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Title IX Beyond School Lines: The Proposed Regulations That Will Limit Colleges and Universities’ Jurisdictional Scope of Responsibility

Rachel Dunham*

INTRODUCTION

In September 2017, United States Secretary of Education Betsy DeVos stated “[n]ot one more survivor will be silenced. We will not abandon anyone. We will amplify the voices of survivors who too often feel voiceless.”¹ About a year later, the United States Department of Education (Department) released proposed Title IX regulations intended to provide federally funded educational institutions with clarity on their legal responsibilities under Title IX.² Some believe that a number of the newly proposed regulations convert DeVos’s seemingly heartfelt commitment to empowering survivors of sexual assault to little more than an empty promise.³

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1. *Secretary DeVos Prepared Remarks on Title IX Enforcement*, U.S. DEP’T EDUC. (Sep. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement> [<https://perma.cc/TL8B-TL5G>].

2. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2019) (to be codified at 34 C.F.R. pt. 106) [hereinafter *Nondiscrimination on the Basis of Sex*].

3. *See generally* *Senate Democrats Urge DeVos To Listen To Students and Survivors of Sexual Assault, Start Over on Title IX Rule*, COMMITTEE ON

One of the Department's proposed regulations would relieve campuses of their Title IX obligations to respond to instances of sexual harassment that occur outside of the educational institution's own "program or activity."⁴ Another proposed regulation would require schools to dismiss any Title IX report of sexual harassment that "did not occur within the [educational institution's] program or activity."⁵ If these proposed regulations are enacted, a large population of students impacted by student-to-student⁶ sexual harassment in the college and university setting would be left without recourse or protection under Title IX.

National data reflects a common scenario in which college sexual assaults take place: eighty-five to ninety percent of sexual assaults are committed by someone known to the victim,⁷ fifty to seventy-five percent of sexual assaults involve alcohol

JUDICIARY (Jan. 31, 2019) (providing insight on how Secretary DeVos's proposed rule would have an adverse effect on the student population), <https://www.judiciary.senate.gov/press/dem/releases/senate-democrats-urge-devos-to-listen-to-students-and-survivors-of-sexual-assault-start-over-on-title-ix-rule> [https://perma.cc/5CVH-NBS4].

4. See Nondiscrimination on the Basis of Sex, *supra* note 2, at 61466; see also U.S. Department of Education Proposed Title IX Regulation Fact Sheet, U.S. DEP'T EDUC. (2018), <https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf> [https://perma.cc/XD5N-XZFC] [hereinafter *Proposed Regulation Fact Sheet*]. The author will hereinafter use the term "program or activity" in reference to the meaning of the term as it is presented in the proposed regulations.

5. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61475.

6. Instances of student-to-student sexual harassment are the focus of this Comment because when the complainant (reporting student who alleges an experience of sexual harassment) and the respondent (responding student who is accused of sexual harassment) are both members of the same educational institution, the school has specific Title IX obligations to respond to the report by providing resources, investigating, and potentially adjudicating the claim. See U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1 (Sept. 2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [https://perma.cc/4ZDB-5U6H] [hereinafter 2017 Q&A]. The educational institution's Title IX obligations to respond decrease significantly when either the complainant or respondent are not members of the same educational institution. See *id.* at 1 n. 3.

7. *Most Victims Know Their Attacker*, NAT'L INST. JUST. (Sept. 30, 2008), <https://nij.ojp.gov/topics/articles/most-victims-know-their-attacker> [https://perma.cc/BWQ7-UFZP].

consumption,⁸ and forty-one percent of college sexual assaults are reported to have occurred at an off-campus party.⁹ These statistics depict a clear trend that sexual assaults in the college setting commonly take place between students *outside* of an educational institution's own program or activity. However, contrary to data and cultural cues, the Department is overlooking the reality of students' lived experiences by proposing a regulation that will considerably reduce the jurisdictional scope of responsibility that educational institutions bear under Title IX.¹⁰

The umbrella of legal protections available to students under Title IX will significantly narrow if the proposed regulations take effect. When a sexual assault between two students occurs off-campus, educational institutions will not be able to respond through Title IX mechanisms, students who report sexual harassment will no longer have recourse under Title IX, and alleged perpetrators will face no accountability via Title IX sanctions. Contrary to DeVos's promise to "amplify the voices of survivors,"¹¹ implementing these regulations will leave a large population of students impacted by sexual harassment voiceless. The Department should revert back to the prior Title IX guidelines that allowed higher educational institutions to investigate and adjudicate complaints of sexual harassment that occurred outside of their own programs or activities.¹² If the Department chooses to move forward with the regulations as drafted, it will undermine the purpose of Title IX, run counter to the desire of the general public, and compromise the best interest of students.

This Comment contains five parts. Part I provides a background of Title IX and the evolution of the federal law from

8. Jessie V. Ford, *Sexual Assault on College Hookups: The Role of Alcohol and Acquaintances*, 32 SOC. F. 381, 383 (2017).

9. *Facts from United Educators' Report: Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, UNITED EDUCATORS, https://www.ue.org/sexual_assault_claims_study/ [<https://perma.cc/XN4X-ERL6>] (last visited Mar. 23, 2020).

10. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61487 (finding that educational institutions that amend their Title IX practices in accordance with the proposed regulations will "experienc[e] a reduction in investigations of approximately [thirty-two] percent").

11. *Secretary DeVos Prepared Remarks on Title IX Enforcement*, *supra* note 1.

12. *See infra* notes 43–48 and accompanying text.

enactment to present day. Part II addresses the impact of the 2018 proposed regulations as limiting institutional response to sexual harassment. Part III explains the Department's legal basis for proposing the two regulations, focusing on the Supreme Court's decision in *Davis v. Monroe Board of Education*. Part IV explores why the Department may have proposed these regulations and argues that any purported rationale for restricting Title IX is not compelling. Finally, Part V addresses the potential community impact the proposed regulations could have on college campuses throughout the country.

I. BACKGROUND

In 1972, the United States Congress enacted Title IX as a means to prohibit educational institutions that receive federal funding from discriminating on the basis of sex.¹³ The federal law provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹⁴ United States Senator Birch Bayh, the lead sponsor of the Title IX legislation, stated that the purpose of Title IX was to oppose "the continuation of corrosive and unjustified discrimination against women" in the American educational system.¹⁵ Since 1972, Title IX has been the predominant legal tool used to protect individuals in the educational setting from various forms of sex discrimination.

Originally, Title IX was thought of as a gender equity law with respect to collegiate sports.¹⁶ Over the years, however, the scope of

13. See *Cannon v. U. of Chi.*, 441 U.S. 677, 704 (1979) (describing two objectives Congress sought to accomplish with Title IX, "First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.").

14. See 20 U.S.C. § 1681(a) (2018).

15. 118 Cong. Rec. 5803 (Feb. 28, 1972); see also *Women's Rights, What's at Stake*, ACLU, <https://www.aclu.org/issues/womens-rights> [<https://perma.cc/36PG-33JJ>] (last visited Mar. 11, 2019) ("A look back at history shows that women have made great strides in the fight for equality Despite the tremendous progress made in the struggle for gender equality, women still face violence, discrimination, and institutional barriers to equal participation in society.").

16. See generally Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity*

Title IX broadened.¹⁷ That broadening was largely the result of the Department's Office for Civil Rights' (OCR) communication to the public and a series of Supreme Court cases.¹⁸ Some examples of the different types of sex discrimination that are now prohibited under Title IX include "sexual harassment; the failure to provide equal opportunity in athletics; discrimination in a school's science, technology, engineering, and math (STEM) courses and programs; and discrimination based on pregnancy."¹⁹ While Title IX covers a range of discriminatory conduct, the prohibition against sexual harassment is what many people think of today when they hear "Title IX."²⁰

The Department has continuously expressed that Title IX requires educational institutions to investigate formal complaints of sexual harassment.²¹ If an educational institution finds that the

Law, 22 MARQ. SPORTS L. REV. 325 (2012) (providing a broad overview of Title IX development).

17. See Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1053 (2015) ("The answer to the question 'is sexual violence sex discrimination?' evolved over the 1980s and 1990s. Courts reached a 'yes' first under Title VII, and then a 'yes' in the 1990s under Title IX.").

18. *Id.* at 1053–1055.

19. Office for Civil Rights, *Sex Discrimination: Overview of the Law*, U.S. DEP'T EDUC. <https://www2.ed.gov/about/offices/list/ocr/sexoverview.html> [<https://perma.cc/67YB-M82C>] (last modified Jan. 10, 2020).

20. The Department proposes to define sexual harassment as being "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or sexual assault as defined in 34 CFR 668.46(a)." Nondiscrimination on the Basis of Sex, *supra* note 2, at 61466.

21. 2017 Q&A, *supra* note 6, at 4 ("In every investigation conducted under the school's grievance procedures, the burden is on the school—not on the parties—to *gather sufficient evidence* to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed." (emphasis added)); U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 15 (2001) <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/FR96-JYAQ>] [hereinafter 2001 REVISED GUIDANCE] ("[T]he school must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation"); Dear Colleague Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. Office for Civil Rights 4 (Apr. 4, 2011) <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/L8G4-RPBD>] (requiring upon knowledge of sexual harassment a

effects of reported misconduct deny a student equal access to education, then the school must take prompt action to remedy the effects of the sexual harassment by eliminating the hostile environment.²² While students who allege that they have experienced sexual harassment should file a report with their educational institution's Title IX coordinator, if they feel the institution is inadequate in its response, then they may file a complaint with the OCR.²³ The OCR is assigned to oversee the enforcement of Title IX to ensure that institutions are accountable in upholding their Title IX obligations.²⁴ Anyone who experiences or witnesses institutional failure to properly respond to reports of sex discrimination in a federally funded educational institution may file a complaint with the OCR.²⁵ Upon receiving a report of a Title IX violation, the OCR undergoes a multi-step approach to process, investigate, and respond to the complaint.²⁶ If the OCR finds that an institution has violated Title IX, and further, if that institution is unwilling to comply with the requisite non-discriminatory practices, then the OCR has the power to "initiate proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance to the recipient."²⁷ As the vast majority of higher educational institutions receive some sort of federal financial assistance (most notably, financial aid to students),²⁸

school "must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.")

22. 2001 REVISED GUIDANCE, *supra* note 21, at 12.

23. See 34 C.F.R. § 100.7(b) (2019) ("Any person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official or his designee a written complaint."); see also § 106.2(b) ("Department means the Department of Education."). Although they are found in the statute corresponding to Title VI, these procedures are applicable to Title IX under its statutory language. § 106.71.

24. U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, COMPLAINT PROCESSING PROCEDURES 1 (2018) <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> [<https://perma.cc/66QV-QMUU>] [hereinafter COMPLAINT PROCESSING PROCEDURES].

25. See §§ 100.7–100.8.

26. See COMPLAINT PROCESSING PROCEDURES, *supra* note 24, at 1–2.

27. *Id.* at 3.

28. *Title IX, KNOW YOUR IX*, <https://www.knowyourix.org/college-resources/title-ix/> [<https://perma.cc/MGB2-WKLU>] (last visited Mar. 10, 2020) [hereinafter KNOW YOUR IX].

compliance with Title IX is necessary for the successful functioning of most colleges and universities.

Beyond the executive administrative enforcement that comes from the OCR, Title IX enforcement was further developed by a series of United States Supreme Court cases throughout the late twentieth century. In general, the Supreme Court gave individual students impacted by Title IX institutional violations the right to litigate privately and hold their schools accountable.²⁹ Specific to the regulations at issue, in *Davis v. Monroe County Board of Education*, the Supreme Court held that an educational institution's private liability should be limited "to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs."³⁰ Importantly, the right to privately litigate further encouraged Title IX enforcement and provided educational institutions with a powerful incentive to comply with non-discriminatory practices.³¹

In 2001, following a series of Supreme Court cases,³² the OCR released the *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (2001 Revised Guidance) to establish administrative Title IX guidelines for educational institutions.³³ The Department, in its

29. In *Cannon v. University of Chicago*, the Supreme Court held that although not expressly provided under Title IX, individuals have a right to file a private cause of action against educational institutions that are in violation of the statute. 441 U.S. 677, 717 (1979). In a subsequent case, *Franklin v. Gwinnet County Public Schools*, the Supreme Court held that a monetary damages remedy is available to private litigants as an additional means to enforce Title IX. 503 U.S. 60, 76 (1992). Following *Cannon* and *Franklin*, the Supreme Court refined the scope of Title IX liability within the private litigation realm. See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (holding that recipients of federal funding can only be held liable for damages in a private action under Title IX if there is "actual knowledge of discrimination in the recipient's programs and [the recipient] fails adequately to respond").

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

31. Deborah Brake & Elizabeth Catlin, *The Path of Most Resistance: The Long Road Toward Gender Equity in Intercollegiate Athletics*, 3 DUKE J. GENDER, L. & POL'Y 51, 60–61 (1996) ("The threat of having to pay out large damage awards also promised to operate as a powerful incentive for schools to bring their athletic programs, as well as their other educational programs, into compliance with Title IX.").

32. See discussion of cases *supra* note 29.

33. See 2001 REVISED GUIDANCE, *supra* note 21 at i.

capacity as a federal agency, has the statutory authority to enforce Title IX beyond the reach of Supreme Court holdings interpreting the statute.³⁴ Despite this, the released guidelines did not veer far from the private liability standards set out in the Supreme Court precedent.³⁵ The 2001 Revised Guidance advised educational institutions that they were only obliged to respond to sexual harassment reports when they had actual notice of sexual harassment that took place in a context over which the institution had substantial control.³⁶

Ten years later, in 2011, the OCR published the *Dear Colleague Letter: Sexual Violence* (Dear Colleague Letter) to serve as a “significant guidance document” that would clarify schools’ responsibilities under Title IX.³⁷ In the Dear Colleague Letter, the Department recognized that “[one] in [five] women are victims of completed or attempted sexual assault while in college,” and acknowledged that this staggering statistic served as an important reason for Title IX practices to be reexamined and reasserted.³⁸ As compared with the Supreme Court private litigation standards³⁹ and the 2001 Revised Guidance, the Dear Colleague Letter expanded the scope of Title IX as a means to better address the number of college women impacted by sexual assault, and consequently, by discrimination in the educational setting.⁴⁰ It is

34. See 20 U.S.C. § 1682 (2018) (“Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute.”).

35. The *Gebser* and *Davis* holdings created a standard for private Title IX lawsuits which requires plaintiffs to demonstrate that educational institutions alleged to be in violation of Title IX were “deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.” *Davis*, 526 U.S. at 650.

36. 2001 REVISED GUIDANCE, *supra* note 21, at 2–3, 15.

37. Ali, *supra* note 21, at 1 n.1.

38. *Id.* at 2.

39. See *supra* notes 29–30.

40. For more information on the Dear Colleague Letter, see Penny Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling “Due Process” Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN’S RTS. L. REP. 126, 136–138.

important to note that men are also victimized by sexual harassment and sexual violence⁴¹ and Title IX provides legal protections for any *person* impacted by sex discrimination in a federally funded educational institution.⁴²

Essentially, the Dear Colleague Letter abandoned the previous requirement that educational institutions must have substantial control over the location in which sexual harassment occurs and instead advised institutions of the following: “[i]f a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures.”⁴³ The Department acknowledged the probability that continuing effects of sexual harassment would occur within the educational setting after an off-campus sexual assault.⁴⁴ Accordingly, the Dear Colleague Letter provided educational institutions with a broader scope to address the lingering effects of sexual harassment in the institutional setting.

In 2014, the Department published the *Questions and Answers on Title IX and Sexual Violence* (2014 Q&A) document as a means to provide educational institutions with further clarity regarding their legal responsibilities under Title IX.⁴⁵ In the 2014 Q&A, the Department reinforced institutional obligations to investigate

41. Research demonstrates that one and sixteen men will be sexually assaulted while in college. *See Statistics About Sexual Violence*, NAT’L SEXUAL VIOLENCE RESOURCE CTR. (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [<https://perma.cc/EK9U-DWPB>].

42. *See supra* note 14 and accompanying text.

43. Ali, *supra* note 21, at 4.

44. *Id.* (“[B]ecause students often experience the continuing effects of off-campus sexual harassment in the educational setting, schools should consider the effects of the off-campus conduct when evaluating whether there is a hostile environment on campus. For example, if a student alleges that he or she was sexually assaulted by another student off school grounds, and that upon returning to school he or she was taunted and harassed by other students who are the alleged perpetrator’s friends, the school should take the earlier sexual assault into account in determining whether there is a sexually hostile environment. The school also should take steps to protect a student who was assaulted off campus from further sexual harassment or retaliation from the perpetrator and his or her associates.”).

45. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, *QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE* ii (Apr. 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/Q4R9-HX H6>] [hereinafter 2014 Q&A].

complaints of off-campus student-to-student sexual assault “regardless of where the conduct occurred” in order to determine whether the off-campus conduct has continuing effects within the academic institutional setting.⁴⁶ As discussed throughout the 2014 Q&A, “[t]he mere presence on campus or in an off-campus education program or activity of the alleged perpetrator of off-campus sexual violence can have continuing effects that create a hostile environment.”⁴⁷ The Department also provided that educational institutions must be proactive in protecting a student who files a complaint of off-campus sexual harassment from additional harassment or retaliation by the alleged perpetrator or third parties.⁴⁸

In September 2017, the Department rescinded the 2011 Dear Colleague Letter and the 2014 Q&A document and announced its plan to engage in a formal rulemaking process regarding educational institutions’ responsibilities under Title IX.⁴⁹ In the interim, the Department directed schools to refer to the OCR’s 2001 Revised Guidance⁵⁰ and the newly published September 2017 Q&A on *Campus Sexual Misconduct* (2017 Q&A) as authoritative on Title IX compliance.⁵¹ The Department’s 2017 Q&A specifically rescinded the prior administration’s guidance that directed schools to process all student-to-student sexual harassment regardless of its location.⁵² The Department was of the view that the Supreme Court’s holding in *Davis*, which requires that an institution have substantial control over the “environment in which the harassment occurs,” provided a compelling reason for the administration to limit educational institutions’ jurisdictional scope of responsibility

46. *Id.* at 29.

47. *Id.* at 29–30.

48. *Id.* at 30; Ali, *supra* note 21, at 4.

49. *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, U.S. DEP’T EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/departement-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/3FRM-X84Y>]; *see also* 2017 Q&A, *supra* note 6, at 1 (“The Department of Education intends to engage in rulemaking on the topic of schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence. The Department will solicit input from stakeholders and the public during that rulemaking process.”).

50. *See* 2001 REVISED GUIDANCE, *supra* note 21, at i.

51. 2017 Q&A, *supra* note 6, at 1.

52. *See id.* at 1 n.3.

under Title IX.⁵³ As compared to the 2011 Dear Colleague Letter and 2014 Q&A, both of which highlighted the potential for off-campus sexual harassment to have “continuing effects on campus,” the 2017 Q&A interim guidance reverted back to the 1999 *Davis* substantial control threshold requirement.⁵⁴

In November 2018, the Department released the newly proposed Title IX regulations in the Notice of Proposed Rulemaking document.⁵⁵ The Department noted that the proposed regulations are intended to provide clarity and improve institutional practices in response to sexual harassment and assault.⁵⁶ In line with the 2017 Q&A guidance, the Department’s proposed regulations would limit educational institutions’ jurisdiction under Title IX. Section 106.44(a) provides: “Consistent with Supreme Court precedent and the text of Title IX, a school would be obligated to respond when: (1) the school has *actual knowledge* of sexual harassment; (2) that occurred within the school’s own ‘*education program or activity*’; (3) against a ‘*person in the United States*.’”⁵⁷ The Department also proposed section 106.45(b)(3), which would bar schools from responding to sexual harassment complaints that fall outside of section 106.44(a).⁵⁸ Section 106.45(b)(3) would provide that “if the conduct alleged by the complainant . . . did not occur within the recipient’s program or activity, the recipient must terminate its grievance process with regard to that conduct.”⁵⁹ Accordingly, under the new Title IX regulations, educational institutions will no longer be able to investigate instances of sexual harassment that occur outside of their own program or activity. That is a dramatic change from prior law and practice. This Comment will next examine the effects that the proposed regulations will have on

53. *Id.* (quoting *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 631 (1999)).

54. *Davis*, 526 U.S. at 645 (1999); 2014 Q&A, *supra* note 45, at 29; Ali, *supra* note 21, at 4.

55. *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, U.S. DEP’T EDUC. (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all> [<https://perma.cc/UB7H-JETD>].

56. *Id.*

57. *Proposed Regulation Fact Sheet*, *supra* note 4.

58. *See* Nondiscrimination on the Basis of Sex, *supra* note 2, at 61474.

59. *Id.*

schools' abilities to respond to reports of sexual harassment alleged to have occurred outside of a school's program or activity.

II. THE PROPOSED REGULATIONS WILL SIGNIFICANTLY DECREASE THE
NUMBER OF TITLE IX INVESTIGATIONS

To understand the impact that the proposed regulations will have on Title IX reporting, it is helpful to first examine what the Department means when it uses the phrase "educational program or activity." The Title IX statute broadly defines a college or university's program or activity as "all of the operations" of a higher educational institution.⁶⁰ The Department further points to factors, identified by case law, to consider to determine whether something is a program or activity: "whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance."⁶¹ Thus, under the proposed Title IX regulations at issue, campuses would only be able to respond to reports of sexual harassment in two instances: (1) if the misconduct occurred in a location or context controlled by the institution or (2) if the misconduct occurred at a program that is supported by the institution in some way.⁶² Because evidence shows that the majority of college sexual assaults occur outside of a context controlled by an educational institution, the proposed regulations will significantly decrease the number of Title IX investigations conducted by schools.

The language of the proposed regulations is clear that schools will be limited to respond to incidents of sexual harassment that occur in environments like academic buildings, campus student housing, off-campus school affiliated housing, or at school sponsored events. Accordingly, students who choose to live off-campus or in non-affiliated housing will no longer be able to file a formal complaint under Title IX if an incident of sexual assault occurs within their residence. Many colleges and universities have high populations of students living in non-affiliated, off-campus housing. Some schools, like community colleges, have one hundred

60. 20 U.S.C. § 1687(2)(A) (2018) (interpretation of "program or activity").

61. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61468.

62. *See id.*

percent of their student populations living off-campus.⁶³ Thus, unless a sexual assault between two students occurred on campus property or at a school-sponsored event, students who attend community colleges would not be protected by Title IX. Demographic data collected from the University of Central Florida (UCF) serves as a useful example of how significant the effects of the proposed regulation would be if put into practice in a more traditional university living environment. With the nation's largest undergraduate enrollment in 2019, 12,922 of UCF's 59,483 students lived on campus or in campus-affiliated housing.⁶⁴ That would mean that only twenty-one percent of UCF's student population would be able to seek recourse under Title IX if sexually assaulted by another student in their own residence. This would leave seventy-nine percent of UCF undergraduate students without an option to formally report a similar incident under Title IX.

The point is further illustrated by research demonstrating that more incidents of sexual misconduct occur off campus, or outside of a school's educational program or activity, than on campus, or within a school's program or activity. The Associated Press requested reporting data on sexual assault incidents from ten of the nation's largest public universities and found that five out of the eight universities that provided data had more reports of sexual harassment from off campus than from on campus.⁶⁵ Another report found that forty-one percent of college sexual assaults occurred at off-campus parties.⁶⁶ As such, the proposed regulations

63. Kelsey Sheehy, *Dorms Help Give 2-Year Colleges a 4-Year Feel*, U.S. NEWS (Feb. 9, 2015), <https://www.usnews.com/education/community-colleges/articles/2015/02/09/dorms-help-give-2-year-colleges-a-4-year-feel> [https://perma.cc/XC2V-24XS] (noting how only twenty-five percent of community colleges throughout the country offer on campus housing).

64. See *UCF Facts 2019-2020*, U. CENT. FLA. (last visited Mar. 24, 2020), <https://www.ucf.edu/about-ucf/facts/> [https://perma.cc/345Q-NBQA].

65. Associated Press, *Sexual Assaults at Major Colleges Are More Likely to Be Off Campus*, *Report Says*, NBC NEWS (Feb. 12, 2019, 8:54 PM), <https://www.nbcnews.com/news/us-news/sexual-assaults-major-colleges-are-more-likely-be-campus-report-n970771> [https://perma.cc/5CE3-YDMT] (stating that the five universities that reported more sexual assault incidents off-campus than on campus were the University of Texas, Texas A&M, Arizona State, Michigan State and the University of Central Florida).

66. *Facts from United Educators' Report: Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, *supra* note 9. While forty-one percent of sexual assaults were reported to occur at an off-campus

will restrict educational institutions from responding to a significant number of sexual harassment incidents.

Colleges and universities would be allowed to respond to some reports of sexual assault that occur off campus, but only if the incident happened at an activity which was “funded, sponsored, promoted, or endorsed” by the school.⁶⁷ Because the majority of undergraduate students are not of legal drinking age, events of this nature often do not involve a risk factor which is commonly associated with college sexual assault—alcohol. Research has shown that between fifty and seventy-five percent of college sexual assaults involve the use of alcohol.⁶⁸ Whereas most college or university sponsored events will not allow the use of alcohol, the majority of college sexual assaults do involve the use of alcohol.⁶⁹ This significantly lowers any chance that the “activities” portion of the proposed regulation would provide students with the opportunity to report their experience of sexual assault to a Title IX office.

By limiting educational institutions’ obligation to respond only to instances of sexual harassment that occur on property they own or at events they oversee, the regulations overlook the circumstances under which most college sexual assaults occur. As a result, a disproportionately high population of students who are impacted by sexual harassment will no longer be protected under Title IX. The Department regulations do not take into account valuable research data that establish a clear picture of national trends—most college sexual assaults involve the use of alcohol, and many college sexual assaults take place off-campus. With all of that in mind, it is important to examine the Department’s legal basis for moving forward with this proposed regulation.

party, some of these parties may fall under a school’s program or activity and could technically be processed as a formal complaint under the proposed regulations (i.e. a school-sponsored sorority hosts a party at its campus-affiliated house that is not on campus).

67. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61468.

68. Ford, *supra* note 8, at 383 (“Studies combining sexual assaults of college women in all kinds of events have found that between 50% and 75% of sexual assault incidents involve alcohol consumption by the survivor, perpetrator, or both . . .”).

69. *Id.*

III. THE DEPARTMENT RELIES ON THE SUPREME COURT'S TEXTUAL
INTERPRETATION OF THE TITLE IX STATUTE TO SUPPORT THE PROPOSED
REGULATIONS

In 1999, the Supreme Court in *Davis v. Monroe County Board of Education* interpreted the text of the Title IX statute and concluded “because the harassment must occur ‘under’ ‘the operations of’ a funding recipient . . . the harassment must take place in a context subject to the school district’s control.”⁷⁰ Further, the Supreme Court held that federally funded educational institutions may only be found liable for damages in private Title IX lawsuits when “the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”⁷¹ While the Department acknowledges that it is “not required to adopt the liability standards applied by the Supreme Court,” it uses the *Davis* holding to support the policy behind the proposed regulation sections 106.44(a) and 106.45(b)(3).⁷²

The Department relies on the *Davis* rationale that colleges and universities should only be responsible for responding to incidents of sexual harassment that occur within a school’s program or activity because those are the environments over which they have substantial control.⁷³ Because the *Davis* holding was narrowly tailored to apply to private litigation, and not to regulatory administration, the arguments discussed below demonstrate why the Department should not limit educational institutions’ jurisdictional scope of responsibility based on the same theory. Rather, the Department should use its executive administrative authority, like the prior administration did,⁷⁴ to allow schools to respond to Title IX reports of sexual harassment between students

70. 526 U.S. 629, 645 (1999).

71. *Id.* The Supreme Court made clear that the *Davis* holding applied to *private* Title IX lawsuits seeking civil damages, not to administrative enforcement. *See id.* at 639 (“We must determine whether a district’s failure to respond to student-on-student harassment in its schools can support a private suit for money damages”).

72. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61469.

73. *See id.*

74. *See* discussion *supra* Part II. The Dear Colleague Letter and 2014 Q&A recognized that sexual harassment between two students, regardless of where it takes place, has the potential to carry over into an institution’s educational environment. *See id.*

through institutional grievance processes, regardless of where the misconduct occurred.

The Supreme Court has previously held that the text of Title IX should be interpreted with “a sweep as broad as its language.”⁷⁵ Justice Stevens, writing in dissent in *Gebser v. Lago Vista Independent School District*, further stated that “the use of passive verbs in Title IX, focusing on the victim of the discrimination rather than the particular wrongdoer, gives this statute broader coverage.”⁷⁶ As it is written, Title IX mandates that no individual “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.”⁷⁷ While the current administration has focused on the program or activity language in the statute, it has overlooked the other equally important words of Title IX.

The general language of the Title IX statute does not concern or address *where* the sex discrimination occurs; rather, its focus is on whether the conduct occurs in a manner that would deprive a student in a federally funded institution of their⁷⁸ right to receive an education free from sex discrimination. Professors from Harvard Law School characterize the Department’s focus on the *Davis* substantial control threshold as being a “legal fiction,” explaining:

The Department’s commentary depends on an argument that schools should not be held responsible for settings over which they have no control. But schools do not enjoy complete control over many settings even *within* their programs and activities. They can engage in prevention activities but they cannot completely prevent wrongful conduct; they can deter but not preclude misconduct. Furthermore, the devotion of resources has no necessary relationship to effective oversight. The Department’s focus

75. *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 521 (1982) (quoting *United States v. Price*, 383 U.S. 787, 801 (1966)).

76. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting) (citing *Smith v. Metro. Sch. Dist. Perry Twp.*, 128 F.3d 1014, 1017 (C.A.7 1997) (Rovener, J., dissenting opinion)).

77. 20 U.S.C. § 1681(a) (2018).

78. The author is deliberately using the term “their” and not “his or her” to be inclusive of all gender identities.

on resource provision and control are legal fictions. The focus should be on access to education, and that turns on education-constricting effects on the educational experience of an individual due to the alleged offender's discriminatory conduct.⁷⁹

Certainly, it can be argued that a school's lack of response to sexual harassment would result in a student being "excluded from" or "denied the benefits of" education on the basis of sex.

When an educational institution responds to a Title IX complaint, it generally does so by providing students with resources and interim measures, investigating the complaint, and possibly adjudicating the complaint.⁸⁰ Although the newly proposed regulations do not bar educational institutions from providing students reporting incidents of sexual harassment outside a school's program or activity with resources and interim measures,⁸¹ the proposed regulations *do* prohibit schools from responding to complaints of sexual harassment through investigatory and adjudicatory processes.⁸² The prior administrative guidelines allowed schools to investigate complaints of sexual harassment that took place outside of their own programs or activities as a way to determine whether that conduct had created a hostile environment

79. Jennie Suk Gersen, Nancy Gertner, & Janet Halley, Comment on Proposed Title IX Rulemaking 19 (Jan. 30, 2019), <http://etseq.law.harvard.edu/wp-content/uploads/2019/01/Comment-on-Proposed-Title-IX-Rulemaking-Gersen-Gertner-and-Halley.pdf> [<https://perma.cc/RD8E-GYPH>].

80. See Nondiscrimination on the Basis of Sex, *supra* note 2 at 61469. Institutional response to formal complaints of sexual harassment can include "supportive measures that a non-deliberatively indifferent response may require, requiring a school to investigate and adjudicate formal complaints." See *id.*

81. *Id.* at 61468. The Department specifically notes that the proposed regulations do not prevent educational institutions from "offering supportive measures to students who report sexual harassment that occurs outside the recipient's education program or activity." *Id.*

82. See *id.* at 61474–75. The proposed section 106.45(b)(3) provides that "if the conduct alleged by the complainant would not constitute sexual harassment as defined in § 106.30 . . . did not occur within the recipient's program or activity, the recipient must terminate its grievance process with regard to that conduct." *Id.* at 61474. In other words, educational institutions would be required "to dismiss a formal complaint or an allegation within a complaint without conducting an investigation if the alleged conduct . . . if the conduct did not occur within the recipient's program or activity." *Id.* at 61475.

in the institutional setting.⁸³ By not being able to investigate reports of off-campus sexual assault between two students, educational institutions will not be able to determine whether there are continuing effects of the sexual misconduct happening within their educational program or activity. As a result, many instances of off-campus sexual harassment will have continuing effects that create a hostile environment within a school's program or activity that will be left unaddressed by the institution. This institutional inaction could consequently "produce a highly discriminatory impact on the [reporting student's] access to education."⁸⁴

In proposing the regulations, the Department no longer mandates that colleges and universities provide supportive measures to students who file a report of student-to-student sexual harassment that is alleged to have occurred outside of a school's program or activity. While many Title IX coordinators likely will still connect these reporting students to resources and assist them in obtaining interim measures, it is important to acknowledge that those actions will no longer be required. Prior to the proposed regulations, when a student filed a formal complaint⁸⁵ of a sexual assault, Title IX required that educational institutions take prompt action to provide interim measures to students involved in the grievance process.⁸⁶ Examples of interim measures include

83. See 2014 Q&A, *supra* note 45, at 29 ("Once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct.")

84. Gersen et al., *supra* note 79, at 19.

85. Under the proposed regulations, a report of sexual assault that occurs outside of a school's program or activity would not constitute a formal complaint. See *Nondiscrimination on the Basis of Sex*, *supra* note 2, at 61474; see also *Proposed Regulation Fact Sheet*, *supra* note 4.

86. Under both the Obama and Trump Administrations, the Department has made this a clear Title IX requirement. See *Nondiscrimination on the Basis of Sex*, *supra* note 2, at 61470 (describing "when a recipient must view a person as a complainant for purposes of offering supportive measures, investigating a formal complaint, and any other response necessary to meet the recipient's obligation to not be deliberately indifferent" (emphasis added)); see also 2014 Q&A, *supra* note 45, at 32 ("Title IX requires a school to take steps to ensure equal access to its education programs and activities and protect the complainant as necessary, including taking interim measures before the final outcome of an investigation.")

physical and mental health services, academic accommodations, housing accommodations, no-contact orders between the parties, changes to work or class schedules, campus escort services, and other measures intended to make “every effort to avoid depriving any student of her or his education.”⁸⁷ Without these supportive measures, a myriad of problems can arise and lead to an increased likelihood of sex discrimination in the educational setting.

Numerous studies support the finding that individuals victimized by sexual assault experience PTSD, depression, fear, generalized anxiety, alcohol or substance dependency, or some combination thereof.⁸⁸ One study provides a compelling narrative of the ways in which unaddressed or aggravated post-sexual assault psychological symptoms can subsequently impact a victim’s academic performance:

[A] woman suffering sequelae in the aftermath of a rape may experience cognitive impairment such that she is less able to concentrate, organize a set of facts, or remember details in the course of her studies. Depression or anxiety may diminish the energy a woman has to commit to academic work or decrease her ability to engage with other students due to social anxiety, shame, or embarrassment. There is also evidence that victimized women may turn to substance abuse as a coping mechanism which could negatively affect grades.⁸⁹

Another study found that students who experienced sexual victimization were more likely to drop out than students who did not, noting that “[t]he dropout rate for students who had been sexually victimized (34.1%) was higher than the overall university dropout rates (29.8%).”⁹⁰

87. 2017 Q&A, *supra* note 6, at 2–3.

88. See, e.g., Carol E. Jordan et al., *Violence and Women’s Mental Health: The Impact of Physical, Sexual, and Psychological Aggression*, 6 ANN. REV. CLINICAL PSYCHOL. 607, 613 (2010).

89. Carol E. Jordan et al., *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE & ABUSE 191, 197 (2014).

90. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J.C. STUDENTS RETENTION: RES., THEORY & PRAC. 234, 244 (2016).

Clearly, the psychological impact of sexual assault increases the likelihood that a student will withdraw or decline academically. Beyond the prohibition of “[sex] discrimination under any education program or activity,” the Title IX statute protects students from being “excluded from participation in,” or “denied the benefits of” education in a federally funded institution because of their sex.⁹¹ When students drop out of school as a result of unaddressed sexual harassment, it could be argued that they are being “excluded from participation” in their education. When students’ grades significantly decrease as a result of unaddressed sexual harassment, arguably they are being “denied the benefits” of their education. Thus, a school’s lack of response to all claims of sexual harassment that arise outside of their own program or activity will lead to violations of Title IX.

Although the Department has the administrative authority to create Title IX regulations,⁹² those regulations should not usurp the purpose of the federal statute they are intended to supplement. The impact of the proposed regulations run directly counter to the Title IX statute’s core objective—to protect students from experiencing sex discrimination in educational settings.⁹³ Not requiring educational institutions to provide resources and interim measures to those who report student-to-student sexual harassment that occurs outside of the school’s program or activity, and prohibiting institutions from investigating and adjudicating those claims, will lead to hostile learning environments. Unaddressed psychological distress and unmanaged turbulent social environments that result from sexual harassment will negatively impact a student’s ability to succeed academically. The implementation of the proposed regulations will lead to tolerance of sex discrimination in the educational setting. Accordingly, the Department should allow

91. 20 U.S.C. § 1681(a) (2018).

92. § 1682; *see also* *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) (“Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute’s nondiscrimination mandate . . .”).

93. *Nondiscrimination on the Basis of Sex*, *supra* note 2, at 61467 (“[T]he purpose of Title IX is to prohibit a recipient from subjecting individuals to sex discrimination in its education program or activity, the definition of sexual harassment under Title IX focuses on sexual conduct that jeopardizes a person’s equal access to an education program or activity.”).

educational institutions to investigate and take action in response to reports of sexual harassment between two students, regardless of where the incident occurred.

IV. EXAMINING THE REASONS WHY THE DEPARTMENT WOULD MOVE FORWARD WITH THE PROPOSED REGULATIONS

Beyond the legal precedent of the *Davis* holding, it is helpful to look at the reasons why the Department may have chosen to move forward with the proposed jurisdictional regulations.⁹⁴ It is impossible to know with certainty why the Department is choosing to restrict the jurisdictional reach of Title IX. However, based on an examination of the OCR's 2018 Notice of Proposed Rulemaking document, the Department's general communications to the public, news articles, research studies, and published public comments made in response to the proposed regulations, one can piece together some possible rationales behind the decision which will be discussed in turn.

First, the Department may be proposing to restrict jurisdiction over Title IX claims because it feels that off-campus sexual assault may be handled more effectively by local law enforcement. That is, because these incidents involve criminal acts occurring outside of the campus domain, the Department may prefer the response to come from local law enforcement rather than higher education administrators. Second, the Department may be proposing to limit the scope of jurisdiction in order to lower the number of formal Title IX complaints that are filed. As a consequence, this may help to decrease educational institutions' financial hardships; the fewer Title IX complaints, the less money that needs to be expended for their resolution. Third, it may be that the Department is of the view that limiting Title IX grievance processes to incidents under which the school has substantial control would enable overburdened schools to create and maintain more fair, uniform, and transparent Title IX processes. Finally, it is possible that the Department believes the proposed regulations are supported by the public and generally reflect the perspectives of Title IX stakeholders. To be clear, most of the described rationales are not explicitly stated by the Department; but it stands to reason that

94. *Id.* at 61469; *see also* note 29 and accompanying text.

these rationales would be the driving force behind the implementation of the proposed regulations. As discussed below, these policy considerations become less persuasive as one takes a closer look into the complex intricacies of college sexual harassment.

A. Possible Rationale #1: Local Law Enforcement May Be Better Situated Than Schools to Investigate Off-Campus Reports of Sexual Assault

The first possible reason why the Department proposed regulation sections 106.44(a) and 106.45(b)(3) is to give deference to local law enforcement's ability to investigate reports of off-campus sexual assault. The Foundation for Individual Rights in Education's⁹⁵ public comment provides that when a sexual assault occurs off-campus, "educational institutions may be poorly situated to properly investigate the situation compared with local law enforcement authorities."⁹⁶ Given the fact that sexual assault is a crime, it makes sense that local law enforcement may be better equipped to investigate that crime than higher education administrators. After all, college and university administrators are not trained as police officers and it should follow logically that those with the proper criminal investigatory training should take the lead.⁹⁷ Unlike law enforcement agencies, colleges and universities are not a branch of the criminal justice system. Under this logic,

95. The Foundation for Individual Rights in Education is a proponent of defending student and faculty rights on America's college campuses, and supports the proposed regulations as, "effectively address[ing] gender-based discriminatory harassment without infringing on the free speech or due process rights of students." Found. for Individual Rights in Educ., Comment of the Foundation for Individual Rights in Education in Support of the Department of Education's Proposed Regulations on Title IX Enforcement 4 (Jan. 30, 2019).

96. *Id.* at 13.

97. A collaboration between the International Association of Chiefs of Police and the United States Department of Justice's Office on Violence Against Women demonstrates a commitment of "law enforcement agencies around the country with improving their response to crimes of violence against women, including sexual assault . . ." Julia Holtemeyer & Michael Rizzo, *Understanding, Investigating, and Responding to Sexual Assault*, DEP'T JUST.: COPS (Apr. 2018), https://cops.usdoj.gov/html/dispatch/04-2018/iacp_resources_article.html [<https://perma.cc/3FDK-ZNYY>].

educational institutions should focus on education and not the investigation and adjudication of crimes.

While law enforcement may be better equipped to address a sexual assault that occurs off-campus between two students in some circumstances, it could be argued that, in some ways, educational institutions are better situated to respond to the incident. Law enforcement personnel likely do not have the breadth of understanding and access to the on-campus resources and accommodations that Title IX coordinators and other similarly situated higher-education administrators do. Local law enforcement officials do not have the authority to address situations that commonly arise in the educational setting after a report of sexual misconduct is made. For instance, what can the police do if the reporting student and the accused share a class together, live in the same residence hall, or eat in the same dining hall?

Ideally, student sexual assault victims would report the crime to the police and the alleged perpetrator would face punishment if found guilty in a criminal proceeding, but that is not often the case. Less than five percent of college sexual assaults are reported to law enforcement officials.⁹⁸ There are many reasons why students choose not to report to police: self-blame, embarrassment, shame, fear of perpetrator retaliation, gender stereotypes, not wanting friends or family to know what happened, distrust of the criminal justice proceedings—the list goes on.⁹⁹ Even if a student overcomes barriers to reporting to the police, the following national statistics depict an alarming problem within our criminal justice system: “Out of every 1000 sexual assaults, 995 perpetrators will walk free; [out of that 1000,] 230 [sexual assaults] are reported to police; 46 reports lead to arrest; 9 cases get referred to prosecutors; 5 cases will lead to a felony conviction; 4.6 rapists will be incarcerated.”¹⁰⁰

98. Bonnie S. Fisher et al., *Reporting Sexual Victimization to the Police and Others: Results from a National-Level Study of College Women*, 30 CRIM. JUST. & BEHAV. 6, 31 (2003).

99. Marjorie R. Sable et al., *Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students*, 55 J. AM. C. HEALTH 157, 160 (2006).

100. *The Criminal Justice System: Statistics*, RAPE ABUSE & INCEST NAT'L NETWORK (last visited Mar. 24, 2019), <https://www.rainn.org/statistics/criminal-justice-system> [<https://perma.cc/3RR9-2DTX>].

Aside from the personal reasons some students may have for not wanting to report to the police, there is a practical reason why students may prefer to go through a Title IX investigative and hearing process instead of a criminal one—Title IX is responsive to the temporal needs of students. Whereas the length of law enforcement investigative proceedings and ensuing criminal trials are often indeterminate, Title IX requires prompt and efficient investigative and hearing proceedings.¹⁰¹ This process is more practical in meeting the needs of students who require responsive action to high-stakes situations that are taking place during a time when their focus should be on obtaining their college degree.

The way the criminal justice system is currently operating to address sexual violence is not providing many individuals the justice they seek. In the past decade, Title IX has evolved to provide students who want to report an instance of sexual violence with an alternative legal tool to do so. Consequently, the number of sexual violence reports made in the higher education setting has significantly increased:

Since the issuance of the [Department's] Office for Civil Rights' . . . 2011 guidance and 2014 Q&A document, there has been a sharp increase in the number of Title IX complaints filed with the Department. Between FY2011 and FY2016, there was a[n] . . . 831 percent increase at the postsecondary level in reports regarding sexual violence.¹⁰²

The extraordinary growth in reporting demonstrates that educational institutions are doing something right in their Title IX responses to reports of sexual violence. Accordingly, Title IX serves as an accessible reporting mechanism that has provided students with alternative means to seek, and possibly receive, justice.

101. Under the Obama guidance, sixty days was the estimated timeframe within which the investigative and hearing process should be completed. 2014 Q&A, *supra* note 45, at 31. Under the proposed regulations, the Department requires educational institutions to “designate reasonably prompt timeframes” for completing investigations and hearings. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61473.

102. Letter from United States Senators to Betsy DeVos, Sec’y of Educ., U.S. Dep’t of Educ., Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 2 (Jan. 30, 2019) [hereinafter *Senators’ Letter*], <https://www.help.senate.gov/imo/media/doc/013019%20Proposed%20Title%20IX%20reg%20caucus%20letter.pdf> [https://perma.cc/H8SC-WQVU].

Since its inception, Title IX has expanded to give students the power of choice—students can choose to report to the police but, if they decide that is not the best option for them or not the only option they want to take, they also are able to report the misconduct to a school official, to receive resources and support, and take part in a prompt investigative and hearing process. Although law enforcement very well may be better equipped to investigate reports of sexual assault, the Department provides educational institutions with significant Title IX guidance on how to investigate and adjudicate sexual violence reports between students. Implementing proposed regulation sections 106.44(a) and 106.45(b)(3) would take away a valuable reporting option from a large number of students. Thus, to the extent that an investigatory preference for law enforcement is a motivating factor behind the regulations, this is an unpersuasive policy rationale to justify moving forward with the proposed regulations.

B. Possible Rationale #2: Limiting Schools' Obligations to Respond to Title IX Complaints Will be Cost-Effective

It stands to reason that the Department would want to narrow educational institutions' jurisdictional scope of responsibility because it will decrease the amount of money schools are currently dedicating to their Title IX programs. Out of the thirty-two pages in the Notice of Proposed Rulemaking document, approximately twelve pages are dedicated to providing a cost-benefit analysis of the proposed regulations.¹⁰³ In its financial analysis, the Department has projected that the new jurisdictional regulations will decrease college and university Title IX investigations by thirty-two percent.¹⁰⁴ In turn, the Department estimates that the decrease in required investigations, among other proposed regulations, will save between \$286.4 million and \$367.7 million in ten years.¹⁰⁵ The predicted monetary relief could help address the financial burdens Title IX has placed upon schools throughout the country.¹⁰⁶

103. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61483–94.

104. *Id.* at 61487.

105. *Id.* at 61484.

106. Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017),

It is certainly true that increased Title IX visibility and responsibility over the last decade has substantially increased the financial burden on most colleges and universities throughout the country.¹⁰⁷ The Dear Colleague Letter reinforced the regulatory requirement¹⁰⁸ that schools must have a designated Title IX coordinator with “adequate training.”¹⁰⁹ As a result of the Department’s communication to the public, educational institutions’ hiring demands throughout the country have substantially increased.¹¹⁰ In addition to hiring Title IX coordinators, many schools have also hired lawyers, educators, advocates, and counselors as a means to address community needs and to handle investigatory and adjudicatory caseloads.¹¹¹

Not only have colleges and universities spent more money hiring Title IX personnel, there has also been an increase in Title IX lawsuits in federal courts.¹¹² A 2015 report found that students

<https://www-chronicle-com.rwulaw.idm.oclc.org/article/How-a-20-Page-Letter-Changed/239141> [<https://perma.cc/N9SD-AQK7>] (“[S]ince the [Dear Colleague] letter was published, higher education has been locked in a costly and often controversial battle to police campus sexual assault. Universities have hired Title IX coordinators to oversee procedures for adjudicating assault reports, in many cases overhauling those policies, and bought online prevention programs for undergraduates.”).

107. The executive director of the Association of Title IX Administrators stated, “colleges are spending more related to Title IX than ever in history, both preventatively and responsively.” Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html?auth=login-google> [<https://perma.cc/9CZD-F6JC>].

108. See 34 C.F.R. § 106.8(a) (2019).

109. Ali, *supra* note 21, at 6–7.

110. See Sarah Brown, *Life Inside the Title IX Pressure Cooker*, CHRON. HIGHER EDUC. (Sept. 5, 2019), <https://www.chronicle.com/interactives/20190905-titleix-pressure-cooker> [<https://perma.cc/NAK3-MWP5>] (“As more colleges hired Title IX coordinators starting in 2011, the staffing boom tended to lead to more awareness and an increase in the reporting of sexual assaults.”); see also Hartocollis, *supra* note 107 (stating that the annual salary of a Title IX coordinator can cost a college or university between \$50,000 to \$150,000 a year).

111. Hartocollis, *supra* note 107.

112. Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 635 (2018) (“[E]ducational institutions are facing legal challenges from complainants and respondents in courts and through OCR complaints.”); Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI., no. 4, 2018,

challenged over twenty-eight percent of Title IX claims in either federal courts or through complaints made to the OCR.¹¹³ As one lawyer who represents colleges and universities in Title IX litigation stated, “[w]hen you make a campus responsible for adjudicating a dispute between two students, you set up a system where there’s a winner and loser . . . the loser seeks to vindicate the rights that they feel the school did not vindicate in court.”¹¹⁴ As more Title IX reports are processed, an increased number of students will continue to seek redress through private litigation, creating a heightened financial burden on schools.¹¹⁵ Accordingly, one could speculate that a lower number of ongoing Title IX adjudications could lead to a decrease in private lawsuits, consequently lowering litigation and settlement costs.¹¹⁶

To the extent that costs do influence the Department’s rulemaking decisions in the Title IX context, *all* costs that result from the proposed regulations should be considered. Although the Department quantified the costs that schools may potentially save as a result of the proposed regulations, it failed to quantify all of the costs that could accrue to schools and society in general as a

at 11 (“While most regard the [Dear Colleague Letter] as being well-intentioned and one of the most comprehensive approaches to reducing campus sexual violence, the document has left much room for interpretation and, consequently, could lead to costly and protracted legal disputes.”).

113. UNITED EDUCATORS, CONFRONTING CAMPUS SEXUAL ASSAULT: AN EXAMINATION OF HIGHER EDUCATION CLAIMS 14 (2015), http://www.ncdsv.org/ERS_Confronting-Campus-Sexual-Assault_2015.pdf [<https://perma.cc/XQG2-QY45>].

114. Greta Anderson, *Students Look to Federal Courts to Challenge Title IX Proceedings*, INSIDE HIGHER ED (Oct. 3, 2019, 3:00 AM), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings> [<https://perma.cc/4EWP-AYQE>].

115. See Hartocollis, *supra* note 107 (quoting Brett Sokolow, the executive director of the Association of Title IX Administrators as saying that litigation “can run into the high six or even seven figures, not counting a settlement or verdict”).

116. Others speculate that the proposed regulations are unlikely to decrease costs. Peter Lake, the director of the Center for Excellence in Higher Education Law and Policy at Stetson University, states that the proposed regulations leave “all sorts of gray space for campuses” and this “could easily lead to a flood of litigation.” Steven Johnson, *The Fight Over Title IX Has Reached the Comments Section. Here’s What People Are Saying*, CHRON. HIGHER EDUC. (Dec. 21, 2018), <https://www-chronicle-com.rwulaw.idm.oclc.org/article/The-Fight-Over-Title-IX-Has/245380> [<https://perma.cc/4FZJ-PUZ8>].

consequence.¹¹⁷ For example, student attrition costs should be weighed against the protections aimed to prevent a school's civil liability that results from a Title IX lawsuit.¹¹⁸ Many public comments express concerns that the proposed regulations will increase barriers to reporting instances of sexual harassment.¹¹⁹ If students are faced with additional barriers to reporting, it could lead to decreased access to supportive resources. As a representative of the National Women's Law Center points out, "[i]t strikes me that one thing that's not included in the cost is the one in five women dropping out of school because their school won't investigate their complaints of sexual violence, and that is a cost that affects everybody."¹²⁰

It is difficult to measure to what degree the Department's proposal to limit educational institutions' jurisdiction is motivated by financial reasons. To the extent that the Department is motivated by cost cutting, decreasing the financial burdens of colleges and universities should not serve as a determinative factor in moving forward with the proposed regulations. Catherine Lhamon, a former leader of the OCR, believes that the cost-benefit analysis in the Notice for Proposed Rulemaking demonstrates that the Department's goal is to "reduce the number of times a school investigates, rather than aspiring to reduce the number of harms that students experience."¹²¹ The Department should not implement proposed regulations based on a predicted cost-effective impact. To the contrary, the Department should only move forward with proposed regulations that will properly effectuate the mission of Title IX.

117. See, e.g., Erica L. Green, *Proposed Rules Would Reduce Sexual Misconduct Inquiries*, *Education Dept. Estimate*, N.Y. TIMES (Sep. 10, 2018), <https://www.nytimes.com/2018/09/10/us/politics/campus-sexual-misconduct-rules.html> [<https://perma.cc/PZ72-TMWP>].

118. See *id.*

119. See public comments cited *infra*, Part V.

120. Green, *supra* note 117.

121. *Id.* But see *id.* (containing a statement from a current representative of the Department that the proposed regulations were not "built on any supposed financial impact and [that] has played no role in Secretary DeVos's decision making"). While one would hope this statement represents the true intent of the Department, for some, a level of skepticism arises when examining the cost-benefit analysis in the Notice of Proposed Rulemaking document.

C. Possible Rationale #3: A Lower Number of Ongoing Title IX Investigations and Hearings Will Assist Schools in Administering More Equitable Title IX Processes

The Department has continuously expressed that an objective of the proposed regulations is to ensure sexual harassment reports are treated seriously and responding students have adequate due process rights.¹²² Many supporters of the Department's proposed regulations believe that the regulations, as a whole, will assist schools in implementing Title IX proceedings with higher due process protections.¹²³ One could surmise that sections 106.44(a) and 106.45(b)(3) are being implemented—at least in part—as a means to assist schools in administering more equitable Title IX proceedings. By decreasing the number of reports a school can respond to, there will be a lower number of ongoing Title IX investigations and hearings. Ultimately, this will allow schools to devote more resources to comprehensively address issues of due process and fairness.

Before considering the argument that jurisdictional restrictions will improve due process, it is first helpful to provide an overview of the problem of due process in the field of Title IX. Some colleges and universities appear to have overextended their Title IX protections for reporting students in response to the 2011 Dear Colleague Letter and 2014 Q&A Title IX guidance documents.¹²⁴ The Harvard Law Professors' public comment on the proposed regulations explained that schools' "fear of attracting negative attention from the [OCR] . . . [created] a perfect storm of due process violations and a loss of legitimacy for important Title IX enforcement."¹²⁵ Many claim that schools implemented Title IX proceedings in a way that disadvantaged responding students in an attempt to be in compliance with the Obama-era guidance.¹²⁶ This is demonstrated by the hundreds of students who reportedly filed

122. *See id.*

123. *See generally* Found. for Individual Rights in Educ., *supra* note 95; *see also* Johnson, *supra* note 116.

124. Gersen et al., *supra* note 79, at 4.

125. *Id.*; *see also* Mann, *supra* note 112, at 634 ("One paramount concern has been that in the resultant rush to protect victims and comply with OCR's new policies, schools did not adequately protect the accused students' procedural due process rights.").

126. *See infra* note 128 for example.

lawsuits against their college or university “alleging their school disciplined them for sexual misconduct without providing due process protections.”¹²⁷ This overextension of Title IX protections created due process concerns for all involved in Title IX investigative and hearing processes, but especially for those accused of sexual misconduct.¹²⁸

Any due process related justifications the Department may have for moving forward with proposed regulation sections 106.44(a) and 106.45(b)(3) are not compelling. The above rationale presumes that by decreasing the quantity of Title IX reports being processed, schools will be able to turn their attention to better implementing impartial and transparent grievance processes. Even though the proposed regulations may alleviate schools of certain administrative burdens, a lower caseload by no means suggests that educational institutions will administer adequate due process—or even know how to. Rather, implementing sections 106.44(a) and 106.45(b)(3) in the name of due process would be a roundabout way of addressing an issue that requires direct

127. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61465 (reporting over 200 students filed lawsuits); *see also* Samantha Harris, *Announcing the Campus Due Process Litigation Tracker!*, FOUNDATION FOR INDIVIDUAL RTS. IN EDUC. (Oct. 16, 2019), <https://www.thefire.org/announcing-the-campus-due-process-litigation-tracker/> [<https://perma.cc/4BPB-MUUY>] (reporting over 500 students filed lawsuits with Title IX due process claims since 2011).

128. Professor Lara Bazelon characterizes the newly proposed regulations as a “step forward” in “addressing troubling racial dynamics at play under the current Title IX system.” Lara Bazelon, *I’m a Democrat and a Feminist. And I Support Betsy DeVos’s Title IX Reforms*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html?searchResultPosition=3> [<https://perma.cc/BRV7-PZGQ>]. Bazelon acknowledges that black men have historically been “over-sexualized, over-criminalized and disproportionately punished,” and that Title IX, as it stands, lacks due process protections for the accused. *Id.* Bazelon’s argument raises important points, many of which are often overlooked in Title IX discourse. But in her discussion on the disparate impact that broad Title IX policies have on black males, she fails to recognize the way that narrowing the scope of Title IX will ultimately harm female students of color. As explained by Professor Nancy Chi Cantalupo, “both of these phenomena could be present simultaneously: women and girls of color could be disproportionately targeted for sexual harassment, and men and boys of color could be disproportionately disciplined for sexual harassment. If so, they are both equally distressing and equally deserving of attention and intervention.” Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 1, 15 (2019).

confrontation. The real problem that the Department needs to address is identifying a way to systemically assist colleges and universities in implementing fair and impartial Title IX policies for students on both sides of the Title IX grievance process.¹²⁹

There are, in fact, alternative proposed regulations that are predicted to be more effective in directly addressing the important issues surrounding due process.¹³⁰ First, section 106.45(b)(3)(vii) requires that Title IX grievance proceedings include live cross-examinations at the hearing.¹³¹ This provision departs from the prior Title IX guidelines which “strongly discourage[d] a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence.”¹³² Second, section 106.45(b)(4)(i) provides schools with the option to use a higher standard of proof, that of clear and convincing evidence.¹³³ This regulation is distinct from the previous administration’s Title IX guidance that required schools use the lower preponderance of the evidence standard.¹³⁴ While both of those regulations are subject to controversy, and this Comment does not take a position on either of those proposals, they nonetheless demonstrate that

129. Although the new regulations are characterized as providing accused students with more due process protections and overall fairer Title IX proceedings, there is a growing concern that some of these changes are being made at the cost of disadvantaging reporting students. *See Senators’ Letter, supra* note 102, at 7 (“While claiming to be about establishing ‘due process,’ the proposed rule tilts school disciplinary proceedings in favor of the respondent, creating inherent inequities and unfairness.”). In considering the ways in which Title IX can be improved, it is *essential* that the Department creates a regulatory standard that will provide *both* the accused *and* the reporting students with fair processes and fair opportunities to be heard. The regulations that narrow educational institutions’ jurisdiction under Title IX will preclude many reporting students from partaking in a fair process or from being given a fair opportunity to be heard in the first place.

130. Conor Friedersdorf, *The ACLU Moves to Embrace Due Process on Title IX*, ATLANTIC (Feb. 8, 2019), <https://www.theatlantic.com/ideas/archive/2019/02/aclu-title-ix/582118/> [<https://perma.cc/Z63L-33MY>].

131. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61476.

132. 2014 Q&A, *supra* note 45, at 31.

133. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61477 (“[T]he recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction.”).

134. *See* 2014 Q&A, *supra* note 45, at 29.

provisions can be crafted to directly address the issue of due process as it relates to Title IX investigations and adjudications. Any hope that decreasing the number of cases that schools have will alleviate administrative burdens and somehow fix the problem of due process is misplaced. The high-stakes nature of Title IX investigations and adjudications demands that due process concerns be addressed directly and comprehensively rather than through simply shrinking the universe of cases.

D. Possible Rationale #4: The Proposed Regulations Reflect the View of Stakeholders

The Department has continuously cited its reliance on the perspective of stakeholders as justification for moving forward with the proposed regulations.¹³⁵ In the Notice of Proposed Rulemaking document, the Department stated “based on its consideration . . . of the views of the stakeholders it has consulted,” the Obama-era Title IX guidance needed to be “reconsidered.”¹³⁶ Further, the Department maintains that the proposed regulations were “developed after more than a year of research, deliberation, and gathering input from students, advocates, school administrators, Title IX coordinators, and other stakeholders.”¹³⁷ Thus, the Department has created the impression that the regulations in general (which include the jurisdictional provisions) reflect the will of stakeholders. That impression is misleading. In fact, a quick google search reveals a considerable amount of opposition to the proposed regulations from the public.

Public opposition can first be identified after a 2017 public commentary period that occurred in response to the Trump Administration’s Executive Order 13777, “Enforcing the Regulatory Reform Agenda.”¹³⁸ In June 2017, the Department solicited public comments to provide “input on regulations that may

135. See Nondiscrimination on the Basis of Sex, *supra* note 2, at 61465.

136. *Id.* at 61469.

137. *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, *supra* note 55.

138. Exec. Order No. 13777, 82 Fed. Reg. 12285 (Feb. 24, 2017). The objective of this order was to “to alleviate unnecessary regulatory burdens placed on the American people.” *Id.* at 12285.

be appropriate for repeal, replacement, or modification.”¹³⁹ One study found that out of the 12,035 public comments submitted in 2017 that addressed Title IX, 11,528 (ninety-seven percent) of the comments, “specifically urg[ed the Department] to uphold the *2011 Dear Colleague Letter: Sexual Violence*.”¹⁴⁰ Yet, the day after the public comment period closed, the Department rescinded the Dear Colleague Letter and the 2014 Q&A document.¹⁴¹ The rescission occurred despite an overwhelming majority of the public expressing their preference towards the Obama administration’s Title IX guidelines.¹⁴² In addition, the Department mischaracterized the prior guidance as being “widely criticized” when it announced the interim Title IX guidance to be followed after the rescission.¹⁴³ Although the majority of public comments in 2017 supported the strong Title IX protections set forth in the Dear Colleague Letter and 2014 Q&A document, the Department chose to rescind the previous administration’s guidance.¹⁴⁴

The Department has since used its authority as an executive administrative agency to formally engage in the rulemaking process pursuant to the Administrative Procedures Act.¹⁴⁵ Because the Department is undergoing this formal rulemaking process, the legal effect of the proposed regulations is distinct from the effects of the 2001 Revised Guidance, 2011 Dear Colleague Letter, and 2014 Q&A guidance documents.¹⁴⁶ Unlike the Department’s prior Title

139. Evaluation of Existing Regulations, 82 Fed. Reg. 28431, 28431 (June 22, 2017).

140. Buffkin et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education’s Executive Order 13777 Comment Call*, 9 CALIF. L. REV. 71, 72 (2018).

141. *Id.* at 102.

142. *Id.* at 72.

143. *Id.* at 75; see also *Department of Education Issues New Interim Guidance on Campus Sexual Misconduct*, *supra* note 49.

144. Buffkin et al., *supra* note 140, at 103 (“Based on this data, [the Department] appears to have actively ignored evidence of the public’s view that, contrary to ED’s statements, this enforcement system was widely welcomed, supported and viewed as successful by members of the public.”); see also *supra* notes 49–52 and accompanying text.

145. See 5 U.S.C. § 553(e) (2018).

146. Sheridan Caldwell, Note, *OCR’s Bind: Administrative Rulemaking and Campus Sexual Assault Protections*, 112 NW. U. L. REV. 453, 463 (2017) (citing Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances*,

IX guidance documents, the proposed regulations will be given the “force and effect of law” and, as such, the Department must partake in a more stringent process prior to implementing the regulations.¹⁴⁷ As required by the Administrative Procedure Act, the formal rulemaking process mandates that the Department open itself up to a public commentary period:

After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose.¹⁴⁸

The Administrative Procedure Act specifically mandates that the Department consider public comments that were submitted in participation of the rulemaking process.

In November 2018, the Department published the proposed Title IX regulations and solicited public comment in accordance with the Administrative Procedure Act.¹⁴⁹ In the allotted time period for comments, the Department received a total of 124,196 public comments on the proposed regulations from individuals, institutions, and organizations nationwide.¹⁵⁰ While there is no official count, the majority of comments are speculated to oppose the new regulations.¹⁵¹ Numerous stakeholders in the field of Title

Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?, 41 DUKE L.J. 1311, 1327–28 (1992).

147. *Id.*

148. § 553(c).

149. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61462.

150. Laura Meckler, *Betsy DeVos Poised to Issue Sweeping Rules Governing Campus Sexual Assault*, WASH. POST (Nov. 25, 2019, 5:42 PM), https://www.washingtonpost.com/local/education/betsy-devos-poised-to-issue-sweeping-rules-governing-campus-sexual-assault/2019/11/25/f9c21656-0f90-11ea-b0fc-62cc38411ebb_story.html [<https://perma.cc/QWL9-MCVJ>].

151. Tovia Smith, *Trump Administration Gets an Earful on New Campus Sexual Assault Rules*, NAT'L PUB. RADIO (Jan. 30, 2019, 7:32 AM), <https://www.npr.org/2019/01/30/689879689/education-department-gathers-feedback-on-new-campus-sexual-assault-rules> [<https://perma.cc/GQ6A-VNCP>], (“There’s no official count of supporters and opponents, but even those who favor the new rules concede they’re getting beat.”).

IX participated in the public comment process to voice concerns regarding the potential impact of the proposed regulations. Public comments came from a variety of voices—ranging from individual perspectives from students, professors and politicians,¹⁵² to institutional perspectives from colleges and universities,¹⁵³ to national coalition perspectives from organizations like the American Civil Liberties Union,¹⁵⁴ American Council on Education,¹⁵⁵ the Association of Title IX Administrators,¹⁵⁶ and the Foundation for Individual Rights in Education.¹⁵⁷ All of these public comments provide the Department with a wide range of valuable perspectives on Title IX policies and practices and should be thoroughly examined and contemplated before the Department implements the proposed regulations.

The Department should not underscore stakeholder support as a primary justification for its choice to move forward with the proposed regulations if it does not actually have this support. Because the Department did not seem to take the public comments submitted in 2017 into consideration in deciding to repeal the prior Title IX guidance, a fair concern is whether the Department will

152. See, e.g., Gina M. Raimondo, Governor, State of Rhode Island and Providence Plantations, Public Comment (Jan 29, 2019), <https://files.constantcontact.com/572742fa401/14a0a427-433e-4e85-b23c-6a9f045f071b.pdf> [<https://perma.cc/7VF3-2VAS>].

153. See, e.g., Kristina M. Johnson, Chancellor, State Univ. of New York, Public Comment (Jan. 29, 2019), <https://www.suny.edu/media/suny/content-assets/documents/chancellor/SUNY-Chancellor-Johnson-Comment-on-ED-Title-IX-Prop-Regs.pdf> [<https://perma.cc/VD7U-SPA5>]; see also The Ass'n of Indep. Colls. and Univs. in Massachusetts, Public Comment (Jan. 23, 2019) <http://aicum.org/wp-content/uploads/2019/01/AICUM-public-comments-on-Notice-of-Proposed-Rulemaking-%E2%80%9CNPRM%E2%80%9D-amending-regulations-implementing-Title-IX-of-the-Education-Amendments-of-1972-Title-IX%E2%80%9D-Docket-ID-ED-2018-OCR-0064.pdf> [<https://perma.cc/8YCD-VBNH>].

154. Am. Civil Liberties Union, Public Comment (Jan. 30, 2019) https://www.aclu.org/sites/default/files/field_document/2019_1_30_title_ix_comments_final.pdf [<https://perma.cc/8FTQ-7A8G>].

155. See Am. Council on Educ., Public Comment (Jan. 30, 2019) <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> [<https://perma.cc/Y3Y8-N4K7>].

156. See Ass'n of Title IX Adm'rs, Public Comment (Jan. 28, 2019) https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18120231/ATIXA-NPRM-Comments-FInal.pdf [<https://perma.cc/XX2B-LVZ7>].

157. See Found. for Individual Rights in Educ., *supra* note 95.

repeat the same pattern with the 2018 public comments. Although the rulemaking process requires that the Department give due consideration to the public comments,¹⁵⁸ the Department's prior mischaracterization of stakeholders' perspectives raises a red flag. While there are, of course, some people and organizations that support the proposed regulations, the documentation described above demonstrates that those stakeholders are not in the majority. As such, if the Department moves forward with the proposed regulations as they are currently drafted, it would be inaccurate to say that they reflect or represent the views of stakeholders.

V. RESTRICTING INSTITUTIONAL RESPONSE HAS THE POTENTIAL TO
NEGATIVELY IMPACT CAMPUS COMMUNITIES

Aside from the rationales considered above, the Department does not appear to have contemplated the possible repercussions that sections 106.44(a) and 106.45(b)(3) could have on campus communities. Prohibiting campuses from investigating or adjudicating sexual harassment claims that occur outside of an educational program or activity has the potential to increase barriers to student reporting, increase rates of student-to-student retaliation, and generally confuse the members of the campus community.

The National Women's Law Center submitted a public comment which raises a concern that the Department's narrowly construed definition of sexual harassment will discourage students from reporting sexual harassment instances.¹⁵⁹ The comment notes:

Already, the most commonly cited reason for students not reporting sexual harassment is the fear that it is "insufficiently severe" to yield a response. Moreover, if a student is turned away by [their] school after reporting sexual harassment because it does not meet the proposed narrow definition of sexual harassment, the student is even

158. *See supra* note 148 and accompanying text.

159. Letter from Nat'l Women's Law Ctr., to Kenneth L. Marcus, Assistant Sec'y for Civil Rights, Dep't of Educ. 5 (Jan. 30, 2019), <https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2019/02/NWLC-Title-IX-NPRM-Comment.pdf> [<https://perma.cc/ZX4H-NQ8W>].

more unlikely to report a second time when the harassment escalates.¹⁶⁰

Furthermore, the comment points to the ways that one student's inability to file a formal complaint could lead to the misperception that other students would also be turned away if they report an instance of sexual harassment that occurred within the educational institution's program or activity.¹⁶¹ This jurisdictional rollback could discredit the positive messaging that institutions have been sending to their campus communities through Title IX initiatives. In turn, many students could experience feelings of institutional betrayal as a result of their educational institution's lack of Title IX response to their sexual harassment complaints.¹⁶² As previously discussed, students already face significant obstacles in reporting their experience with sexual harassment.¹⁶³ A public comment signed by thirty-six United States Senators articulated the issue well: because underreporting of sexual harassment is already recognized as a rampant issue amongst colleges and universities, "it is troubling [that] the Department is proposing procedures that will increase the barriers to reporting, rather than seeking to decrease those barriers."¹⁶⁴

The proposed regulations could not only increase barriers to reporting but could also have the effect of generally limiting the contact that Title IX coordinators have with students involved in sexual harassment incidents. After a formal sexual misconduct report is made, Title IX coordinators are tasked with overseeing the

160. *Id.* at 14 (footnote omitted).

161. *Id.* ("Similarly, if a student knows of a friend or classmate who was turned away after reporting sexual harassment, the student is unlikely to make even a first report.").

162. Jennifer Freyd, *Institutional Betrayal and Institutional Courage*, U. OR. <https://dynamic.uoregon.edu/jjf/institutionalbetrayal/> [<https://perma.cc/XJ3J-FMEA>] (last updated Mar. 25, 2020) ("The term 'Institutional Betrayal' refers to wrongdoings perpetrated by an institution upon individuals dependent on that institution, including failure to prevent or respond supportively to wrongdoings by individuals . . . committed within the context of the institution.").

163. *See supra* note 99 and accompanying text.

164. *See Senators' Letter, supra* note 102, at 9.

grievance process.¹⁶⁵ To create an equitable grievance process, the Title IX coordinator should ensure that both the reporting student and the responding student are informed of the school's Title IX policies and procedures.¹⁶⁶ But, because the proposed regulations do not afford schools the ability to move forward with certain reports of sexual harassment, many grievance processes will not be initiated. This means that Title IX coordinators will no longer have the opportunity to communicate pertinent information to reporting and accused students¹⁶⁷ about institutional expectations of student conduct throughout the grievance process.

Limiting the contact and communications a Title IX coordinator has with students involved in an alleged sexual harassment incident raises a concern about whether reporting students or accused students will actually be aware of their school's anti-retaliation policies. Educational institutions' inability to respond with grievance processes to such a high portion of sexual harassment reports could make it so the students involved in a dismissed sexual harassment report are not put on notice regarding anti-retaliation policies.¹⁶⁸ The 2014 Q&A document specified that "[A] school should also tell complainants and witnesses that Title IX prohibits retaliation, and that school officials will not only take steps to prevent retaliation, but will also take strong responsive action if it occurs."¹⁶⁹ The proposed regulations, by narrowing colleges' and universities' jurisdictional scope, have the potential to decrease student awareness of anti-retaliation policies, which could lead to increased rates of retaliatory behavior.

Not only might reporting students face retaliation on campus, the same can happen to accused students as well. One study which

165. *What Are the Responsibilities of the Title IX Coordinator?*, EVERFI, <https://everfi.com/insights/blog/title-ix-coordinator-responsibilities/> [https://perma.cc/3ZAF-C5LP] (last updated Feb. 25, 2020).

166. KNOW YOUR IX, *supra* note 28.

167. The author is using the term "the accused" rather than "responding student" in this section because, in the scenario being described, the student accused of sexual harassment would not have to respond to any grievance processes under the proposed regulations.

168. For an example of anti-retaliation policies that are commonplace in higher education institutions, see *Title IX: Retaliation*, U. ARIZ., <https://titleix.arizona.edu/ua-policies/retaliation> [https://perma.cc/7YES-356L] (last visited Mar. 11, 2020).

169. 2014 Q&A, *supra* note 45, at 43.

examined the community impact of sexual violence found that “[one] in [three] female undergraduates and [one] in [five] male students will be told by a friend that he or she was a victim.”¹⁷⁰ Without the availability of administrative support and supervision, there is a chance that peers of the reporting student will engage in retaliatory conduct. Picture the following scenario: A member of a fraternity, Student X, sexually assaults a member of a sorority at an off-campus, non-affiliated party. Subsequently, this sorority member confides in a male friend who is in a different fraternity and discloses her experience to him. Outraged, this male friend goes back to his fraternity house, which is located on campus, tells some members that Student X is a rapist, gathers a group of male students to go to Student X’s fraternity house on campus, and then violence ensues between the two organizations. This example serves to illustrate the ways in which information can travel quickly, emotions can run high, and social situations can escalate in a college environment. Ultimately, the proposed jurisdictional regulations limits schools’ abilities under Title IX to proactively address negative behavior and prevent further damage from occurring in academic environments. While the institution can potentially address retaliatory behaviors through other avenues of their student conduct processes, school administrators will no longer be granted the foresight in prevention of retaliation or the ability to swiftly respond to it under Title IX.

A final concern that warrants consideration is whether the effects of the proposed regulation will confuse schools about what the best practice is in responding to sexual harassment reports. Some believe that the prior administrative Title IX guidelines created an inconsistency in Title IX policies and procedures. Professor John Grasso explains:

The “Dear Colleague” letter did not require a recipient school to adopt a specific policy. Its requirements were general. Each school was left to develop its own system to meet the requirements imposed on it under Title IX. As a

170. Victoria L. Banyard et al., *Friends of Survivors: The Community Impact of Unwanted Sexual Experiences*, 25 J. INTERPERSONAL VIOLENCE 242, 248 (2010).

result, there is very little uniformity amongst the procedures employed by our various colleges.¹⁷¹

Thus, the proposed regulations are intended to create a consistent legal framework that will fill gaps of misunderstanding or misapplication in institutional response to sexual harassment.¹⁷²

While the Department has expressed that a goal of the proposed regulations is to provide students and educational institutions with “the clarity of an essentially uniform standard,”¹⁷³ there is a potential for the opposite to occur. The Department indicated that although educational institutions will be barred under Title IX from responding to a report of sexual harassment that falls outside of a school’s program or activity, colleges and universities can use other means to respond. The Department stated, “nothing in the proposed regulations would prevent a recipient from initiating a student conduct proceeding . . . to students who report sexual harassment that occurs outside the recipient’s education program or activity.”¹⁷⁴ To create separate administrative reporting mechanisms and student conduct processes to address the same type of conduct solely based on the place where the conduct occurred seems counterintuitive. That would mean that just because a student reports sexual harassment by another student on campus, they would be afforded higher protections through regulated Title IX proceedings than a student who reports sexual harassment that occurred elsewhere. Rather than creating a “uniform standard,” institutions will have to create two separate policies and practices to respond to sexual harassment incidents between students. The division of processes would likely lead to further confusion and inequity in institutional practices surrounding the issue of sexual harassment.

In the last decade, Title IX has allowed educational institutions to create the infrastructure to respond to the serious public health concern of college sexual assault—regardless of the physical

171. John R. Grasso, *Navigating Title IX and Campus Sexual Misconduct Defense-Advocacy’s Wild West*, R.I. B.J., May–June 2019, at 11, 14.

172. Nondiscrimination on the Basis of Sex, *supra* note 2, at 61484 (“[W]e propose this regulatory action to address sexual harassment under Title IX for the central purpose of ensuring that recipients understand their legal obligations . . .”).

173. *Id.* at 61466.

174. *Id.* at 61468.

location at which it takes place.¹⁷⁵ Without having the proper infrastructure in place to respond to sexual harassment, educational institutions will lack direct access to provide students with helpful information and guidance. Furthermore, the jurisdictional regulations will be taking away a proactive reporting mechanism that has the potential to protect students from experiencing retaliation or from future victimization.¹⁷⁶ For the Department to take this viable reporting option away from so many students will be disadvantageous to campus communities.

CONCLUSION

The Department should withdraw the regulations which require educational institutions to dismiss complaints of sexual harassment that occur outside of their own programs or activities. As discussed above, the predicted impact of sections 106.44(a) and 106.45(b)(3) runs contrary to the text and purpose of Title IX, the purported policy rationale for the Department's decision to move forward with the jurisdictional regulations is unpersuasive, and the potential negative consequences the regulations will have on campus communities is concerning. By stripping colleges and universities of their authority to respond to such a high number of sexual harassment incidents, the Department will be mandating and sanctioning institutional inaction, which will ultimately create a hostile learning environment for too many students.

The more equitable access *all* students have to education, the better our society will fare. The proposed regulations have the potential to erode the last decade of work that has been dedicated to creating campus climates that directly address and respond to sexual harassment. The Department should continue on the path

175. *Sexual Violence is Preventable*, CTR. DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/injury/features/sexual-violence/index.html> [https://perma.cc/9FFR-BYBL] (last updated Jan. 8, 2020) (“Sexual violence is a serious public health concern in the United States.”).

176. Research demonstrates that many rapists are repeat offenders. See Jeremy Bauer-Wolf, *Repeat Rapists on Campus*, INSIDE HIGHER ED (April 12, 2019), <https://www.insidehighered.com/news/2019/04/12/study-repeat-rapists-committing-vast-majority-sexual-crimes> [https://perma.cc/Y2DH-GK52]. By properly processing a Title IX complaint concerning an off-campus sexual assault committed by a student, it follows that colleges and universities can protect other students from future victimization.

already well-trodden of enabling schools to directly address and respond to incidents of sexual harassment that are alleged to have occurred between its students. A clear step in the right direction would be ensuring Title IX protections extend beyond school lines.