SEXUAL ASSAULT ON COLLEGE CAMPUSES: SEEKING THE APPROPRIATE BALANCE BETWEEN DUE PROCESS AND VICTIM PROTECTION

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ABSTRACT

Peer sexual assault is a significant problem on American college and university campuses. On April 4, 2011, the Office for Civil Rights of the Department of Education sought to address this problem by issuing a new "Dear Colleague Letter" that provided enhanced guidance on how educational institutions should adjudicate such incidents. The letter has the perverse effect of complicating matters further by blurring the already fine line between victim protection and due process for the accused, and it exposes a potential liability trap for educational institutions. This Note explains why the law surrounding victim protection and due process is difficult for institutions to apply and argues that the Department of Education should produce a model judicial policy so that institutions, victims, and accused students will have more certainty in this complicated arena. In furtherance of such a policy, this Note offers specific due-process protections for accused students that should be embraced by educational institutions and the Department of Education alike.

INTRODUCTION

Student-on-student sexual assault is a significant problem on college and university campuses,[1] as demonstrated by several highly

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1. *See* CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT, at xviii (2007), *available at* http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf (finding that one in five women are victims of sexual assault while in college).

publicized episodes at well-known institutions of higher education.[2] As colleges and universities pursue effective means of targeting this problem, many schools have themselves become targets of legal action. Both sexual-assault victims as well as alleged perpetrators have sued their schools for failing to provide sufficient investigative and judicial proceedings when responding to accusations of assault.[3] Some of these cases have resulted in significant judgments against universities.[4]

On April 4, 2011, the Office for Civil Rights (OCR) of the Department of Education (DOE) addressed the issue of campus sexual assault by issuing a new "Dear Colleague Letter"[5] that

2. *See, e.g.*, Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 95–98 (2010) (discussing the well-publicized Tiffany Williams case at the University of Georgia); Ben Eisen, *A Rape Case That's Not Going Away*, INSIDE HIGHER ED (June 19, 2009, 3:00 AM), http://insidehighered.com/news/2009/06/19/assault (describing an alleged gang rape at the University of the Pacific).

3. *See, e.g.*, Christina Huffington, *Yale Students File Title IX Complaint Against University*, YALE HERALD, Mar. 31, 2011, http://yaleherald.com/topstory/breaking-news-yale-students-file-title-ix-suit-against-school ("The Department of Education's Office for Civil Rights . . . announced . . . it will open an investigation to review Yale's policies for dealing with sexual harassment and sexual assault."); Elyse Ashburn, *Education Dept. Tells 2 Colleges To Revamp Sexual-Harassment Policies*, CHRON. HIGHER EDUC. (Dec. 10, 2010), http://chronicle.com/article/Education-Dept-Tells-2/125704 (discussing settlements between the Department of Education (DOE) and Eastern Michigan University and Notre Dame College in which the institutions would revamp their efforts to comply with Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1686 (2006), to avoid further investigations); Allie Grasgreen, *Wrong People on Trial?*, INSIDE HIGHER ED (June 7, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/06/07/women_raise_questions_about_university_judicial_hearings_under_title_ix (discussing victims' lawsuits against educational institutions).

4. *See, e.g.*, Found. for Individual Rights in Educ., *In Verdict Against Sewanee, Federal Jury Sends Important Message About Proper Handling of Sexual Assault Cases*, MORAL LIBERAL (Sept. 6, 2011), http://www.themoralliberal.com/2011/09/06/in-verdict-against-sewanee-federal-jury-sends-important-message-about-proper-handling-of-sexual-assault-cases ("In a decision that should send some rumblings through the world of higher education . . . the jury awarded $26,500 in compensatory damages to the former student for [the institution's] negligence in mishandling his disciplinary hearing [for an alleged sexual assault]."); *see also* Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007) (permitting a rape victim's Title IX suit for damages against her former university to proceed).

5. Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. Dear colleague letters are guidance documents written to educational administrators that explain the OCR's legal positions and enforcement priorities. The letters lack the force of congressionally made law, but courts pay them great attention due to deference prescribed by *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984). *See, e.g.*, Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 93 (D. Conn. 2010) ("[T]here seems to be little question that this court should defer to [the OCR letters] insofar as they represent OCR's interpretation of its own regulations.").

outlined the procedures that institutions should follow to remain in compliance with Title IX,[6] the federal statute that prohibits sex discrimination in education.[7] Many colleges and universities responded to the April 4, 2011 Dear Colleague Letter ("Dear Colleague Letter") by amending their procedures for adjudicating allegations of sexual assault.[8] Meanwhile, the letter itself has sparked a debate about the appropriate balance between protecting victims of assault and ensuring adequate due process for the accused in the context of campus adjudications.[9] Scholars such as Professor Peter Berkowitz of Stanford University criticized the letter as an affront to

6. Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1686 (2006).

7. *See id.* § 1681 ("No person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .").

8. *See, e.g.*, Luc Cohen, *U. Redefines Sexual Misconduct*, DAILY PRINCETONIAN, Sept. 27, 2011, at 1 (discussing changes to the term "sexual assault" in Princeton University's sexual-misconduct policies); Michelle Davis, *U.Va. Alters Rules for Sexual Misconduct*, CAVALIER DAILY (Univ. of Va.), Aug. 20, 2011, at A1 ("The University [of Virginia] redefined the circumstances under which a student can raise sexual assault charges in July, altering its policy from one of 'clear and convincing evidence' to a broader standard in which an incident of sexual misconduct more likely than not occurred."); Michael Goodrich, Op-Ed., *Justice in the Academy*, CHRONICLE (Duke Univ.), Sept. 7, 2011, at 11 ("[A]lleged violations of university policy that fall under Title IX . . . will now be resolved using the preponderance of evidence standard . . . ." (quoting Stephen Bryan, Associate Dean of Students at Duke University) (internal quotation marks omitted)); Lee Shearer, *UGA Toughens Sexual Harassment Policy*, ONLINEATHENS (Sept. 16, 2011), http://www.onlineathens.com/stories/091611/uga_886443218.shtml ("The University of Georgia has adopted a new, tougher sexual harassment policy that for the first time explicitly defines sexual violence as a violation of UGA policy.").

9. *See, e.g.*, Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J., Aug. 20, 2011, at A13 ("Most egregiously, OCR requires universities to render judgment using 'a preponderance of the evidence' standard." (quoting Letter from Russlynn Ali, *supra* note 5, at 11)); Rick Hills, *What Constitutes "Due Process" for the Accused in Universities' Hearings Dealing with Campus Rape?*, PRAWFSBLAWG (Aug. 21, 2011), http://prawfsblawg.blogs.com/prawfsblawg/2011/08/what-constitutes-due-process-in-universities-campus-rape-adjudications.html ("But Peter [Berkowitz] cannot be serious that all of the rights appropriate for a criminal case . . . ought to be imported into an administrative hearing . . . ."); *see also Criticisms of the Department of Education's April 4, 2011 "Dear Colleague Letter"*, FALSE RAPE SOC'Y, http://falserapearchives.blogspot.com/2011/09/writings-demonstrating-error-and.html (last visited Sept. 25, 2012) (maintaining a list of links to documents that have disclaimed the Dear Colleague Letter).

male students' due-process rights.[10] Others, however, lauded the letter for ushering in an era of clarity in the world of Title IX compliance.[11]

In the midst of this debate, this Note argues that the Dear Colleague Letter suffers from a fatally inadequate discussion of the appropriate balance between victim protection and due process. Specifically, the document has raised more questions than it has answered, leaving the interests of both victims and accused students in flux. Because institutions simultaneously face statutory duties to respond properly to victims' claims of assault and constitutional or contractual obligations to provide due process to the accused, better-defined policies—such as those advanced in this Note—are needed. Without such guidance, institutions are left with a choice. They may closely follow the OCR's guidelines on victim protection, thereby risking possible due-process claims from alleged perpetrators, or they may independently attempt to balance victim-protection and due-process interests and risk Title IX violations for inadequate victim protection. Under either approach, institutions face potential liability,[12] and both victims and alleged perpetrators may be insufficiently protected.

This Note begins by outlining the legal forces at play in peer sexual-assault cases. Part I summarizes the campus disciplinary process and discusses Title IX, due process, and the Federal Educational Rights and Privacy Act (FERPA).[13] This analysis reveals that a lack of guidance on how these various processes and laws interact has produced confusion about how institutions should

10. Berkowitz, *supra* note 9; *see also* Anonymous, *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), http://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students (telling the OCR that the Dear Colleague Letter went "too far").

11. *E.g.*, NCHERM Partners, *NCHERM Reaction to the OCR Title IX Dear Colleague Letter on Campus Sexual Assault*, RISKMABLOG (Apr. 6, 2011), http://riskmablog.blogspot.com/2011/04/ncherm-reaction-to-ocr-title-ix-dear.html; *see also, e.g.*, Donna Bickford, Brenda Betham, Michelle Issadore & Michelle Kroner, *Open Letter to Anonymous*, INSIDE HIGHER ED (Nov. 8, 2011), http://www.insidehighered.com/views/2011/11/08/essay-defending-ocr-letter-colleges-and-sexual-assault ("We would argue that the OCR guidelines, while not perfect, instead provide valuable guidance to campuses looking to support all their students equitably."); Erin Buzuvis, *OCR "Dear Colleague" Letter Addresses Sexual Harassment in Schools*, TITLE IX BLOG (Apr. 6, 2011), http://title-ix.blogspot.com/2011/04/ocr-dear-colleague-letter-addresses.html (describing the Dear Colleague Letter as a "much-needed reminder" of Title IX's requirements).

12. *See supra* note 4 and accompanying text; *see also infra* Part I.B.

13. Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (2006 & Supp. IV 2011).

balance due-process rights and victim protection. In Part II, this Note closely examines the Dear Colleague Letter and explains how the letter's guidelines have failed to address the confusion. Part III outlines a new approach to adjudicating peer sexual assault that includes universal standards on the burden of proof, cross-examination, discovery, evidentiary matters, and access to counsel.

This Note embraces several normative views that should be noted at the outset. First, students in the aggregate should be entitled to consistent due-process protections. Because most students lack information about available due process when selecting their future alma mater, they need a baseline of protection.[14] Second, this Note assumes that both institutions and victims would benefit from a uniform framework. Only by enabling institutions to confidently respond to reports of violence—without fear of liability for violating an alleged perpetrator's due-process rights—will assault victims be protected fully. Third, despite recent inflammatory comments to the contrary,[15] victim protection and due process for the accused are not mutually exclusive. Institutions, given appropriate guidance, can balance these two interests. Therefore, this Note advocates for certain due-process protections, not at the expense of victim protection, but so that institutions will have clarity on how to adjudicate sexual-assault reports and so that the interests of both victims and the accused are adequately protected.

I. THE LEGAL LANDSCAPE: A COMPLICATED WEB OF STATUTORY, CONSTITUTIONAL, CONTRACTUAL, AND JUDICIAL FORCES

When college students report to college or university officials that they have been sexually assaulted[16] by a peer, they immediately

14. The Supreme Court recognizes a special interest in protecting consumers when information about their desired product is not readily available. *See, e.g.*, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985) ("Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal." (citation omitted)); *In re* R.M.J., 455 U.S. 191, 202 (1981) ("The public's comparative lack of knowledge . . . renders advertising for professional services especially susceptible to abuses that the States have a legitimate interest in controlling.").

15. *See supra* note 9 and accompanying text.

16. Although the term "sexual assault" captures a range of behavior, this Note focuses on standards for the severest forms of assault, such as completed or attempted rape, in which the parties' interests are greatest. The term "sexual assault" is used throughout this Note to reference such conduct.

trigger a host of legal obligations for the institution. This Part provides an overview of the campus adjudicatory system and explains how that system must work in tandem with federal and applicable state laws. Section A summarizes the basic campus adjudicatory system. Section B provides an overview of the applicable federal laws and principles. Section C explains how and why these systems have created confusion and tension for college and university administrators.

A. The Campus Adjudicatory System

At the outset, distinguishing between the campus adjudicatory system and the criminal-justice system is important. The Dear Colleague Letter addresses only campus adjudicatory procedures at colleges and universities throughout the United States.[17] The criminal-justice system, on the other hand, is concerned with criminal prosecution. Although the same conduct might be adjudicated in both systems, the systems themselves and their attendant levels of victim protection and due process are distinct.[18]

The methods and procedures of campus adjudicatory systems differ across institutions. The procedures can also vary within an institution depending on the type of misconduct at issue. Generally, however, the institution will have an adjudicatory process that is managed by an office of student affairs.[19] In addition, all institutions are bound by their own policies and procedures vis-à-vis the accused and by constitutional due-process mandates, state contract law, federal education laws, and the oversight and guidance of the OCR.[20]

In a typical sexual-assault adjudication, the accused student first receives notice of the charge from the student-affairs office and is

17. *See* Letter from Russlynn Ali, *supra* note 5, at 2 ("This letter . . . discuss[es] the proactive efforts *schools* can take to prevent sexual harassment and violence . . . ." (emphasis added)).

18. *See id.* at 9–10 ("Police investigations may be useful for fact gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.").

19. *See, e.g.*, *Disciplinary Procedures*, OFFICE OF STUDENT LIFE, DAVIDSON COLL., http://www3.davidson.edu/cms/x8912.xml (last visited Sept. 25, 2012) (outlining the student disciplinary process, as enforced by the Dean of Students); *Overview of Process*, CTR. FOR STUDENT CONDUCT, UNIV. OF CAL., BERKELEY, http://campuslife.berkeley.edu/conduct/process (last visited Sept. 25, 2012) (summarizing the process "used to determine if a student . . . engaged in behavior that violates the Code of Student Conduct," as administered by the Dean of Students).

20. *See infra* Part I.B.

asked to respond, either in writing or in person.[21] Next, the accused student and the alleged victim appear before a misconduct panel, which is akin to a jury and is comprised of a blend of students, faculty, or staff.[22] This panel hears arguments, makes a factual finding, and, if appropriate, assigns a sanction.[23] An appellate review is also generally available, consisting of faculty members or administrators who evaluate a written appeal.[24] This appellate review is typically the last stage within the institution, though some institutions may allow the student or the student's parents to petition senior officers for relief. Students who are dissatisfied with the outcome of the institution's adjudication must resort to the state or federal court system.[25]

B. Applicable Laws and Constitutional Principles

Throughout the campus adjudicatory system, two major bodies of law interact to ensure that all parties are represented properly. First, Title IX prohibits sex discrimination in higher education.[26] Second, either contractual[27] or constitutional due-process rights

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21. *See, e.g.*, *Disciplinary Matters*, ADMIN. BD., HARVARD COLL., http://www.adboard.fas.harvard.edu/icb/icb.do?keyword=k62415&tabgroupid=icb.tabgroup88722 (last visited Sept. 25, 2012) ("As a first step in the Board review process students will be informed of the allegations by the Secretary of the Board . . . ."); *Disciplinary Procedures*, *supra* note 19 ("[The formal statement of charges] is to be served on the person charged promptly . . . ."); *Overview of Process*, *supra* note 19 ("[W]e inform the student of [a report of misconduct] and ask the student to schedule a meeting to discuss the incident.").

22. *See, e.g.*, *Disciplinary Procedures*, *supra* note 19 (stating that the Secretary of the Honor Council schedules disciplinary hearings); *Overview of Process*, *supra* note 19 ("If the student . . . prefers to have a hearing . . . the case will be forwarded to a hearing."). *But see Disciplinary Matters: Responding to an Allegation Made Against You in a Peer Dispute Case*, ADMIN. BD., HARVARD COLL., http://isites.harvard.edu/icb/icb.do?keyword=k62415&pageid=icb.page290403 (last visited Sept. 25, 2012) (discussing an adjudication process that is conducted via written reports).

23. *See Disciplinary Procedures*, *supra* note 19 ("The [Sexual Misconduct] Board's purpose is to hear cases which include allegations of Sexual Misconduct. The Board is charged with determining whether the Accused is responsible or not responsible for the alleged conduct and determining appropriate sanctions.").

24. *E.g.*, *id.*; *see also, e.g.*, *Overview of Process*, *supra* note 19 ("Appeals may be made in writing to the Vice Chancellor for Student Affairs and must be based on new information not available at the time of the hearing, significant procedural error, or other good cause."); *Reconsideration and Appeals Process*, ADMIN. BD., HARVARD COLL., http://isites.harvard.edu/fs/docs/icb.topic601968.files/Reconsideration%20Appeals%20Flowchart.pdf (last visited Sept. 25, 2012) (outlining the appeals process).

25. *See infra* Part I.B.2.

26. *See supra* note 7.

27. Goodman v. President & Trs. of Bowdoin Coll., 135 F. Supp. 2d 40, 54, 58 (D. Me. 2001) ("[A] number of opinions by the Court of Appeals for the First Circuit and other courts

require that certain procedures be followed before a student is disciplined.[28] But these considerations are only the beginning of the analysis. Other laws, including FERPA, create additional complications in the relationship between Title IX and due process.[29]

1. *Title IX: Federally Mandated Victim Protection.* Enacted as part of the Education Amendments of 1972,[30] Title IX[31] is one of the most important federal statutes in higher education. Along with Title VI of the Civil Rights Act of 1964[32] and the Supreme Court's precedent on discrimination generally, Title IX protects college and university students from sex-based discrimination by conditioning the receipt of federal funds on compliance with the statute.[33] In relevant part, the statute states, "No person . . . 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."[34] Subsequent legislation expanded the scope of the statute to include the entire educational institution whenever a single program or school within the institution receives federal funding.[35] Because virtually every higher-education

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within this circuit have endorsed the existence of a contractual relationship between students and colleges . . . . [T]he Court holds that [the student] Plaintiff's contractual relationship with Bowdoin includes the Handbook term promising that Bowdoin would abide by certain procedures to ensure impartial proceedings and fundamental fairness.").

28. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 157–59 (5th Cir. 1961) (holding that college students at public universities have due-process rights in disciplinary proceedings).

29. *See infra* Part I.B.3. In addition to these laws, the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act), 20 U.S.C. § 1092(f) (2006 & Supp. IV 2011), is implicated by peer sexual assault and requires institutions to maintain and report aggregate assault data. This Note does not address the Clery Act, because it does not alter the way in which *individual* judicial proceedings are governed.

30. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (codified as amended in scattered sections of 7, 12, 20, 29, and 42 U.S.C. (2006 & Supp. IV 2011)).

31. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, tit. IX, 86 Stat. 373 (codified as amended at 20 U.S.C. §§ 1681–1686 (2006)).

32. Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VI, 78 Stat. 2252 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-4a (2006)) (prohibiting discrimination by institutions that receive federal funds).

33. *See generally* KLINTON W. ALEXANDER & KERN ALEXANDER, HIGHER EDUCATION LAW: POLICY AND PERSPECTIVES 484–503 (2011) (explaining the importance of Title IX and other laws in the context of federal prohibitions on sex discrimination in higher education).

34. 20 U.S.C. § 1681(a) (2006).

35. *See* Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, sec. 3(a), § 908, 102 Stat. 28, 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2006)) ("For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of . . . a college, university, or other postsecondary institution . . . .").

institution benefits from federal assistance, the law applies universally.[36]

When it enacted Title IX, Congress sought to prohibit the "use of federal resources to support discriminatory practices and to provide individual citizens with effective protection against such practices."[37] Although little legislative history exists regarding the statute's intended purpose and scope,[38] the law's structure suggests that it was meant to play a similar role as Title VI of the Civil Rights Act of 1964, except with a specific focus on sex and the school environment.[39] Accordingly, the statute applies to a host of activities and programs within higher education, including admissions and financial aid,[40] sexual harassment,[41] and athletics.[42]

Title IX is enforced and administered by the OCR,[43] and the OCR has accordingly promulgated official regulations that interpret

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36. David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 243 (2005); *see also, e.g.*, Cohen v. Brown Univ., 101 F.3d 155, 187–88 (1st Cir. 1996) (applying Title IX's requirements to a private university's athletics program).

37. ALEXANDER & ALEXANDER, *supra* note 33, at 501.

38. *See* North Haven Bd. of Educ. v. Bell, 456 U.S. 512, 527–28 (1982) (explaining that Title IX "originated as a floor amendment, [and that] no committee report discusses the provisions"); Diane Heckman, *Women & Athletics: A Twenty Year Retrospective on Title IX*, 9 U. MIAMI ENT. & SPORTS L. REV. 1, 9 n.30 (1992) ("Title IX was adopted without formal hearings . . . .").

39. *See North Haven Bd. of Ed.*, 456 U.S. at 528 (explaining that Title IX was seen by some as a "cut and paste job" of Title VI (quoting *Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Educ. of the H. Comm. on Educ. & Labor*, 94th Cong. 409 (1975) (statement of Rep. James G. O'Hara, Chairman, Subcomm. on Postsecondary Education))).

40. *See* 34 C.F.R. §§ 106.21–106.23, 106.37 (2012) (regulating sex discrimination in college admissions, recruitment, and financial aid). *But see* David S. Cohen, *The Stubborn Persistence of Sex Segregation*, 20 COLUM. J. GENDER & L. 51, 89–90 (2011) (outlining exceptions to Title IX's prohibition on sex discrimination in educational admissions).

41. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173 (2005).

42. *See generally* Equity in Athletics, Inc. v. U.S. Dep't of Educ., 291 Fed. App'x. 517 (4th Cir. 2008) (discussing the promulgation of regulations by the Secretary of Health, Education, and Welfare that extend the applicability of Title IX to intercollegiate athletic activities); Favia v. Ind. Univ. of Pa., 7 F.3d 332 (3d Cir. 1993) (affirming a preliminary injunction that compelled a university to reinstate athletics programs that had been cut in violation of Title IX); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (applying regulations that implement the intercollegiate athletics provisions of Title IX to a suit brought by members of women's sports teams that had been dropped to intercollegiate club status).

43. *Title IX and Sex Discrimination*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last updated June 18, 2012); *see also* 34 C.F.R. § 106.3(a) (2012) ("If the Assistant Secretary [for Civil Rights] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such

and expound upon the statute itself.[44] In addition, the OCR and the DOE issue dear colleague letters and other publications that provide clarification to administrators on complicated and timely compliance issues.[45] These documents offer important guidance on the enforcement strategies of the OCR and the DOE, and courts give *Chevron* deference to reasonable interpretations of Title IX found in dear colleague letters.[46]

Although the statute itself contains no reference to student-on-student sexual assault, courts have applied Title IX to such gender violence by defining sexual assault as a type of sex discrimination.[47] Courts have also considered institutional liability in the presence of deliberate indifference to student-on-student sexual assault.[48] To establish deliberate indifference and to trigger institutional liability, the victim must show that a relevant institutional official had actual notice of the assault and refused to take appropriate action.[49] The possibility of liability incentivizes higher-education institutions to be proactive in addressing accusations of sexual assault. Yet despite

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recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

44. *See generally* 34 C.F.R. §§ 106.1–106.71 (regulating sex discrimination in higher education pursuant to Title IX).

45. *See Reading Room*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., http://www2.ed.gov/about/offices/list/ocr/publications.html#General (last visited Sept. 25, 2012) (listing and providing electronic access to dear colleague letters and other official documents promulgated by the OCR).

46. *See, e.g.*, Biediger v. Quinnipiac Univ., 728 F. Supp. 2d 62, 92 (D. Conn. 2010) (explaining that courts are "bound to defer to OCR's interpretation of Title IX" in a dear colleague letter and that OCR regulations are "owed 'particularly high deference' under the doctrine of *Chevron*" (quoting McCormick *ex rel.* McCormick v. Sch. Dist. of Mamaroneck, 370 F.3d 275, 288 (2d Cir. 2004))).

47. *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 643 (1999) (concluding that "deliberate indifference to known acts of harassment . . . amounts to an intentional violation of Title IX").

48. *See e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290–91 (1998) ("[W]e hold that a damages remedy will not lie under Title IX unless an official who . . . has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination . . . and fails adequately to respond. We think, moreover, that the response must amount to deliberate indifference to discrimination."); *see also* Simpson v. Univ. of Colo., 371 F. Supp. 2d 1229 (D. Colo. 2005) (granting summary judgment for the defendant university in a claim for money damages and injunctive relief brought by two students who alleged being sexually assaulted by the members and recruits of the university's football team), *rev'd*, 500 F.3d 1170 (10th Cir. 2007); Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007) (reversing the lower court's grant of summary judgment based in part upon the deliberate-indifference theory).

49. *Gebser*, 524 U.S. at 290.

rigorous institutional mechanisms to avoid liability, colleges and universities are confronted with Title IX sexual-assault litigation somewhat regularly.[50] Therefore, the risk of liability for educational institutions is real. This risk encourages institutions to be vigilant, and potentially even overly zealous, in adjudicating accusations of sexual assault.[51]

2. *Due Process: Constitutional and Contractual Protections for the Accused.* Although Title IX creates an incentive for institutions to act expeditiously in response to accusations of sexual assault, due-process concerns provide an equally important incentive for institutions to take a deliberate and careful approach to addressing such matters. Due process is a foundational component of the American legal system, ensuring that accused individuals are able to take full advantage of the crucible of litigation before they are held responsible for a crime or impropriety.[52] In the criminal-justice system, due-process rights provide a vast shield of protective affirmative rights and presumptions. Some notable examples of affirmative rights include the rights to consult counsel, to be tried by a

50. *See, e.g.*, *Simpson*, 500 F.3d at 1173 (permitting female university students to proceed in their Title IX claims); Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282 (11th Cir. 2007) (permitting a rape victim's Title IX suit for damages against her former university to proceed); *see also* Doe v. Univ. of the Pac., No. CIV. S-09-764 FCD/JKN, 2010 WL 5135360, at *18 (E.D. Cal. Dec. 8, 2010) (granting summary judgment for the defendant university in a lawsuit brought by a female student, an assault victim who alleged that the university violated Title IX and created a hostile environment, even though it employed various tools to protect her interests).

51. In addition, the implications of Title IX liability are substantial and may extend beyond the courtroom. In *Williams v. Board of Regents of the University System of Georgia*, 477 F.3d 1282 (11th Cir. 2007), a female student alleged that the institution had violated Title IX by failing to respond adequately to her report that she was gang raped by three student athletes, *id.* at 1288–90. The Eleventh Circuit held that the victim had presented an actionable complaint when she demonstrated that the institution recruited the ringleader of the assault with knowledge of his history of sexual violence, failed to supervise the ringleader properly while he was living in student-housing facilities, waited approximately eleven months after the event to conduct a disciplinary hearing, and failed to take precautions that would prevent future attacks. *Id.* at 1296–97. The suit received significant press coverage, which depicted the university in a negative light, and contributed to the early termination of the university's men's basketball season in 2003. *Appeals Court Partly Revives Sex-Harassment Claim Against U. of Georgia*, CHRON. HIGHER EDUC. (Feb. 12, 2007), http://chronicle.com/article/Appeals-Court-Partly-Revive/38209.

52. *See* Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("As early as Magna Carta, procedure was regarded as a valuable means for the protection of the rights of litigants. . . . Few principles of law, applicable as well to the administrative process, are as fundamental or well established . . . .").

jury of one's peers, to subpoena witnesses, and to cross-examine witnesses.[53] Individuals accused of crimes also benefit from a presumption of innocence and the highest standard of proof in the American legal system, the beyond-a-reasonable-doubt standard.[54] In the higher-education context, however, students have never been afforded such expansive rights.[55] In fact, the Supreme Court squarely held that students have no constitutionally protected *substantive* due-process rights to their education.[56] Instead, courts have recognized that college students at public universities possess only limited *procedural* due-process rights.[57] Students at private institutions, on the other hand, are protected by the Constitution only when procedures are fundamentally unfair.[58] Otherwise, due-process rights exist only in the institution's student handbook provisions, which are enforceable through breach-of-contract claims.[59] Because courts have defined due process differently for public- and private-school students, this Note discusses those rights separately.

a. Due-Process Rights for Public-School Students. Students enrolled at public colleges and universities have constitutionally protected due-process rights, although courts disagree as to the exact parameters of those rights. The first case to recognize that a public-college student should be afforded procedural due-process rights under the Fourteenth Amendment was *Dixon v. Alabama State*

53. U.S. CONST. amend. VI.

54. *See* Addington v. Texas, 441 U.S. 418, 423–24 (1979) ("In the administration of criminal justice, our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of the accused beyond a reasonable doubt.").

55. *See, e.g.*, Valente v. Univ. of Dayton Sch. of Law, No. 3:07-cv-473, 2008 WL 343112 (S.D. Ohio Feb. 6, 2008) (rejecting the plaintiff's desired due-process requirements for an honor-code proceeding, such as a voir dire process and the right to a unanimous jury finding, and explaining that such rights were unique to the criminal context).

56. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) ("Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

57. *See* Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 156–57 (5th Cir. 1961) (noting that public universities cannot arbitrarily take action that would negatively impact the private interests of students and instead must have clear processes and procedures).

58. *See* Psi Upsilon of Phila. v. Univ. of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991) ("The only caveat applied to this principle [that students at private institutions are protected by contractual provisions] is that the disciplinary procedures established by the institution must be fundamentally fair.").

59. *See infra* notes 84–85 and accompanying text. This Note refers to such claims as "contractual due-process claims."

Board of Education,[60] in which students alleged that their due-process rights had been violated when they were expelled without a hearing from Alabama State College after participating in civil-rights protests.[61] The Fifth Circuit held that even though the Constitution does not afford any substantive right to an education, "it nonetheless remains true that the State cannot condition the granting of even a privilege upon the renunciation of the constitutional right to procedural due process."[62] Accordingly, *Dixon* held that public-college students had private interests at stake in remaining enrolled at the public university of their choice and therefore were entitled to due process under the Fourteenth Amendment when those interests were in jeopardy.[63] Since *Dixon*, courts have accepted that public-college students should be afforded due-process protections in serious disciplinary hearings.[64] In fact, in *Goss v. Lopez*,[65] the Supreme Court

60. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

61. *Id.* at 150–55.

62. *Id.* at 156. The court elaborated:

> It is not enough to say, as did the district court in the present case, "The right to attend a public college or university is not in and of itself a constitutional right." That argument was emphatically answered by the Supreme Court in [*Cafeteria and Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886 (1961)], when it said that the question of whether " . . . summarily denying [plaintiff] access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment . . . cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. 'One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.'"

Dixon, 294 F.2d at 156 (second and fourth alterations in original) (citations omitted) (quoting Dixon v. Ala. State Bd. of Educ., 186 F. Supp. 945, 950 (M.D. Ala. 1960), *rev'd*, 294 F.2d 150 (5th Cir. 1961); and *Cafeteria Workers*, 367 U.S. at 894).

63. *Dixon*, 294 F.2d at 156–57.

64. Courts, including the Supreme Court, have viewed *Dixon* as establishing that students enrolled at public institutions of higher education have constitutionally protected procedural due-process rights that must be observed before they may be suspended or expelled. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975) ("Since the landmark decision of the Court of Appeals for the Fifth Circuit in *Dixon v. Alabama State Board of Education*, the lower federal courts have uniformly held the Due Process Clause applicable to decisions made by tax-supported educational institutions to remove a student from the institution long enough for the removal to be classified as an expulsion." (citations omitted)); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988) ("[A] student facing expulsion or suspension from a public educational institution is entitled to the protections of due process." (citing *Dixon*, 294 F.2d at 157)); Nash v. Auburn Univ., 812 F.2d 655, 660 (11th Cir. 1987) ("In *Dixon v. Alabama State Board of Education*, we broadly defined the notice and hearing required in cases of student expulsion from college . . . ." (citations omitted)). In *Goss v. Lopez*, 419 U.S. 565 (1975), however, the Supreme Court held that public elementary-school students facing suspensions of ten days were entitled to procedural due-process protections because the state of Ohio had statutorily granted a right to such education, *id.* at 573–74. Therefore, the Court relied on the fact that the state had

hailed *Dixon* as a "landmark" decision and used *Dixon*'s reasoning to support the Court's conclusion that public elementary-school students have due-process rights in certain circumstances.[66] Modern courts have refined the *Dixon* reasoning to hold that students' procedural due-process rights arise from liberty interests in their reputations and academic good standing.[67]

Although courts have consistently observed that procedural due-process rights exist for public-college students who have been accused of serious infractions, they have been less consistent on the scope of those due-process rights.[68] Instead, courts prefer ex post, case-by-case determinations of the rights to which students are entitled.[69] Such an approach is characteristic of the American judicial system generally, but educational institutions—who owe fiduciary and contractual obligations to all their students, including the accused and the

granted a right, rather than a privilege, as the basis for holding that such a right deserved due-process protections. *Id.* Notwithstanding this important distinction, since *Dixon* and *Goss*, courts have been comfortable with the premise that students at public colleges are generally entitled to due process in disciplinary procedures. *See, e.g.*, Terrell v. Del. State Univ., No. 09-464 (GMS), 2010 WL 2952221, at *4 (D. Del. 2010) (discussing both *Goss* and *Dixon* as the basis of procedural due process for accused students in college adjudicatory settings); Jaksa v. Regents of Univ. of Mich., 597 F. Supp. 1245, 1247–49 (E.D. Mich. 1984) (same); Donohue v. Baker, 976 F. Supp. 136, 145 (N.D.N.Y. 1997) (discussing *Goss* and explaining that public-college students are entitled to procedural due-process protections).

65. Goss v. Lopez, 419 U.S. 565 (1975).

66. *Id.* at 576 n.8. The Court drew an important distinction three years later, however, in *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978). There, the Court explained that "[t]he need for flexibility is well illustrated by the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for far less stringent procedural requirements in the case of an academic dismissal." *Id.* at 86. Therefore, "because the academic process is not adversarial, dismissals for academic reasons do not require a formal notice and hearing." Furey v. Temple Univ., 730 F. Supp. 2d 380, 393 (E.D. Pa. 2010) (citing *Horowitz*, 435 U.S. at 86).

67. *See, e.g.*, Danso v. Univ. of Conn., 919 A.2d 1100, 1106 (Conn. Super. Ct. 2007) ("It is doubtful that a college student attending a state university has a valid property interest in staying in school. . . . [H]owever, [such] a student . . . has a liberty interest in continuing that education.").

68. *See, e.g.*, Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("Once it is determined that due process applies, the question remains what process is due.").

69. *See Goss*, 419 U.S. at 577–78 ("We turn to that question [of what process is due], fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that '[t]he very nature of due process negates any concept of inflexible procedures universally applicable . . . .'" (first alteration in original) (citations omitted) (quoting Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895 (1961))).

victim[70]—need further guidance to be equipped to act ex ante, before the interests of either party have been compromised.

The need for more specific guidance is exposed by comparing similar cases from different courts. For example, in *Donohue v. Baker*,[71] the court held that the accused had a right to cross-examine his accuser in a campus adjudication, particularly because the "case [was] one of credibility" dealing with his testimony against that of an alleged sexual-assault victim.[72] In reaching this conclusion, the court acknowledged that the interests in protecting the victim from embarrassment and further harassment were substantial but reasoned that such concerns were outweighed by the accused student's right to confront his accuser.[73]

Donohue stands as an outlier, however, and most other courts have held that students in disciplinary hearings have no right to cross-examination.[74] A Connecticut state court held that a student who was accused of sexually intimidating a classmate was not denied due process when he was prevented from cross-examining the alleged victim.[75] Similarly, another court explained that "the right to unlimited cross-examination has not been deemed an essential requirement of due process."[76] Despite the fact that the weight of authority is against the right of cross-examination, educational

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70. *See* ALEXANDER & ALEXANDER, *supra* note 33, at 155–57 (explaining that the student-university legal relationship has been interpreted using five different frameworks, including that of a contractual relationship and a fiduciary relationship); *see also* Alvin L. Goldman, *The University and the Liberty of Its Students—A Fiduciary Theory*, 54 KY. L.J. 643, 674 (1966) ("[T]he university, like any fiduciary, . . . should have the burden of demonstrating that any disciplinary action: (a) was reasonably imposed for cause consistent with its function of maintaining an open-minded atmosphere . . . for freely inquiring into and exploring ideas; and (b) was imposed in a manner consistent with scholarly integrity and process.").

71. Donohue v. Baker, 976 F. Supp. 136 (N.D.N.Y. 1997).

72. *Id.* at 145–47.

73. *See id.* at 147 ("Regardless of how 'sensitive' the proceeding was deemed to be, the defendants remained bound to observe the plaintiff's constitutional rights.").

74. *See, e.g.*, Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 142 EDUC. L. REP. 11, 11 (2000) ("Prior to 1997, no federal judge had reinstated a post-secondary student . . . solely because the university[] . . . did not permit the student to cross-examine witnesses.").

75. Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007) ("Due process . . . does not require that a student . . . be afforded a right to cross-examine witnesses . . . .").

76. Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988) (explaining that unspecified limitations on an accused student's ability to conduct cross-examination were insufficient to create due-process concerns, in part because the ability to conduct expansive cross-examination has not been deemed a right for accused students).

administrators still fear that they may be held liable if the *Donohue* reasoning spreads to other jurisdictions.[77]

Courts also disagree about whether due process requires that students have access to legal counsel. For instance, in *Donohue*, the court found no due-process violation when the accused student was denied access to nonstudent legal counsel.[78] Likewise, in *Danso v. University of Connecticut*,[79] a student's due-process rights were not infringed when he was denied access to the student advocate of his choice.[80] By contrast, in *Furey v. Temple University*,[81] the Eastern District of Pennsylvania held that a student who was facing expulsion should have been granted access to legal counsel.[82]

As these cases demonstrate, the judicial approach to defining due-process rights for public-college students has been inconsistent. Moreover, courts have not addressed some pressing questions about due-process rights, such as whether the accused has the right to subpoena witnesses or compel discovery. Greater certainty is needed.

b. Due-Process Rights for Private-School Students. Courts have declined to extend the reasoning of *Dixon* to private universities and, as a result, students at private institutions face even greater variability in terms of their due-process rights.[83] Because students at such institutions lack constitutional due-process rights, they must derive any due-process rights from state contract law as it relates to student disciplinary policies and from other agreements between the student and the institution.[84] The only way in which the Constitution could be

77. *See* Baker, *supra* note 74, at 11 ("Although only a district court ruling, the significance of *Donohue* for practitioners was considerable.").

78. *Donohue*, 976 F. Supp. at 146.

79. Danso v. Univ. of Conn., 919 A.2d 1100 (Conn. Super. Ct. 2007).

80. *Id.* at 1110.

81. Furey v. Temple Univ., 730 F. Supp. 2d 380 (E.D. Pa. 2010).

82. *Id.* at 397–98.

83. In fact, *Dixon* explained that "the well-settled rule that the relations between a student and a private university are a matter of contract." Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961); *see also*, Psi Upsilon of Phila. v. Univ. of Pa., 591 A.2d 755, 758 (Pa. Super. Ct. 1991) ("In the university context due process is defined according to whether the institution is public or private. . . . The law . . . at private [institutions] . . . is not so well settled. . . . [S]tudents who are being disciplined are entitled only to those procedural safeguards which the school specifically provides." (emphasis omitted) (quoting Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 579 (Pa. Super. Ct. 1990))).

84. *See, e.g.*, Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 724 (1st Cir. 1983) ("Since [the student's] claim is based on his contract with the university, [state] law governs . . . ."); Goodman v. President & Trs. of Bowdoin Coll., 135 F. Supp. 2d 40, 45 (D. Me. 2001) ("Plaintiff

implicated is if the student can show that the institution's procedures were not "fundamentally fair."[85]

Therefore, private-college students are less protected than their public-school peers. For example, in *Cloud v. Trustees of Boston University*,[86] the court emphasized that

> "[i]f school officials act in good faith and on reasonable grounds . . . their decision to suspend or expel a student will not be subject to successful challenge in the courts." This deferential standard of review applies when . . . there is no contractual right to a hearing. Where, as here, the university specifically provides for a disciplinary hearing before expulsion, [the court] review[s] the procedures followed to ensure that they fall within the range of reasonable expectations . . . . [The court] also examine[s] the hearing to ensure that it was conducted with basic fairness.[87]

Under this deferential standard, the court found no contractual due-process violations, even though the student's ability to cross-examine witnesses had been curtailed by one witness who had refused to state her identity, the student's past criminal proceedings had been introduced as prejudicial character evidence, the university had failed to produce relevant employee witnesses, and the committee was possibly biased.[88] The court made its determination even though the relevant student handbook provisions stated that students who faced disciplinary action by the institution would be provided "the right to have the case decided by an impartial judicial body," "the right to confront and cross examine any witness," and "the right to call witnesses and introduce evidence."[89]

Likewise, in *Jansen v. Emory University*,[90] a court was unwilling to engage in a substantive analysis of the student's contractual due-process claims and instead summarily rejected the claims as falling outside the realm of the court's expertise. The court reasoned that institutions should be afforded autonomy in adjudicating academic infractions—as opposed to disciplinary infractions, which trigger only

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alleges breach of contract against Defendant Bowdoin College on the grounds that the college breached the promises set forth in its Student Handbook . . . .").

85. *Psi Upsilon*, 591 A.2d at 758.

86. Cloud v. Trs. of Bos. Univ., 720 F.2d 721 (1st Cir. 1983).

87. *Id.* at 724–25 (first and second alterations in original) (quoting Coveney v. President & Trs. of Holy Cross Coll., 445 N.E.2d 136, 139 (Mass. 1983)).

88. *Id.* at 723–26.

89. *Id.* at 723 (quoting the student handbook).

90. Jansen v. Emory Univ., 440 F. Supp. 1060 (N.D. Ga. 1977).

limited judicial oversight.[91] Although the Supreme Court has supported the distinction between academic and disciplinary matters for due-process purposes,[92] in *Jansen* the student's poor academic record resulted from two failing grades that were administered for purely *disciplinary* reasons.[93] Nevertheless, the court refused to substantively examine the student's contract claims.[94]

Even when courts have recognized contractual due-process causes of action, the results have been inconsistent. For example, the Eighth Circuit in *Corso v. Creighton University*,[95] facing facts nearly identical to *Jansen*, reached an opposite conclusion. In *Corso*, the court declined to give deference to an institution's adjudication of academic infractions and instead found that the institution had breached its contractual promise of due process.[96] Thus, in the due-

91. *Id.* at 1063 ("Courts . . . should not lightly undercut the 'compelling need and very strong policy consideration in favor of giving . . . school officials the widest possible latitude in the management of school affairs.' Plaintiff is correct in observing that the traditional rule of nonintervention in academic matters does not apply to review of disciplinary actions by educational institutions. . . . The mere fact that some of his grades were based on Honor Council violations does not render suspect or reviewable the decision of the faculty [to dismiss him from the program]." (second alteration in original) (citations omitted) (quoting Keys v. Sawyer, 353 F. Supp. 936, 940 (S.D. Tex. 1973))). *Jansen* involved a dental student at Emory University who was dismissed from the program for poor academic performance after he received two failing grades for disciplinary problems. *Id.* at 1061, 1063. Despite a provision in the student handbook that provided that "no student will be dismissed without due process," the student was dismissed at a faculty meeting to which the student was not invited. *Id.* at 1062.

92. *See supra* note 66.

93. *Jansen*, 440 F. Supp. at 1061, 1063.

94. *Id.*

95. Corso v. Creighton Univ., 731 F.2d 529 (8th Cir. 1984).

96. *Id.* at 533. In both *Jansen* and *Corso*, students faced sanctions for cheating. In *Jansen*, the court refused to address the student's due-process concerns because it viewed the sanctions as "academic" rather than "disciplinary." *Jansen*, 440 F. Supp. at 1063. But in *Corso*, the court found the institution liable, implicitly refusing to apply the distinction between academic and disciplinary matters. *Corso*, 731 F.2d at 533. Numerous other examples of such inconsistencies exist. For example, compare the approach to contractual interpretation in *Psi Upsilon of Philadelphia v. University of Pennsylvania*, 591 A.2d 755 (Pa. Super. Ct. 1991), with *Goodman v. President and Trustees of Bowdoin College*, 135 F. Supp. 2d 40 (D. Me. 2001). In *Psi Upsilon*, the Superior Court of Pennsylvania held that a fraternity's contract with the university, in which the fraternity agreed "[t]o accept collective responsibility for the activities of the individual members," was neither overbroad nor vague. *Psi Upsilon*, 591 A.2d at 759 (emphasis omitted) (quoting university policies and procedures). In *Goodman*, however, the court was more willing to engage in loose contractual interpretation. In that case, the plaintiff alleged that he had been denied contractual due-process rights when he was prevented from obtaining access to medical records and contacting a witness to an alleged fight. *Goodman*, 135 F. Supp. 2d at 44. The student handbook stated that the institution reserved "the right to make changes in . . . procedures, and charges," but the court limited this provision and prevented a change in

process context, courts have been inconsistent, with variations existing from court to court.[97] Likewise, as students move from the public- to the private-school context, their constitutional due-process rights change dramatically. This lack of consistency between courts and across the public- and private-school divide is concerning.

3. *FERPA: Mandated Limits on Available Information.* Although FERPA is not a primary regulator of student sexual-assault proceedings, it does complicate sexual-assault proceedings by curtailing the amount of information that can be made available in the adjudicatory process. The law protects as confidential any document that is classified as an "education record[]."[98] This phrase has a broad and general definition and includes "information directly related to a student" that is "maintained by an educational agency or institution or by a person acting for such agency or institution."[99] In sexual-assault cases, highly pertinent information relating to the events in question or to one party's past may be protected. Although the statute provides some limited exceptions to allow for disclosure, no such exception exists for campus adjudicatory proceedings.[100] Therefore, as the Dear Colleague Letter acknowledges, FERPA curtails the amount of information available in campus adjudicatory hearings.[101] In fact, educators have long expressed confusion about how the law should operate in sexual-assault proceedings.[102] For related reasons, commentators have criticized the law for stymieing campus-safety efforts.[103]

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policy during the procedures. *Id.* at 57 (quoting Bowdoin's *1998-1999 Student Handbook*) (internal quotation marks omitted).

97. *See supra* notes 71-77 and accompanying text.

98. 20 U.S.C. § 1232g(a) (2006); *see also* Katrina Chapman, Note, *A Preventable Tragedy at Virginia Tech: Why Confusion over FERPA's Provisions Prevents Schools from Addressing Student Violence*, 18 B.U. PUB. INT. L.J. 349, 353–54 (2009) ("FERPA requires that student records be kept confidential. It provides access . . . only with the consent of parents . . . .").

99. 20 U.S.C. § 1232g(a)(4)(A)(1).

100. *Id.* § 1232g(b)(1) (2006 & Supp. IV 2011).

101. Letter from Russlynn Ali, *supra* note 5, at 11 n.29.

102. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at vi–vii (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("[C]ommenters raised concerns about the interrelation of [FERPA] and Title IX. The concerns relate to two issues: (1) the harassed student's right to information about the outcome of a sexual harassment complaint and (2) the due process rights of individuals . . . accused of sexual harassment . . . .").

103. *See, e.g.*, Chapman, *supra* note 98, at 352 ("FERPA still does not adequately define when an emergency exists . . . ."); Stephanie Humphries, Note, *Institutions of Higher Education,*

C. Cause for Confusion

Faced with these competing legal considerations, college and university administrators struggle to balance their obligations to victims of sexual assault with their corresponding duties to provide due-process protections to accused students. Title IX creates a firm obligation for institutions to respond vigilantly to reports of assault.[104] But courts enforcing due-process rights—enforceable under either constitutional or contract law—mandate that institutions provide *some* level of process, though these institutions have received limited and contradictory guidance about what process is actually due. This uncertainty and variability produces a liability trap for educators who are unsure of how to proceed.[105] FERPA further complicates matters by restricting the information that can be considered in sexual-assault proceedings.[106] As a result, students are subjected to fundamentally different processes depending on the institution they attend.[107] In response to this inconsistency, the OCR published its Dear Colleague Letter.

Safety Swords, and Privacy Shields: Reconciling FERPA and the Common Law, 35 J.C. & U.L. 145, 149 (2008) ("[B]oth FERPA and the common law contain internal tensions regarding safety and privacy that neither Congress nor the courts have adequately reconciled . . . .").

104. *See supra* Part I.B.1.

105. *See, e.g.*, Doe v. Univ. of the South, No. 4:09-cv-62, 2011 WL 1258104, at *22 (E.D. Tenn. Mar. 31, 2011) (allowing a student's breach-of-contract claim to proceed under the theory that the university deprived him of due process). The jury eventually awarded the student over $20,000 in compensatory damages. Collin Eaton, *Jury Verdict in Sex-Assault Case at Sewanee Sends Warning to Private Colleges*, CHRON. HIGHER EDUC. (Sept. 2, 2011), http://chronicle.com/article/Jury-Verdict-in-Sex-Assault/128884; *see also* Williams v. Bd. of Regents of the Univ. Sys. of Ga., 477 F.3d 1282, 1294–99 (11th Cir. 2007) (holding that an adequate Title IX claim had been mounted against the University of Georgia by a former student and rape victim).

106. *See supra* Part I.B.3.

107. For example, the standard of proof in student disciplinary hearings has historically varied wildly across institutions. *Compare* Margaret Fosmoe, *ND To Change Sex Assault Response*, SOUTH BEND TRIB., July 2, 2011, at A1 ("Notre Dame agreed to make clear that it will use a 'preponderance of evidence' standard to evaluate sexual harassment allegations."), *with* Rebecca D. Robbins, *Harvard Will Not Alter Its Sexual Assault Policies in Response to Yale*, HARVARD CRIMSON (June 27, 2012), http://www.thecrimson.com/article/2012/6/27/sexual-assault-no-response (detailing differing standards of proof at different Harvard schools), *and* Davis, *supra* note 8 (explaining that the University of Virginia altered "its policy from one of 'clear and convincing evidence'" to a preponderance standard).

II. THE DEAR COLLEAGUE LETTER

The April 4, 2011, Dear Colleague Letter, released amid much fanfare,[108] frames its guidance by emphasizing the OCR's concern with high rates of sexual violence on school campuses.[109] It then proceeds to discuss the obligations of schools receiving federal funds to respond to such violence, particularly focusing on procedural requirements.[110] The letter concludes with recommendations for preventing assault.[111]

As a guidance document, the Dear Colleague Letter effectively conveys the OCR's expectations. It builds on the OCR's earlier guidelines[112] by focusing almost exclusively on the victim's interests[113] and articulates at least five substantive points that raise due-process concerns for the accused.[114] Ultimately, the letter fails to address this key underlying issue: how Title IX should interact with applicable due-process requirements for the accused.

A. Analyzing the Dear Colleague Letter's Substantive Points

First, and perhaps most controversially, the Dear Colleague Letter recommends a specific standard of proof for judicial

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108. In fact, Vice President Joseph Biden and Education Secretary Arne Duncan took the unusual step of publically announcing the Dear Colleague Letter's release at a media event at the University of New Hampshire. Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Investigations*, CHRON. HIGHER EDUC., Apr. 4, 2011, at A20. The Dear Colleague Letter's author, DOE Assistant Secretary for Civil Rights Russlynn Ali, described the letter as "historic," emphasizing that it is not an attempt to alter the law, but rather serves as a "clarification" of existing law. Allie Grasgreen, *Call to Action on Sexual Harassment*, INSIDE HIGHER ED (Apr. 4, 2011, 3:00 AM), http://www.insidehighered.com/news/2011/04/04/education_department_civil_rights_office_clarifies_colleges_sexual_harassment_obligations_title_ix (quoting Ali) (internal quotation marks omitted).

109. Letter from Russlynn Ali, *supra* note 5, at 1–3.

110. *Id.* at 3–14.

111. *Id.* at 14–19.

112. *See id.* at 2 ("This letter supplements the *2001 Guidance*,[OFFICE FOR CIVIL RIGHTS, *supra* note 102,] by providing additional guidance . . . regarding the Title IX requirements as they relate to sexual violence."); *see also* OFFICE FOR CIVIL RIGHTS, *supra* note 102, at 1 ("[W]e intend th[is] revised guidance to serve the same purpose as the 1997 guidance. It continues to provide the principles that a school should use to recognize and effectively respond to sexual harassment of students in its program as a condition of receiving Federal financial assistance.").

113. This is not to suggest that the OCR should not be concerned with protecting victims of assault. Rather, the OCR should more effectively address *both* students' interests. For institutions to be able to provide maximum protections against peer sexual assault, institutions must first know the limits of due-process requirements. Therefore, the OCR should provide more guidance as a means of enabling institutions to fully comply with Title IX.

114. Letter from Russlynn Ali, *supra* note 5, at 8–14.

proceedings involving accusations of peer sexual assault.[115] The letter prescribes a preponderance-of-the-evidence standard, noting that "[t]he 'clear and convincing' standard . . . currently used by some schools, is a higher [and improper] standard of proof."[116] It goes on to explain that campus adjudicatory proceedings are wholly distinct from criminal proceedings and that neither proceeding's outcome should affect the other.[117] This standard-of-proof portion of the Dear Colleague Letter has engendered the most criticism from commentators.[118] DOE Assistant Secretary for Civil Rights Russlynn Ali has noted that, notwithstanding this vociferous criticism, this portion of the Dear Colleague Letter is critically important.[119] Referencing the clear-and-convincing standard of proof, she has elaborated that "[t]he guidance answers a longstanding question that we have heard from many general counsels about, and that is what the standard of proof is. . . . Far too often universities use that higher standard when it comes to Title IX."[120]

Second, the Dear Colleague Letter outlines a discovery process that is curtailed by FERPA.[121] Although both the alleged victim and perpetrator must have "similar and timely access to any information that will be used at the [judicial] hearing," this access is severely limited in situations in which FERPA mandates a right to privacy.[122] The Dear Colleague Letter does not detail the specific FERPA provisions that are triggered during the institution's judicial process, but it does note that "the alleged perpetrator should not be given access to communications between the complainant and a counselor or information regarding the complainant's sexual history."[123] After the institution's judicial process concludes, FERPA is triggered again

115. *Id.* at 11.

116. *Id.*

117. *Id.* at 10.

118. *See, e.g.*, Berkowitz, *supra* note 9 ("Most egregiously, OCR requires universities to render judgment using 'a preponderance of the evidence' standard."). *But see* Stacy Malone, *Victim Rights Law Center Responds to* Wall Street Journal *Editorial*, VICTIM RIGHTS LAW CTR. (Aug. 31, 2011), http://www.victimrights.org/sexual-assault-happens-college-campuses-stop-blaming-victims-and-hold-perpetrators-accountable ("Mr. Berkowitz . . . confuses the civil and criminal laws when he criticizes the burden of proof . . . .").

119. *See* Grasgreen, *supra* note 108 ("In the press call, Ali stressed the importance of clarifying the standard of proof for sexual harassment.").

120. *Id.*

121. Letter from Russlynn Ali, *supra* note 5, at 13.

122. *Id.* at 11 & n.29.

123. *Id.* at 11 n.29.

and shapes the way in which the institution may handle an announcement of guilt or innocence.[124] The institution may inform the victim of the result of the hearing and any subsequent sanctions or penalties against the perpetrator and may also disclose this information to the general public.[125] But according to the OCR, FERPA prohibits the institution from disclosing any other information relating to the student's education record, such as whether the student was punished for conduct not relating to the harassed student.[126]

The Dear Colleague Letter also addresses privacy issues from the victim's perspective.[127] Before an investigation can begin, the complainant must consent.[128] In addition, the complainant retains the power to request confidentiality, in which case the institution must take appropriate steps to prevent the accused from learning of the accuser's identity.[129] In the presence of certain factors, however, the institution may be entitled to disclose the victim's identity.[130] The institution must weigh the complainant's request for confidentiality against "the seriousness of the alleged harassment; the complainant's age; whether there have been other harassment complaints about the same individual; and the alleged harasser's rights to receive information about the allegations if the information is maintained by the school as an 'education record' under [FERPA]."[131]

Third, the Dear Colleague Letter gives the institution complete discretion to determine whether the parties are permitted to have counsel.[132] The letter takes no position on whether counsel should or should not be allowed but notes that both parties must be treated equally in this regard.[133] Fourth, the letter takes a strong position on the question of cross-examination, noting that "OCR strongly discourages schools from allowing the parties personally to question

124. *Id.* at 13–14.
125. *Id.*
126. *Id.* at 13.
127. *Id.* at 5.
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* (quoting 20 U.S.C. § 1232g (2006 & Supp. IV 2011)).
132. *Id.* at 12.
133. *Id.*

or cross-examine each other."[134] Fifth, the Dear Colleague Letter mandates that an appeals process be made available to both parties.[135]

In addition to these substantive points, the Dear Colleague Letter clarifies other important issues to help institutions better recognize and prevent prohibited conduct. For instance, it defines sexual harassment as "unwelcome conduct of a sexual nature," which "includes sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature."[136]

Finally, although the letter focuses almost exclusively on the interests of the victim, it contains two important sentences that discuss the rights of the accused. Specifically, "[p]ublic and state-sponsored schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due-process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."[137]

B. Unaddressed Questions

Despite the Dear Colleague Letter's specific guidance, it fails to address fundamental questions about how the complex web of higher-education regulations pertaining to sexual assault and due process should interact to form one seamless umbrella of guidelines. Instead, tension remains between the requirements of Title IX, constitutionally and contractually mandated due process, and the rules of confidentiality and disclosure under FERPA. For example, an institution trying to comply simultaneously with *Donohue* and the Dear Colleague Letter might reach an impasse because *Donohue* requires cross-examination as a matter of right in cases where the main issue is witness credibility,[138] whereas the letter cautions against the practice. Perhaps more worrisome, however, is the reality that wide variance continues to exist across institutions and among sexual-assault adjudication policies.[139]

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134. *Id.*

135. *Id.*

136. *Id.* at 3.

137. *Id.* at 12.

138. *See supra* note 72 and accompanying text.

139. For example, despite the consistency advocated by the OCR's insistence on a uniform standard of proof, some institutions are refusing to follow suit. *E.g.*, Robbins, *supra* note 107. Other variations also persist. For instance, Davidson College dispatches an independent, neutral investigator to conduct an initial investigation of all claims of assault, *Disciplinary Procedures*, *supra* note 19, while the University of California at Berkeley employs no such preliminary

III. MOVING FORWARD: CONFRONTING THE NEED FOR CLARITY

To resolve the continued uncertainty, the OCR should issue further guidance in the form of a model judicial policy that must be adopted by institutions and implemented uniformly. Such a document would ensure consistency and enable institutions to balance more appropriately the competing interests of protecting victims of sexual assault while also providing adequate due process for the accused. Admittedly, the OCR is tasked with enforcing Title IX,[140] not with ensuring that students accused of sexual assault are provided appropriate due process. But because public institutions must also ensure that students' due-process rights are constitutionally protected, Title IX must operate within constitutional limits and may not mandate a more expeditious proceeding than the Constitution would require.[141] Without affirmative guidance on how to balance these competing obligations, the OCR's views on Title IX will remain ineffectual, thereby endangering victims, increasing the probability of liability on the part of the institution for denial of due process, and jeopardizing the accused student's due-process rights.[142]

In the spirit of this recommendation, the remainder of this Note advocates for the adoption of specific due-process provisions that should be incorporated by institutions of higher education. Admittedly, these recommendations are framed in constitutional due-process principles and are, therefore, more applicable to public institutions. In the interest of uniformity, however, both public and private institutions should embrace these suggestions. The Note begins in Section A by outlining the relevant interests at stake and explaining why campus sexual assault requires its own, particularized due-process standard. Section B offers recommendations regarding

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investigations and merely directs an initial meeting with the accused to discuss the charges, *see Overview of Process*, *supra* note 19.

140. *See* 34 C.F.R. § 106.3(a) (2012) ("If the Assistant Secretary [for Civil Rights] finds that a recipient has discriminated against persons on the basis of sex in an education program or activity, such recipient shall take such remedial action as the Assistant Secretary deems necessary to overcome the effects of such discrimination.").

141. *See* Letter from Russlynn Ali, *supra* note 5, at 12 ("Public and state-sponsored schools must provide due process to the alleged perpetrator."); *see also* Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975) (explaining that, since *Dixon*, due process is required before a student may be disciplined by a public-education institution).

142. Although empowering the OCR to craft a model policy would admittedly increase the DOE's role, such a role is warranted due to the interest of balancing due process with victim protection and the need for greater consistency and clarity.

the standard of proof, cross-examination, discovery, and access to counsel.

A. Peer Sexual Assault Is a Distinct Circumstance That Warrants Specialized Due-Process Protections

Before devising an approach to campus sexual assault that incorporates both Title IX and procedural due-process requirements, understanding the particular interests at stake in the context of peer sexual assault is important. These interests should trigger a specific and limited standard that is applied only in this special context. The need for such special treatment is demonstrated by applying the Supreme Court's precedent for determining applicable due-process requirements.[143] In *Mathews v. Eldridge*,[144] the Court directed lower courts to weigh three factors when determining the proper scope of constitutionally protected due-process rights in a particular situation or context:

> First, the private interest that will be affected by the official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the [state] interest, including the function involved and fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[145]

This Section analyzes each of these factors in the context of sexual-assault campus adjudicatory proceedings. First, accused students have liberty interests in preserving their good names and reputations.[146] This interest in protecting one's reputation from false accusations and preserving one's unblemished scholastic record is vitally important, particularly in the modern era, because false accusations can have lasting implications. In fact, compared to the effects of other types of infractions such as academic dishonesty, the implications of being found responsible for sexual assault by a judicial panel can endure throughout one's lifetime. Some of the more

143. Mathews v. Eldridge, 424 U.S. 319 (1976) (involving a dispute regarding the constitutionality of administrative proceedings under the Due Process Clause).

144. Mathews v. Eldridge, 424 U.S. 319 (1976).

145. *Id.* at 335.

146. Danso v. Univ. of Conn., 919 A.2d 1100, 1106 (Conn. Super. Ct. 2007).

extreme cases, including the Duke lacrosse scandal[147] and the University of the Pacific gang-rape case,[148] demonstrate how college sexual-assault proceedings have resonance with the national media. Although not every sexual-assault case will garner such far-reaching publicity, many offenses do attract local media coverage and can provoke significant discussion and controversy among the student body.[149]

Second, the risk of erroneous deprivation of the accused student's liberty interest is substantial, particularly in the cases in which the evidentiary record consists only of the accuser's testimony. In *Mathews*, the Court distinguished between two types of scenarios: those in which the dispute involves competing expert interpretations of agreed-upon facts and those in which the facts themselves are in question and are subject to the veracity of the witnesses.[150] In the latter situation, when witness credibility is essential, oral evidence and cross-examination are very important because, without such evidence, the risk of erroneous deprivation of liberty is high.[151] Most campus sexual-assault cases fall into this area of disputed facts. A verdict will often turn on the disciplinary panel's view of witness credibility, rather than on debates between experts. Therefore, the second *Mathews* factor points in favor of providing as much evidentiary process as possible so that the disciplinary panel is deciding cases with more rather than less evidence before it.

On the other side of the scale is the third *Mathews* factor—the cost that increased process would impose on the adjudicatory system. In *Mathews*, these costs were divided into two categories: the costs of implementing the procedural requirements and the costs of allowing the beneficiary of the process to remain in possession of his or her

147. *See, e.g.*, Byron Calame, *Revisiting* The Times*'s Coverage of the Duke Rape Case*, N.Y. TIMES, Apr. 22, 2007, at C12 (analyzing the extensive media scrutiny surrounding the Duke lacrosse scandal).

148. Doe v. Univ. of the Pac., No. 4:09-cv-62, 2010 WL 5135360 (E.D. Cal. Mar. 31, 2010); *see also* Eisen, *supra* note 2 (describing the alleged University of the Pacific gang rape).

149. *E.g.*, Georgina Gustin, *Rape of Student at Blackburn Rattles Campus*, ST. LOUIS POST-DISPATCH, Sept. 24, 2004, at B06 ("A sexual assault on the quiet campus of Blackburn College in Carlinville last week has rattled students . . . ."); *Sexual Assault Workshop*, WASH. POST, June 30, 1991, at D11A ("[The College of William and Mary] was embroiled in controversy this school year after a freshman complained she was the victim of date rape.").

150. *Mathews*, 424 U.S. at 343–44.

151. *Id.* at 341.

interests until a decision had been reached.[152] In the higher-education context, both sets of costs may be significant.

The first group of costs—those of actually implementing the due-process procedures at the hearing—can be substantial. Courts have generally avoided imposing far-reaching due-process burdens in the education context for fear that such burdens would detract from the educational environment and displace the autonomy of the institution's educational mission.[153] Expansive due-process requirements are expensive, time-consuming, and generally beyond the expertise of the educational context. For example, the right of the accused to subpoena witnesses or to conduct discovery might easily tax a student-affairs office's limited resources. More importantly, the prospect of an expensive, embarrassing, and prolonged adjudicatory process could decrease a victim's willingness to report incidents of assault. This chilling effect is itself a type of cost that is borne by the institution, both in the form of an eroded feeling of academic unity on campus as well as in the form of potential Title IX liability for insufficient protections against assault.[154]

Notwithstanding the fact that a full trial-like process would impose tangible costs on educational institutions, there are some mitigating factors unique to the higher-education context that may limit the costs. For example, campus adjudicatory proceedings are often at least partially staffed by student members who are not paid for their services.[155] The use of such student judicial officers does not completely eliminate the institutional burden or the potential for undue embarrassment for the victim,[156] but student participation does mitigate the expense of the proceeding. On a more theoretical level,

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152. *Id.* at 347–48.

153. *See, e.g.*, Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) ("This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out.").

154. *See, e.g.*, Baker, *supra* note 74, at 23 ("[I]n this setting, the opportunity to cross-examine the alleged offender is not likely to encourage prospective complainants to undertake the personal risks associated with filing a formal complaint, and the traumatic side-effects of cross-examination ordinarily impact the alleged victims much more negatively than the alleged offenders.").

155. *See, e.g.*, *Disciplinary Procedures*, *supra* note 19 ("The Honor Council is composed of thirty students . . . elected at large from the student body.").

156. Indeed, in some instances, the use of student judicial officers may actually exacerbate the concern of undue embarrassment for the victim, insofar as students will be hesitant to subject themselves to an investigative proceeding in front of their peers and classmates.

due process is valued as a part of the broader educational mission of the institution. A survey of the mission statements and objectives of the top twenty-five colleges and universities in the United States[157] reveals that, with near uniformity, institutions of higher education value the quest for knowledge and truth in a complex world.[158] Therefore, the institution itself has often demonstrated a commitment to the discovery of truth in all aspects of the educational environment, and this mission would be furthered by implementing additional process requirements.[159] Rather than an ancillary distraction, therefore, due process can be viewed as an investment in the institution's core academic mission—a consideration which may partially offset the magnitude of the cost.

The second group of costs—those of allowing the accused student to remain enrolled at the institution—can also be significant. For an educational institution, sexual-assault scandals are concerning for at least two reasons. First, they threaten to subvert the learning environment by detracting from the student body's focus on education. Second, they can potentially produce a culture of fear among students on campus. Particularly on a residential campus, where the institution desires to foster a community in which students can feel free to learn and explore, lingering safety concerns can be catastrophic to the educational mission. In an effort to address these concerns, institutions may incur additional costs. For example, the

157. For a list of these institutions, as measured in 2012 by the *U.S. News and World Report*, see *National University Rankings*, U.S. NEWS & WORLD REP., http://colleges.usnews.rankingsandreviews.com/best-colleges/rankings/national-universities (last visited Sept. 25, 2012).

158. *See, e.g.*, *Mission Statement*, UNIV. OF CAL., http://www.universityofcalifornia.edu/aboutuc/missionstatement.html (last updated Jan. 26, 2004) ("The distinctive mission of the University is to serve society as a center of higher learning, providing long-term societal benefits through transmitting advanced knowledge, discovering new knowledge, and functioning as an active working repository of organized knowledge." (quoting the 1974–78 University of California Academic Plan) (internal quotation mark omitted)); *University Mission Statement*, YALE UNIV., http://www.yale.edu/about/mission.html (last visited Sept. 25, 2012) ("Like all great research universities, Yale has a tripartite mission: to create, preserve, and disseminate knowledge.").

159. *See* Goldman, *supra* note 70, at 674 ("[T]he university, like any fiduciary, . . . should have the burden of demonstrating that any disciplinary action: (a) was reasonably imposed for cause consistent with its function of maintaining an open-minded atmosphere conducive to the acquisition and use of tools for freely inquiring into and exploring ideas; and (b) was imposed in a manner consistent with scholarly integrity and process.").

institution may decide to rearrange the victim's student's course schedule to avoid any contact with the victim.[160]

On balance, these three *Mathews* factors point toward a special due-process standard that applies specifically to peer sexual assault. Students who have been accused of sexual assault face serious consequences if they are found guilty or even accused of such infractions, which, unlike many other types of campus infractions, are particularly attention-grabbing and lasting in their implications.[161] The third *Mathews* factor, however, requires an important cost-benefit analysis that protects institutions from having to provide overly burdensome protections. Finally, the dual pressures facing institutions are heightened in this context where Title IX and FERPA apply, evincing a need for a special approach. Such external pressures simply do not apply in other common campus disciplinary matters such as academic-honesty violations.

B. Specific Recommendations: Standard of Proof, Evidentiary Issues, and Access to Counsel

In light of the *Mathews* calculus, this portion of the Note outlines specific due-process protections that should be embraced by institutions and the OCR in a model judicial policy. Specifically, this Section provides recommendations regarding (1) the standard of proof; (2) cross-examination procedures; (3) the discovery process; and (4) access to counsel.

1. *A Preponderance Standard of Proof Is Most Appropriate*. The most controversial aspect of the Dear Colleague Letter has been its recommendation for a new standard of proof in campus adjudicatory hearings.[162] The OCR's call for a universal preponderance-of-the-evidence standard has left many crying foul and accusing the OCR of openly targeting male students.[163] Notwithstanding this criticism, a preponderance standard is appropriate under *Mathews* and is actually not even the most pressing due-process issue implicated by the Dear Colleague Letter.

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160. *See, e.g.*, RICE UNIV., *Student Handbook—Sexual Assault/Misconduct*, http://www.students.rice.edu/students/sexual_AssaultMisconduct.asp (last visited Sept. 25, 2012) ("The University will assist students who request assistance in rearranging their classes or living arrangement because of an alleged sexual assault.").

161. *See supra* notes 147–149 and accompanying text.

162. *See supra* note 9 and accompanying text.

163. *See supra* note 9 and accompanying text.

The OCR justifies its call for a preponderance-of-the-evidence standard by analogizing to the administrative law context, in which a preponderance standard is the norm.[164] Putting aside any arguments about the persuasiveness of this analogy, a preponderance standard is appropriate under *Mathews* because it is the fairest allocation of power in the special context of sexual assault. A preponderance standard recognizes that the campus adjudicatory system is distinct from the criminal-law context[165] and acknowledges that the institution has competing obligations to the victim and to the accused.[166] As between these interests, setting the scale either below or above the midline of certainty skews the balance too far in the favor of the advantaged party.

Likewise, the special nature of sexual-assault hearings must be kept in mind. In many sexual-assault proceedings, the entire factual record will consist of testimony from the alleged victim and the alleged assailant.[167] In this proverbial "he said, she said" environment, the standard of proof should be lower, not higher.[168] When combined with a presumption of innocence in favor of the accused, any standard above a preponderance would produce an insurmountable obstacle for victims with meritorious claims, thereby implicating Title IX liability[169] and exposing the institution to added costs. Therefore, a preponderance standard is appropriate because it satisfies the first two *Mathews* factors by adequately protecting against wrongful findings while also protecting the institution from the costs of Title IX liability by not eliminating the possibility of victory for the victim.[170]

Moreover, from a theoretical perspective, the Supreme Court has emphasized that

> [t]he function of a standard of proof . . . is to "instruct the factfinder concerning the degree of confidence our society thinks he should

164. *See* Letter from Russlynn Ali, *supra* note 5, at 11 n.28.

165. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Letter from Russlynn Ali, *supra* note 5, at 9–10.

166. ALEXANDER & ALEXANDER, *supra* note 33, at 155–57.

167. Robert Smith, *On Sexual Harassment and Title IX*, REAL CLEAR POLITICS (Aug. 30, 2011), http://www.realclearpolitics.com/articles/2011/08/30/on_sexual_harassment_and_title_ix_111065.html.

168. It should be recalled, of course, that this lower standard of proof is appropriate only within the institutional disciplinary process. Any criminal proceeding would involve the familiar beyond-a-reasonable-doubt standard. *See supra* Part I.A.

169. *See supra* notes 48–50 and accompanying text.

170. *See supra* notes 145–151 and accompanying text.

> have in the correctness of factual conclusions for a particular type of adjudication." . . . In a criminal case . . . the interests of the defendant are of such magnitude that historically and without any explicit constitutional requirement they have been protected by standards of proof designed to exclude as nearly as possible the likelihood of an erroneous judgment.[171]

For this reason, the criminal-justice system utilizes the beyond-a-reasonable-doubt standard.[172] A "less commonly used" standard is that of clear and convincing evidence,[173] which is what many institutions employed before the Dear Colleague Letter.[174] The Court has cautioned, however, that this standard is appropriate only when "particularly important individual interests or rights are at stake"[175] such as in "cases involving allegations of fraud or some other quasi-*criminal* wrongdoing by the defendant."[176] By contrast, the preponderance standard is generally appropriate in the civil context because it allows "[t]he litigants [to] share the risk of error in roughly equal fashion."[177]

Applying these guidelines to the higher-education context demonstrates that a clear-and-convincing or beyond-a-reasonable-doubt standard is inappropriate. It should be recalled that, although an allegation of sexual assault may have criminal implications, the campus adjudicatory proceeding is distinct from that process and does not implicate the same liberty interests.[178] In the criminal-justice system, the accused is entitled to the beyond-a-reasonable-doubt standard,[179] but such a standard is inappropriate in the context of campus adjudicatory proceedings. Though the interests of the accused in not being wrongfully disciplined for sexual misconduct are substantial, the Supreme Court has not held that they reach such a level as to require a clear-and-convincing standard. For instance, one

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171. Addington v. Texas, 441 U.S. 418, 423 (1979) (quoting *In re* Winship, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

172. *Id.* at 424.

173. *Id.*

174. *See supra* notes 8, 107 and accompanying text.

175. Grogan v. Garner, 498 U.S. 279, 286 (1991) (citing Herman & MacLean v. Huddleston, 459 U.S. 375, 389–90 (1983)).

176. *Addington*, 441 U.S. at 424 (emphasis added).

177. *Id.* at 423.

178. *See supra* notes 17–18 and accompanying text.

179. *See, e.g.*, Dist. Attorney's Office v. Osborne, 129 S. Ct. 2308, 2320 (2009) (explaining in the context of a rape case that a criminal defendant is presumed innocent at trial and is entitled to the beyond-a-reasonable-doubt standard).

of the classic cases in which a clear-and-convincing standard applies is in the context of immigration hearings.[180] In those situations, the interests of the accused in remaining in the United States are sufficiently weighty to trigger the clear-and-convincing standard.[181] By contrast, the interests of a college student in protecting his or her good name and remaining enrolled in her or his school of choice do not rise to the level of significance of a deportation hearing. Such interests, though important, will generally pale in comparison to one's interest in a lawful immigration status. Rather, the accused student's interests are more like those in a hearing for involuntary discharge from the military, in which a preponderance standard is used.[182] Like members of the military who have selected and committed to a particular military branch, students have voluntarily enrolled in their school of choice and have an interest in remaining at that school and in protecting their good name.[183]

Finally, the third *Mathews* factor—that of the administrative burden—does not outweigh the need for a preponderance standard. Relative to the clear-and-convincing standard that critics of the Dear Colleague Letter have advocated,[184] a preponderance standard imposes fewer burdens upon an institution providing adjudication. Moreover, a higher burden might also expose the institution to Title IX liability by stifling victims' abilities to seek institutional remedies, thereby imposing additional cost considerations. Therefore, institutions should adopt a preponderance standard because that standard advances Title IX's goals without infringing on due process for the accused.

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180. *See, e.g.*, Woodby v. INS, 385 U.S. 276, 285–86 (1966) ("To be sure, a deportation proceeding is not a criminal prosecution. But it does not syllogistically follow that a person may be banished from this country upon no higher degree of proof than applies in a negligence case. . . . In denaturalization cases the court has required the Government to establish its allegations by clear, unequivocal, and convincing evidence." (citation omitted)); Chaunt v. United States, 364 U.S. 350, 353 (1960) ("[I]n view of the grave consequences to the citizen, naturalization decrees are not lightly to be set aside—the evidence must indeed be 'clear, unequivocal, and convincing . . . .'" (quoting Schneiderman v. United States, 320 U.S. 118, 125 (1943))).

181. *Woodby*, 385 U.S. at 285–86.

182. *See, e.g.*, Hodges v. United States, 35 Fed. Cl. 68, 78 (1996) (explaining that an administrative board employs a preponderance standard in a military-discharge case).

183. *See supra* note 67 and accompanying text.

184. *See supra* note 9.

2. *Cross-Examination Should Be Embraced as an Affirmative Right of the Accused.* Without any footnotes or citations to legal authority, the Dear Colleague Letter states that the "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing."[185] Whether the OCR would deem cross-examination conducted by the accused student's counsel to be more appropriate is unclear. What *is* clear, however, is that this policy potentially places many institutions in a direct conflict with their duty to provide due process to the accused.[186] As explained in Part I, one federal district court has recognized that students in disciplinary hearings must be afforded the right to confront their accuser.[187] Particularly in the context of accusations of sexual assault, witness credibility may be the determinative factor; a student's legal defense—and academic and professional future—may turn on the ability to cross-examine the accuser.[188] For administrators who are concerned that other courts might adopt the *Donohue* reasoning,[189] the OCR's guidelines pose a direct conflict between competing obligations.

The OCR should amend its views on cross-examination or should at least provide a legal basis for its conclusions. Otherwise, institutions are left uncertain as to whether they should allow direct cross-examination, and a false step in either direction could produce liability.[190] The preferable approach would be for the OCR to declare cross-examination permissible, though most courts that have decided this issue have declined to disturb the institution's discretionary decision to allow or disallow cross-examination.[191] Much of this reluctance has centered on concerns that cross-examination would overly burden the campus adjudicatory process[192] or affirmatively

185. Letter from Russlynn Ali, *supra* note 5, at 12.

186. *See, e.g.*, Donohue v. Baker, 976 F. Supp. 136, 139–40 (N.D.N.Y. 1997) ("At the very least, in light of the disputed nature of the facts and the importance of witness credibility in this case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser . . . .").

187. *Id.* at 146–47; *see also supra* notes 71–74 and accompanying text.

188. *Donohue*, 976 F. Supp. at 146–47.

189. *See supra* note 77 and accompanying text.

190. *See supra* note 4 and accompanying text.

191. Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Conn. Super. Ct. 2007); Baker, *supra* note 74, at 13–14 .

192. *See supra* note 153.

harm the victim.[193] These are weighty concerns, but *Mathews* requires that institutions also consider the accused's need to meaningfully confront the accuser and the charges that have been asserted,[194] factors that will generally outweigh the added time investment required to permit cross-examination.

Moreover, cross-examination can be structured in such a way that the victim is protected from embarrassment. In *Donohue*, for instance, the court merely held that the accused student should be afforded the opportunity "to direct questions to his accuser *through the panel*."[195] This method of cross-examination would prevent the victim from being directly questioned by the accused assailant. Institutions have found many creative ways of permitting cross-examination that enable the accused student to have the opportunity to confront the witness, while also protecting the victim from suffering psychological harm. For instance, institutions have allowed cross-examination to take place through video[196] or while the witness was shielded from the view of the accused and the accused's counsel.[197] Although these methods may increase the administrative burden on the institution, thus implicating the third *Mathews* factor, they are already in common use and are an appropriate compromise between exposing the victim to unbridled stress and not allowing the accused to confront his accuser.

Further, the unique context of student sexual-assault proceedings necessitates the right to cross-examination, which may be the only opportunity that the accused student has to make a meaningful argument of fact. In analogous contexts, such as in the Administrative Procedure Act[198] and in hearings for involuntary military discharge,

193. *See* Baker, *supra* note 74, at 23 ("Due to the highly personal nature of a rape charge and the emotional toll it exacts on the victim, no procedural design issue generates more administrative angst than cross-examination.").

194. *See supra* notes 150–151 and accompanying text.

195. Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (emphasis added). It is unclear whether OCR's ban on direct cross-examination, *see supra* note 134 and accompanying text, also prohibits this indirect cross-examination.

196. *See, e.g.*, Doe v. Univ. of the Pac., No. Civ. S-09-764 FCD/KJN, 2010 WL 5135360, at *4 (E.D. Cal. Dec. 8, 2010) ("As an accommodation to [the victim], the University arranged for [her] to provide her testimony to the Board in a building across campus from where [the perpetrators] testified.").

197. *See, e.g.*, Cloud v. Trs. of Bos. Univ., 720 F.2d 721 (1st Cir. 1983) (involving a judicial hearing in which the witness was shielded from the view of the accused student); Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117, 129–30 (D. Me. 2004) (involving a hearing in which the witness was placed behind a screen and cross-examined out of view).

198. Administrative Procedure Act, 5 U.S.C. §§ 551–559, 701–706 (2006).

both of which implicate similar liberty interests, cross-examination is permitted.[199] In fact, the Federal Circuit has held that cross-examination is required in military-discharge proceedings in situations that are potentially destructive for the victim.[200]

The same factors and considerations as those in military-discharge hearings are at play in the context of college disciplinary hearings for allegations of sexual assault. The institution should have some leeway to conduct procedures as it sees fit, but accused students must be given the opportunity to cross-examine their accusers because in this special context the entire proceeding often turns on witness credibility. Further, the testimony of unavailable witnesses will often be presented as hearsay evidence,[201] which creates an even greater interest in allowing the cross-examination of those witnesses who are present. By this reasoning, the accused's interest in avoiding wrongful deprivation of rights and the need to uncover the truth—the first and second *Mathews* factors—point toward allowing cross-examination. Likewise, the ability to utilize innovative cross-examination methods satisfies the cost concerns captured in the third *Mathews* factor. Accordingly, the OCR should amend its views on cross-examination to allow institutions to ensure that adequate due process is provided to accused students.

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199. *See id.* § 556(d) ("A party is entitled to present his case or defense . . . and to conduct such cross-examination as may be required for a full and true disclosure of the facts."); *infra* note 200.

200. In *Doe v. United States*, 132 F.3d 1430 (1997), the court reversed the decision of a military board to discharge an Air Force officer amid allegations that he had sexually molested his daughter, *id.* at 1437. The evidence against the officer consisted solely of recorded statements that his daughter had made to a third party, and the officer was unable to cross-examine this important witness. *Id.* at 1435–36. The court noted:

> Sexual molestation of a child, especially if committed by a child's own parent, is indeed heinous. But like other person-to-person offenses, whether the act in fact occurred, when there is no corroborating evidence, depends very much on the believability of the complaining witness. And though an administrative discharge proceeding is not held to the same high standard of proof as a criminal hearing, and hearsay evidence is not as tightly controlled as it is in civil court proceedings, nevertheless there remains a minimum level of proof that must be found in the record. . . . The greatest engine for truth, it has been written, is the opportunity to confront one's accusers and to cross-examine them. In administrative proceedings such as this, the rules are modified to permit agency processes that are less formal than those of a law court. But that does not authorize a gross departure from basic principles as has occurred in this case.

Id. at 1436–37 (citations omitted).

201. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971) (explaining the admissibility of hearsay in administrative hearings).

3. *Crafting an Innovative Discovery Process.* The Dear Colleague Letter implicates, but unfortunately does not address, other evidentiary issues, creating further confusion for institutions, victims, and accused students. For instance, one problem that has emerged in many campus hearings has been the inability of the accused student to access relevant evidence to build an effective defense.[202] The OCR, however, has not commented on whether an open discovery process is permissible.

Generally speaking, the accused student should not have the power to compel testimony or to conduct mandatory pretrial depositions. These powers are inappropriate for the higher-education sexual-assault context because they would impose significant costs on the institution and serve to delay the process and undermine the institution's need for discretion and inconspicuousness.[203] Additionally, in the sexual-assault context, compelled testimony may be traumatizing to the students who are forced to testify, particularly if relationships with either the victim or the accused are damaged as a result.[204] These costs are not outweighed by either the first or second *Mathews* factor. The accused student's liberty interest does not require an ability to drag unwilling witnesses to a disciplinary hearing or a deposition room, particularly in an administrative proceeding in which criminal punishment is not at stake. Although facts will vary from case to case, student-on-student sexual assault is often a witnessless crime, which means that depriving accused students of the subpoena or deposition powers will rarely jeopardize their ability to present a defense. Furthermore, FERPA's requirements protect the victim's academic record from being subjected to trial-like scrutiny,[205] making compelled discovery tools impractical. Accordingly, courts have recognized that far-reaching discovery techniques are inappropriate in the higher-education context.[206]

Though certain discovery tools are inappropriate, some modicum of discovery is essential for due process. As Justice Brennan explained, discovery is important because it "helps develop a full

202. *See, e.g.*, Cloud v. Trs. of Bos. Univ., 720 F.2d 721, 726 (1st Cir. 1983) (addressing the accused's complaints that he was not afforded access to relevant witnesses).

203. *See, e.g.*, Danso v. Univ. of Conn., 919 A.2d 1100, 1108 (Super. Ct. Conn. 2007) ("Due process . . . does not require that a student at a disciplinary hearing be afforded a right to . . . compel testimony.").

204. *See supra* notes 154, 200 and accompanying text.

205. *See supra* Part I.B.3.

206. *Danso*, 919 A.2d at 1108.

account of the relevant facts, helps detect and expose attempts to falsify evidence, and prevents factors such as surprise from influencing the outcome at the expense of the merits of the case."[207] An innovative approach is necessary. At the very minimum—and as recognized by the Dear Colleague Letter[208]—the accused must have access to the evidence that will be presented at the hearing. This requirement finds support in all the *Mathews* factors.[209] Moreover, this approach facilitates compliance with FERPA because it mandates that institutions turn over only the information that has been selected as admissible at the hearing, which presumably is also FERPA compliant.

Additionally, other, more innovative discovery techniques could easily be adopted that would enrich due process without overly burdening the institution or the victim. First, although subpoenas are inappropriate, institutions should formally encourage witnesses to attend hearings by excusing them from class or scheduling hearings when school is in session, if timely. Second, nonstudent employees should be required to testify when requested because institutional employees must further the institution's truth-seeking duty and, accordingly, being compelled to testify should be viewed as falling within the scope of employment.

Second, the accused should be permitted to use optional written interrogatories when witnesses are unavailable or unwilling to participate in the hearing. Likewise, institutional officers should be willing to act on the accused student's behalf to contact potential witnesses and ask questions for the purpose of reporting the contents of these conversations to the judicial panel. Such evidence might be hearsay, but hearsay evidence is permissible in this context.[210] Some institutions already act on the accused student's behalf during cross-examination in campus adjudications,[211] and this approach could

207. Taylor v. Illinois, 484 U.S. 400, 425 (1988) (Brennan, J., dissenting).

208. Letter from Russlynn Ali, *supra* note 5, at 11 n.29.

209. This point should be somewhat axiomatic. First, the liberty interest at stake in disciplinary hearings is sufficient to warrant prior access to the facts. Second, without access to the factual evidence, the accused will be unable to mount an effective defense, dramatically increasing the risk of erroneous deprivation of liberty. Third, providing timely access to the accused will impose only minimal costs. This final point finds support in the Dear Colleague Letter itself. *Id.*

210. *See* Richardson v. Perales, 402 U.S. 389, 402 (1971) (explaining that hearsay evidence may be admissible in the administrative hearing context).

211. *See, e.g.*, Donohue v. Baker, 975 F. Supp. 136, 147 (N.D.N.Y. 1991) (requiring cross-examination to be conducted through the institution's judicial panel); Cloud v. Trs. of Bos.

produce similar beneficial results during discovery. More importantly, by coordinating discovery from within the student-affairs office, the institution will be able to more carefully manage contact between the accused student and the alleged victim, hopefully preventing any antagonistic behavior by either party.[212] Further, conducting discovery via the student-affairs office would be another way for the institution to ensure that the accused student is not seeking FERPA-protected information or harassing the victim. These techniques would supplement the institution's own investigation into the accusation of sexual assault and would increase the amount of information that can be submitted to the disciplinary panel. Therefore, this innovative approach to discovery provides a way for the institution to balance its obligations to both the victim and the accused.

4. *Equal Treatment in Accessing Counsel.* The OCR has chosen to defer to the institution on the issue of whether counsel should be permitted at disciplinary hearings.[213] Although this approach is better than simply issuing a directive without legal support—as the OCR did on the issue of cross-examination[214]—a more consistent standard is needed to ensure adequate protection of both the victim's and the accused student's interests. With this goal in mind, institutions should generally provide both the accused and the victim with the option, but not the right, to obtain legal counsel. For students who elect not to obtain legal counsel, a student or administrative advocate should be offered as an alternative. Such a regime is supported by *Mathews* because it comports with the magnitude of the interests at stake in the sexual-assault context and ensures that the students' respective rights are meaningfully advanced.[215] Further, allowing counsel does not pose a prohibitive burden under the third *Mathews* factor. In fact, many institutions already allow counsel for the accused.[216] Others provide

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Univ., 720 F.2d 721, 725 (1st Cir. 1983) (involving cross-examination conducted with the victim shielded from view).

212. Institutions already try carefully to manage future interactions between the alleged victim and the accused. *See supra* note 160. Not only are such efforts important for the prevention of future trauma to the alleged victim, but in some instances, the institution might even be legally obligated to ensure that the parties refrain from future conduct so as to avoid a "hostile environment." Letter from Russlynn Ali, *supra* note 5, at 4, 13 n.33.

213. *See supra* note 132 and accompanying text.

214. *See supra* Part III.B.2.

215. *See supra* Part III.A.

216. *See, e.g.*, Gomes v. Univ. of Me. Sys., 304 F. Supp. 2d 117 (D. Me. 2004) (involving a student represented by counsel).

student advocates.[217] These solutions are adequate and provide the accused student the opportunity to consult with an adviser before mounting a defense.

Although the parties should have the right to access counsel, this right should work in tandem with the ability of the counterparty to access counsel. In other words, when the accused can afford counsel but the victim cannot, then neither party should have counsel.[218] In that situation, the institution should offer to each student the services of a competent student or administrative advocate of the parties' choosing. Notably, this equal-representation approach would go further in protecting the victim than the OCR's own policy, which mandates only equal formal *access* to counsel.[219] By contrast, the equal-representation approach will ensure that neither party has a competitive advantage because of one party's ability or willingness to pay. Admittedly, this approach steps outside the *Mathews* calculus by considering issues of fairness to the victim rather than focusing solely on the accused student's due-process rights. This focus is appropriate, however, so long as the accused student is provided some form of representation. Beyond this baseline, fairness between the parties should be a relevant factor.

CONCLUSION

Despite the OCR's attempts to provide specific guidance to institutions of higher education on how to respond to accusations of peer sexual assault, numerous questions and conflicts remain. The basis for such confusion rests largely on the fact that Title IX must work in tandem with constitutionally or contractually defined due-process rights, yet to date the OCR has not issued specific guidance on how these two bodies of law should interact. Other laws such as FERPA come into play at the margins and make matters even more complicated. This uncertainty is unacceptable, particularly given the weight of the interests involved. Therefore, the OCR should issue further guidance in the form of a model judicial policy that more

217. *See* Donohue v. Baker, 976 F. Supp. 136, 145–47 (N.D.N.Y. 1997) (discussing a campus disciplinary proceeding in which the accused student was provided access to a student advocate); Danso v. Univ. of Conn., 919 A.2d 1100, 1109 (Conn. Super. Ct. 2007) (same).

218. Determining a party's ability to afford legal counsel will be a fact-based assessment made by a student-affairs office. Such a decision may require the student or his or her guardian to authorize the relevant official to consult the student's financial-aid profile.

219. Letter from Russlynn Ali, *supra* note 5, at 12.

carefully outlines how due process and victim protection should interact. Ideally, such guidelines would spur Congress to provide corresponding legislative enactments that recognize the interplay between Title IX and due-process rights.

In light of these interests, this Note argues for the implementation of a special due-process regime for sexual-assault adjudication on college and university campuses. These recommendations should be embraced by institutions, as they comply with the *Mathews* calculus and should be explicitly ratified by the OCR. Specifically, institutions should (1) adopt a preponderance-of-the-evidence standard, as already recommended by the OCR; (2) provide accused students with the right to cross-examine all witnesses, subject to specific limits to protect the victim from undue embarrassment or stress; (3) implement a limited and innovative discovery process, in which the institution provides assistance to the accused while also permitting timely access to available factual evidence, subject to FERPA's limitations; and (4) give both the accused and the victim the option, but not the right, to obtain legal counsel, but ensure that both parties have equal types of representation.

By articulating and approving a regime of due-process rights for students accused of sexual assault—such as the type of regime proposed in this Note—the OCR would enable institutions to balance their obligations to both victims and accused students more carefully, thereby providing more adequate and far-reaching protection for both parties.