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## Victim Protection or Revictimization: Should College Disciplinary Boards Handle Sexual Assault Claims?

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# VICTIM PROTECTION OR REVICTIMIZATION: SHOULD COLLEGE DISCIPLINARY BOARDS HANDLE SEXUAL ASSAULT CLAIMS?

ERICA CORAY\*

**Abstract:** Colleges and universities that receive federal funding are legally required to respond to all sexual assault complaints on their campuses. Numerous laws and guidance documents address the specific obligations of higher education institutions in their responses to complaints; however, many colleges and universities have failed to meet these obligations. This Note examines the requirements colleges and universities must comply with when responding to sexual assault complaints. It then highlights three high-profile mishandlings of sexual assault cases by colleges and universities and analyzes the benefits and drawbacks of allowing campus disciplinary committees to independently respond to sexual assaults. This Note then suggests that law enforcement should be integrated into the campus response procedures, specifies particular procedural changes that are necessary in campus disciplinary proceedings, and suggests alternative penalties to ensure institution compliance. Finally, this Note addresses proposed legislation aimed at improving the response of institutions to sexual assault on college and university campuses.

## INTRODUCTION

Early one morning a few weeks into a new school year at Hobart and William Smith Colleges (HWS), Anna, an eighteen-year-old first-year student, was found by her friends bent over a pool table at a dance hall (“The Barn”) being sexually assaulted from behind by a senior football player.<sup>1</sup> A group of people stood by, watching and laughing.<sup>2</sup> After being removed from the hall and escorted home by friends, Anna, who had been drinking heavily, could not recall ever being at The Barn, but did recount being raped at a fraternity house earlier in the evening by the same senior football player and two others.<sup>3</sup> A sexual assault nurse would later record that Anna’s med-

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<sup>1</sup> Walt Bogdanich, *Reporting Rape and Wishing She Hadn’t*, N.Y. TIMES, July 13, 2014, at 1.

<sup>2</sup> *Id.* The *New York Times* article that reported Anna’s story also mentioned that some witnesses took photos of the ordeal on their cell phones, although these did not appear to resurface. *See id.*

<sup>3</sup> *See id.* Anna recalled being left alone in a room at the fraternity house with the senior football player who was later seen assaulting her at the dance hall. *Id.* She stated that, after refusing

ical exam revealed evidence of blunt force trauma and indications of “intercourse with multiple partners, multiple times, or that intercourse was very forceful.”<sup>4</sup>

Worried friends reported the incident to campus police, who then accompanied Anna to the hospital.<sup>5</sup> Campus police then began an investigation by taking statements from Anna, other students, and the accused players.<sup>6</sup> The senior football player was advised not to contact Anna or involve his friends in any retaliatory acts, a warning he failed to comply with on numerous occasions.<sup>7</sup> The matter was then referred to a disciplinary panel to evaluate the allegations and determine any punishments.<sup>8</sup> The three-member disciplinary panel that was tasked with evaluating the evidence of sexual assault included the college’s Vice President of Human Resources, an assistant psychology professor, and the director of the campus bookstore.<sup>9</sup>

At the disciplinary hearing, neither the accuser nor the accused was permitted to have a lawyer present, although each was allowed an adviser who was required to remain silent throughout.<sup>10</sup> As with most college and university disciplinary committees, the panelists acted as prosecutors, judges, and jury, without any limitations or guidelines for their questioning.<sup>11</sup> Records indicate that the questioning was sporadic, unclear, and focused on Anna’s actions—what she had to drink and how she had danced—without ever questioning the players as to why their stories had changed multiple times.<sup>12</sup>

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the player’s sexual advances three times, he and two other football players sexually assaulted her. *Id.*

<sup>4</sup> *Id.* The hospital also ran tests concluding that no date rape drugs were used but that, at the time of the first sexual assault, Anna’s blood alcohol level would have been twice the level considered legally drunk. *Id.*

<sup>5</sup> *Id.* The campus security officer who responded, Sergeant Pluretti, called campus paramedics after talking with Anna and realizing she could not recall what had happened at The Barn. *Id.* The paramedics recommended that Anna be evaluated at a hospital. *Id.* Anna, accompanied by the friend who had initially found her at The Barn, was taken to the closest hospital that had a sexual assault nurse, located about twenty to thirty minutes away from the campus. *Id.*

<sup>6</sup> *Id.* University administrators also sent an email to dozens of students that included Anna’s name, stating that the students might be needed to testify later. *Id.*

<sup>7</sup> *Id.* The no-contact order given to the player explicitly stated “you should not involve your friends in any manner to breach this order.” *Id.* The player, violating the order, twice asked friends to contact Anna on his behalf and asked her friends to communicate messages from him. *Id.*

<sup>8</sup> *See id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* Anna was asked to respond to internal campus reports and witness statements that she was never given access to or had received only the day before the disciplinary proceedings. *See id.*

<sup>12</sup> *See id.* Originally the senior player told campus officers that he did not have sexual contact with Anna and only admitted to limited sexual contact after being confronted with multiple reports

Twelve days after the attack, the panel finished its investigation and hearing and cleared all three players of any misconduct.<sup>13</sup> Anna received a written confirmation of the panel's decision, including a note stating where in the school's sexual misconduct policy she could find information about appealing the decision.<sup>14</sup> The page that she was directed to, however, included no information about the appeals process; instead, it included a section on "False Allegations," an error the school later admitted.<sup>15</sup> Although Anna initially declined to report the incident to police after a school official warned her it could lead to a long, drawn-out process, she changed her mind six months later and filed a report.<sup>16</sup> The Ontario County District Attorney, however, claiming that he did not have enough information to proceed, closed the case quickly.<sup>17</sup>

In response to numerous reports of campus sexual assaults like Anna's and the inadequate responses of colleges and universities, President Obama created the White House Task Force to Protect Students from Sexual Assault ("Task Force") in January 2014.<sup>18</sup> The Task Force released its first report in April 2014, confirming that Anna's experience at HWS was not uncommon: one in five women is sexually assaulted while attending college in the United States.<sup>19</sup> In most cases, the attacker is an acquaintance of the victim, rather than a stranger, and many attacks occur while the victim is incapacitated.<sup>20</sup> A previous government study of college men who admitted committing rape reported that the majority of the men surveyed committed multiple offenses, with an average of six rapes each.<sup>21</sup> Although the number

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from witnesses. *Id.* One of the other players initially denied being in the room at the fraternity house, only to later admit he was there and that Anna had performed oral sex on him. *Id.*

<sup>13</sup> See *id.* This was a particularly short timeline as most campus sexual assault investigations are expected to take approximately sixty days. *Id.*

<sup>14</sup> *Id.* Anna's lawyer did appeal the decision regarding the senior football player to the student-affairs administrator, who upheld the panel's decision, but found that the player did not comply with the no-conduct order. *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* The detective assigned to Anna's case relied heavily on the school's records and provided the prosecutor with a report that included errors regarding witness statements and an incorrect assessment of the blood alcohol tests that Anna was given at the hospital. *Id.* Although the tests were administered hours after the attack, the detective concluded that the blood alcohol level reported "would not make a person impaired to the point of blacking out." *Id.*

<sup>18</sup> See WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 6 (2014) [hereinafter NOT ALONE], [http://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf) [<http://perma.cc/X3TC-E8LB>].

<sup>19</sup> See *id.*

<sup>20</sup> *Id.* Incapacitation refers to attacks that occur while a victim of sexual assault is drunk, drugged, or passed out. *Id.*

<sup>21</sup> WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 14 (2014) [hereinafter A RENEWED CALL TO ACTION], <http://www>.

of sexual assaults on college campuses outpaces the assault rate for women of the same age who are not in college,<sup>22</sup> only about twelve percent of campus assaults are reported to law enforcement.<sup>23</sup>

Colleges and universities are legally required to implement training and procedures aimed at preventing sexual assaults on their campuses and to adequately respond to all complaints of sexual assault.<sup>24</sup> Although the U.S. Department of Education has issued numerous documents intended to clarify the specific requirements for prevention, disciplinary proceedings, and victim protection,<sup>25</sup> colleges and universities across the United States are continually failing to fulfill their duties.<sup>26</sup> As a result, commentators have questioned whether campus disciplinary committees should adjudicate a charge as serious as sexual assault, or whether complaints should be automatically referred to local law enforcement.<sup>27</sup>

Part I of this Note reviews the laws and guidance materials that define the responsibilities of colleges and universities in responding to and preventing sexual assault claims. Part II analyzes the effectiveness of these legal requirements with a review of particular high profile mishandlings of sexual assault cases by colleges and universities. Part III compares campus interdisciplinary committee procedures with law enforcement procedures and discusses the benefits and shortcomings of the campus approach. Finally, Part IV argues that, although the campus approach has benefits, law enforcement should be integrated into the campus response system, particularly for the most serious sexual assault complaints.

## I. PREVENTION AND PROTECTION FOR VICTIMS OF SEXUAL ASSAULT ON COLLEGE CAMPUSES

Title IX of the Education Amendments Act of 1972 (Title IX) serves as the most prominent federal legislation requiring colleges and universities to

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whitehouse.gov/sites/default/files/docs/sexual\_assault\_report\_1-21-14.pdf [http://perma.cc/U4YT-2N3X].

<sup>22</sup> Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 483 (2012).

<sup>23</sup> A RENEWED CALL TO ACTION, *supra* note 21, at 14.

<sup>24</sup> See 20 U.S.C. § 1681(a) (2012); 20 U.S.C. § 1092(f) (2012). Policies for preventing sexual assaults should include “prevention and awareness programs” for incoming students and ongoing campaigns for current students and faculty. 20 U.S.C. § 1092(f)(8)(B)(i)(I).

<sup>25</sup> Susan Hanley Duncan, *The Devil Is in the Details: Will the Campus SaVE Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J.C. & U.L. 443, 450 (2014).

<sup>26</sup> See Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault Cases*, HUFFINGTON POST (July 24, 2015, 2:06 PM), [http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault\\_55b19b43e4b0074ba5a40b77](http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77) [http://perma.cc/SPR6-AU66].

<sup>27</sup> Eliza Gray, *Why Victims of Rape in College Don’t Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution> [http://perma.cc/8VFU-9HAK].

respond to sexual harassment claims.<sup>28</sup> Since the passage of Title IX, the U.S. Department of Education's Office for Civil Rights (OCR), which oversees and enforces Title IX compliance, has issued various guidance documents clarifying the obligations of colleges and universities in preventing and addressing sexual assault complaints on their campuses.<sup>29</sup> Additionally, federal laws have been passed that expand the requirements of Title IX and codify the obligations set forth in the guidance documents.<sup>30</sup>

### *A. History and Overview of Title IX and Its Applicability to Sexual Assault on College Campuses*

Title IX was enacted on June 23, 1972 on the heels of the Civil Rights Movement as a protection against sex-based discrimination in education programs.<sup>31</sup> Senator Birch Bayh of Indiana introduced Title IX as Americans began to focus on the inequality women faced in education and the workplace.<sup>32</sup> The act prohibits colleges and universities from discriminating against students on the basis of sex.<sup>33</sup>

Although Title IX is most well known for increasing women's participation in intercollegiate athletics, a 1977 case in the U.S. District Court for the District of Connecticut concluded that Title IX applied to sexual harassment claims.<sup>34</sup> Pamela Price, a Yale University (Yale) undergraduate student complained to university officials that a professor had given her a "C" grade instead of an "A" because she had refused his sexual advances.<sup>35</sup> School officials told Price and fellow students who joined her complaint

<sup>28</sup> 20 U.S.C. § 1681(a); Kristen Galles, *Title IX and the Importance of a Reinvigorated OCR*, 37 A.B.A. HUM. RTS. 18, 18 (2010).

<sup>29</sup> Duncan, *supra* note 25, at 448, 450.

<sup>30</sup> See 20 U.S.C. § 1092(f).

<sup>31</sup> U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., TITLE IX LEGAL MANUAL 16, 19 (2001) [hereinafter TITLE IX LEGAL MANUAL], <http://www.justice.gov/crt/about/cor/coord/ixlegal.pdf> [<http://perma.cc/9ZSD-8K8B>]. The legislation was enacted as 20 U.S.C. § 1681, or Title IX of the Education Amendments Act of 1972. *Id.* at 19.

<sup>32</sup> *Id.* at 16–17 (quoting Senator Bayh as stating the purpose of the act was to limit “the continuation of corrosive and unjustified discrimination against women in the American educational system”).

<sup>33</sup> 20 U.S.C. § 1681(a). The language of the act specifically states: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” *Id.*

<sup>34</sup> Alexander v. Yale Univ., 459 F. Supp. 2 (D. Conn. 1977) *aff'd*, 631 F.2d 178 (2d Cir. 1980); Alexandra Brodsky & Elizabeth Deutsch, *No, We Can't Just Leave College Sexual Assault to the Police*, POLITICO MAGAZINE (Dec. 3, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294.html> [<http://perma.cc/SS2U-EP8T>].

<sup>35</sup> Alexander, 631 F.2d at 3–4; Brodsky & Deutsch, *supra* note 34.

that there was nothing they could do.<sup>36</sup> The students turned to feminist lawyer Catherine MacKinnon, who brought the complaint to court on the basis that sexual harassment was sex discrimination and, therefore, Title IX required Yale to address the complaints.<sup>37</sup> Although the case was dismissed on technicalities, the court accepted the claim that sexual harassment constituted sex discrimination and that, consequently, Title IX legally required colleges and universities to respond to campus sexual harassment and violence claims.<sup>38</sup> The U.S. Supreme Court affirmed and refined Title IX's applicability to sexual harassment claims with two cases brought in the late 1990s that set legal standards for cases brought by plaintiffs in private causes of action.<sup>39</sup>

Title IX applies to all educational programs or activities that receive any federal funding.<sup>40</sup> The language of the statute is broad and is meant to prohibit all gender discrimination in education; however, the statute does not specifically list the types of prohibited discrimination.<sup>41</sup> Instead, federal agencies are tasked with promulgating rules that are meant to achieve the purpose of the statute and to terminate funding to violators.<sup>42</sup>

In addition to investigating individual complaints of sex discrimination, OCR may initiate an investigation of any college or university that is required to comply with Title IX.<sup>43</sup> Individuals who bring complaints through OCR are not eligible for monetary damages, but investigations are usually more comprehensive and have longer-lasting effects than an individual lawsuit: OCR investigations could require a school to completely change its policies and procedures around the prevention of sexual harass-

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<sup>36</sup> Brodsky & Deutsch, *supra* note 34. At the time of Price's complaint, Yale did not have any procedures in place for responding to sexual assault complaints and the legal obligation to do so had not yet been clarified. *Id.*

<sup>37</sup> *See id.*

<sup>38</sup> *Alexander*, 631 F.2d at 3–4; Brodsky & Deutsch, *supra* note 34. The court ruled that plaintiffs failed to meet the requirements for justiciability because they were either not personally injured by the actions or they had graduated and therefore the issue was moot. *See Alexander*, 631 F.2d at 3.

<sup>39</sup> *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (determining that, when a student claims harassment by a teacher, monetary damages are available if the school district had "actual notice of, and [was] deliberately indifferent to, the teacher's misconduct"); *see Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629 (1999) (concluding that, to be actionable, the harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit").

<sup>40</sup> 34 C.F.R. § 106.1 (2014). This includes universities, colleges, local school districts, libraries, and museums. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, [http://www2.ed.gov/about/offices/list/ocr/docs/tix\\_dis.html](http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html) (last updated Apr. 2015) [<http://perma.cc/44Y3-X8A3>].

<sup>41</sup> Galles, *supra* note 28, at 18.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 20.

ment and the handling of complaints on campus.<sup>44</sup> When it determines that an institution has failed to comply, OCR must first attempt to enter into a voluntary resolution agreement that requires the institution to take measures to improve its response.<sup>45</sup> If OCR is unable to agree to a voluntary resolution, it then has the power to rescind all federal funding; however, it has yet to take such an extreme measure.<sup>46</sup>

### *B. Post-Title IX Federal Legislative Protections for Sexual Assault Victims on College Campuses*

Following the passage of Title IX, the U.S. Congress passed additional legislation aimed at preventing sexual assaults and protecting victims on college campuses.<sup>47</sup> The Campus Security Act, passed in 1990, requires colleges and universities to consistently report crime statistics and encourages them to develop policies and procedures for preventing and handling crimes on campus, including sexual assault.<sup>48</sup> In 1998, amendments to the Campus Security Act formally changed its name to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) in memory of Jeanne Clery, a Lehigh University student who was raped and murdered in her dorm room by a fellow student in 1986.<sup>49</sup>

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<sup>44</sup> Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 226 (2011). As part of the investigation process, OCR may look at the policies and procedures of the subject school and review its response and resolution of claims. *Id.* at 234. Additionally, the investigation can include review of past sexual assault cases and interviews with any personnel involved in sexual assault cases on the campus. *Id.*

<sup>45</sup> NOT ALONE, *supra* note 18, at 17. OCR negotiates resolution agreements during or after an investigation finds mishandling of sexual assaults by an institution. See U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, CASE PROCESSING MANUAL 20–22 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<http://perma.cc/XK8H-PCLU>]. Agreements should specifically address the allegations that led to the investigation of the institution and may also include provisions related to information OCR discovers during its investigation. See *id.* at 19–22. The agreement must include specific actions and steps the institution will take to remedy compliance issues, including specific dates of implementation and submission of any requested reports or documents. *Id.* The agreement signifies the resolution of the initial complaint, with the understanding by the institution that OCR will monitor the institution to ensure it is following the terms of the agreement until the office concludes that the institution has complied with the obligations. See *id.* at 22–26.

<sup>46</sup> NOT ALONE, *supra* note 18, at 17; Galles, *supra* note 28, at 21.

<sup>47</sup> See 20 U.S.C. § 1092(f) (2012); Duncan, *supra* note 25, at 449–50.

<sup>48</sup> See 20 U.S.C. § 1092(f). The Clery Act has been amended to expand on reporting requirements (1998), to add sex offender notification requirements (2000), and to prohibit retaliation against complainants (2008). See *Legislative History*, CLERY CTR., <http://clerycenter.org/legislative-history> [<https://perma.cc/YF5J-SA6Y>].

<sup>49</sup> Duncan, *supra* note 25, at 449; Beverly Beyette, *Campus Crime Crusade: Howard and Connie Clery Lost Their Daughter to a Crazy Thief; Now They're Angry and Fighting Back*, L.A. TIMES, Aug. 10, 1989, at 11; *Summary of the Jeanne Clery Act*, CLERY CTR., <http://clerycenter.org/summary-jeanne-clery-act> [<https://perma.cc/EWZ6-H7L3>]. Joseph Henry was convicted of



The main purpose of the Clery Act is to provide prospective students and their parents with access to crime statistics of colleges and universities in order to better inform enrollment decisions.<sup>50</sup> The Act is enforced by the Department of Education and requires colleges and universities that receive federal aid to disclose information about crimes, including crimes of forcible and non-forcible sexual violence, that occur on and around their campuses.<sup>51</sup> Specifically, institutions of higher education must publish an Annual Security Report in October, reporting data about crimes that have occurred on campus during the previous three years.<sup>52</sup> The Clery Act also requires institutions to keep a daily public crime log and disclose crime statistics.<sup>53</sup> Further, institutions must also create and publish an emergency response and notification system, detailed in their Annual Security Report, which must also be tested annually.<sup>54</sup> Finally, schools are required to issue timely warnings to students and employees of crimes that are “an immediate threat to the health or safety of students or staff.”<sup>55</sup>

### *C. OCR Guidance on Appropriate Policies and Procedures for Preventing and Adjudicating Sexual Assault Claims in Higher Education*

Given the broad applicability of Title IX beyond sexual harassment and the limited language of both the statute and regulations, OCR recognized the need to provide guidance to higher education institutions on the proper prevention and handling of sexual harassment claims.<sup>56</sup> In April

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first-degree murder and sentenced to death after he entered Clery’s room intending to burglarize it while she was sleeping. Beyette, *supra*. Henry brutally raped and murdered her to prevent her from identifying him. Beyette, *supra*. After exhausting all appeals, Henry agreed to a sentence of life imprisonment in 2002. *See Henry v. Horn*, 218 F. Supp. 2d 671, 708 (E.D. Pa. 2002).

<sup>50</sup> Cantalupo, *supra* note 22, at 511. In order to “dispel the myth” that crime does not occur on college campuses, the Clery Act attempts to disseminate information about criminal activity on or near college campuses. *See H.R. REP. NO. 101-518*, at 3369–70 (1990).

<sup>51</sup> 20 U.S.C. § 1092(f)(1); *see Summary of the Jeanne Clery Act, supra* note 49. Schools are not only required to publish data about crimes that occur on school-owned property, but also may be required to report crimes that occur in Greek housing, off-campus housing, or property that is adjacent to the school’s campus. *Summary of the Jeanne Clery Act, supra* note 49.

<sup>52</sup> *Summary of the Jeanne Clery Act, supra* note 49. The report must be disseminated to all current students and faculty. *Id.*

<sup>53</sup> 20 U.S.C. § 1092(f)(4)(A) (2012). The log must include the “nature, date, time, and general location of each crime” and all crimes must be included in the log within two days of their occurrence. *Id.*; *Summary of the Jeanne Clery Act, supra* note 49.

<sup>54</sup> 20 U.S.C. § 1092(f)(1)(J).

<sup>55</sup> *Id.* The Clery Act also requires schools to report fire data and publish an annual fire safety report and to create policies for handling reports of missing students. *Summary of the Jeanne Clery Act, supra* note 49. If an institution is found to have “substantially misrepresented the number, location, or nature of the crimes required to be reported,” that institution may be subject to a civil penalty. 20 U.S.C. § 1092(f)(13).

<sup>56</sup> *See Duncan, supra* note 25, at 450.

2011, Russlynn Ali, OCR's Assistant Secretary for Civil Rights, issued a letter to colleagues [hereinafter Dear Colleague Letter] that built upon previously published guidance by clarifying the specific requirements schools must meet to comply with Title IX.<sup>57</sup> While not legislation, the letter is meant to be a "significant guidance document" that clarifies the standards that OCR will use in reviewing a school's policies and procedures for handling sexual harassment claims.<sup>58</sup> In addition to the Dear Colleague Letter, in 2013 OCR also published the Resolution Agreement and Findings Letter which resulted from its investigation of sexual harassment policies at the University of Montana-Missoula.<sup>59</sup>

### 1. OCR's 2011 Dear Colleague Letter

The 2011 Dear Colleague Letter reiterated that sexual violence falls under the term "sexual harassment" and is prohibited under Title IX.<sup>60</sup> Additionally, the letter defined sexual harassment as including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."<sup>61</sup> It restated that sexual harassment creates a hostile environment when it affects a victim's ability to participate in school.<sup>62</sup> The Dear Colleague Letter also echoed the standard clarified in OCR's 2001 guidance document by stating that, under Title IX, schools are obligated to act when they "know or reasonably should know" about sexual harassment on their campuses.<sup>63</sup>

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<sup>57</sup> Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, to Colleagues 1–2 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/C99M-HUKH>]. Prior to the 2011 guidance, OCR released guidance documents in 1997, 2001, and 2003 detailing requirements for handling sexual assault complaints under Title IX. Office for Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034 (Mar. 13, 1997); Letter from Gerald A. Reynolds, Assistant Sec'y, U.S. Dep't of Educ., Office for Civil Rights to Colleagues (July 28, 2003), <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<http://perma.cc/QG3V-TFN2>]; U.S. DEP'T OF EDUC., OFF. FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter 2001 GUIDANCE], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<http://perma.cc/J2P8-Z4E5>].

<sup>58</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at n.1 (noting that "[t]his letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations").

<sup>59</sup> See Duncan, *supra* note 25, at 449; *infra* Part I.C.2.

<sup>60</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 1.

<sup>61</sup> *Id.* at 3.

<sup>62</sup> *Id.* The letter further clarified that a hostile environment could occur as the result of one act of sexual harassment, if sufficiently severe, such as in the instance of rape. *Id.*

<sup>63</sup> *Id.* at 4; 2001 GUIDANCE, *supra* note 57, at 12.

Further, the Dear Colleague Letter addressed the possibility of dual investigations by law enforcement and schools.<sup>64</sup> Specifically, the letter differentiated the two and stated that the involvement of law enforcement does not abrogate a school of its duty to carry out its own independent investigation.<sup>65</sup> When a school investigates, the outcome of that investigation should not be dependent on the outcome of a criminal investigation because the standards and requirements of each differ.<sup>66</sup> Significantly, the standard of evaluation for school investigations under Title IX is proof by a “preponderance of the evidence,” rather than the heightened “clear and convincing” standard that some institutions had been using.<sup>67</sup> Moreover, a school may not wait until the conclusion of a criminal investigation to begin its own investigation, as it may be required to take immediate action to protect a complainant.<sup>68</sup>

The Dear Colleague Letter provided guidelines regarding how schools should properly comply with the OCR regulations that effectuate Title IX when the complaint is sexual harassment.<sup>69</sup> The regulations require schools to designate an employee as a Title IX Coordinator to oversee all Title IX complaints, including those of sexual assault, and to notify all students and staff of the individual’s role and contact information.<sup>70</sup> The Dear Colleague Letter emphasized the requirement that schools disseminate a notice of nondiscrimination—specifically stating that they do not discriminate based on sex as required by Title IX—to all students, employees, and applicants.<sup>71</sup>

<sup>64</sup> See Letter from Russlynn Ali to Colleagues, *supra* note 57, at 4, 10.

<sup>65</sup> *Id.* at 4.

<sup>66</sup> See *id.* at 10 (“Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”).

<sup>67</sup> *Id.* at 11. The letter specifically states that schools are in violation of their obligations under Title IX if they use the “clear and convincing” standard. *Id.* The letter defines the “preponderance of the evidence” standard as “more likely than not that sexual harassment or violence occurred.” *Id.* The “clear and convincing” standard is defined as “highly probable or reasonably certain that sexual harassment or violence occurred.” *Id.*

<sup>68</sup> *Id.* at 10. The letter states that a school may be required to delay some of its investigation to allow police to gather evidence; however, the school must make every effort to abide by the requirement to resolve complaints “promptly and equitably.” See *id.*

<sup>69</sup> *Id.* at 6–8.

<sup>70</sup> 34 C.F.R. § 106.8(a) (2014). The Title IX Coordinator cannot have other responsibilities that may create a conflict of interest with his or her role as Coordinator, must be available to meet with students when necessary, and must receive training on recognizing sexual harassment claims and compliance with the school’s grievance procedures. Letter from Russlynn Ali to Colleagues, *supra* note 57, at 7.

<sup>71</sup> 34 C.F.R. § 106.9; Letter from Russlynn Ali to Colleagues, *supra* note 57, at 6. The notice must also specify that inquiries can be made to the Title IX Coordinator and must provide all contact information for the coordinator. Letter from Russlynn Ali to Colleagues, *supra* note 57, at 6. The Dear Colleague Letter recommends, but does not require, that schools specify that sexual harassment is included under sex discrimination and that schools should include specific examples of what constitutes sexual harassment. *Id.* at 6–7.

To highlight the obligation of schools to adopt and publish grievance procedures that lead to prompt and equitable resolutions, the Dear Colleague Letter, although noting that procedures may vary depending on the school, provided examples and recommendations of proper procedures.<sup>72</sup> Upon the resolution of an investigation, both parties must be notified in writing of whether sexual harassment was determined to have occurred.<sup>73</sup> In addition to proper grievance procedures, schools are required to enact preventative measures to address sexual harassment on their campuses.<sup>74</sup> Preventative measures may include education programs and victim resources, and should include descriptions of both sexual harassment and sexual violence and the policies and procedures in place to address complaints.<sup>75</sup>

## 2. University of Montana-Missoula's Resolution Agreement and Findings Letter

Following an investigation into the University of Montana-Missoula (the "University") in 2013, OCR published its Findings Letter ("Findings Letter") detailing the University's noncompliance with Title IX, and a Resolution Agreement, articulating corrective steps that must be taken by the University ("Resolution Agreement").<sup>76</sup> The Findings Letter clarified that a hostile environment may result from "severe *or* pervasive" sexual harass-

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<sup>72</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 8–9. For example, the Dear Colleague Letter recommends that it would be improper to use mediation to resolve complaints of sexual assault and states that complainants should not be required to resolve the issue directly with their alleged harasser. *See id.* at 8.

<sup>73</sup> *Id.* at 13.

<sup>74</sup> *Id.* at 14.

<sup>75</sup> *Id.* at 14–15. The Dear Colleague Letter further notes that schools should stress the concern for safety in order to encourage students who would normally be reluctant to report harassment in situations involving alcohol or drugs to come forward. *Id.* at 15.

<sup>76</sup> Duncan, *supra* note 25, at 449; U.S. DEP'T OF JUSTICE & U.S. DEP'T OF EDUC., DOJ CASE NO. DJ 169-44-9, OCR CASE NO. 10126001, RESOLUTION AGREEMENT AMONG THE UNIVERSITY OF MONTANA-MISSOULA, THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, EDUCATIONAL OPPORTUNITIES SECTION AND THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS (2013), [hereinafter RESOLUTION AGREEMENT], <http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf> [<http://perma.cc/KN9C-JJN9>]; Letter from Anurima Bharagava, Chief, U.S. Dep't of Justice, Civil Rights Division & Gary Jackson, Regional Dir., U.S. Dep't of Educ., Office for Civil Rights, to Royce Engstrom, President, Univ. of Mont. & Lucy France, Univ. Counsel, Univ. of Mont. on, DOJ Case No. DJ 169-44-9, OCR Case No. 10126001 (May 9, 2013) [hereinafter Findings Letter], <http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf> [<http://perma.cc/S4UC-QB4F>]. The investigation was initiated after two women came forward in 2011 claiming they had been sexually assaulted by male athletes. Findings Letter, *supra*, at 2. These complaints were followed by seven additional reports of sexual assault, which led the University to take interim steps to prevent future attacks. Findings Letter, *supra*, at 2–3. The U.S. Department of Justice then launched a formal investigation of the University's compliance with Title IX in sexual assault cases in May 2012. Findings Letter, *supra*, at 3.

ment.<sup>77</sup> The Findings Letter also detailed Title IX's prohibition of retaliatory acts, stating that the school must take appropriate measures to protect complainants and other participants from retaliation of any kind.<sup>78</sup>

The Findings Letter specifically focused on the University's inconsistent and limited definitions of sexual harassment.<sup>79</sup> The guidance provided in the Findings Letter stated that the definition of sexual harassment should be "any unwelcome conduct of a sexual nature."<sup>80</sup> Notably, the Findings Letter explained that, while sexual harassment may be considered from an objective standard, subjective perspectives could also be considered when evaluating claims to determine if a hostile environment has been created.<sup>81</sup>

In discussing the University's grievance procedures, the Findings Letter noted that schools are not required to implement separate grievance and disciplinary procedures for sexual harassment claims, but that they must ensure that all procedures in place comply with Title IX's prompt and equitable standards.<sup>82</sup> OCR's investigation found that the University did not promptly investigate or resolve complaints and did not provide equitable and impartial investigations, noting specifically that, contrary to previous guidance, the University incorrectly applied the higher "clear and convincing" standard to its sexual assault investigations.<sup>83</sup> As a result, the Resolution Agreement included a requirement that all employees and staff, specifically those who would be involved with Title IX complaints, undergo training on Title IX and how to handle sexual harassment complaints.<sup>84</sup>

Although the Findings Letter and Resolution Agreement were specifically related to the policies and procedures of the University of Montana-Missoula, they were explicitly meant to serve as a "blueprint for colleges and universities throughout the country to protect students from sexual har-

<sup>77</sup> Findings Letter, *supra* note 76, at 5. The Findings Letter also reiterated that one severe act can lead to a hostile environment based on sexual harassment. *Id.*

<sup>78</sup> *Id.* at 6. The Findings Letter defines retaliatory acts as "intimidation, threats, coercion, or discrimination" and prohibits retaliation against the initial complainant and any individual who assists, testifies, or otherwise participates in the sexual assault investigation. *Id.* The letter also requires the university to, at the very least, make complainants aware of the procedure for reporting retaliatory acts. *See id.*

<sup>79</sup> *Id.* at 8. The University had incorrectly defined "sexual harassment" too narrowly as conduct that is "sufficiently severe or pervasive to deny or limit a student's ability to participate in or receive the benefits, services, or opportunities of the University . . ." *Id.* Although this was congruent with the hostile environment created by sexual harassment, it was more limited than the required definition of "unwelcome conduct of a sexual nature." *Id.*

<sup>80</sup> *Id.* The Findings Letter also criticized the University's incorrect implication that harassment must be "severe and pervasive" to create a hostile environment instead of the "severe or pervasive" standard set in the Dear Colleague Letter. *Id.* at 9.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 13.

<sup>83</sup> *Id.* at 13, 17.

<sup>84</sup> RESOLUTION AGREEMENT, *supra* note 76, at 7-8.

assessment and assault.”<sup>85</sup> Therefore, the requirements enumerated in the Findings Letter and Resolution Agreement, in tandem with the Dear Colleague Letter issued in 2011, put schools on notice of the standards used by OCR in investigating compliance with Title IX claims resulting from sexual harassment.<sup>86</sup>

#### *D. Recent Amendments to the Clery Act*

The Campus Sexual Violence Elimination Act (SaVE Act) was signed into law in 2013 as part of the Violence Against Women Reauthorization Act (VAWA).<sup>87</sup> The SaVE Act amended the Clery Act in a number of ways.<sup>88</sup> First, in addition to providing statistics on sexual assault, the SaVE Act requires institutions of higher education to include information on domestic violence, dating violence, and stalking incidents in their Annual Security Report.<sup>89</sup> The SaVE Act also requires institutions to create and distribute policies on prevention and awareness education programs.<sup>90</sup> Education programs must include a statement referencing the institution’s prohibition of sexual assault and related offenses, definitions of domestic violence, dating violence, sexual assault, and stalking, as well as the definition of consent, options for bystander intervention, and information about warning signs, avoidance, and risk reduction.<sup>91</sup>

The SaVE Act significantly expands Clery Act requirements related to procedures for handling sexual assault complaints.<sup>92</sup> Victims must be provided with information detailing their options for notifying law enforcement, and campus authorities must assist victims if they choose to report.<sup>93</sup> An institution must also inform sexual assault victims of their option to change academic, living, transportation, or working situations, and provide information regarding available counseling, mental health, and legal assistance.<sup>94</sup> Finally, victims must be notified of procedures for disciplinary hearings and of the possible sanctions on the accused that will result if it is

<sup>85</sup> Findings Letter, *supra* note 76, at 1.

<sup>86</sup> See Duncan, *supra* note 25, at 449; Letter from Russlynn Ali to Colleagues, *supra* note 57, at n.1.

<sup>87</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, § 304 (2013) (codified at 20 U.S.C. § 1092(f)); see also *The Campus Sexual Violence Elimination (SaVE) Act*, CLERY CTR., [hereinafter *Campus SaVE Act Guidance*], <http://clerycenter.org/campus-sexual-violence-elimination-save-act> [<http://perma.cc/M9WC-ARVX>].

<sup>88</sup> See *Campus SaVE Act Guidance*, *supra* note 87.

<sup>89</sup> 20 U.S.C. § 1092(f)(1)(F)(iii) (2012).

<sup>90</sup> *Id.* § 1092(f)(8)(B).

<sup>91</sup> *Id.*

<sup>92</sup> Duncan, *supra* note 25, at 452.

<sup>93</sup> 20 U.S.C. § 1092(f)(8)(B)(ii)(III).

<sup>94</sup> *Id.* § 1092(f)(8)(B)(vii).

determined that sexual assault occurred, as well as the ways in which the university will protect victim confidentiality.<sup>95</sup>

In addition to requirements related to the treatment of victims after an assault, the SaVE Act details obligations regarding disciplinary hearings that affect both the accuser and the accused.<sup>96</sup> Specifically, both the accuser and accused must have an equal opportunity to have others present at the disciplinary proceedings and to be accompanied by an advisor of their choosing.<sup>97</sup> Disciplinary proceedings must be conducted by officials who have been trained on the investigation and hearing processes for domestic violence, dating violence, sexual assault, and stalking claims.<sup>98</sup> Additionally, the SaVE Act codifies the requirement discussed in the Dear Colleague Letter that an institution must provide written notification to both the accuser and accused detailing the outcome of the disciplinary proceedings.<sup>99</sup>

Contrary to the discussion in the Dear Colleague Letter that explicitly specifies the evidentiary requirement as “preponderance of the evidence,” however, the SaVE Act simply states that an institution must distribute its policy and include which standard of evidence it will employ in disciplinary proceedings.<sup>100</sup> Finally, the Act codifies the prohibition of retaliation against any individual who chooses to claim the rights enumerated in the Clery Act.<sup>101</sup>

## II. HIGHER EDUCATION’S FAILURE TO COMPLY WITH SEXUAL ASSAULT OBLIGATIONS AND GUIDELINES

A 2014 study of 440 four-year higher education institutions conducted by the U.S. Senate Subcommittee on Financial & Contracting Oversight demonstrated that colleges and universities continually fail to comply with their legal obligations in handling sexual assault complaints.<sup>102</sup> Despite statistics exhibiting a high rate of sexual assaults on college campuses, more than forty percent of institutions surveyed had not conducted a single sexual assault investigation in the past five years.<sup>103</sup> Although OCR recommends that all faculty and staff receive training on the appropriate handling of sex-

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<sup>95</sup> *Id.* § 1092(f)(8)(B)(v).

<sup>96</sup> *See id.* § 1092(f)(8)(B)(iv).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*; Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12.

<sup>100</sup> 20 U.S.C. § 1092(f)(8)(A)(ii) (2012); *see Duncan, supra* note 25, at 453.

<sup>101</sup> 20 U.S.C. § 1092(f)(17).

<sup>102</sup> *See* U.S. SENATE SUBCOMM. ON FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS 1 (2014) [hereinafter SEXUAL VIOLENCE ON CAMPUS], <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf> [<http://perma.cc/GTA7-FLLA>].

<sup>103</sup> *Id.* at 8; *see NOT ALONE, supra* note 18, at 6.

ual assault complaints, more than twenty percent of institutions had provided no sexual assault training to staff or faculty.<sup>104</sup>

The Campus Sexual Violence Elimination Act (SaVE Act) requires those serving on interdisciplinary panels to be adequately trained; however, more than thirty percent of institutions fail to provide training on “rape myths” to those involved in the adjudicatory procedures.<sup>105</sup> The study found that more than twenty-seven percent of institutions include students on the adjudicatory panel, while twenty percent leave oversight of sexual violence claims involving athletes to their athletic departments.<sup>106</sup> Additionally, despite guidance stating that schools should use a “preponderance of the evidence” standard in adjudicatory procedures, fifteen percent of surveyed institutions continue to apply a stricter standard.<sup>107</sup> Highlighting the need for reform to protect victims of sexual assault on college campuses, the following are examples of cases or investigations that demonstrate institutions’ mishandlings of sexual assault complaints. As of July 2015, 124 colleges and universities across the United States were the subjects of investigations of Title IX violations regarding their management of sexual assault allegations.<sup>108</sup>

#### A. Case Study: University of Colorado Boulder

In 2007, two female students, Lisa Simpson and Anne Gilmore, settled a private Title IX case against the University of Colorado Boulder (CU) for sexual assaults that occurred in 2001.<sup>109</sup> The women were assaulted by players from the football team and the team’s visiting recruits.<sup>110</sup> After going to sleep, Simpson awoke to multiple recruits and players surrounding her, removing her clothing, and sexually assaulting her orally and vaginally.<sup>111</sup> In the same room, three men also sexually assaulted Gilmore, who was too intoxicated to consent.<sup>112</sup>

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<sup>104</sup> See SEXUAL VIOLENCE ON CAMPUS, *supra* note 102, at 1; RESOLUTION AGREEMENT, *supra* note 76, at 7–8.

<sup>105</sup> See 20 U.S.C. § 1092(f)(8)(B)(iv) (2012); SEXUAL VIOLENCE ON CAMPUS, *supra* note 102, at 2, 11. Rape myths include the high prevalence of acquaintance rape as opposed to stranger rape, the traumatic effects of sexual violence that can affect a victim’s memory and actions, and what constitutes adequate consent. SEXUAL VIOLENCE ON CAMPUS, *supra* note 102, at 11.

<sup>106</sup> SEXUAL VIOLENCE ON CAMPUS, *supra* note 102, at 11.

<sup>107</sup> *Id.* at 12.

<sup>108</sup> Kingkade, *supra* note 26. This is up from fifty-five in May 2014 when OCR originally released a list of schools under investigation. *Id.*

<sup>109</sup> See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1172 (10th Cir. 2007); Allison Sherry, *CU Settles Case Stemming From Recruit Scandal*, DENVER POST, Dec. 6, 2007, at A1.

<sup>110</sup> *Simpson*, 500 F.3d at 1180.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* Gilmore and Simpson had planned to spend the evening at Simpson’s apartment with another female student who was a tutor with the athletic department. *Id.* The tutor asked Simpson



After Simpson reported the assault to the police, the university revoked the scholarships of the four players allegedly involved, but did not bar them from continuing to play for the football team.<sup>113</sup> There was also evidence that university officials had interfered with the investigation and that the football coach continued to pursue admission for one of the recruits who had been involved in the attack.<sup>114</sup> Although the university failed to acknowledge guilt in the case, they eventually settled with Simpson and Gilmore: the women received \$2.5 million and \$350,000, respectively.<sup>115</sup>

The Title IX claim against the university arose out of CU's knowledge of the risk of sexual harassment associated with its recruiting program and team culture and its deliberate and frequent indifference towards its duty to prevent sexual assaults.<sup>116</sup> In particular, in 1997, a high school girl had asserted that she was assaulted by recruits at an off-campus party held by a football player.<sup>117</sup> Then, a few months before the assault on Simpson and Gilmore, a female student who worked for the athletics department was raped by a football player.<sup>118</sup> The team's coach met with the victim, told her that pressing charges would "change her life," and that he would not punish, but rather "support the player."<sup>119</sup> Furthermore, the coach hired a former player as an assistant coach who had been previously banned from the CU campus after a woman claimed he had sexually assaulted her.<sup>120</sup>

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if she could invite players to join them and eventually about twenty football players and recruits arrived at the apartment where the sexual assaults took place. *Id.*

<sup>113</sup> *Id.* at 1184.

<sup>114</sup> *Id.* Evidence suggested that a CU police officer, who also acted as the football coach's escort during games, held a meeting with players before the investigating officers were able to meet with them. *Id.* An assistant coach for the team also had players copy a videotape that was requested by investigating officers before he turned it over to the officers. *Id.*

<sup>115</sup> See Sherry, *supra* note 109.

<sup>116</sup> See *Simpson*, 500 F.3d at 1174. In overturning the district court's ruling of summary judgment in favor of the university, the U.S. Court of Appeals for the Tenth Circuit stated:

We conclude that a funding recipient can be said to have "intentionally acted in clear violation of Title IX," when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient.

*Id.* at 1178, 1185 (citing *Davis Next Friend LaShonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999)).

<sup>117</sup> *Id.* at 1181. After the 1997 incident, the Boulder County District Attorney met with CU officials and made recommendations about properly advising players on acceptable behavior during recruit visits. *Id.* at 1181–82.

<sup>118</sup> *Id.* at 1183.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1183–84.

*B. Case Study: University of Washington*

S.S., a student assistant equipment manager for the University of Washington (UW) football team, was raped in 2001 by a football player with whom she had recently ended a consensual relationship.<sup>121</sup> S.S. later reported the attack to an assistant coach for the football team and identified her attacker.<sup>122</sup> A few weeks later, S.S. met with UW's Associate Athletic Director and Assistant Athletic Director who advised her to leave her position with the football team and offered her counseling sessions, but did not present any options for reporting the attack.<sup>123</sup> They also warned S.S. that if players found out about the attack they would harass her, and that if she continued to work for the team and it was later revealed that she was attacked by a member of the team "it would reflect poorly on the University of Washington's handling of the situation."<sup>124</sup>

After hearing nothing from the Athletics Department for weeks, S.S. approached the Assistant Athletic Director and stated her desire to file a police report.<sup>125</sup> Instead of discussing her options and assisting her, the Assistant Athletic Director advised S.S. that she was attempting to work out a solution and that S.S. should wait.<sup>126</sup> Without conducting an investigation of the complaint, UW officials decided that the two students—the victim and the alleged perpetrator—should attend a mediation session with the university's ombudsman.<sup>127</sup> This, however, violated OCR's 2001 guidance that had explicitly required all allegations of sexual assault to be investigated and that disallowed mediation as an appropriate resolution to sexual assault claims.<sup>128</sup> Notwithstanding this guidance, the mediation session continued, during which the accused football player threatened to leave UW if he was suspended; moreover, the ombudsman stated that the player would not be suspended because it would lead the media to question why the player was

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<sup>121</sup> *S.S. v. Alexander*, 177 P.3d 724, 728–29 (Wash. Ct. App. 2008). Despite her verbal protestations, the player forced himself into her room, removed her clothing, and vaginally raped her. *Id.* at 729.

<sup>122</sup> *Id.* at 729. The report of the attack was revealed after the coach offhandedly asked if S.S. had ever been sexually assaulted by a football player, to which she answered affirmatively. *Id.* At the time the coach failed to provide S.S. with any options for reporting the incident. *Id.* The team's equipment manager later approached S.S. and asked if she would like to meet with the head coach but S.S. declined. *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* S.S. responded that she preferred to keep her position with the team. *Id.*

<sup>125</sup> *Id.* at 730.

<sup>126</sup> *Id.*

<sup>127</sup> *See id.*

<sup>128</sup> 2001 GUIDANCE, *supra* note 57, at 21. (stating that "[in] some cases, such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis").

not participating in football games.<sup>129</sup> The player was instructed to attend counseling and perform community service.<sup>130</sup>

Later, S.S. approached the ombudsman to express her dissatisfaction with the result of the mediation.<sup>131</sup> Instead of discussing other available options with her, the ombudsman called S.S. into her office a few days later and required S.S. to write down a statement—dictated to her—asserting that she had participated in mediation, that she was satisfied, and that the matter was closed.<sup>132</sup> Later in the year, S.S. approached the ombudsman notifying her that she had heard of another student who had been sexually assaulted by the same player.<sup>133</sup> The ombudsman confirmed that she was aware of the alleged rape but that she could not “punish [the player] for something he had already been punished for.”<sup>134</sup> S.S. brought a private Title IX claim against the university, claiming that UW deprived her of her right to be free from discrimination.<sup>135</sup> The Court of Appeals of Washington found that there was “ample evidence” that UW acted with deliberate indifference and reversed the trial court’s ruling for summary judgment in favor of UW.<sup>136</sup>

### C. Case Study: Southern Methodist University

More recently, OCR investigated Southern Methodist University (SMU) following three complaints alleging gender harassment, sexual harassment, and sexual violence.<sup>137</sup> OCR published a corresponding resolution agreement letter on December 11, 2014.<sup>138</sup>

The first complaint against SMU arose from multiple instances in which a female student claimed that her law professor had subjected her to

<sup>129</sup> See *Alexander*, 177 P.3d at 730–31.

<sup>130</sup> *Id.* at 731.

<sup>131</sup> *Id.* The ombudsmen responded by asking whether S.S. was “making everything up” and advised her that another mediation session would be required for a different outcome. *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 728. Following the ordeal, S.S. reported that she felt hopeless, had trouble concentrating on her schoolwork, and was distressed whenever she had to encounter the player on campus. *Id.* at 731. A counselor who worked with S.S. after the attack found that S.S. suffered from both depression and anxiety as a result of the assault and subsequent handling of the situation by school officials. *Id.* at 732.

<sup>136</sup> *Id.* at 740, 745. The court noted that UW only offered mediation as a remedy, discouraged the victim from filing a police report, failed to appropriately discipline the alleged rapist, failed to conduct an investigation, and acted in a manner to keep the report out of the media in determining that UW acted with deliberate indifference towards S.S.’s claim. See *id.* at 740.

<sup>137</sup> See Letter from Taylor D. August, Reg’l Dir., U.S. Dep’t of Educ., Office for Civil Rights, to Dr. R. Gerald Turner, President, Southern Methodist Univ. (Dec. 11, 2014) 1 [hereinafter SMU Resolution], <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf> [http://perma.cc/N3M5-8G5V].

<sup>138</sup> See *id.*

gender harassment by continually making disparaging gendered comments, such as calling her “prom/beauty queen,” “hired bimbo,” “bitchy,” and “doo-dy blonde.”<sup>139</sup> A former employee of SMU filed the second complaint, claiming that the university had a pattern and practice of allowing sexual harassment and discrimination against female students.<sup>140</sup> The third complaint to OCR resulted from a male student’s claim of sexual assault by another male student and his allegation that the university failed to respond appropriately to his complaint and to protect him from retaliatory acts.<sup>141</sup>

OCR determined that when the first complainant notified the university of her alleged harassment, SMU did not have any hearing procedures in place.<sup>142</sup> Although OCR found that university police promptly investigated the third complainant’s allegations, the university did not investigate or take measures to protect the student from retaliation.<sup>143</sup> Further, OCR found that SMU’s procedures were not adequately prompt and equitable and that the university failed to properly notify students and faculty of the assigned Title IX Coordinator on campus, thereby failing to comply with Title IX guidelines.<sup>144</sup> As a result of the investigation, SMU agreed to change a number of its policies for responding to sexual assaults based on recommendations made by OCR.<sup>145</sup>

### III. DIFFERENCES, BENEFITS, AND LIMITS OF THE CAMPUS APPROACH TO SEXUAL ASSAULT COMPLAINTS

College and university procedures for responding to sexual harassment complaints are meant to be distinct from typical law enforcement procedures.<sup>146</sup> Advocates promoting campus disciplinary procedures often point to evidence demonstrating that victims fail to report sexual assaults to police out of fear that law enforcement will not believe them or will treat their claims with hostility.<sup>147</sup> This fear is substantiated by data that demonstrates the low prosecution rates for sexual assaults, alongside evidence, such as the case studies discussed previously, that demonstrates that college and

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<sup>139</sup> *Id.* at 10.

<sup>140</sup> *Id.* at 12.

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 9.

<sup>143</sup> *Id.* at 20.

<sup>144</sup> *Id.* at 21.

<sup>145</sup> *See id.* at 21–22. These changes included properly notifying students and faculty of the Title IX Coordinator on campus, creating resources advising students of their Title IX rights, training staff and students on the appropriate definitions of gender harassment, sexual harassment, and sexual assault, and clarifying options for parties involved in sexual harassment claims. *See id.*

<sup>146</sup> *See* Letter from Russlynn Ali to Colleagues, *supra* note 57, at 4.

<sup>147</sup> *See* Cantalupo, *supra* note 44, at 213; Gray, *supra* note 27.

university responses are often equally inadequate.<sup>148</sup> There are numerous differences for victims between campus investigations and disciplinary proceedings (“the campus approach”) and the processes used in the criminal justice system (“the law enforcement approach”).<sup>149</sup>

### *A. Benefits of the Campus Approach to Sexual Assault Complaints*

The differing requirements of the campus approach to sexual assault claims from those used in the law enforcement approach can lead to benefits for student victims on college campuses.<sup>150</sup> Campus disciplinary procedures were created to enforce school-created conduct codes, not rape statutes.<sup>151</sup> This difference is crucial because the required definition of sexual harassment to be used by institutions is “unwelcome conduct of a sexual nature.”<sup>152</sup> This definition is broader than actionable sexual assault crimes in state rape statutes, which often require an element of sexual contact and sometimes require force.<sup>153</sup> As a result, sexual assaults that may not be considered criminal acts under state statutory schemes, or which may be difficult to prosecute, will require action by an institution’s disciplinary committee.<sup>154</sup> Further, the campus approach tends to be more victim-centered, allowing students who report sexual assaults to have more control over the case than they would if they reported to law enforcement, where the prosecutor makes most decisions and the victim is considered a witness and not a party to the case.<sup>155</sup>

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<sup>148</sup> See Gray, *supra* note 27. Although government reports state that national data on prosecution rates is not available, it is estimated that at least two-thirds of sexual assault cases are dismissed. See A RENEWED CALL TO ACTION, *supra* note 21, at 17.

<sup>149</sup> See Letter from Russlynn Ali to Colleagues, *supra* note 57, at 4–5. There are also multiple differences between the two approaches that substantially affect accused students; however, that analysis is beyond the scope of this Note, which focuses on the remedies for victims of sexual assault on college campuses. See Holly Hogan, *The Real Choice in a Perceived “Catch-22”*: Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings, 38 J.L. & EDUC. 277, 288–92 (2009).

<sup>150</sup> See Cantalupo, *supra* note 22, at 491.

<sup>151</sup> Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault> [<http://perma.cc/N53H-XNCN>].

<sup>152</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 3.

<sup>153</sup> See, e.g., CAL. PENAL CODE § 261 (2013) (defining rape as “an act of sexual intercourse”); N.J. STAT. ANN. § 2C:14-2 (2014) (defining aggravated sexual assault as “an act of sexual penetration”); OR. REV. STAT. ANN. § 163.415 (2010) (defining sexual abuse in the third degree as “sexual contact” without consent).

<sup>154</sup> See Letter from Russlynn Ali to Colleagues, *supra* note 57, at 10.

<sup>155</sup> *Id.* at 5 (stating that schools should obtain consent from complainants before beginning an investigation and should consider the victim’s requests pertaining to pursuance of the case and confidentiality); see Cantalupo, *supra* note 22, at 498.

Additionally, the obligation of institution officials to take interim measures to protect victims on campuses is distinct from the law enforcement approach, which affords few protections to victims before beginning investigations.<sup>156</sup> Institutions implementing the campus approach are required to take immediate action to eliminate the hostile environment on campus, whether or not the victim requests interim remedies.<sup>157</sup> The nature of college campuses keeps victims and assailants in close quarters; for example, they may live in the same dorm or attend the same classes.<sup>158</sup> Therefore, it is necessary for school officials to take steps to protect complainants, such as moving either party to different housing, allowing a complainant to drop or change classes without penalty, and prohibiting the accused from contacting the complainant.<sup>159</sup>

Furthermore, unlike the “beyond a reasonable doubt” standard applied in criminal cases,<sup>160</sup> colleges and universities adjudicating sexual assault claims are advised to adopt the civil-based, less strict, “preponderance of the evidence” standard to determinations of guilt.<sup>161</sup> As a result, alleged perpetrators should face punishment when the institution finds that evidence demonstrates that it is more likely than not that sexual harassment occurred in a given situation.<sup>162</sup>

Additionally, the length of investigations and disciplinary proceedings are generally shorter in the campus approach than the law enforcement approach.<sup>163</sup> Institutions are required to provide procedures that are “prompt and equitable.”<sup>164</sup> The 2011 Dear Colleague Letter, while noting that there may be variations based on the complexity of an investigation, specifies that a typical investigation should take approximately sixty days to complete.<sup>165</sup> This provides complainants with a resolution much sooner than a criminal trial, which can take years to conclude.<sup>166</sup>

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<sup>156</sup> See Annie Kerrick, *Justice Is More Than Jail: Civil Legal Needs of Sexual Assault Victims*, 57 *ADVOCATE* 38, 38 (2014); Letter from Russlynn Ali to Colleagues, *supra* note 57, at 15. Victims in criminal trials can have judges issue stay-away orders once an arrest or arraignment has occurred, or have the limited option of pursuing civil restraining orders. See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 *SUFFOLK U. L. REV.* 467, 476–77 (2005).

<sup>157</sup> See Letter from Russlynn Ali to Colleagues, *supra* note 57, at 15.

<sup>158</sup> See Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims’ Educational and Civil Rights*, 38 *SUFFOLK U. L. REV.* 395, 410 (2005).

<sup>159</sup> See Letter from Russlynn Ali to Colleagues, *supra* note 57, at 15–17.

<sup>160</sup> *In re Winship*, 397 U.S. 358, 364 (1970).

<sup>161</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 11.

<sup>162</sup> *Id.*

<sup>163</sup> See Hogan, *supra* note 149, at 288–89; Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12.

<sup>164</sup> 34 C.F.R. § 106.8(b) (2014).

<sup>165</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12.

<sup>166</sup> See Kerrick, *supra* note 156, at 39.

### B. Drawbacks of the Campus Approach

Although the campus approach provides some benefits to victims, some requirements, or lack thereof, can prove detrimental to victims when compared to the criminal justice system.<sup>167</sup> Individuals on campus who first receive sexual assault complaints, such as resident life and public safety personnel, usually lack specific training on working with sexual assault victims.<sup>168</sup> Additionally, although those tasked with investigating and adjudicating sexual assault complaints should receive training on handling sexual assault complaints, they often lack legal training.<sup>169</sup> The designated Title IX Coordinator on campus is only required to have training on the definitions of sexual assault and sexual violence and the institution's specific grievance procedures in place to respond to complaints.<sup>170</sup>

Compounding the lack of legal training for disciplinary committees, school adjudicatory proceedings lack many of the procedural safeguards that exist in the criminal justice system.<sup>171</sup> Title IX guidelines do not require institutions to allow either the complaining or accused student to have legal representation at disciplinary proceedings.<sup>172</sup> In providing "prompt and equitable" procedures, institutions are only required to permit both parties the same representation, whether this is providing no access to legal counsel for either party, only allowing silent legal counsel, or permitting full participation by a lawyer.<sup>173</sup> Legal representation is beneficial to both parties by ensuring the process is fair and by assisting in the presentation of evidence and questioning of witnesses.<sup>174</sup> Without safeguarding the right to participation of legal counsel, the victim may be required to collect and present evidence and to cross-examine the alleged attacker on his or her own.<sup>175</sup> Although guidance discourages allowing students to question one another, it is

<sup>167</sup> See Natasha Vargas-Cooper, *To Prosecute Sexual Assault, Go Off Campus*, AL JAZEERA AMERICA (Feb. 13, 2014, 8:25 AM), <http://america.aljazeera.com/opinions/2014/2/campus-rape-prosecutionsexualassault.html> [<http://perma.cc/Q66F-NTGC>].

<sup>168</sup> See Cantalupo, *supra* note 44, at 221–22.

<sup>169</sup> *Id.*; Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12. The Dear Colleague Letter requires "all persons involved in implementing [an institution's] grievance procedures" to simply be experienced in taking complaints and to have knowledge of the appropriate grievance procedures and confidentiality requirements. Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12. These requirements do not include any training on collecting forensic evidence or conducting interviews with victims or witnesses. See Vargas-Cooper, *supra* note 167; Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12.

<sup>170</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 7.

<sup>171</sup> See Reardon, *supra* note 158, at 408 (noting the "loose rules regarding investigations" at colleges and universities).

<sup>172</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12.

<sup>173</sup> See 20 U.S.C. § 1092(f)(8)(B)(iv)(II) (2012); Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12.

<sup>174</sup> See Reardon, *supra* note 158, at 411–12.

<sup>175</sup> *Id.* at 412.

not prohibited, which can lead to traumatizing encounters for student victims who are required to question their attackers during disciplinary proceedings.<sup>176</sup>

Additionally, campus disciplinary committees lack the coercive powers of the criminal justice system, such as the ability to subpoena witnesses.<sup>177</sup> Victims may then be required to attempt to find and present their own witnesses and evidence to support their claims in front of the disciplinary committee.<sup>178</sup> The lack of clear requirements regarding witnesses and evidence collection for campus disciplinary proceedings can also lead to the rapid spread of rumors and loss of confidentiality for victims.<sup>179</sup> This is compounded by the failure of the campus approach to include “rape shield” laws or their equivalent that regulate evidence and protect victims in criminal sexual assault trials.<sup>180</sup> Almost every jurisdiction in the United States has enacted a “rape shield” law preventing defendants from introducing evidence of a victim’s past sexual encounters, keeping the private sexual lives of victims from becoming central to rape trials.<sup>181</sup> In contrast, campus disciplinary proceedings lack this protection, with guidance seeming to imply its admissibility by providing simply that disciplinary boards should not allow “only the alleged perpetrator to present character witnesses.”<sup>182</sup>

Finally, the consequences for students found guilty of sexual assault in campus disciplinary proceedings are much less severe than the possible jail

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<sup>176</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12; Reardon, *supra* note 158, at 412. Allowing accused students to freely question their victims may be a violation of the Title IX requirement that institutions end the “hostile environment” on campus. Reardon, *supra* note 158, at 412; Letter from Russlynn Ali to Colleagues, *supra* note 57, at 12. The Dear Colleague Letter states that “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its occurrence, and address its effects.” Letter from Russlynn Ali to Colleagues, *supra* note 57, at 4.

<sup>177</sup> See Cantalupo, *supra* note 22, at 517.

<sup>178</sup> See Reardon, *supra* note 158, at 407–08.

<sup>179</sup> See *id.* at 408. The 2001 Guidance requires institutions to “discuss confidentiality standards and concerns with the complainant initially,” but qualifies this by noting that the victim’s desire for confidentiality could limit the institution’s ability to investigate and does not discuss specific steps that can be taken to protect confidentiality. 2001 GUIDANCE, *supra* note 57, at 17. In the case of Anna at Hobart and William Smith Colleges, discussed in the Introduction to this Note, school officials sent emails to “dozens of students” that included Anna’s name, and then defended their actions by stating that these students would possibly have been needed to testify. Bogdanich, *supra* note 1.

<sup>180</sup> See Reardon, *supra* note 158, at 408 (discussing the need for institutions to develop clear limitations on the use of witnesses and the type of evidence that can be admitted); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 80 (2002).

<sup>181</sup> Anderson, *supra* note 180, at 80.

<sup>182</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 11.



time and sex offender registration they would face in a criminal trial.<sup>183</sup> The harshest penalty an institution can hand down to a student who is found guilty of sexual assault is expulsion, yet this option is often avoided in favor of more modest sanctions.<sup>184</sup> An investigation by the Center for Public Integrity (CPI) found that, of schools surveyed, only ten to twenty-five percent of students found guilty of sexual assaults were expelled from school.<sup>185</sup> Some victims choose the campus approach particularly to avoid the severity of jail as punishment for assailants; however, they then face the possibility of further trauma when modest punishments lead to victims continuously encountering their attacker on campus.<sup>186</sup> Further, as noted previously, studies have shown that student rapists are often repeat offenders who commit an average of six rapes each.<sup>187</sup> As a result, even the harshest penalty of expulsion, which can benefit the initial victim, leaves offenders out of jail and free to harm new victims.<sup>188</sup>

#### IV. ENSURING COMPLIANCE AND IMPROVING THE CAMPUS APPROACH TO SEXUAL ASSAULT

Without effective methods of ensuring compliance, institutions are able to weigh the costs and benefits of initiating a possibly costly and high profile investigation or minimizing the complaint and risking a later investigation by the Department of Education Office for Civil Rights (OCR).<sup>189</sup> Officials at higher education institutions responsible for investigating and adjudicating complaints, even when committed to reducing sexual assaults on their campuses, are often also motivated by an interest in protecting the reputation of the school.<sup>190</sup> Further, the disciplinary proceedings that are

<sup>183</sup> Cantalupo, *supra* note 22, at 517; *see* Lombardi, *supra* note 151. Possible sanctions include expulsion, suspension, counseling, community service, alcohol treatment programs, and being required to submit a research paper on violence. Lombardi, *supra* note 151.

<sup>184</sup> *See* Lombardi, *supra* note 151.

<sup>185</sup> *Id.* The CPI report notes that administrators reason that sanctions given during college disciplinary proceedings are meant to be teaching opportunities as opposed to punishment. *Id.* The report quotes one administrator who stated “[o]ur basic philosophy is not to expel,” and another who noted “there is nothing in our mission about justice.” *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *See* Cantalupo, *supra* note 22 and accompanying text. The CPI study noted that campus administrators often mischaracterize student sexual assaults as communication errors, believing that repeat offenders conform to the masked stranger in the bushes as opposed to student acquaintances. *See* Lombardi, *supra* note 151.

<sup>188</sup> *See* Jed Rubenfeld, Op-Ed., *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<http://perma.cc/E8MP-SLMP>]; Lombardi, *supra* note 151.

<sup>189</sup> *See* Cantalupo, *supra* note 44, at 242.

<sup>190</sup> *See* Caroline Kitchener, *When Helping Rape Victims Hurts a College's Reputation*, ATLANTIC (Dec. 17, 2014), <http://www.theatlantic.com/features/archive/2014/12/when-helping-rape-victims-hurts-a-universitys-reputation/383820> [<http://perma.cc/F8YD-J57T>]; Vargas-Cooper, *supra* note 167.

initiated lack key protections for victims that exist in the criminal justice system.<sup>191</sup>

Although not all sexual assault complaints must automatically be referred to law enforcement agencies, institutions should be required to integrate local law enforcement into their response systems and should notify law enforcement of all complaints of sexual violence that occur on campuses.<sup>192</sup> The federal government should also require a disinterested third party with extensive training on working with sexual assault victims to be involved with campus investigations and disciplinary procedures.<sup>193</sup> Additionally, victims should be provided with an advocate throughout the process and legislation or guidance should stipulate specific required punishments for students found guilty.<sup>194</sup> Finally, more realistic and persuasive sanctions should be levied against non-compliant institutions to ensure that colleges and universities have stronger motivation to comply with obligations to properly investigate all sexual assault complaints on their campuses.<sup>195</sup>

#### *A. Proposed Legislation: The Campus Accountability and Safety Act*

In July 2014 a group of U.S. Senators, led by Claire McCaskill of Missouri and Kirsten Gillibrand of New York, first introduced new legislation aimed at improving the response to sexual assaults on college campuses.<sup>196</sup> The proposed legislation, The Campus Accountability and Safety Act (CASA), would amend both the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act) and the Higher Education Act of 1965.<sup>197</sup>

As proposed, CASA incorporates substantial requirements to improve the campus response to sexual assault complaints, which includes an obligation on institutions to conduct a climate survey annually to assess students' experiences with sexual violence and harassment on campus.<sup>198</sup> Requiring

<sup>191</sup> See Reardon, *supra* note 158, at 411–12.

<sup>192</sup> See Rubinfeld, *supra* note 188.

<sup>193</sup> See Reardon, *supra* note 158, at 408.

<sup>194</sup> See NOT ALONE, *supra* note 18, at 11; Sarah Favot, *IMPACT: Official Calls Mishandling of Sexual Assault Cases 'Staggering.'* CTR. FOR PUB. INTEGRITY (Apr. 29, 2011, 10:14 AM), <http://www.publicintegrity.org/2011/04/29/4420/impact-official-calls-mishandling-sexual-assault-cases-staggering-0> [<http://perma.cc/FF4K-RKCZ>].

<sup>195</sup> See Cantalupo, *supra* note 44, at 231–32, 258.

<sup>196</sup> Michael Stratford, *Sex Assault Bill Unveiled*, INSIDE HIGHER ED (Jul. 31, 2014), <https://www.insidehighered.com/news/2014/07/31/us-senators-announce-campus-sexual-assault-legislation> [<http://perma.cc/7P8X-X7GU>].

<sup>197</sup> Campus Accountability and Safety Act, S. 2692, 113th Cong. (2014).

<sup>198</sup> S. 2692 § 2(5). The survey would be administered online and would be confidential. *Id.* The survey would have to include trauma-informed questions assessing students' knowledge of grievance procedures, details about specific incidences of sexual assault and violence, and whether

climate surveys is a positive step in minimizing the ability of institutions to manipulate crime statistics in an attempt to appear safer to potential students and their parents.<sup>199</sup> Additionally, CASA would require all institutions to attempt to enter into a memorandum of understanding with law enforcement.<sup>200</sup> These agreements would have to include protocols for sharing information, conducting investigations, and notifying law enforcement of crimes at the victims' discretion.<sup>201</sup> The Secretary of Education would have discretion to waive the memorandum of understanding requirement if an institution was able to demonstrate that it made a good faith effort to enter into an agreement, but was unable to due to law enforcement refusal.<sup>202</sup> Although this is a beneficial step towards incorporating law enforcement into campus investigative procedures, it is limited in that it does not specify a requirement to notify law enforcement when sexual violence occurs.<sup>203</sup> Assault victims should always have control over the decision of whether or not to report to police, but law enforcement liaison officers should be notified when violent sexual assault has occurred on campus.<sup>204</sup>

CASA would also require institutions to designate a confidential advisor to take reports and provide trauma-informed assistance to victims of sexual assault on campuses.<sup>205</sup> The advisor could not be a student, would have to be distinct from the Title IX Coordinator, and would be available to discuss options with the victim, assist the victim with filing a report, advise the victim of the institution's obligations, and arrange accommodations such as adjusting class schedules or living arrangements with campus officials.<sup>206</sup> Well-trained victim advocates are integral to responding to the immediate needs of sexual assault victims.<sup>207</sup> CASA, however, does not discuss the

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victims were referred to law enforcement. *Id.*; see Stratford, *supra* note 196. The senior vice president for government and public affairs for the American Council on Education, however, argues that there is no evidence that climate surveys work and that it is unclear from the law how they would be implemented. *See id.*

<sup>199</sup> *See* Cantalupo, *supra* note 44, at 247 (stating that when institutions self-report, they are often able to use their discretion when deciding whether to include an assault in a required report). CASA would promote compliance by allowing fines of up to \$150,000 for each violation or misrepresentation associated with the climate surveys. S. 2692 § 2(5).

<sup>200</sup> S. 2692 § 3(a). The memorandums would have to be updated every two years. *Id.*

<sup>201</sup> *Id.*

<sup>202</sup> *See id.* In demonstrating a good faith attempt, institutions that failed to successfully enter into a memorandum of understanding would be required to provide a copy of the rejected final offer they submitted to law enforcement. *Id.*

<sup>203</sup> *See id.* § 4.

<sup>204</sup> *See* Reardon, *supra* note 158, at 405; Rubinfeld, *supra* note 188.

<sup>205</sup> S. 2692 § 4.

<sup>206</sup> *Id.* CASA would allow institutions to partner with victim service organizations to serve as confidential advisors in lieu of hiring or assigning an advisor on campus. *Id.*

<sup>207</sup> *See* Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 681 (2009).

role of the advocate in disciplinary proceedings and fails to include a requirement that victims (and accused students) must be allowed active representation.<sup>208</sup>

Additionally, CASA would prohibit institutions from disciplining students who report sexual violence for other infractions such as alcohol consumption.<sup>209</sup> Prohibiting institutions from sanctioning reporting students will encourage more victims and bystanders to report sexual assaults without fear of disciplinary action.<sup>210</sup> CASA also proposes the requirement that institutions establish uniform procedures for investigating and adjudicating sexual assault complaints, explicitly prohibiting different procedures for complaints that involve student athletes.<sup>211</sup> This is a necessary step in ensuring that victims are fully aware of the process the institution will use and in limiting the ability of athletic departments to interfere with appropriate adjudication of complaints.<sup>212</sup>

Finally, CASA would increase the fine for Clery Act violations from \$35,000 per violation to \$150,000 and give the Department of Education the discretion to fine institutions that violate the bill's provisions up to one percent of their operating budgets.<sup>213</sup> This would give the Department more flexibility in determining fines, giving institutions more incentive to comply with their obligations in responding to sexual assaults.<sup>214</sup>

### *B. Procedural Changes Required to Ensure More Effective Disciplinary Proceedings*

Sexual assault cases should not automatically be removed from institutions by law enforcement because this could lead to fewer reports by victims who are afraid of losing control over their cases; however, colleges and universities should be required to institute uniform procedural changes

<sup>208</sup> See S. 2692 § 4. The act allows the confidential advisor to be available to work with local law enforcement and campus authorities, to be involved in evidence collection by conducting forensic interviews, and to advise victims of their rights and the institution's responsibilities. *Id.* However, the act does not explicitly state that the advisor would be directly involved with supporting the victim through the disciplinary proceeding process. See *id.*

<sup>209</sup> *Id.*

<sup>210</sup> See Reardon, *supra* note 158, at 403–04.

<sup>211</sup> S. 2692 § 6. The act would also prohibit different procedures for students based on academic major or “any other characteristic or status.” *Id.*

<sup>212</sup> See Reardon, *supra* note 158, at 404.

<sup>213</sup> S. 2692 §§ 2–6. In determining the penalty to impose, the Secretary of Education could consider “the appropriateness of the penalty to the size of the operating budget of the educational institution” as well as “the gravity of the violation or failure, and whether the violation or failure was done intentionally, negligently, or otherwise . . .” *Id.* § 6.

<sup>214</sup> See Stratford, *supra* note 196. College administrators argue that the stiffer fines are ambiguous and “reflect a view that colleges and universities don’t want to deal with this issue.” *Id.*

when handling sexual assault cases.<sup>215</sup> First, institutions should be required to create a victim services office with trained personnel to specifically support victims of sexual assault.<sup>216</sup> If a school lacks the resources to create a comprehensive resource center, they should be required to provide a victim advocate who is trained specifically on trauma-informed care for sexual assault victims.<sup>217</sup> Although institutions are currently required to designate a Title IX Coordinator, the coordinator is not required to be specifically trained on trauma-informed response and care, but rather only on the school's proper grievance procedures and what constitutes sexual assault.<sup>218</sup> This advocate should be available to provide confidential support to victims at the time of the report and represent them in the disciplinary hearings.<sup>219</sup>

Institutions should no longer be free to decide whether or not to allow reporting and accused students the right to representation; instead, they should be required to allow both students to have an advocate present who is able to represent them throughout disciplinary proceedings.<sup>220</sup> The complainant should have the option of being represented by the victim advocate on campus or of choosing his or her own representation.<sup>221</sup> Allowing victims to be represented in proceedings reduces the risk of further traumatizing victims who are denied counsel and are often required to personally present their cases and question their attackers.<sup>222</sup>

Building on the guidance documents that have been released, OCR should develop model policies and procedures that clarify specific requirements of the campus response to sexual assaults.<sup>223</sup> First, the procedures should explicitly prohibit institutions from allowing athletic departments to handle sexual assault complaints involving athletes.<sup>224</sup> All sexual assault

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<sup>215</sup> See Rubinfeld, *supra* note 188; see Cantalupo, *supra* note 44, at 262–63.

<sup>216</sup> Cantalupo, *supra* note 44, at 262.

<sup>217</sup> Cantalupo, *supra* note 207, at 684. Providing a designated advocate allows the victim to communicate almost entirely with one individual, mitigating the need to tell his or her story multiple times throughout the process. *Id.* at 681.

<sup>218</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57 at 12.

<sup>219</sup> See Cantalupo, *supra* note 207, at 681, 683.

<sup>220</sup> See *id.* at 683.

<sup>221</sup> *Id.* at 684.

<sup>222</sup> See Reardon, *supra* note 158, at 411–12. Institutions that continue to require victims to question their attacker directly and/or allow accused students to question victims could be in violation of Title IX's requirement that institutions eliminate ongoing hostile environments on campus. *Id.* at 412.

<sup>223</sup> See Cantalupo, *supra* note 44, at 255–56.

<sup>224</sup> See Nick Anderson, *McCaskill Questions Athletics-department Role in Sex-assault Cases Involving Athletes*, WASH. POST (July 9, 2014), [http://www.washingtonpost.com/local/education/mccaskill-survey-shows-most-colleges-lack-data-on-campus-sex-assaults/2014/07/09/344a0e52-0757-11e4-a0dd-f2b22a257353\\_story.html](http://www.washingtonpost.com/local/education/mccaskill-survey-shows-most-colleges-lack-data-on-campus-sex-assaults/2014/07/09/344a0e52-0757-11e4-a0dd-f2b22a257353_story.html) [<http://perma.cc/5TAY-CL2D>]. Currently the Dear Colleague Letter includes this requirement in a footnote. Letter from Russlynn Ali to Colleagues, *supra* note 57, at n.22.

complaints should be streamlined through the same procedures to ensure that reporting students are aware of the disciplinary process that will be implemented to respond to every complaint.<sup>225</sup> Schools should also be prohibited from expanding the scope of investigations to include character witnesses.<sup>226</sup> Only witnesses with firsthand knowledge of the events being investigated should be incorporated into disciplinary proceedings.<sup>227</sup>

Additionally, required punishments for students found guilty of offenses, varying by severity, should be included in obligatory policies and procedures.<sup>228</sup> This would reduce the possibility of disciplinary committees concluding that an accused student is guilty and then providing inadequately modest punishments.<sup>229</sup> Although it is unrealistic to require uniform policies and procedures for all aspects of the disciplinary proceedings given the variety of institutions across higher education, OCR should strengthen requirements ensuring particular aspects of the process are uniform across all institutions.<sup>230</sup>

### *C. The Severity of Sexual Assault Should Require Schools to Integrate Law Enforcement into Their Responses*

College and university disciplinary committees are designed to enforce conduct codes, not criminal codes.<sup>231</sup> Given the severity of sexual assault, institution disciplinary committees should not be left to manage investigations and consider punishments without the involvement of law enforcement.<sup>232</sup> Currently, most schools do not have agreements or procedures with local law enforcement about how to coordinate their response to and investigations of student sexual assault complaints.<sup>233</sup> The most recent guidance from OCR states that institutions should notify victims of their right to file a

<sup>225</sup> See Reardon, *supra* note 158, at 404. This is also beneficial in that it puts potential assailants on notice of the specific steps that the institution will take in responding effectively to complaints. *Id.*

<sup>226</sup> See *id.* at 408.

<sup>227</sup> *Id.*

<sup>228</sup> See *id.* at 409.

<sup>229</sup> See Lombardi, *supra* note 151.

<sup>230</sup> See NOT ALONE, *supra* note 18, at 12 (stating that schools should be given flexibility to create policies that are unique to their situation, but noting that there are some general policies that should be “universally applied”). *Id.*

<sup>231</sup> See Vargas-Cooper, *supra* note 167; Lombardi, *supra* note 151 (noting that the educational mission of campus disciplinary proceedings differs from the punitive mission of the criminal justice system).

<sup>232</sup> See Vargas-Cooper, *supra* note 167 (comparing the severity of rape to other felonies and stating: “You wouldn’t expect a mere campus panel investigation into an alleged school-related murder; homicide detectives would be brought in immediately.”).

<sup>233</sup> SEXUAL VIOLENCE ON CAMPUS, *supra* note 102, at 9. More than seventy-three percent of the institutions surveyed had not developed policies or agreements with local law enforcement agencies. *Id.*

criminal complaint and stipulates that law enforcement involvement does not abdicate an institution's obligation to conduct a Title IX investigation.<sup>234</sup> The guidance, however, does not require a relationship between institutions and law enforcement.<sup>235</sup>

Institutions should be required by law to create procedures that integrate law enforcement into their response.<sup>236</sup> Beyond simply informing a victim of his or her right to report to law enforcement, institutions should be required to provide an escort to accompany victims to local law enforcement to discuss their options.<sup>237</sup> These procedures should include requiring local law enforcement to designate a liaison officer who is properly trained on effectively receiving and investigating sexual assaults to work directly with schools when a student reports a sexual assault.<sup>238</sup>

Sexual assault victim advocates are wary of requiring law enforcement involvement, claiming that this will discourage many women from reporting assaults.<sup>239</sup> This fear is legitimate; to mitigate this, institutions should clearly explain the option of reporting to police, but make it clear to victims that they can ultimately decide whether or not to file an official police report.<sup>240</sup> Whether or not the district attorney decides to pursue a criminal trial, oversight of the initial investigation by trained personnel will ensure effective protection of evidence and provide legitimacy to disciplinary procedures.<sup>241</sup> Requiring immediate involvement by law enforcement liaisons will also mitigate the conflict of interest of college and university officials who have an interest in protecting the reputation of their institutions through the minimization of victim's complaints.<sup>242</sup>

#### *D. Stronger and More Effective Sanctions Needed to Promote Compliance*

Requirements and guidance for institutions are useless without stronger mechanisms to ensure that colleges and universities comply with their obligations when responding to sexual assault complaints.<sup>243</sup> Currently,

<sup>234</sup> Letter from Russlynn Ali to Colleagues, *supra* note 57, at 10.

<sup>235</sup> *See id.* The Dear Colleague Letter requires that institutions that independently choose to enter into memorandums of understanding must still complete their own investigations and must notify the victim of his or her right to exclusively file a complaint through the campus disciplinary procedures. *Id.*

<sup>236</sup> Rubinfeld, *supra* note 188.

<sup>237</sup> Vargas-Cooper, *supra* note 167.

<sup>238</sup> Rubinfeld, *supra* note 188.

<sup>239</sup> *See* Gray, *supra* note 27. Law enforcement officials, however, expressed the difficulty in pursuing criminal cases when they do not have access to evidence early in the process. *Id.*

<sup>240</sup> Cantalupo, *supra* note 207, at 670; Reardon, *supra* note 158, at 405.

<sup>241</sup> *See* Vargas-Cooper, *supra* note 167.

<sup>242</sup> *See id.*; Kitchener, *supra* note 190.

<sup>243</sup> *See* Cantalupo, *supra* note 44, at 242, 258, 265.

OCR must attempt to resolve complaints through a voluntary resolution with the institution under investigation before withholding federal funding.<sup>244</sup> As mentioned previously, if voluntary compliance fails, OCR's only punitive option is to withhold all federal funding from an institution, an option that has never been utilized.<sup>245</sup> In order to effectively encourage institutions to comply, OCR must have the ability to levy substantial fines as opposed to having the sole option of withholding all federal funding.<sup>246</sup>

Higher education is a competitive business in which institutions strive to attract the best students and the donations of alumni.<sup>247</sup> Reputation, including the relative safety of an institution's campus, is extremely important.<sup>248</sup> Encouraging students to report assaults could lead to the appearance that an institution is unsafe.<sup>249</sup> As a result, institutions may violate the law and attempt to minimize a victim's complaint, including encouraging him or her not to report to law enforcement, in order to avoid the negative publicity that could result from an investigation.<sup>250</sup> Institutions may be willing to risk the exposure of a possible compliance review by OCR down the line rather than comply with Title IX and draw attention to incidents on their campuses.<sup>251</sup> Giving OCR the option to fine non-compliant schools after an initial investigation would increase the risk associated with refusing to comply with Title IX obligations and give OCR more flexibility when issuing sanctions.<sup>252</sup>

## CONCLUSION

Sexual assault is a serious offense that can cause victims long-lasting trauma—especially young victims, such as those enrolled in institutions of higher education. This trauma is compounded when a victim comes forward

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<sup>244</sup> NOT ALONE, *supra* note 18, at 17.

<sup>245</sup> Cantalupo, *supra* note 44, at 241; Galles, *supra* note 28, at 21. The Department of Education has the option of fining schools that violate the Clery Act and has chosen to do so in the past; however, the Clery Act is aimed at crime reporting meant to inform potential students and does not directly affect the response to sexual assaults that occur on campus. Cantalupo, *supra* note 44, at 224–25.

<sup>246</sup> *See id.* at 258. In comparison, the National Collegiate Athletic Association, which regulates intercollegiate athletics, has discretion to sanction and penalize noncompliant institutions based on “the relative severity of the infraction(s), the presence of aggravating or mitigating factors and . . . the existence of extenuating circumstances.” NAT'L COLLEGIATE ATHLETIC ASS'N, DIVISION I MANUAL 313 (2015), <http://www.ncaapublications.com/productdownloads/D116.pdf> [<http://perma.cc/ZM52-FBSK>].

<sup>247</sup> *See* Cantalupo, *supra* note 44, at 224.

<sup>248</sup> *Id.*

<sup>249</sup> *See* Kitchener, *supra* note 190 (discussing specific school administrators who pushed back against requests to expand successful victim services after expansion led to increased reporting of sexual assaults); Cantalupo, *supra* note 44, at 219.

<sup>250</sup> *See* Kitchener, *supra* note 190.

<sup>251</sup> *See* Cantalupo, *supra* note 44, at 243.

<sup>252</sup> *See id.* at 241, 258.



with a complaint only to experience skepticism, inadequate investigations, and attempts to diminish the severity of the attack. Title IX's prohibition of sex discrimination requires colleges and universities to respond to every report of sexual assault that occurs on their campuses. Despite the efforts to clarify institution obligations through legislation and guidance, colleges and universities across the United States continually fail to comply, causing victims to experience further harm.

Government guidance continually attempts to coerce colleges and universities to effectively respond to sexual assaults through campus disciplinary procedures in lieu of requiring mandatory law enforcement and/or third party involvement. This approach has proven ineffective as institutions may put their reputations ahead of the needs of sexual assault victims. College and university disciplinary committees that were created to adjudicate honor code violations are not equipped to provide the trauma-informed response victims need. Law enforcement liaisons must be integrated into the initial response and investigation of complaints of sexual assault on college campuses. Despite the involvement of law enforcement liaisons, victims should be made fully aware that they control the trajectory of the complaint and have the option to increase or decrease the investigation at any time.

Additionally, further procedural changes are necessary for college and university disciplinary proceedings. Both victims and accused students must be allowed to have active representation throughout the disciplinary process to protect their interests. Institutions should be explicitly prohibited from altering disciplinary procedures based on the athletic or academic status of accused students. Model uniform sanctions for students found guilty should be mandatory for all institutions to ensure that punishments aren't inconsistent across colleges and universities. Finally, OCR should be given authority to fine colleges and universities who are found to be noncompliant. Recently proposed federal legislation would improve the response of institutions to sexual assault in a number of ways, and all efforts should be made to pass the legislation.

Given the troubling statistics demonstrating the high risk of sexual assault on college campuses, strong measures must be taken to ensure equal access to safe educational opportunities, improve the response of colleges and universities, and promote compliance with current obligations. Young women should not be at a higher risk of sexual assault simply because they choose to pursue an education. The physical and emotional harms that result from sexual assault should not be compounded by inadequate responses by colleges and universities that simply serve to revictimize students who turn to them for support and guidance.