexual-assault complaints, we are left with anecdotes about men of color being accused and punished.”); see also Jeannie Suk Gersen, *Shutting Down Conversations About Rape at Harvard Law*, NEW YORKER (Dec. 11, 2015), <https://www.newyorker.com/news/news-desk/argument-sexual-assault-race-harvard-law-school> [<https://perma.cc/UQ8S-RF5F>] (“The dynamics of racially disproportionate impact affect minority men in the pattern of campus sexual-misconduct accusations, which schools, conveniently, do not track . . .”).

rescission of Obama-era guidance that specifically targeted school disciplinary bias against male students of color.⁸ DeVos has called for a “fair grievance process” on one hand while dismantling protections against racial discrimination on the other.⁹ Although a full examination of the contradiction of DeVos’s actions is beyond the scope of this Article, the Trump administration’s changes to the treatment of sexual harassment claims under Title IX will indeed have racial implications.

The Trump administration’s new Title IX regulations will undermine the rights of survivors. Specifically, the changes will likely discourage survivors from reporting sexual violence¹⁰ under Title IX, lead to disparate representation between parties to such claims, and result in higher rates of claim dismissal.¹¹ These negative consequences will particularly harm women students of color,¹² who experience sexual harassment and sexual assault at higher rates than their White counterparts. Evidence indicates, for instance, that women students of color have historically comprised between 26.2 and 45.2 percent of plaintiffs in college and university sexual assault cases while representing only 19.6 percent of students enrolled in college and university programs.¹³ This statistic strongly

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8. Lydia Wheeler, *DeVos Review of Racial Bias Guidance Stirs Controversy*, HILL (Apr. 11, 2018), <https://thehill.com/regulation/382574-devos-review-of-racial-bias-guidance-stirs-controversy> [<https://perma.cc/HDP9-JBV3>].
 9. See Helen Salita, *DeVos’ Campus Sexual Assault Changes Give More Rights to the Accused*, SOJOURNERS MAG. (Nov. 21, 2018), <https://sojo.net/articles/devos-campus-sexual-assault-changes-give-more-rights-accused> [<https://perma.cc/9HBL-FVDP>]. As of February 2019, DeVos had rescinded over twenty Obama-era policy guidelines on anti-discrimination laws. Gersen, *supra* note 5.
 10. “Sexual violence” is an umbrella term including both sexual assault and sexual harassment. This Article will use the term to broadly describe offenses covered under Title IX. Specific references to sexual assault and sexual harassment are made where appropriate and where the Article discusses these offenses in particular. Sexual assault includes acts or attempted acts of a sexual nature carried out against a person’s will through the use of physical force, intimidation, or coercion. Within the scope of this Article, sexual harassment includes unwanted sexual advances, requests for sexual favors, or other verbal and physical harassment of a sexual nature. See Nicola Henry, *Rape, Sexual Assault and Sexual Harassment: What’s the Difference?*, CONVERSATION (Mar. 26, 2018), <https://theconversation.com/rape-sexual-assault-and-sexual-harassment-whats-the-difference-93411> [<https://perma.cc/48PE-HRQD>]; see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, SEXUAL HARASSMENT, <https://www.eeoc.gov/sexual-harassment> [<https://perma.cc/PBY4-CATP>].
 11. See KATHARINE K. BAKER, DEBORAH L. BRAKE & NANCY CHI CANTALUPO, TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf> [<https://perma.cc/A5HV-MYJE>]; see also Nat’l Women’s L. Ctr., Comment Letter on Proposed Rule: Nondiscrimination on the Bases of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf> [<https://perma.cc/RU5H-BQAT>].
 12. “Women students of color” refers to individuals who are students and identify as women and as non-White. The term thus includes both cisgender and transgender women, as well as individuals whose racial identity is in whole or in part African, Asian, Latine, Pacific Islander, Middle Eastern, or Native American.
 13. Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 44–45 (2019) (summarizing a study of forty-two campus sexual assault cases ranging between 1998–2015).

suggests that women students of color are targeted at higher rates than their White colleagues.¹⁴ Therefore, the Trump administration’s regulations concerning sexual assault claims under Title IX will disproportionately affect women students of color.

Mitigating the negative impact of these regulatory changes on women students of color requires adopting policies that would benefit all survivors of campus sexual harassment. This Article offers recommendations for such policies. It explores the Trump administration’s Title IX regulations and the resulting implications for women students of color. It then suggests recommendations for reform that could enable educational institutions to better protect women students of color.

Part I initiates the discussion with an overview of the historical intersection of race and gender under Title IX. It then narrows the context to women students of color, who report sexual harassment at disproportionately high rates, and sexual harassment in schools.¹⁵ The Part concludes with a brief overview of factors that contribute to the heightened vulnerability of women students of color and the reasons it is vital for any Title IX reforms to account for these considerations.

Parts II and III review the Obama and Trump administrations’ different policies on adjudicating sexual harassment claims under Title IX. Part II describes the Obama-era guidance concerning sexual harassment on campus, its recognition of and advocacy for survivors, and its strengths in accounting for the intersection of race and gender. Part III provides insight into the Trump administration’s reversal of strides made by the Obama-era Office of Civil Rights (OCR) and discusses its changes in greater detail. Namely, Part III addresses the Trump administration’s decision to narrow the operative definition of sexual harassment, raise the standard of notice required to trigger a mandatory institutional investigation, raise the evidentiary standard required to succeed in a Title IX proceeding, and afford colleges and universities substantial discretion in addressing Title IX claims.

Part IV then provides a summary of the regulatory changes’ implications for women students of color and the educational institutions they attend. It offers insight into how women students of color who experience sexual harassment will likely proceed under the new regulations and how the regulations could impact the success of Title IX claims.

Part V closes with recommendations for regulatory reform under Title IX that could mitigate the negative consequences discussed in Part IV and achieve greater justice for all survivors of campus sexual harassment. To better understand these implications and recommendations, it is appropriate first to explore the intersection of race and gender and how it influences women students of color and their experiences pursuing sexual harassment claims under Title IX.

14. *Id.* at 45.

15. *Id.*

I. WOMEN STUDENTS OF COLOR AND SEXUAL VIOLENCE IN SCHOOLS

The intersection of race and gender has been discussed for decades by legal and social scholars who often advocate for legislation that recognizes the challenges faced by women of color attempting to “function at the junction” of these identities.¹⁶ However, this intersection has yet to be addressed in the law surrounding campus sexual assault. In the context of Title IX specifically, the intersection of race and gender has led to conflict and confusion about how to manage claims. For example, legal conflicts occur when a woman student of color is targeted for sexual harassment based on her gender and race simultaneously.¹⁷ In such cases, questions arise as to the legal remedies available to her and whether she should pursue relief under Title IX or under a different remedy, such as the Civil Rights Act of 1964. This decision matrix creates unnecessary complexity for women survivors of color and demonstrates the challenges women of color face in pursuing claims against perpetrators.

This complexity, combined with the increased vulnerability of women of color to sexual harassment, stresses the necessity for legislative and regulatory reform that accounts for the interplay between race and gender. The following discussion provides further insight into the experiences of women students of color and lays out factors legal scholars have identified as contributing to their heightened vulnerability to sexual harassment. This discussion provides the foundation from which this Article evaluates both the Obama and Trump administrations’ Title IX policies and their respective impacts on women students of color.

A. Reporting at Disproportionately High Rates

Despite increasingly popular campus climate surveys and mandatory reporting requirements for sexual harassment claims, statistical data on sexual misconduct published by educational institutions is limited.¹⁸ That said, several scholars have conducted original research and reviews of campus sexual harassment cases in attempts to capture the experiences of women survivors of color.¹⁹ Of these scholars, law professors Nancy Chi Cantalupo and William

16. Alfred Dennis Mathewson, *Black Women, Gender Equity, and the Function at the Junction*, 6 MARQ. SPORTS L.J. 239, 240 (1996); see also Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991) (“Because of their intersectional identity as both women and of color within discourses that are shaped to respond to one or the other, women of color are marginalized within both.”).

17. See Cantalupo, *And Even More of Us*, *supra* note 13, at 6 (asking “[w]hat standard will be used if she experiences racialized sexual harassment or sexualized racial harassment?”).

18. See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 7–8 (2014), <https://www.justice.gov/archives/ovw/page/file/905942/download> [<https://perma.cc/TT89-5AY3>] (recommending universities conduct “campus climate surveys” to obtain information regarding peer sexual harassment among students).

19. See Lilia M. Cortina, Suzanne Swan, Louise F. Fitzgerald & Craig Waldo, *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCH. WOMEN Q. 419, 428

Kidder conducted the most recent study, published in the *Utah Law Review* in 2018.²⁰

Professors Cantalupo and Kidder systematically reviewed a random selection of forty-two university sexual harassment cases decided between 1998 and 2015.²¹ According to their research, 45.2 percent of the plaintiffs were women of African American, Asian Pacific Islander, Latine, or Middle Eastern descent.²² Women students of color accounted for only 19.6 percent of students enrolled in college and university degree programs during that period.²³ Although this sample is somewhat limited, it suggests that women students of color report campus sexual harassment at disproportionately higher rates than their White colleagues. This is consistent with several studies on the reporting rates of women of color in the workplace.²⁴

Empirical evidence gathered on the experiences of women of color in the workplace indicates that women employees of color report sexual harassment at rates disproportionate to their representation in the workforce and at higher rates than their White colleagues. Tanya Hernandez, a Fordham law professor, found in her original study of workplace sexual harassment complaints made between 1964 and 2000 that “women of color were consistently overrepresented as complaining parties” whereas “white women were underrepresented despite their larger presence in the female labor force.”²⁵ Hernandez also found that among women who said they had been sexually assaulted, more women of color (91.8 percent) filed complaints than their White counterparts (77 percent).²⁶

A better understanding of sexual harassment in schools would require universities and other institutions of higher learning to improve data gathering and generate clearer statistics. However, the overall message is clear: women of color are targeted by sexual harassers in workplaces and on school campuses at disproportionately higher rates than their White counterparts. Educational institutions have an obligation to care about these statistics. Student survivors, particularly young women of color, face educational harms, health consequences, and economic costs that can negatively impact their continued presence on campus and pursuit of higher learning opportunities.

(1998) (finding that African American women and Latina women reported higher incidences of sexual harassment by educational faculty at one major university); *see also* MICHELE A. PALUDI & RICHARD A. BARICKMAN, *SEXUAL HARASSMENT, WORK, AND EDUCATION: A RESOURCE MANUAL FOR PREVENTION* 70 (1998) (citing 1992 and 1996 studies finding that “women of color, especially those with ‘token’ status” and “ethnic minority women,” experience higher rates of academic sexual harassment).

20. Nancy Chi Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, 2018 *UTAH L. REV.* 671 (2018).

21. Cantalupo, *And Even More of Us*, *supra* note 13, at 44–45.

22. *Id.*

23. *Id.* at 44.

24. *See, e.g.*, Tanya Katerí Hernández, *A Critical Race Feminism Empirical Research Project: Sexual Harassment & the Internal Complaints Black Box*, 39 *U.C. DAVIS L. REV.* 1235 (2005).

25. *Id.* at 1239.

26. *Id.* at 1254.

B. Contributing Factors to Heightened Vulnerability

Empirical evidence indicates that racial stereotyping, cultural stigma, and perceived economic disparity contribute to the higher rates at which sexual harassers target women of color.²⁷ Sexual harassment and sex discrimination scholars have long documented sexualized racial stereotypes surrounding women of color.²⁸ These sexualized racial stereotypes contribute to beliefs commonly held by harassers that women of color are sexually available or promiscuous and will welcome any sexual attention or conduct directed at them.²⁹ Scholars have found that, as a result of these stereotypes, the group of harassers that target women of color is likely larger and more racially diverse than the group of those who target White women.³⁰ Racial power dynamics likely deter most harassers of color from targeting White women.³¹ Racial and cultural perceptions influence how women of color are engaged by potential harassers and their interplay increases vulnerability to harassment and unwanted sexual advances.

Perceived economic disparity is another factor that contributes to the increased sexual harassment faced by women of color. On college campuses, women who have difficulty paying for necessities or who rely substantially on Pell Grants (need-based grants for low-income students) have an increased risk of experiencing sexual harassment.³² This risk is likely associated with socioeconomic power dynamics and privilege, including the limited ability of these survivors to obtain representation in sexual harassment proceedings.³³ Harassers often presume that women of color experience economic precarity and that they are thus easier to assert and enjoy control over than White women.³⁴ As a result of this presumption, potential harassers are likely to view women students of color as more vulnerable targets than their White colleagues.³⁵

The intersection of race and gender also poses an elevated level of complexity for women students of color pursuing sexual harassment claims. This complexity compounds their vulnerability to sexual harassment as a result of sexualized racial stereotypes, cultural stigma, and perceived economic disparity. Accordingly, federal legislation and regulations should be constructed to respond to sexual harassment claims in a manner that sufficiently accounts for the dynamics facing women students of color. The following review of the Obama-era Title IX guidance on campus sexual harassment assesses the Obama

27. Hernández, *supra* note 24, at 1244 n.39.

28. Cantalupo, *And Even More of Us*, *supra* note 13, at 46.

29. *Id.*

30. Maria L. Ontiveros, *Three Perspectives on Workplace Harassment of Women of Color*, 23 GOLDEN GATE U. L. REV. 817, 818 (1993).

31. *Id.*

32. Claude A. Mellins, Kate Walsh, Aaron L. Sarvet, Melanie Wall, Louisa Gilbert, John S. Santelli, Martie Thompson, Patrick A. Wilson, Shamus Khan, Stephanie Benson, Karimata Bah, Kathy A. Kaufman, Leigh Reardon & Jennifer S. Hirsch, *Sexual Assault Incidents Among College Undergraduates: Prevalence and Factors Associated with Risk*, PLOS ONE 14 (2017).

33. *See id.*

34. Cantalupo, *And Even More of Us*, *supra* note 13, at 49.

35. *Id.* at 26.

administration’s policies within this context and provides a foundation against which to evaluate the Trump administration’s regulatory changes.

II. OBAMA-ERA TITLE IX GUIDANCE ON SEXUAL VIOLENCE

In order to qualify for federal funding, colleges and universities must comply with both the statutory parameters of Title IX and the Department of Education’s directives, including Title IX regulations,³⁶ policy guidance, and “Dear Colleague Letter” documents.³⁷ Federal courts have held that educational institutions violate Title IX when they exhibit “deliberate indifference” when confronted with sexual harassment actions toward their students.³⁸ In order for a student to establish a Title IX sexual harassment case against a college or university, they must prove that the school is an institution that receives federal funding, that the student was discriminated against on the basis of sex, that they were deprived in whole or in part of access to or receipt of educational programs or activities, and that the university had an official policy of sexual harassment or acted with deliberate indifference after being placed on notice of the harassment.³⁹ So what constitutes deliberate indifference?

After the Supreme Court determined that Title IX covers sexual harassment,⁴⁰ the Obama Department of Education’s OCR, the entity responsible for enforcing Title IX, issued policy guidance reflecting that determination and outlining the expectations for educational institutions in managing sexual harassment claims.⁴¹ Specifically, the guidance warned that “if a school otherwise knows or reasonably should know of a hostile environment and fails to take prompt and effective corrective action, a school has violated Title IX even if the student has failed to use the school’s existing grievance procedures or otherwise inform the school of the harassment.”⁴² This policy compelled educational institutions to immediately and appropriately investigate sexual harassment claims

36. See 34 C.F.R. pt. 106 (2019).

37. See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, BACKGROUND, SUMMARY, AND FAST FACTS (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-factsheet-201104.pdf> [<https://perma.cc/8TK9-H6D7>] [hereinafter DCL FAST FACTS 2011]; see also U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/8LSX-2QDP>] [hereinafter OCR Q&A 2014].

38. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998); see also *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999); Diane Heckman, *The Role of Title IX in Combatting Sexual Violence on College Campuses*, 325 EDUC. L. REP. 1, 7 (2016).

39. *Gebser*, 524 U.S. at 290–91.

40. *Id.*

41. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 19, 2001), <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/HCB2-PJX2>].

42. *Id.* at 14.

and take prompt and practical steps to end sexual harassment.⁴³

The Obama administration, inspired by the growing student-led movement to end campus sexual harassment, attempted to improve protections for sexual harassment survivors by filling gaps in the policy's implementation and releasing additional guidance during President Obama's second term.⁴⁴ The Dear Colleague Letter and subsequent Question & Answer document released by the Obama administration standardized the evidentiary burden of proof across all Title IX adjudications, expanded the definition of "sexual harassment" to include sexual violence, and offered a more precise explanation of institutional responsibilities for adjudicating alleged sexual misconduct.⁴⁵ The OCR, under the guidance of then-Vice President Joe Biden, intended for this policy guidance to "strengthen enforcement of Title IX after a period of relative inaction."⁴⁶ An explanation of each of these policy documents and their role in developing more fair and equitable processes for educational institutions to resolve Title IX sexual harassment cases follows.

A. Dear Colleague Letter: Sexual Violence

The Obama-era OCR's Dear Colleague Letter (DCL) on Sexual Violence was released in April 2011.⁴⁷ The document reiterated previous OCR policy guidance and defined sexual harassment as "unwelcome conduct of a sexual nature" which creates a hostile environment where "the conduct is sufficiently serious that it interferes with or limits a student's ability" to obtain an education.⁴⁸ The DCL also expanded the definition of sexual harassment to include sexual violence, which it defined as rape, sexual assault, sexual battery, and sexual coercion.⁴⁹ The letter also required that schools respond to incidents of sexual harassment and violence regardless of whether they occur on campus, at a school facility, or in any other location, including off-campus.⁵⁰ It required schools to take "prompt and effective steps" to end sexual violence, prevent its recurrence,

43. Beccah Golubock Watson, *Know Your Rights: Sexual Violence on Campus*, YWCA (Oct. 18, 2013), <https://nwlc.org/blog/know-your-rights-sexual-violence-campus/> [https://perma.cc/6HS5-PML5].

44. See Janet Napolitano, "Only Yes Means Yes": *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 387–401 (2014) (noting that even prior to 2010, student activists "played a pivotal role in raising awareness of sexual violence and sexual assault on campuses").

45. NAT'L ASS'N OF STUDENT PERS. ADM'RS, BACKGROUND BRIEF: TITLE IX & SEXUAL ASSAULT PREVENTION AND RESPONSE 2–3, https://www.naspa.org/images/uploads/main/Title_IX_Sexual_Assault_Background_Brief_FINAL.pdf [https://perma.cc/9D3P-3W75].

46. Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 144 (2013).

47. Letter from Russlynn Ali, Assistant Sec. for Civ. Rts., U.S. Dep't of Educ., Off. for Civ. Rts. 10 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/YKV6-KR6L] [hereinafter DCL 2011].

48. *Id.*

49. DCL FAST FACTS 2011, *supra* note 37.

50. Gaines West, Meg Penrose & Amy Klam, *Title IX: The Difficulties in Protecting an Accused's Rights*, 80 TEX. B.J. 510, 510 (2017).

and address its effects, regardless of whether the sexual violence was or became the subject of a criminal investigation.⁵¹ Along these lines, the DCL created the Title IX Coordinator position and required all educational institutions receiving federal funding to designate or assign one employee to oversee all Title IX complaints. The Title IX Coordinator had to be sufficiently trained on the behaviors that constitute sexual misconduct and the respective institution’s grievance procedures.⁵²

Perhaps most notably, the DCL reiterated that the correct evidentiary standard to use in resolving complaints of sexual harassment was a “preponderance of the evidence” standard (i.e., it is more likely than not that the sexual harassment occurred).⁵³ This is particularly relevant for women students of color because race-based discrimination claims are adjudicated under this standard. The use of any other standard presents a challenge to women students of color who then must decide whether to frame a sexual harassment claim in terms of their gender or their race. Recognizing this challenge, the OCR noted that “the Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act,” another statute prohibiting discrimination on the basis of sex, as well as Title VI, a statute prohibiting discrimination on the basis of race in educational institutions.⁵⁴ As a result, the Obama administration reasoned that educational institutions should consistently use the same evidentiary standard to adjudicate claims under Title IX.⁵⁵

The decision to homogenize the evidentiary standards for complaints made under Title IX and complaints made under other civil rights statutes was met with mixed responses. Some scholars believe that because sexual violence is often a criminal offense, all complaints regarding sexual violence made under Title IX should be held to the criminal legal evidentiary standard (i.e., beyond a reasonable doubt) instead of a less burdensome civil standard.⁵⁶ Several Harvard Law professors, including Alan Dershowitz, published a piece in the *Boston Globe* objecting to the preponderance of the evidence standard, arguing that procedures under the DCL “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”⁵⁷

51. DCL 2011, *supra* note 47, at 16.

52. Sidney E. McCoy, *The Safe Campus Act: Safe for Whom? An Analysis of Title IX and Conservative Efforts to Roll Back Progressive Campus Sexual Assault Reform*, 122 PENN ST. L. REV. 763, 777–78 (2018).

53. DCL 2011, *supra* note 47, at 10.

54. *Id.* at 11.

55. *Id.*

56. See West et al., *supra* note 50, at 511; Audrey Wolfson Latourette, *Title IX Office of Civil Rights Directives: An Assault Against Due Process and First Amendment Rights*, 23 J.L. BUS. & ETH. 1 (2017).

57. Twenty-Eight Members of the Harvard Law School Faculty, *Rethink Harvard’s Sexual Harassment Policy*, THE BOSTON GLOBE (Oct. 15, 2014, 4:00 AM), <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [https://perma.cc/9XG2-K6WA].

Critics of the preponderance of the evidence standard fail to recognize the relationship between school adjudicatory and disciplinary procedures and Title IX—a federal *civil rights* statute. If campus sexual assault and an educational institution’s response to it are to be governed by Title IX and its associated regulations, as held by the Supreme Court,⁵⁸ then they must accordingly be viewed as civil rights issues. Furthermore, conflating an educational institution’s investigation and adjudication process with a criminal proceeding is simply incorrect. Educational adjudications do not carry the same weight as criminal proceedings, nor do they present a similar potential loss of liberty.

For women students of color, standardizing the burden of proof offers a practical solution to the dilemma of pursuing sexual harassment complaints under either racial or gender discrimination statutes. According to the Leadership Conference of Civil and Human Rights, the use of the preponderance of evidence standard provides equity for Black women and girls by ensuring fair and consistent treatment when reporting sexual harassment and violence on both race and sex bases.⁵⁹ Departure from this standard would “exacerbate inequities against survivors by mandating unfair processes that favor named harassers.”⁶⁰ Applying any higher standard under Title IX makes it significantly more challenging for women students of color to successfully prove their cases—benefiting named harassers—when claims are made under sex-based protections rather than under the umbrella of other civil rights laws.⁶¹ Women students of color who experience sexual harassment in higher education should not have to choose how they frame their argument in order to receive equitable opportunity and due process in pursuing claims against their perpetrators.

B. Questions and Answers on Title IX and Sexual Violence

The Obama Administration’s second policy document addressing sexual harassment claims made under Title IX was published on April 29, 2014, the same day the White House released the first report of the Task Force to Protect Students from Sexual Assault. The document, entitled Questions and Answers on Title IX and Sexual Violence (Q&A), reiterated the policies outlined in the 2011 DCL. It further prescribed training and preventative measures that educational institutions should take to curtail sexual violence, as well as the “immediate and appropriate steps” those institutions must take after a complaint is filed.⁶² The guidance reflected the message of the Task Force’s initial report that prevention plays an equally important role to post-incident procedures in protecting students from

58. See Gebser and Davis, *supra* note 38.

59. The Leadership Conf. on Civ. and Hum. Rts. et al., Comment Letter on Proposed Rule: Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 8 (Jan. 30, 2019), <http://civilrightsdocs.info/pdf/policy/letters/2019/Joint-Comment-Title-IX-NPRM-01302019-Final.pdf> [<https://perma.cc/AQ49-TBLF>].

60. *Id.* at 8–9.

61. *Id.* at 8.

62. OCR Q&A 2014, *supra* note 37, at 15.

sexual harassment.⁶³

The Q&A reiterated the three procedural measures schools must have in place to prevent sexual violence under Title IX. Specifically, the document elaborated on the requirements that schools disseminate a notice of non-discrimination, designate at least one employee to fill the Title IX Coordinator role, and adopt and publish grievance procedures for the “prompt and equitable” resolution of complaints.⁶⁴ The Q&A also outlined training requirements for school employees and the types of training schools should offer students on grievance procedures, what constitutes sexual harassment under the schools’ policies, and strategies and skills for preventing sexual violence.⁶⁵

Under the Q&A, once an incident of sexual harassment occurred, schools were deemed to have notice “if a responsible employee knew, or *in the exercise of reasonable care should have known*,” about the incident.⁶⁶ The Q&A defined a “responsible employee” as an employee who “has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX Coordinator . . . or whom a student could reasonably believe has this authority or duty.”⁶⁷ Further, once a responsible employee was given notice, they had to report the incident to the school’s Title IX coordinator or other appropriate designee.⁶⁸

The Q&A also elaborated on the many direct and indirect ways in which an educational institution, or a responsible employee of an institution, might receive notice about an incident of sexual violence, including sexual harassment and sexual assault. Examples of direct notice included a student filing a grievance or otherwise informing the institution’s Title IX Coordinator; an individual (including a student, parent, or friend) reporting an incident to a teacher, principal, campus police, the Office of Student Affairs, or other responsible employee; or a teacher or dean witnessing the incident.⁶⁹ Indirect sources of notice included social networking sites, members of the local community, and the media. Indirect sources are notable because under the Q&A, a school’s failure to take “prompt and effective corrective action” would violate Title IX even if the student survivor did not use the school’s formal grievance procedure or otherwise inform the school directly of the incident.⁷⁰

Per the Q&A, “prompt and effective corrective action” required that educational institutions protect the complainant and ensure their safety as necessary.⁷¹ It also required investigatory fact-finding and evidence-gathering in order to determine whether the conduct occurred and, if so, what actions the school

63. See DCL 2011, *supra* note 47, at 14–15.

64. *Id.* at 6.

65. OCR Q&A 2014, *supra* note 37, at 41.

66. *Id.* at 2 (emphasis added).

67. *Id.* at 15.

68. *Id.* at 14.

69. *Id.* at 2.

70. *Id.*

71. *Id.* at 3.

would take to address it and prevent its recurrence.⁷² Corrective actions might include imposing sanctions against the perpetrator and providing remedies for the complainant, such as changing academic and extracurricular schedules or living, transportation, and dining arrangements as appropriate.⁷³ The investigation, according to the Q&A, had to be “adequate, reliable, impartial, and prompt” and could include a hearing but did not necessarily require one under Title IX.⁷⁴

Critics of the Q&A, primarily conservative lobbyists and lawmakers, claimed that the document “created a system that lacked basic elements of due process and failed to ensure fundamental fairness.”⁷⁵ According to one attorney who represented accused students in Title IX cases, Obama’s policy guidance was an affront to “common sense and sanity.”⁷⁶ Some critics have even suggested that campus proceedings are the wrong forum entirely for sexual harassment claims and that campuses should be prohibited from investigating a sexual assault claim unless the survivor reported the assault to the police.⁷⁷

In reality, whether a reported incident results in criminal charges or not, universities must address campus sexual harassment to maintain a safe and equitable learning environment. To send all incidents to the criminal justice system could deprive survivors of equal educational opportunities and would violate the very essence of student civil rights under Title IX.⁷⁸ Criminal investigations aim to punish, and perhaps imprison, perpetrators of sexual violence.⁷⁹ Conversely, civil rights investigations, including those conducted under Title IX, intend to ensure complainant survivors receive equal access to educational opportunities that may become inaccessible due to sexual harassment or sex discrimination.⁸⁰ Furthermore, nearly 95 percent of campus sexual assault survivors never report their experiences to law enforcement, likely due in part to the long-standing history of bias against survivors of sexual assault.⁸¹

For women students of color in particular, linking access to campus

72. OCR Q&A 2014, *supra* note 37, at 24–25.

73. *Id.* at 32.

74. *Id.*

75. Press Release, U.S. Department of Education, Department of Education Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/EFF9-FQNU>].

76. Justin Dillon, *New Title IX Proposal Would Restore Fairness in Sexual-Misconduct Cases*, CHRON. OF HIGHER EDUC. (Nov. 19, 2018), <https://www.chronicle.com/article/New-Title-IX-Proposal-Would/245131> [<https://perma.cc/3URY-BVZ9>].

77. See Tyler Kingkade, *28 Groups that Work with Rape Survivors Think the Safe Campus Act is Terrible*, HUFFINGTON POST (Sept. 17, 2015), https://www.huffpost.com/entry/rape-survivors-safe-campus-act_n_55f300cce4b063ecbfa4150b [<https://perma.cc/9LRD-EF6F>]; see also Safe Campus Act, H.R. 3403, 114th Cong. (2015).

78. The Leadership Conference on Civil and Human Rights, *supra* note 59, at 8.

79. *Id.*

80. *Id.*

81. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1961 n.97 (2016) (“Akin to the [survivor]-blaming attitudes of some modern-day law enforcement officials, courts in the 1800s in England linked a woman’s lack of chastity to a lack of credibility in rape proceedings.”).

procedures to the criminal justice system can further deter reporting. Evidence indicates that women of color are less likely to report experiences of sexual violence to law enforcement because they do not trust that officials will take their claims seriously.⁸² Bolstering their suspicions are studies demonstrating that prosecutors are 4.5 times more likely to file charges if a survivor is White than if a survivor is Black.⁸³ A 2001 study indicated that over half of all sexual violence cases involving Black women survivors saw prosecutions denied and cases dismissed, compared to less than one third of cases involving a White woman survivor.⁸⁴

In an effort to increase reporting, the Obama-era Q&A policy guidance provided students with numerous ways to notify their schools about acts of sexual violence and placed no obligation or imposition on survivors to report such acts to law enforcement.⁸⁵ By separating campus adjudications from criminal procedures, the Q&A helped alleviate the risk that criminal reporting requirements would deter women students of color from reporting sexual harassment to their educational institutions. Unfortunately, the Trump administration’s regulations departed significantly from the concern for survivors’ rights that characterized the Obama administration’s approach to Title IX.

III. THE TRUMP ADMINISTRATION ON SEXUAL HARASSMENT UNDER TITLE IX

As previously mentioned, Obama’s DCL and Q&A elicited staunch resistance from conservative politicians. In that vein, the Trump administration rescinded both the DCL and Q&A on September 22, 2017, replaced the policies with interim guidance under the direction of Betsy DeVos, and then promulgated new regulations, effective August 14, 2020. The administration executed this rescission of Obama-era policies despite overwhelming public support for Obama’s Title IX guidance.⁸⁶ DeVos justified the action by claiming that the Obama-era guidance on campus sexual misconduct “lacked basic elements of fairness” and that the procedures implemented under the guidance treated accused students unfairly.⁸⁷

82. Michelle S. Jacobs, *The Violent State: Black Women’s Invisible Struggle Against Police Violence*, 24 WM. & MARY J. WOMEN & L. 39, 76 (2017).

83. *Id.* at 77.

84. *Id.* at 78.

85. See OCR Q&A 2014, *supra* note 37, at 27.

86. See Amanda Orlando, Mariko Cool, Nancy Chi Cantalupo & Tiffany Buffkin, *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, 9 CALIF. L. REV. ONLINE 71, 72 (Mar. 2019) <https://www.californialawreview.org/widely-welcomed-and-supported-by-the-public/> [<https://perma.cc/H9P4-SLT6>] (“Of the 12,035 public comments addressing Title IX, 99 percent . . . of the commenters filed a comment in support of Title IX, with 97 percent . . . of Title IX supporters specifically urging [the Department of Education] to uphold the 2011 Dear Colleague Letter.”).

87. Stephanie Saul & Kate Taylor, *Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017),

The new guidance immediately drew overwhelming criticism, and multiple survivor advocacy groups filed suit against the Department of Education seeking declaratory and injunctive relief from the guidance.⁸⁸ As a means of bolstering their standing in court, the Department of Education drafted regulatory changes to codify the guidance and published the proposed rules in the Federal Register for public comment on November 29, 2018.⁸⁹ The Department of Education then issued a Final Rule on May 6, 2020.⁹⁰ Although the regulatory changes implemented by the Trump administration diverge from Obama-era policy guidance in many ways, this Article focuses on four significant changes that will have far-reaching consequences for all survivors of campus sexual harassment and will disproportionately impact women students of color.⁹¹

Under the regulations, an educational institution violates Title IX only if it is (1) “deliberately indifferent” to (2) sexual harassment that is “so severe, pervasive, *and* objectively offensive that it effectively *denies* a person equal access to the recipient’s education program or activity,” and (3) a school employee with “the authority to institute corrective measures” had “actual knowledge” of the harassment.⁹² The new regulations also provide schools with (4) the discretion to choose between two evidentiary standards—preponderance of evidence or clear and convincing—in adjudicating sexual harassment claims under Title IX.⁹³ Thus, the Trump Administration’s Title IX regulations regarding the handling of sexual harassment allegations on college campuses will negatively impact survivors in four fundamental ways by (1) narrowing the definition of sexual harassment, (2) increasing the threshold for institutional notice, (3) heightening the evidentiary standard required to prove harassment, and (4) permitting a less rigorous institutional response. A detailed explanation of each of these policy modifications follows and provides a foundation upon which to discuss the impact of the regulatory changes on women students of color.

A. Deliberate Indifference

The Trump administration’s Title IX regulations require educational institutions to respond to sexual harassment⁹⁴ claims “in a manner that is not

<https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>
[<https://perma.cc/H6GY-UQUM>].

88. FORDHARRISON, *U.S. Department of Education Faces Lawsuit Challenging Recent Guidance Concerning Campus Sexual Misconduct* (Nov. 1, 2017), <https://www.fordharrison.com/us-department-of-education-faces-lawsuit-challenging-recent-guidance-concerning-campus-sexual-misconduct> [<https://perma.cc/CU7L-T3AP>].

89. 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 34 C.F.R. pt. 106).

90. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020).

91. Nat’l Women’s L. Ctr., *supra* note 11, at 7.

92. 83 Fed. Reg. at 61,466 (emphasis added).

93. *Id.* at 61,477.

94. Including sexual assault, as defined in 34 § C.F.R. 668.46(a) (Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act).

deliberately indifferent.”⁹⁵ Unlike the Obama-era policy guidance that required schools to respond “reasonably” and with “prompt and effective” corrective action, the new regulations require only that a school’s response not be “*clearly unreasonable* in light of the circumstances.”⁹⁶ The new regulations further state that an educational institution should only be held liable for Title IX violations if it “makes an intentional decision not to respond” to sexual harassment claims.⁹⁷

The Trump administration reasons that the deliberate indifference standard—the standard in “private actions for monetary damages”⁹⁸ under Title IX—should also apply to “administrative enforcement of Title IX” instead of the Obama Administration’s reasonableness standard.⁹⁹ However, this contradicts established understandings of the appropriate standard for administrative enforcement. The Solicitor General of the United States informed the Supreme Court that the deliberate indifference standard identified in *Gebser* does not apply to a federal agency enforcing Title IX administratively,¹⁰⁰ and the Department of Justice published the same determination in its Title IX Legal Manual.¹⁰¹

The proposed regulatory modifications allow schools to evade a finding of deliberate indifference by merely (1) responding to a formal complaint in accordance with the school’s outlined grievance procedures or (2), in the case that no formal complaint is filed, offering “supportive measures” to the complainant or the respondent.¹⁰² This weakens the regulatory scheme for ensuring Title IX compliance and affords educational institutions significant leeway in their responses, or lack thereof, to sexual harassment claims. This lower standard for measuring an educational institution’s response to sexual harassment will practically “shield schools from any accountability under Title IX.”¹⁰³

95. Susan D. Friedfel & Crystal L. Tyler, *Department of Education Amended Title IX Regulations*, JACKSON LEWIS (June 11, 2020), <https://www.jacksonlewis.com/publication/department-education-amended-title-ix-regulations> [<https://perma.cc/Q3C2-BHUT>].

96. 83 Fed. Reg. at 61,466.

97. *Id.* at 61,467.

98. See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) (“We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.”).

99. Jared P. Cole & Christine J. Back, *Title IX and Sexual Harassment: Private Rights of Action, Administrative Enforcement, and Proposed Regulations*, CONG. RSCH. SERV., 43 (Apr. 12, 2019), <https://fas.org/sgp/crs/misc/R45685.pdf> [<https://perma.cc/6L73-KQJR>].

100. Brief for the United States as Amicus Curiae Supporting Petitioner, *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (No. 97-843).

101. U.S. DEP’T OF JUST., CIVIL RIGHTS DIVISION, TITLE IX LEGAL MANUAL 100 (Jan. 11, 2001) [<https://perma.cc/PM4G-BEN3>] (“[F]or purposes of administrative enforcement of Title IX and as a condition of receipt of federal financial assistance—as well as in private actions for injunctive relief—if a recipient is aware, or should be aware, of sexual harassment, it must take reasonable steps to eliminate the harassment, prevent its recurrence and, where appropriate, remedy the effects.”).

102. 83 Fed. Reg. at 61,469–70.

103. Nat’l Women’s L. Ctr., *supra* note 11, at 21.

B. Narrowing the Definition

The Trump administration's regulations define sexual harassment under Title IX as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively *denies* a person equal access to the [school's] education *program or activity*."¹⁰⁴ This definition is significantly narrower than that established in Obama-era policy guidance,¹⁰⁵ which identified sexual harassment as conduct that *limited* a student's ability to participate in or benefit from a school's programming.¹⁰⁶ In contrast, the new regulatory definition requires that for conduct to be actionable under Title IX, it must be so severe that it *completely denies* a person access to education.¹⁰⁷

This new definition is also inconsistent with the Supreme Court's liability standard for holding schools accountable for sexual harassment. The Supreme Court has held that a school is liable for sexual harassment if the institution "effectively *denie[s]*" a student equal access to its "*resources and opportunities*."¹⁰⁸ Denial of "equal access to a school's 'program' or 'activity' is a more burdensome threshold" to prove than "denial of equal access to a school's 'resources' [and] 'opportunities.'"¹⁰⁹ The National Women's Law Center (NWLC) argues that "students are not equipped to understand the complexities of [the Trump administration's new] definition," as its drafting contemplates "trained lawyers and judges carefully weighing whether conduct meets each element of the standard."¹¹⁰ To ask students to "measure and parse their complaints" per this definition when they simply want a safe learning environment is inappropriate and inconsistent with the goals of protecting survivors.¹¹¹

For women students of color, the specific and heightened threshold for harassment under the new definition creates an additional layer of complexity when considering potential claims. Women students of color who survive sexual harassment must now not only consider whether the conduct meets the threshold required for schools to act but also whether their case would be more successful if adjudicated under race- or gender-based protections. Narrowly construing which conduct suffices to trigger institutional action will further discourage women students of color from reporting incidents of sexual violence and make their decisions to report more complicated.¹¹²

C. "Actual Knowledge"

The Trump administration's third significant departure from Obama-era

104. 83 Fed. Reg. at 61,466 (emphasis added).

105. See DCL 2011, *supra* note 47, at 3.

106. 83 Fed. Reg. at 61,462, 61,468–69.

107. See Cole & Back, *supra* note 99, at 43 (emphasis added).

108. Davis, 526 U.S. at 651 (emphasis added).

109. Nat'l Women's L. Ctr., *supra* note 11, at 13.

110. *Id.*

111. *Id.* at 13–14.

112. See *id.* at 14.

guidance seeks to further align the adjudicatory procedures and due process standards of Title IX to those of the criminal justice system—a harmonization which Professor Cantalupo has aptly termed “criminalizing” Title IX.¹¹³ The new regulations also dramatically increase the threshold for what constitutes notice to an educational institution when a sexual harassment incident has occurred. To trigger a mandatory institutional response, the regulations require that an educational institution have “actual knowledge” of an incident, defined as “notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official . . . who has authority to institute corrective measures on behalf of the [institution].”¹¹⁴ This regulation diverges from previous Title IX policy guidance in two major ways.

First, the Trump administration’s regulations require “actual knowledge” of an incident and clearly state that the “imputation of knowledge based solely on *respondeat superior* or constructive notice is insufficient” to hold a school liable under Title IX.¹¹⁵ This significantly increases the previous threshold for notice, which required only that an educational institution “knew or, in the exercise of reasonable care, should have known” about an incident of sexual harassment to be liable under Title IX.¹¹⁶ DeVos’s Department of Education reasoned that Obama-era policy guidance, which relied on the standard of notice established nearly twenty years ago in the 2001 guidance,¹¹⁷ did not give sufficient clarity to educational institutions regarding when they would be held liable for their conduct.¹¹⁸

Second, the requirement reduces the number of school officials to whom students may report an incident to establish effective and proper notice. The Trump administration’s regulations note that “the mere ability or obligation to report sexual harassment does not qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient” school.¹¹⁹ The Department of Education believes that this requirement ensures that an educational institution “is liable only for its misconduct.”¹²⁰

Unlike the Obama-era “responsible employee” standard, the new regulation fails to account for the reality that students who seek help often turn to “whatever

113. See Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 325 (2019) (“Criminalization impedes civil rights laws’ functions because equality is not a goal. The criminal justice system is focused on keeping the abstract, general community safe from violence, and primarily relies on incarceration of criminal actors to protect that community. The system will not—because it structurally *cannot*—protect [survivors’] rights to equal treatment and protection.”).

114. 83 Fed. Reg. at 61,466.

115. *Id.*

116. OCR Q&A 2014, *supra* note 37, at 2.

117. DCL 2011, *supra* note 47, at 2.

118. 83 Fed. Reg. at 61,466.

119. *Id.*

120. *Id.* at 61,467.

adult they trust the most.”¹²¹ This reduction in the number and type of employees who can receive proper notice is particularly likely to impact women students of color who typically do not see themselves represented in school administrations. Furthermore, students are likely uninformed about which employees have the authority required under the new regulations to address harassment and therefore receive proper notice.¹²² Consequently, the notice requirement “unjustifiably limits the set of school employees” who can receive the actual notice that triggers a school’s required response and accountability under Title IX.¹²³ In practice, the Department of Education’s implementation of this requirement fails survivors by reducing the likelihood that a school will be held liable for failing to respond to an incident.

D. Clear and Convincing Evidence

The Trump administration’s final regulatory change suggests that schools use a clear and convincing evidence standard in Title IX proceedings as opposed to the Obama administration’s preponderance of the evidence standard. The clear and convincing standard requires “[e]vidence indicating that the thing to be proved is highly probable or *reasonably certain*.”¹²⁴ Conversely, the preponderance of the evidence standard requires only that facts indicate it is *more likely than not*, or there is a greater than 50 percent chance, that the perpetrator committed the alleged acts.¹²⁵ The suggestion of the higher threshold of the clear and convincing standard is allegedly intended to increase due process rights for the accused.¹²⁶ Still, the regulations provide schools the option to apply either the former preponderance of the evidence standard or the stricter clear and convincing evidence standard.¹²⁷

A school’s discretion to choose which evidentiary burden of proof they apply comes with two stipulations. First, a school may apply the preponderance of the evidence standard “only if the [school] uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”¹²⁸ Second, the school “must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.”¹²⁹

These stipulations create additional barriers to preventing sexual harassment and effectively responding to sexual harassment claims. The first stipulation makes students contemplating Title IX proceedings responsible for knowing which standard their educational institution applies and breeds inconsistency in campus adjudications across the country. Complainants at schools that apply the

121. Nat’l Women’s L. Ctr., *supra* note 11, at 15.

122. *Id.*

123. *Id.*

124. *Evidence*, BLACK’S LAW DICTIONARY (11th ed. 2019) (emphasis added).

125. *See Preponderance of the Evidence*, BLACK’S LAW DICTIONARY (8th ed. 2004).

126. *See* 83 Fed. Reg. at 61,477.

127. *Id.*

128. *Id.*

129. *Id.*

clear and convincing standard will have more difficulty proving their claims than their counterparts at schools that apply the preponderance of evidence standard.

Furthermore, the second stipulation raises a significant complication for schools with previously negotiated standards of proof for proceedings involving employees. Many educational institutions have collective bargaining agreements (CBAs) in place with labor organizations that explicitly require the use of the clear and convincing standard during employee adjudication hearings.¹³⁰ For example, the American Association of University Professors Collective Bargaining Congress, a major labor organization that negotiates CBAs at institutions of higher education in the United States, has successfully pursued a clear and convincing standard for faculty discipline in multiple CBAs they have negotiated.¹³¹ The American Council on Education contends that it is impractical to expect institutions to renegotiate these CBAs in order to apply the preponderance of the evidence standard across all Title IX proceedings.¹³² The Trump administration has therefore made clear and convincing evidence the “*de facto* federally prescribed standard” through these stipulations.¹³³

The new regulations clearly depart from Obama-era policy guidance and the practice under other civil rights protections. As Professor Cantalupo explains, departure from the preponderance of the evidence standard creates “an immediately obvious intersectional legal conflict.”¹³⁴ The new standard singles out sexual harassment survivors for less protection than survivors of racial or other discriminatory harassment.¹³⁵ The use of inconsistent evidentiary standards thus presents conflicting thresholds for women students of color, who identify and may pursue remedies both as women and as people of color.¹³⁶ Under the new Title IX regulations, women students of color who experience sexual harassment and pursue gender-based remedies will quite possibly experience different and unequal treatment than if they framed their experiences as primarily racial harassment.¹³⁷

Increasing the evidentiary burden, along with other deviations from prior policy guidance, indicates that the Trump administration sought to, according to Professor Cantalupo, criminalize Title IX.¹³⁸ By making Title IX investigation and adjudication procedures more like those of the criminal justice system, the

130. See Joanna L. Grossman & Deborah L. Brake, *A Sharp Backward Turn: Department of Education Proposes to Protect Schools, Not Students, in Cases of Sexual Violence*, VERDICT (Nov. 29, 2018), <https://verdict.justia.com/2018/11/29/a-sharp-backward-turn-department-of-education-proposes-to-protect-schools-not-students-in-cases-of-sexual-violence> [<https://perma.cc/KT7H-Y2K3>].

131. See *id.*

132. Ted Mitchell, Am. Council on Educ., Comment Letter on Proposed Rule Amending Title IX Regulations 18 (Jan. 30, 2019), <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> [<https://perma.cc/G9EY-SAZX>].

133. *Id.*

134. Cantalupo, *And Even More of Us*, *supra* note 13, at 7.

135. *Id.* at 8.

136. *Id.*

137. *Id.*

138. Cantalupo, *Dog Whistles*, *supra* note 113, at 325–26.

Department of Education will fail to “protect victims’ rights to equal treatment and protection” and make it more difficult for educational institutions to provide a safe learning environment.¹³⁹ Implications for women students of color, who experience sexual harassment at higher rates and must navigate the complexity of intersecting identities, will be extensive.

IV. IMPLICATIONS FOR WOMEN STUDENTS OF COLOR

The Trump administration’s regulations will impact all students engaged in Title IX proceedings but will have a disproportionately negative impact on women students of color. Sexual harassers target women students of color at higher rates than other populations, and the Trump administration’s Title IX regulations present particular challenges for these women and the schools they attend. The regulations will make it more difficult for institutions of higher education to prevent sexual harassment against women students of color and for student survivors to file and pursue successful claims against perpetrators. The regulations will discourage women students of color from reporting sexual harassment, lead to disparate representation of parties in educational adjudications, and likely increase the rate at which claims are dismissed.

A. Hesitancy to Report

While studies show that women students of color are more likely to report incidents of sexual harassment than their White colleagues, reporting rates under prior policy guidance were still relatively low.¹⁴⁰ Historical surveys indicate that incidents of sexual harassment and misconduct on college campuses are “widely underreported.”¹⁴¹ One study conducted by the National Institute of Justice found that, on average, only 16 percent of survivors who were physically forced into sexual acts against their will, and 8 percent of those who experienced sexual assault through incapacitation contacted a survivor’s, crisis, or health care facility after the incident.¹⁴² Another study estimated that over 95 percent of campus sexual assault survivors do not report incidents to campus authorities,¹⁴³ and a 2015 study of twenty-seven universities found that 28 percent or less of “even the most serious incidents are reported.”¹⁴⁴

139. Cantalupo, *Dog Whistles*, *supra* note 113, at 325.

140. Hernández, *supra* note 24, at 1239–1241.

141. See Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 124 (2016).

142. Christopher P. Krebs, Christine Lindquist, Tara D. Warner, Bonnie S. Fisher & Sandra L. Martin, NAT’L INST. OF JUST., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xvii (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/U42A-FCKR>].

143. Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, NAT’L INST. OF JUST. & BUREAU OF JUST. STAT., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN: RESEARCH REPORT, 31–33 (2000), <https://files.eric.ed.gov/fulltext/ED449712.pdf> [<https://perma.cc/N85F-AS5S>].

144. David Cantor, Bonnie Fisher, Susan Chibnall, Reanne Townsend, Hyunshik Lee, Carol Bruce & Gail Thomas, WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL

The new official definition of sexual harassment is lengthy and complicated. Asking students to carefully weigh their complaints in accordance with a definition drafted for lawyers and judges may further impact reporting rates. The most commonly cited reason for students not reporting sexual harassment is fear that the incident was “insufficiently severe” to yield a response.¹⁴⁵ Further, a student may believe they endured severe and pervasive harassment but not know whether it was “objectively offensive” or “effectively denied [them] equal access” to a “program or activity.”¹⁴⁶ Women students of color, in particular, are now left to weigh whether their complaints meet the updated definition of sexual harassment and navigate the complicated analysis of whether they should frame their complaint in terms of racial or gender-based discrimination in order to obtain relief.

Furthermore, should a student experience an incident of sexual harassment that meets the Trump administration’s definition, the difficulty of identifying an “appropriate” official to whom they can formally report an incident may further discourage survivors from reporting their experiences. As the NWLC has observed, “even when students find the courage to talk to . . . school employees they trust, schools [will] frequently have no obligation to respond”¹⁴⁷ if those employees do not have the “authority to institute corrective measures” under the regulations.¹⁴⁸ Colleges and university administrations are historically and overwhelmingly White, so it may be more challenging for women students of color to identify officials to whom they feel comfortable reporting an incident and who also have the authority to take action.¹⁴⁹

Moreover, as previously discussed, evidence indicates that women students of color worry that sexualized racial stereotypes cast doubt on the truth of their claims. That concern is not without empirical support.¹⁵⁰ Studies have shown that the sexualized racial stereotypes described in Part I of this Article “perpetuate the notion that African American women are willing participants in their own victimization.”¹⁵¹ One survey also found that White college students perceive

ASSAULT AND SEXUAL MISCONDUCT iv (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [https://perma.cc/3ZNV-T3P9].

145. See Kathryn J. Holland & Lilia M. Cortina, “*It Happens to Girls All the Time*”: Examining Sexual Assault Survivors’ Reasons for Not Using Campus Supports, 59 AM. J. CMTY. PSYCH. 50, 61 (2017).

146. See Nat’l Women’s L. Ctr., *supra* note 11, at 13–14.

147. *Id.* at 16.

148. 83 Fed. Reg. at 61,466.

149. See Lorelle L. Espinosa, Jonathan M. Turk, Morgan Taylor & Hollie M. Chesman, AM. COUNCIL ON EDUC., RACE AND ETHNICITY IN HIGHER EDUCATION: A STATUS REPORT, 247–48 (2019), <https://1xfsu31b52d33idlp13twtos-wpengine.netdna-ssl.com/wp-content/uploads/2019/02/Race-and-Ethnicity-in-Higher-Education.pdf> [https://perma.cc/Y2E6-HSPH].

150. See Jacobs, *supra* note 82, at 46 (noting that the stereotype of Black women as “promiscuous” contributes to the underreporting, under-investigation, and under-prosecution of sexual assaults of Black women compared to those of White women).

151. See CAMPUS ADVOC. RES. & EDUC., *Sexual Violence Resources for Students Who Identify as*

Black women survivors of sexual assault as less believable and more responsible for their assault than White women survivors.¹⁵² As a result, the Title IX regulations will ultimately discourage women students of color in particular from reporting sexual harassment.

B. Disparate Representation of the Parties

Under the Trump administration's regulations, when a student reports an incident of sexual harassment, the narrowed definition, the de facto requirement of a stricter evidentiary standard, and the mandate for a live hearing will create a trial-like proceeding.¹⁵³ As the American Council on Education points out, "a courtroom-like 'trial' atmosphere will develop, with both students represented by counsel."¹⁵⁴ Under the Obama administration's policy guidance, educational institutions had to appoint advisers to support claimants and respondents throughout the investigation and adjudication and to present evidence to similarly situated campus officials.¹⁵⁵ The regulations no longer require universities to appoint such representation, leaving the parties to fend for themselves.¹⁵⁶ As a result, if the accused independently hires an experienced litigator, schools may struggle to ensure the survivor's representation is comparable without offering some form of financial assistance.¹⁵⁷ For women students of color in particular, the prospect of disparate representation in sexual harassment cases will acutely increase due to possible financial constraints and limited access to counsel.

The financial resources available for women students of color to pursue claims of sexual harassment, particularly in undergraduate education, are significantly limited compared to similar resources available to White women students. A study conducted by the American Council of Education found that 84.4 percent of Black students completed the Free Application for Federal Student Aid (FAFSA) to finance their undergraduate study for the 2015-2016 school year.¹⁵⁸ The study also found that, more than any other racial group, Black students

Women of Color, UC MERCED 2, https://care.ucmerced.edu/sites/care.ucmerced.edu/files/page/documents/sexual_violence_and_women_of_color_1.pdf [<https://perma.cc/U9P4-XA4M>].

152. Roxanne A. Donovan, *To Blame or Not to Blame: Influences of Target Race and Observer Sex on Rape Blame Attribution*, 22 J. INTERPERSONAL VIOLENCE 722, 723 (2007).

153. 83 Fed. Reg. at 61,474.

154. Mitchell, *supra* note 132, at 10.

155. See OCR Q&A 2014, *supra* note 37, at 26 (noting that the OCR did not require schools to permit parties to have lawyers in addition to any appointed advisers and that if lawyers were allowed in proceedings, schools were required to allow lawyers equally for both parties).

156. See *Choosing an Adviser: Frequently Asked Questions Regarding Title IX/Sexual Misconduct Advisers*, PRINCETON UNIV. (Aug. 3, 2020), <https://sexualmisconductinvestigations.princeton.edu/information-parties/choosing-adviser> [<https://perma.cc/9PWX-7B9A>] ("Parties are responsible for identifying and choosing an adviser for themselves, as well as reaching out to that adviser regarding their availability to serve as an adviser.").

157. See *id.* (stating that Princeton University, for instance, will provide certain financial resources to assist a party if they choose to engage an attorney as their adviser but that the process and details regarding such arrangement are forthcoming).

158. Espinosa et al., *supra* note 149, at 157.

reported zero expected family contribution towards their education.¹⁵⁹ The same study noted that Black recipients of both associate’s and bachelor’s degrees graduated with higher average debt than students from any other racial and ethnic groups.¹⁶⁰ Women students of color, especially Black women students, rely more consistently on federal financial aid, grants, and scholarships to finance their education than their White colleagues. Accordingly, they likely have fewer financial resources readily available to them to vigorously pursue sexual harassment claims.

The costs associated with Title IX adjudications are extensive. The costs of legal counsel for Title IX proceedings could rise to as much as \$100,000 under the Trump administration’s regulations.¹⁶¹ In addition to the cost of legal counsel, student survivors of sexual harassment often incur medical and counseling expenses and may experience lost scholarships and defaults on student loans as a result of the mental and emotional toll.¹⁶² For women students of color, who often rely significantly on financial aid to pursue their education, the expense of experienced legal counsel may be particularly cost-prohibitive.¹⁶³ Although the OCR has often required that educational institutions reimburse survivors for some expenses, the increased financial burden of pursuing a sexual harassment claim with legal counsel presents an immediate barrier for survivors.¹⁶⁴

State legislatures and survivor advocacy groups have proposed solutions for this issue, but none have meaningfully mitigated the constraints facing women students of color. For example, in 2018, the Maryland state legislature passed a bill that required the Maryland Higher Education Commission (MHEC) to provide access to and pay for attorneys for students at public institutions pursuing Title IX sexual harassment claims.¹⁶⁵ According to Democratic Delegate Brooke Lierman, the state legislature sought to “make sure that students have access to an attorney so that if they decide to bring [Title IX claims], the cost is not a barrier.”¹⁶⁶

159. Espinosa et al., *supra* note 149, at xiv.

160. *Id.*

161. Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), <https://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html> [<https://perma.cc/4GW5-R62A>].

162. See KNOW YOUR IX: STATISTICS (last visited Aug. 9, 2020), <https://www.knowyourix.org/issues/statistics/> [<https://perma.cc/335Z-4QH7>] (stating that the costs of rape can range from \$87,000 to \$240,770 per rape and include medical treatment, counseling, and harder to quantify impacts on quality of life).

163. See WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2, 15 (2014), https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf [<https://perma.cc/6H3Z-UUGK>] (noting that a rape can cost a survivor between \$87,000 and \$240,776 over the span of their lifetime).

164. Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L. J. 2106, 2112 (2016).

165. See H.B. 913, FISCAL AND POLICY NOTE, 3D READER REV. (Md. Gen. Assembly, 2018 Session), http://mgaleg.maryland.gov/2018RS/fnotes/bil_0003/hb0913.pdf [<https://perma.cc/EF56-S9D2>].

166. Brad Dress, *This Maryland Bill Would Budget for the State to Pay Students’ Title IX Legal Fees*, DIAMONDBACK (Feb. 27, 2019), <https://dbknews.com/2019/02/27/maryland-title-ix-legal-fund-students-sexual-misconduct-budget-commission-attorneys/> [<https://perma.cc/G9X4-SQ3G>].

However, the state budget failed to allocate the necessary funds to MHEC, so no students benefitted.¹⁶⁷ Further, legislation of this nature fails to address how students at private institutions that receive federal funding can obtain sufficient and equitable access to legal counsel.

The American Council on Education has proposed that absent any other solution, as part of their Title IX compliance, educational institutions themselves should be forced to pay for students' access to sufficient legal counsel.¹⁶⁸ The increased procedural and evidentiary requirements of the new regulations will require sophisticated legal representation and would therefore increase costs for schools.¹⁶⁹ While the solution to disparate representation remains unclear, the issue is a legitimate and obvious concern for student survivor advocates, and it will likely present a considerable obstacle for women students of color under the new regulations.

C. Increased Dismissal of Claims

Assuming a woman student of color reports sexual harassment and participates in the campus investigation and adjudication with sufficient and equitable representation, the Trump administration's regulations still increase the probability that her educational institution will dismiss the claim. Despite purportedly basing recommendations on creating due process, the Department of Education must anticipate the coming rise in dismissal rates of sexual harassment claims. In fact, the very essence of the regulatory modifications is to elevate the difficulty of reporting and proving sexual harassment for survivors.¹⁷⁰

Admittedly, an increase in the dismissal rates of campus sexual harassment claims will affect far more than just women students of color—it will negatively affect all complainants. The degree to which a dismissal of one's claim may specifically affect women students of color, however, is significant. According to the NWLC, the dismissal of a woman student of color's sexual harassment claim is often accompanied by disciplinary action against the survivor.¹⁷¹ Shiwali Patel,

167. Dress, *supra* note 166.

168. See Mitchell, *supra* note 132, at 10.

169. *Id.*

170. Erica L. Green, *Sexual Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html> [<https://perma.cc/L2TE-ALQ5>] (noting that many believed “the rules were meant to decrease the number of Title IX investigations on campus and chill sexual assault and harassment reporting”); see also Ruth Lawlor, *How the Trump Administration's Title IX Proposals Threaten to Undo #MeToo*, WASH. POST (Feb. 4, 2019), <https://www.washingtonpost.com/outlook/2019/02/04/how-trump-administrations-title-ix-proposals-threaten-undo-metoo/> [<https://perma.cc/F9TV-X2N3>] (“By undermining the ability of [survivors] to come forward, pared-back Title IX provisions will reinscribe the racist status quo by limiting the kinds of cases that can be heard.”).

171. Tyler Kingkade, *Schools Keep Punishing Girls—Especially Students of Color—Who Report Sexual Assaults, and the Trump Administration's Title IX Reforms Won't Stop It*, THE74MILLION (Aug. 6, 2019), <https://www.the74million.org/article/schools-keep-punishing-girls-especially-students-of-color-who-report-sexual-assaults-and-the-trump-administrations-title-ix-reforms-wont-stop-it/> [<https://perma.cc/BR6N-394S>].

an attorney at NWLC, claims, “These discriminatory responses from schools are far too common, particularly towards girls of color and especially Black girls, who—because of harmful race and sex stereotypes—are too often disbelieved.”¹⁷² Exacerbating the issue, DeVos’s regulations fail to explicitly outline any prohibition of retaliation against either complainants or witnesses or any notice of the parties’ right to be free from retaliation, whether or not the claims are dismissed.¹⁷³

Nevertheless, the disincentives and obstacles that DeVos’s regulations present to women students of color are not insurmountable. In providing comments on the regulations, survivor advocacy groups have made it resoundingly clear that options for fair reform do exist. The following section presents recommendations for some such options.

V. RECOMMENDATIONS FOR ALLEVIATING THE NEGATIVE IMPACT ON WOMEN OF COLOR

Alleviating the negative impact of the Trump Administration’s Title IX regulations on women students of color requires recognizing and embracing the intersection of race and gender and adopting a holistic approach to addressing and preventing sexual harassment under Title IX. It also requires developing policies that embrace intersectionality to pragmatically solve the dilemmas present under existing civil rights statutes. Three recommendations that promote such an approach to Title IX enforcement include (1) an end to the “criminalization”¹⁷⁴ of sexual harassment claims made under the statute, (2) a return to the preponderance of the evidence standard, and (3) a reinvigoration of and a new emphasis on the role and responsibilities of the Title IX Coordinator. If implemented, these recommendations will better equip educational institutions to prevent and address sexual harassment.

A. Distinguishing the Educational Adjudication Process from a Criminal Court of Law

The first step towards facilitating a more equitable process for enforcing Title IX is to distinguish educational adjudications of claims made under the civil rights statute from criminal courts of law. Title IX is unquestionably a civil rights statute and exists principally to prevent discrimination based on gender. Its implementation and enforcement should fall in line uniformly with the administrative enforcement of other civil rights statutes like Title VI, which prohibits schools from discriminating based on race or national origin.¹⁷⁵ The

172. *Id.*

173. *See* 83 Fed. Reg. at 61,472–74.

174. Cantalupo & Kidder, *supra* note 20, at 325–26.

175. *See* U.S. DEP’T OF JUST., TITLE VI LEGAL MANUAL 1, <https://www.justice.gov/crt/fcs/T6Manual6> [<https://perma.cc/T9Q7-QLG6>] (last visited Oct. 30, 2019) (providing guidance on the enforcement of Title VI and practical tips for adjudicating claims made under the statute).

Trump administration's policies regarding campus sexual harassment and new regulations, however, will dramatically alter how educational institutions enforce Title IX. The requirements for investigating and adjudicating sexual harassment claims in the new regulations depart significantly from the standards under other civil rights statutes and the policies of previous administrations, while conflating campus disciplinary proceedings with criminal courts of law. One need only review historical case law to know this is wrong.

In *Gorman v. University of Rhode Island*, the First Circuit held that a fair disciplinary proceeding in a campus setting is not “one that necessarily must follow the traditional common law adversarial method.”¹⁷⁶ The Supreme Court expressed similar sentiments in *Goss v. Lopez*, holding that “escalating [an educational adjudication’s] formality and adversar[ial] nature may not only make it too costly...but also destroy its effectiveness as part of the teaching process.”¹⁷⁷ Accordingly, significant differences should exist between Title IX investigations and adjudications in the campus setting and legal proceedings in a court of law.¹⁷⁸ The “due process” required in educational proceedings should focus solely on adequate notice and opportunity to be heard. Anything beyond that, such as cross-examination requirements or restrictions on confidentiality, unnecessarily treats educational proceedings as mini-trials, discourages survivors from coming forward, and differentiates sexual harassment claims made under Title IX from the treatment of claims made under other civil rights statutes.¹⁷⁹

B. Preponderance of the Evidence for all Harassment Claims

In the same vein, the Department of Education should promulgate a modification to the regulations that requires that all Title IX claims be adjudicated under the same evidentiary standard as claims adjudicated under other civil rights statutes: preponderance of the evidence. Returning to the singular preponderance of the evidence standard provides clarity for educational institutions and makes it easier for students to come forward with their complaints. A uniform burden of proof eliminates the dilemma for women students of color of determining whether they should file claims under Title VI (as sexualized racial harassment) or under Title IX (as racialized sexual harassment), based on the burden of proof. The commonalities between Title VI and Title IX support harmonizing the standard of proof between the two, as inconsistency not only hurts women students of color but is also an “[u]nwarranted [d]eparture from the [c]onventional [r]ules of [c]ivil

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

177. *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

178. See Gino Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN ST. L. REV. 977, 992 (2016) (explaining current differences between educational adjudications and legal proceedings).

179. See *Doe v. Univ. of Cincinnati*, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016) (denying a due process challenge in a sexual harassment case where the accused students were not permitted to cross-examine witnesses directly but were permitted to submit written questions to a panel chair rather than directly to the complainant); see also *Doe v. Ohio State Univ.*, 219 F. Supp. 3d 645, 658–59 (S.D. Ohio 2016) (rejecting a due process claim on similar grounds).

[I]tigation.”¹⁸⁰

Under the Trump Administration’s regulations, schools with existing CBAs or other contractual documents requiring the clear and convincing evidentiary standard for employee adjudications may be liable for sex discrimination under Title IX if they retain the preponderance of the evidence standard.¹⁸¹ Schools may not be able to defend using the preponderance of the evidence standard for student-on-student harassment while using the higher clear and convincing standard for employees. Federal law would thus require that these educational institutions renegotiate their CBAs, which they should do as a necessary step in ensuring the uniform and equitable administration of Title IX and other civil rights statutes. In the interest of protecting women students of color, schools “should feel compelled to adopt the preponderance of the evidence standard.”¹⁸²

C. Emphasis on the Role and Necessity of the Title IX Coordinator

While the preceding recommendations focus on the process of adjudicating sexual harassment claims under Title IX, the third recommendation focuses on perhaps the most critical staff position for effectuating enforcement of Title IX and fostering a safe learning environment—the Title IX Coordinator. Title IX Coordinators, whose position was created under the Obama administration and maintained in the new regulations, are responsible for coordinating investigations, providing information and consultation to complainants, scheduling and overseeing grievance hearings, and notifying parties of the decisions and procedures for appeal.¹⁸³

The Association for Title IX Administrators reports that there are approximately 25,000 Coordinators who ensure Title IX compliance within schools, colleges, and universities.¹⁸⁴ These individuals and their staffs have the authority, per the OCR, to conduct proceedings to determine whether an educational institution has violated federal law. Considering the weight of the position and the importance of these responsibilities, improving the Coordinator position will likely alleviate some of the difficulties facing women students of color.

According to a 2018 study, educational institutions face four challenges in meeting current requirements regarding Title IX Coordinators and their role.¹⁸⁵

180. Ramya Sekaran, *The Preponderance of the Evidence Standard and Realizing Title IX’s Promise: An Educational Environment Free from Sexual Violence*, 19 GEO. J. GENDER & L. 643, 655 (2018).

181. See 34 C.F.R. § 106.51(a)(3) (“A [school] shall not enter into a contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination . . .”).

182. Cantalupo, *And Even More of Us*, *supra* note 13, at 72.

183. See 83 Fed. Reg., *supra* note 89 at 61,469–70.

184. Ass’n of Title IX Adm’rs, *About ATIXA and Title IX*, ATIXA, <https://atixa.org/about/> [<https://perma.cc/8PLE-JCX3>].

185. Elizabeth J. Meyer & Andrea Somoza-Norton, *Addressing Sex Discrimination with Title IX Coordinators in the #MeToo Era*, PHI DELTA KAPPAN (Sept. 24, 2018),

Respondents reported that Title IX Coordinators are hard to find, have ambiguous or overly broad job descriptions, have insufficient training and education for the role, and struggle to understand how their role supports students with marginalized identities, like transgender students.¹⁸⁶ Of particular concern is the fact that the Title IX Coordinators who participated in the study noted that less than 1 percent of their work pertained to Title IX, and some of them did not learn that Title IX responsibilities were part of their position until several months after beginning their employment.¹⁸⁷ This study indicates the strong need for a renewed emphasis on the Title IX Coordinator role.

Survivor advocacy groups should push institutions of higher education for full-time employment and increased training requirements for Title IX Coordinators. According to a 2018 survey of 692 Title IX Coordinators, most were in part-time positions and possessed less than three years of experience.¹⁸⁸ Given the challenges of the new regulations, human resource teams should hire Title IX Coordinators to be dedicated exclusively to the role and its responsibilities on a full-time basis. Doing so will ensure that Title IX Coordinators have the time and resources to not only respond to complaints but also to “design and lead prevention and education activities to address the issue of sex-based discrimination.”¹⁸⁹ Further, Title IX Coordinators should receive training about other titled federal civil rights programs in order to better understand how to support students who may have viable complaints under various statutes. Educational institutions should budget for the role and its training requirements and fill the position effectively in order to maintain Title IX compliance and eligibility for federal funding. Ultimately, schools will fail to protect and support women students of color without adequately trained staff who are fully committed to managing the increased complexity of sexual harassment complaints under the Trump administration’s Title IX regulations.

CONCLUSION

Campus sexual harassment is a highly politicized issue. As Anne McClintock, A. Barton Hepburn Professor of Gender and Sexuality Studies at Princeton University, describes, it has become a “right-wing ‘beachhead’” from which conservatives can “infiltrate academia, push back Obama-era policies, undermine collective civil rights, and impose large-scale federal deregulation.”¹⁹⁰

<https://www.kapponline.org/meyer-somoza-norton-sex-discrimination-title-ix-coordinators-metoo-schools/> [<https://perma.cc/J7N5-XB54>].

186. *Id.*

187. *Id.*

188. Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 38, 45 (2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5946097/pdf/behavsci-08-00038.pdf> [<https://perma.cc/9K76-RWF8>].

189. Meyer & Somoza-Norton, *supra* note 185.

190. Anne McClintock, *Who’s Afraid of Title IX?*, JACOBIN (Oct. 24, 2017), <https://www.jacobinmag.com/2017/10/title-ix-betsy-devos-doe-colleges-assault-dear-colleague> [<https://perma.cc/B8L5-E8JJ>].

The Trump administration’s Title IX regulations concerning sexual harassment are a clear departure from past policy guidance on the matter and present a particularly dangerous dilemma for women students of color. While claiming that the general goal of the administration’s rules is to ensure that the accused receive “due process,” DeVos has essentially conflated campus investigations and adjudicatory procedures with criminal courts of law and made the process much more difficult for survivors to navigate.

The observations and recommendations made throughout this article seek to establish the protection of complainants while maintaining fair proceedings for respondents. This article also seeks to identify solutions for mitigating the unique dilemmas facing women students of color who experience sexual harassment and violence. The recommendations made here, however, are insufficient on their own to support women survivors of color. Other interventions are needed. Perhaps the most critical need is improved research regarding women students of color and their experiences of sexual harassment. The lack of data available on women students of color and their experiences with sexual violence at institutions of higher learning makes it difficult for advocacy organizations, educational institutions, and government officials to shape policies that effectively support survivors.

The lack of demographic and racial information reported regarding campus sexual harassment incidents must be a future area of focus for legal and social scholars alike. Data and metrics around sexual harassment in schools, and particularly the experiences of students of color, can assist policy makers in promulgating future regulations on the matter. The Clery Act, initially passed in 1990, aimed to compel colleges and universities to collect crime reporting data and to disclose those statistics to the public.¹⁹¹ However, the Act’s effectiveness in obtaining and disseminating information about gender-based sexual violence has been limited. Schools face disincentives to report sexual harassment incidents under the Clery Act for fear that their campuses will appear less safe.¹⁹² In order to create a robust set of data upon which to build policy, the Act should be amended to compel schools to disclose additional relevant data, including demographic information of the complainant and respondent, the results of investigations, and any disciplinary actions taken.¹⁹³

Without capturing and disclosing sufficient information about the experiences of students of color, on both the complainant and respondent sides of Title IX adjudications, developing policies and regulations that account for their experiences remains difficult. Educational institutions, survivor advocacy groups, and lawmakers need to continue their work to obtain relevant and sufficient data points on campus sexual harassment. Only then can truly evidence-based best practices be developed—practices that account for diverse student bodies, support

191. See *Summary of the Jeanne Clery Act: A Compliance and Reporting Overview*, CLERY CTR., <https://clerycenter.org/policy-resources/the-clery-act/> [<https://perma.cc/AGD9-M62C>].

192. Cantalupo, *And Even More of Us*, *supra* note 13, at 75.

193. See 20 U.S.C. § 1092.

survivors of sexual harassment, and facilitate a fair process that protects the rights of all parties.