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Claremont McKenna College

Appraising the DeVos TIX Rule: Due Process in
Campus Adjudication Processes

submitted to
Professor John Pitney

by
Athulya Nath

for
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Abstract

The increasing awareness and desire to fight sexual violence on college campuses have led to focusing campus adjudication processes on achieving justice. This thesis will analyze Betsy DeVos's Title IX changes and explore whether she achieves due process protections in the new policy. This thesis will detail DeVos's various changes – increased evidentiary standard, live hearing and cross-examination, narrowed definitions, reduction of responsible employees, and presumption of innocence for accused students – and how these changes are beneficial or detrimental to due process as a whole. This thesis will also explore the presence of rape culture on college campuses, the disparity in the perception of individuals of various intersecting identities, and what Institutions of Higher Education (IHEs) can do to combat sexual violence outside of an adjudication process.

Key words: Title IX, due process, college, university, rape culture

Chapter 1: History of TIX

History of TIX

Title IX (TIX), as stated by the 1972 Title IX Education Amendment, started to prohibit “discrimination on the basis of sex in education programs and activities operated by recipients of federal financial assistance.”¹ Initially compliance meant providing equal access to female athletics programs, more academic opportunities, and counseling resources. Eventually, TIX also absorbed the responsibility of addressing cases of sexual violence.

Justice Sandra Day O’Connor in *Davis v. Monroe County Board of Education* (1999) stated that school districts and schools must address “harassment 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.”² The Supreme Court in both *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999) supports TIX policy covering this harassment in teacher-student and student-student relationships.^{3,4}

During the Obama administration, the Office for Civil Rights (OCR) published the “Dear Colleague Letter,” which provided guidelines on what Institutions of Higher Education (IHEs) must do in order to protect students against sexual misconduct. Three

¹ United States Department of Justice, “Equal Access to Education: Forty Years of Title IX,” June 23, 2012, <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>.

² Sandra Day O’Connor, *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999), No. 97-843 (US Supreme Court May 24, 1999).

³ Sandra Day O’Connor, *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274 (1998), No. 96-1866 (US Supreme Court June 22, 1998).

⁴ (Sandra Day O’Connor 1999)

years later, a Q&A document further detailed the guidelines regarding handling disclosures. These documents spurred controversies regarding due process and the overreach of federal power.

After Betsy DeVos became the Secretary of Education, she rescinded Obama-era guidelines and replaced them with new guidelines that included changing evidentiary standards and the TIX process. Once the Department of Education (DOE) released the new draft, the comment period allowed for feedback on the new rule. Much feedback opposed the new changes; however, the final draft was approved while retaining most of DeVos's changes. By August 2020, the new regulations were in place.⁵

Once the Biden administration came into the White House, he declared a hard stance on the administration reevaluating the TIX regulations. In June of 2022, Biden unveiled his new TIX regulations, which broadened the scope of cases that TIX has the purview to adjudicate.⁶ Critics of Biden's policies are worried about the same issue that critics of the Obama-era regulations: due process.

Pervasiveness of Sexual Violence

As described by Catharine MacKinnon in her article, she finds that sexual harassment starts earlier than in IHEs. Children in middle school are subject to being

⁵ Jeremy Bauer-Wolf, "A Look at 11 Years of Title IX Policy," September 19, 2022, <https://www.highereddive.com/news/a-look-at-11-years-of-title-ix-policy/623810/>.

⁶Ibid.

called terms such as “‘lesbian,’ [or] ‘prostitute.’”⁷ The “boys [snap] the girls’ bras, [run] their fingers down the girls’ backs, [stuff] paper down the girls’ blouses”⁸ and many other affronts that invade the students’ personal space. The perpetrators range from peers to teachers, and the victims tend to be younger than their perpetrators or students with special needs.

The violence which starts so early in students’ lives does not cease once they reach an IHE. Instead, MacKinnon finds that students become more vulnerable when they “are largely within the age range – eighteen to twenty-four years.”⁹ Those in the college ages “are three times more likely than women in general to be sexually violated; college-aged men students are seventy-eight percent more likely than nonstudents to be victims of rape or other sexual assault.”¹⁰

According to Leigh Gaskin, rape culture is defined as “a social, political, economic, and governmental system that allows and continues the normalization of rape and sexual assault within a society.”¹¹ This normalization is achieved through actions such as “trivializing rape, rejecting the extensiveness of rape and sexual assault, and victim blaming.”¹² Kate Harding says that rape culture “encourages us to scrutinize victims’ stories for any evidence that they brought the violence upon themselves.”¹³ Rape

⁷ Catharine A. MacKinnon, “In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education,” *Yale Law Journal* 125, no. 7 (May 2016), <https://www.yalelawjournal.org/feature/in-their-hands-restoring-institutional-liability-for-sexual-harassment-in-education>.

⁸ Ibid.

⁹ Ibid.

¹⁰ Ibid.

¹¹ Leigh Gaskin, “Chapter Eight Rape Culture: The Need for an Intersectional, Comprehensive Social Justice Movement,” in *RAPE CULTURE 101: Programming Change* (Demeter Press, 2020), 137–48, <https://www.jstor.org/stable/j.ctv12sdxdg.11>.

¹² Ibid.

¹³ Kate Harding, *Asking for It: The Alarming Rise of Rape Culture--and What We Can Do about It* (Da Capo Press, 2015).

culture also allows supports the existence of rape myths, statements that places the blame of sexual violence onto the victim rather than the perpetrator.

Examples of rape myths include the claim that “‘no’ really means ‘yes,’”¹⁴ that women have agency when in a situation when they experience sexual violence, that the woman brought on the sexual violence due to their promiscuity, or that women use false accusation as a tool against men all perpetuate a culture of disbelieving survivors. These rape myths perpetuate a culture of disbelieving survivors. IHEs are especially vulnerable to supporting rape culture. According to the article written by Ann Burnett and colleagues, “college campuses foster date rape cultures, which are environments that support beliefs conducive to rape.”¹⁵ Additionally, Burnett et al., find that organizations with a concentration of men that foster conversations that tend towards shaming women or encourage men to be “physically dominating”¹⁶ in a way that could promote engaging “in more sexual coercion toward dating partners”¹⁷ and also contribute to rape culture.

The effect of rape culture does not just end at the minimization of the experiences of survivors. It also affects the safety survivors feel in reporting their experiences. Burnett et al. cite a study that finds that “fewer than 5% of sexual offenses are reported to law enforcement”¹⁸ as they are afraid that the systems in place “protects the perpetrators and creates a sense of tolerance towards rape.”¹⁹ According to Meredith Minister’s book,

¹⁴ Ibid.

¹⁵ Ann Burnett et al., “Communicating/Muting Date Rape: A Co-Cultural Theoretical Analysis of Communication Factors Related to Rape Culture on a College Campus,” *Journal of Applied Communication Research* 37, no. 4 (October 9, 2009): 465–85, <https://doi.org/10.1080/00909880903233150>.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

relying on law enforcement to help solve the issue of rape culture is counterproductive as “law enforcement uses rape and the treat of rape as a mechanism of control.”²⁰

In an attempt to make sexual violence and other forms of crime more transparent in IHEs, the Jeanne Clery Disclosure of Campus Security Poiley and Campus Crime Statistics Act, otherwise known as the Clery Act, enforced annual reporting of crime statistics to the public so that individuals are aware of the issues on campuses. According to the Clery Act, the crimes that are included in the reporting include “domestic violence, dating violence, and stalking incidents.”²¹ Though the Clery Act attempts to provide some transparency, the hesitancy to report incidents of sexual violence indicates that at certain IHEs, the crime statistics are not accurate to the level of violence that occurs on campus. According to the AAUW, “77% of campuses reported zero incidents of sexual assault, including rape and fondling, domestic violence, dating violence, and stalking.”²² Knowing the pervasiveness of sexual violence on a variety of IHEs, the lack of reported incidents does not mean that this violence does not occur. It simply indicates a problem of severe underreporting.

The first case of sexual violence being a responsibility of TIX was in *Alexander v. Yale University* (1977). This case established that TIX must consider how sexual misconduct – such as quid pro quo – can prevent a school from pursuing the goals of TIX. In this case, the plaintiffs argued that Yale University was in not in compliance with

²⁰ Meredith Minister, *Rape Culture on Campus* (Lanham, Maryland: Lexington Books, 2018), https://books.google.com/books?hl=en&lr=&id=mAlkDwAAOBAJ&oi=fnd&pg=PR5&dq=rape+culture+on+college+campuses&ots=WJLk1_XYfj&sig=yQavD-81asGf629AJEuwNOXqVCs#v=onepage&q=rape%20culture%20on%20college%20campuses&f=false.

²¹ US Congress, “20 U.S. Code § 1092 - Institutional and Financial Assistance Information for Students,” 1092 20 § (n.d.), <https://www.law.cornell.edu/uscode/text/20/1092>.

²² AAUW, “An Underreported Problem: Campus Sexual Misconduct” (Washington DC, n.d.), <https://www.aauw.org/resources/article/underreported-sexual-misconduct/>.

TIX as the environment that allowed for sexual violence to exist made the school environment hostile.²³

In *Franklin v. Gwinnett County Public Schools* (1992), the Supreme Court ruled that schools would award monetary compensation for reported yet non-adjudicated TIX cases. The plaintiff had reported incidents of sexual misconduct to the school district. Nevertheless, the school told the plaintiff not to pursue charges and ignored the issue. As a result, the plaintiff brought the charges against the school and received monetary compensation.²⁴ This case set a precedent that if an institution fails to uphold TIX, it could be liable for monetary compensation. IHEs must address sexual misconduct.

A case that spotlighted the prevalence of sexual assault in an IHE was the Brock Turner case. Turner was a Stanford student who sexually assaulted an unconscious woman behind a dumpster. This case saw demeaning the assault as “20 minutes of action”²⁵ from Turner’s father and a severely reduced prison sentence compared to the recommended six years of imprisonment. In a piece by Michael Vitiello, he makes an argument that Turner was not a rapist. Vitiello believes that “words matter”²⁶ and that lawyers commenting on Turner’s case need to be understand the proper definitions of rape versus sexual assault and then compare it to the charges against Turner.

However, this point does not seem to hold when considering the Federal Bureau of Investigation’s (FBI) definition of rape compared the charges against Turner. The

²³ Arthur H. Latimer, *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977), No. 77-277 (US District Court for the District of Connecticut December 21, 1977).

²⁴ Byron R. White, *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (US Supreme Court February 26, 1997).

²⁵ Marina Koren, “Why the Stanford Judge Gave Brock Turner Six Months,” *The Atlantic*, June 17, 2016, <https://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/>.

²⁶ Michael Vitiello, “Brock Turner: Sorting Through the Noise,” *The University of the Pacific Law Review* 49, no. 3 (January 6, 2018), <https://scholarlycommons.pacific.edu/cgi/viewcontent.cgi?article=1181&context=uoplawreview>.

definition of rape, according to the FBI, is “penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim. Attempts or assaults to commit rape are also included; however, statutory rape and incest are excluded.”²⁷ Vitiello details the specific charges against Turner as “assault with intent to rape an intoxicated person; sexually penetrating an intoxicated person with a foreign object (his finger); and sexually penetrating an unconscious person with a foreign object (again, his finger).”²⁸ Turner’s assault and penetration charges fall under the purview of the FBI’s definition of rape.

The combination of the publicity of Turner’s case and the prevalence of the #MeToo movement brings attention to how sexual violence is pervasive within IHEs. Shortly after this case and the outrage on the severely shortened sentence, Alyssa Milano, a celebrity, prompted women on Twitter to share stories of surviving sexual violence under the hashtag #MeToo, a term coined by Tarana Burke over a decade prior.²⁹ As of October 2018, the Pew Research Center reported that the hashtag had over 19 million hits.³⁰

With the context of present day issues, the return to IHEs after the global pandemic is grounds to create more vulnerable populations. As students enter IHEs, they display a heightened understanding of what constitutes sexual violence in the

²⁷ Federal Bureau of Investigation, “Rape” (US Department of Justice, n.d.), <https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/rape#:~:text=The%20revised%20UCR%20definition%20of%20rape%20and%20incest%20are%20excluded.>

²⁸ Michael Vitiello 2018

²⁹ Mary Pflum, “A Year Ago, Alyssa Milano Started a Conversation about #MeToo. These Women Replied.,” *NBC News*, October 15, 2018, <https://www.nbcnews.com/news/us-news/year-ago-alyssa-milano-started-conversation-about-metoo-these-women-n920246>.

³⁰ Monica Anderson and Skye Toor, “How Social Media Users Have Discussed Sexual Harassment since #MeToo Went Viral” (Pew Research Center, October 11, 2018), <https://www.pewresearch.org/fact-tank/2018/10/11/how-social-media-users-have-discussed-sexual-harassment-since-metoo-went-viral/>.

post-#MeToo movement.³¹ There were essentially two classes of students who have not been in IHEs and may not understand the prevalence of sexual violence on campuses. As students have been returning to campuses, protests have erupted in various IHEs, notably at Virginia Tech³² and University of Nebraska-Lincoln³³, about the prevalence of sexual assaults on their campuses.

TIX aims to ensure that the educational environment fosters safety and inclusivity. These protests are indicative of IHEs failing to deliver the justice that the students are asking for. Haley Carter in her article states that sending sexual violence cases to the criminal justice system, when their IHEs fail to keep the learning environment safe would “violate the very essence of student civil rights under Title IX.”³⁴ The escalation would make a situation that requires a civil process, intended on correcting a hostile environment, to become a criminal investigation which could lead to a more punitive and exhausting outcome. Additionally, Carter finds that survivors may not want to report to the police “due in part to the long-standing history of bias against survivors of sexual assault.”³⁵

³¹ Anna E. Jaffe, Ian Cero, and David DiLillo, “The #MeToo Movement and Perceptions of Sexual Assault: College Students’ Recognition of Sexual Assault Experiences Over Time,” *Psychol Violence* 11, no. 2 (January 14, 2021): 209–18, <https://doi.org/10.1037/vio0000363>.

³² Yann Ranaivo, “Activists Call for Changes to Address Sexual Violence at Virginia Tech,” *The Roanoke Times*, September 28, 2021, https://roanoke.com/news/local/education/activists-call-for-changes-to-address-sexual-violence-at-virginia-tech/article_e84c2f94-20b7-11ec-abd6-cb69a91c3251.html#:~:text=Activists%20call%20for%20changes%20to%20address%20sexual%20violence%20at%20Virginia%20Tech,-Yann%20Ranaivo&text=More%20than%20200%20gathered%20on,demanded%20more%20sweeping%20systemic%20changes.

³³ Aaron Bonderson, “Thousands Protest For Third Straight Night at UNL, Pleading for Change Following Sexual Assault Allegation,” *Nebraska Public Media*, August 28, 2021, <https://nebraskapublicmedia.org/en/news/news-articles/thousands-protest-for-third-straight-night-at-unl-pleading-for-change-following-sexual-assault-allegation/>.

³⁴ Haley C. Carter, “Under the Guise of ‘Due Process’: Sexual Harassment and the Impact of Trump’s Title IX Regulations on Women Students of Color,” *Berkeley Journal of Gender, Law & Justice* 36, no. 1 (2021): 180–210.

³⁵ *Ibid.*

Obama Administration and “Dear Colleague Letter”

The federal regulations that made TIX the regulation that many know it to be today came from the Obama administration with his “Dear Colleague” letter (DCL). The DCL was an attempt to address growing concerns in IHEs regarding the prevalence of sexual violence and the inaction of school administrations. Carter described the goals of the DCL and the later released Question & Answer (Q&A) document to “[standardize] the evidentiary burden of proof across all Title IX adjudications, [expand] the definition of ‘sexual harassment’ to include sexual violence, and [offer] a more precise explanation of institutional responsibilities for adjudicating alleged sexual misconduct.”³⁶

The DCL defined sexual harassment as “unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”³⁷ The DCL defines sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.”³⁸ These definitions allowed for a wide net of unwarranted behaviors under the purview of TIX for investigation. The DCL and Q&A not only

³⁶ Ibid.

³⁷ Russlynn Ali, “Dear Colleague Letter,” April 4, 2011, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>

³⁸ Office of Civil Rights, “Sex-Based Harassment” (Washington DC: U.S. Department of Health and Human Services, October 27, 2021), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/harassment/index.html#:~:text=Sexual%20violence%20refers%20to%20physical,the%20capacity%20to%20give%20consent.>

created the expansive net of what constitutes sexual violence but also what locations the IHEs had a responsibility of ensuring followed TIX regulations: “Title IX protects students in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school’s facilities, on a school bus, at a class or training program.”³⁹ The new TIX policy reduced the definition of sexual violence and locations where a school is responsible for investigating TIX abuses.

Additionally, the DCL and Q&A document established the TIX Coordinator position. IHEs now had to have a coordinator responsible for knowing “the behaviors that constitute sexual misconduct and the respective institution’s grievance procedures.”⁴⁰ The responsibilities of the TIX coordinator changed under the Trump administration. Carter also states that the DCL established the standard of evidence as “preponderance of evidence”⁴¹ and the Q&A further details the requirement of having responsible employees. DeVos reworked both of these aspects of TIX.

OCR and its Role

The Office of Civil Rights (OCR) was responsible for implementing the changes. The Department of Education Organization Act of 1979 created the OCR. As mentioned in the National Archives, the OCR was to “ensure equal access to education and to promote education excellence throughout the nation through vigorous enforcement of

³⁹ Russlynn Ali 2011

⁴⁰ Haley C. Carter 2021

⁴¹ Ibid.

civil rights.”⁴² Any educational organization that receives federal funding must adhere to federal civil rights policies. OCR uses satellite offices throughout the country to help prevent civil rights abuses, identify cases of infractions against policy, and prosecute institutions that fail to comply.⁴³

Initially, TIX did not have the same reach that it has today. TIX’s initial purpose was to remove obstacles for women to access sports in IHEs. Many IHEs, when facing budgetary constraints, would cut women’s sports, thus disproportionately limiting access to athletics for women. TIX would attempt to rectify this by mandating that IHEs were no longer allowed to do this. However, there was an issue of compliance without receiving federal funding. In *Grove City College v. Bell* (1984), the case debated whether a private college that generally does not receive federal funding needed to be in full compliance with TIX. The Supreme Court determined that IHEs only had to be TIX compliant in specific programs in which students who received federal funding were participating. In the decision, Justice White writes that “the fact that federal funds eventually reach the College’s general operating budget cannot subject it to institution-wide coverage.”⁴⁴ This case severely limited the scope of the TIX policy. P. Michael Villalobos in his article “The Civil Rights Restoration Act of 1987: Revitalization of Title IX” wrote on the implications of this case. Villalobos found that after the decision was published, there was an “immediate termination of twenty-three Title IX investigations.”⁴⁵ Claimants had

⁴² “Department of Education. Office for Civil Rights.” (U.S. National Archives and Records Administration, n.d.), 10518452, National Archive Catalog, <https://catalog.archives.gov/id/10518452>.

⁴³ Ibid.

⁴⁴ Byron R. White, *Grove City Coll. v. Bell*, 465 U.S. 555 (1984), No. 82-792 (US Supreme Court February 28, 1984).

⁴⁵ P. Michael Villalobos, “The Civil Rights Restoration Act of 1987: Revitalization of Title IX,” *Marquette Sports Law Review* 1, no. 1 (1990), <https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1005&context=sportslaw>.

to prove that an institution received federal funding to bring up issues of TIX violations to the OCR.

To counter the *Grove City College* decision, Congress passed the Civil Rights Restoration Act of 1987. This act expanded the definition of “the phrase ‘program or activity’ and the term ‘program’ to mean all of the operations... any part of which is extended Federal financial assistance.”⁴⁶ This act ensured that any institution that received federal funding in any of their programs to be fully under TIX compliance. This expansion gave OCR the power it has today to ensure that it can uphold the policy’s mission throughout the entire institution.

The Supreme Court, during Obama’s administration, determined that OCR is to enforce TIX compliance as one of the civil rights policies. The OCR specifically states, “if a school knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence, and address its effects.”⁴⁷ If not, they are in direct contradiction of TIX.

In order to execute this guidance, the OCR developed a three-pronged test to check compliance:

1. Has the harassment impaired access to educational opportunities;
2. Whether school did have notification of the harassment;

⁴⁶ “Civil Rights Restoration Act of 1987,” S.557 § (1988), <https://www.congress.gov/bill/100th-congress/senate-bill/557>.

⁴⁷ Office of Civil Rights, “Know Your Rights: Title IX Prohibits Sexual Harassment1 and Sexual Violence Where You Go to School” (U.S. Department of Education, n.d.), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.html>.

3. Did the school take prompt/effective action to remedy harassment and prevent it from happening again?⁴⁸

According to OCR records, between 2014 to 2017, over 300 cases⁴⁹ of TIX non-compliance regarding sexual violence and harassment were investigated. Occidental College and Swarthmore College were two notable IHEs with OCR sanctions due to investigations. As a result of a vast number of IHEs being noncompliant with the OCR and TIX, IHEs created policies that seemed to over-regulate and over-police sexual violence allegations. IHEs were pushing for the adjudication of a majority of cases through formal processes rather than opening an avenue for informal resolutions. This push for formal resolutions was to ensure that they could stay in compliance with OCR's regulations.

IHEs were attempting to use DCL, Q&A and OCR guidance to create their policies. However, the three policies could only give vague guidance but not necessarily detail how specific processes must be. The policies were unable to give guidance on how to approach disclosures and other vital aspects of TIX. Information on retaliation or procedural protections were notably missing.⁵⁰ Case laws, state policies –such as SB 493 in California– would provide more guidance about policies IHEs could adopt to structure their TIX policies.

⁴⁸ Grayson Sang Walker, "The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault Note," *Harvard Civil Rights-Civil Liberties Law Review* 45, no. 1 (Winter 2010): 95–134.

⁴⁹ Nick Anderson, "At First, 55 Schools Faced Sexual Violence Investigations. Now the List Has Quadrupled.," *The Washington Post*, January 18, 2017, <https://www.washingtonpost.com/news/grade-point/wp/2017/01/18/at-first-55-schools-faced-sexual-violence-investigations-now-the-list-has-quadrupled/>.

⁵⁰ Grayson Sang Walker 2010

The Pertinence of Sexual Violence Today

The history of TIX raises the question of why TIX incorporating sexual violence is essential today. For one, sexual violence is pertinent to creating a hostile educational environment. Many cases of sexual violence go unreported because of hesitancy. Carter uses studies to indicate low rates of reporting sexual violence. For instance, only sixteen percent of survivors forced into performing nonconsensual acts, and eight percent of individuals forced into nonconsensual acts while incapacitated reached out to support services. Another study estimated over ninety-five percent of survivors never reported incidents to campus authorities.⁵¹

With the data that is available, RAINN reports that college-aged women are three times more likely than all women to be at risk of sexual violence. Thirteen percent of all students, both undergraduate and graduate, experience some sexual violence through “physical force, violence or incapacitation.”⁵² Specifically for undergraduate students, “26.4% of females and 6.8% of males experience rape or sexual assault through physical force, violence, or incapacitation.”⁵³ Students with additional intersections of identity are at greater risk of experiencing sexual violence.

A study by Mary Koss, a professor of psychology at University of Arizona, asked questions to perpetrators about their mindset regarding non-consensual sex. In her study, “7.7 percent of male students volunteered anonymously that they had engaged in or attempted forced sex.”⁵⁴ These students did not view it as rape either because they did not

⁵¹ Haley C. Carter 2021

⁵² RAINN, “Campus Sexual Violence: Statistics,” n.d., <https://www.rainn.org/statistics/campus-sexual-violence>.

⁵³ Haley C. Carter 2021

⁵⁴ Anya Kamenetz, “The History of Campus Sexual Assault,” *NPR*, November 30, 2014, <https://www.npr.org/sections/ed/2014/11/30/366348383/the-history-of-campus-sexual-assault>.

face any “negative consequences”⁵⁵ that could deter them from repeating such offenses.

This mentality of sexual violence – the idea that perpetrators could commit such acts and think that such behavior is not violence simply because they did not face consequences – contributes the presence of rape culture.

IHEs have a responsibility to create a TIX policy that protects survivors and the accused. Survivors can, according to Carter, “face educational harms, health consequences, and economic costs that can negatively impact their continued presence on campus and pursuit of higher learning opportunities.”⁵⁶ The accused must navigate environments that may believe that accusations lead to immediate guilt, an equal level of loss of access to educational opportunities, and other adverse consequences.

Backlash to Obama-era TIX

Since Obama’s DCL and Q&A, there have been many controversies regarding due process for the accused. Because the OCR had started to crack down on violations of TIX, IHEs started to over-police and forced more formal processes. Over-policing and specific policies at various IHEs throughout the United States are inequitable or lack due process. An article by Jeannie Suk Gersen for *The New Yorker* found that the inequitable processes lacking due process occurred by “deny[ing] accused students access to the complaint, the evidence, the identities of witnesses, or the investigative report, and to forbid them from questioning complainants or witnesses.”⁵⁷ In Middlebury College and

⁵⁵ Ibid.

⁵⁶ Haley C. Carter 2021

⁵⁷ Jeannie Suk Gersen, “Assessing Betsy DeVos Proposed Rules on Title IX and Sexual Assault,” *The New Yorker*, February 1, 2019, <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault>.

University of Pennsylvania, “investigators and adjudicators have been trained to ‘start by believing’ the complainant rather than to start from a position of neutrality.”⁵⁸

According to Laura Perry, the OCR was concerned that DCL and Q&A provided broad and vague descriptions of sexual violence and harassment, lacked consistency regarding access to evidence, and indicated no right to cross-examine the witnesses.⁵⁹ Additionally, the Obama-era guidelines never had a comment period to allow for feedback from the public. The lack of a comment period made these guidelines lack the official force of law.

Obama not allowing for a comment period made the DCL and the Q&A controversial. The Administrative Procedure Act (APA) 5 USC §551 et seq. (1946) states that federal agencies that create regulations must publish “notices of proposed and final rulemaking in the Federal Register, and [provide] opportunities for the public to comment on notices of proposed rulemaking.”⁶⁰ When Obama published the DCL, the OCR did not send out any notice, have a comment period, or a delayed acceptance. In an article written by Ari Cohn for the Foundation for Individual Rights and Expression (FIRE), Cohn describes the lack of comment period or proper notice as OCR failing “to comply with the required APA procedures, and... [robbing] the public of its opportunity and duty to participate in the rulemaking process.”⁶¹ The lack of transparency and buy-in from the public before establishing legislation that allows for an overhaul of prior sexual violence

⁵⁸ Ibid.

⁵⁹ Laura Perry, “From Brock Turner to Brian Banks: Protecting Victims and Preserving Due Process in the New Area of Title IX,” *DePaul Journal for Social Justice* 14, no. 2 (Summer 2021): 1–51.

⁶⁰ “Summary of the Administrative Procedure Act,” 5 USC §551 et seq. (1946) § (n.d.), [https://www.epa.gov/laws-regulations/summary-administrative-procedure-act#:~:text=\(1946\),on%20notice%20of%20proposed%20rulemaking](https://www.epa.gov/laws-regulations/summary-administrative-procedure-act#:~:text=(1946),on%20notice%20of%20proposed%20rulemaking).

⁶¹ Ari Cohen, “Did the Office for Civil Rights’ April 4 ‘Dear Colleague’ Letter Violate the Law?,” September 12, 2011, <https://www.thefire.org/news/did-office-civil-rights-april-4-dear-colleague-letter-violate-law>.

policies seemed like an affront to individual rights. When DeVos reworked TIX, she had a comment period and provided adequate notice, which ensured that the TIX policies complied with the APA.

Another issue with the DCL and Q&A is the structure of the processes allowed at IHEs. There are two models: investigator and live hearing models. With the investigator models, there is no live hearing, and the accused has no access to the evidence. When the consequence of TIX procedures could have an outcome like suspension, not having the ability to know the evidence to be presented denies the accused due process.

The process pushed by DeVos and the new guidelines is a live hearing model. In this procedure, Laura Perry describes “an administrative hearing to provide appropriate consequences to the accused student if they are found responsible.”⁶² This process attempts to increase due process for the accused so that they have greater awareness and say in the investigation process.

⁶² Laura Perry 2021

Chapter 2: The DeVos TIX Changes

The Motivation

Betsy DeVos said that Obama-era guidelines “lacked basic elements of fairness.”⁶³

In a 2017 speech at George Mason University, DeVos explained:

“Survivors, victims of a lack of due process, and campus administrators have all told me that the current approach does a disservice to everyone involved. That’s why we must do better, because the current approach isn’t working. Washington has burdened schools with increasingly elaborate and confusing guidelines that even lawyers find difficult to understand and navigate.

Where does that leave institutions, which are forced to be judge and jury?... This failed system has generated hundreds upon hundreds of cases in the Department’s Office for Civil Rights, mostly filed by students who reported sexual misconduct and believe their schools let them down.”⁶⁴

DeVos’s case against the earlier guidelines focused on respecting due process, limiting the desire to overcorrect by forcing more TIX processes to occur and controlling government overreach. She suggested that accused students with specific identities faced more significant penalties in the TIX process than others, showing less due process for those with these identities. She determined the definition of sexual assault to be too vague and narrowed it down in her guidelines.

⁶³ Stephanie Saul and Kate Taylor, “Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations,” *The New York Times*, September 22, 2017, <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html>.

⁶⁴ Susan Svrluga, “Transcript: Betsy DeVos’s Remarks on Campus Sexual Assault,” *The Washington Post*, September 7, 2018, https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?pwap_token=eyJ0eXAiOiJKV1QiLCJhbGciOiJIUzI1NiJ9.eyJzdWJpZC16IjOwNjgzODMiLCJyZWZzb24iOiJnaWZ0IiwibmJmIjoxNjY3NDIwMzI2LCJpc3MiOiJzdWJzY3JpcHRpb25zIiwiaXhwIjoxNjY4NjI5OTI2LCJpYXQoIjE2Njc0MjAzMjYsImpp0aSI6ImNhYTZhNTEzLTgwMGItNDM3Ni04YmUxLTBhMjE0MTBhMjllYyIsInVybCI6Imh0dHBzOi8vd3d3Lndhc2hpbmd0b25wb3N0LmNvbS9uZXdzL2dyYWRILXBvaW50L3dwLzlwMTcvMDkvMDcvdHJhbnNjcmllwdCIjZXRzeS1kZXZvc3MtemVtYXJrcy1vbiljYW1wdXMtc2V4dWFsLWFzZ2F1bHOvIn0.xg9oEKvsSiln3j9ZhOKKTEpPs3Ewvs9H_mC_hqfW_kek.

For students with intersectional identities, DeVos and her supporters said that due process is essential for black students who may face more discrimination and harsher penalties under TIX. DeVos, in her George Mason University speech, mentioned the experience of a veteran of the Navy who attended a local HBCU. Three weeks before graduation, she said he was “suspended via a campus-wide email which declared him a ‘threat to the campus community. When he tried to learn the reason for his suspension, he was barred from campus.”⁶⁵ This student had to reach out to a pro bono lawyer who helped him file a Freedom of Information Act request. Besides informing him of his suspension for sexual harassment, the school did not give him further details. This student relapsed into sobriety and thought his entire life had slipped through his fingers.

Some legal scholars have expressed similar concerns. Janet Halley recognizes the historical prevalence of this discrimination against black men in cases relating to sexual violence. She uses examples of Emmett Till and Central Park Five as historical events that indicate disproportionate punishment of black men and *To Kill a Mockingbird* as literary evidence of the same phenomenon. Halley sees “the general social disadvantage that black men continue to carry in our culture”⁶⁶ that can sway adjudicators “to put blame on them”⁶⁷ in any adjudication process.

Attorney Laura Perry contends that black students are disproportionately affected by TIX decisions. For instance, Brock Turner received six months in prison, whereas Corey Batey, a black athlete, was sentenced to fifteen years. Perry says that black

⁶⁵ Susan Svrluga 2018

⁶⁶ Janet Halley, “Trading the Megaphone for the Gavel in Title IX Enforcement,” *Digital Access to Scholarship at Harvard*, 2015, https://dash.harvard.edu/bitstream/handle/1/16073958/vol128_Halley_REVISED_2.17.pdf?sequence=1.

⁶⁷ Ibid.

students have the added burden “of fighting the allegations against them in a racist legal system that has a long history of inadequately applying procedural protections to people of color.”⁶⁸ On average, “black men receive sentences approximately 20 percent longer than white men who have committed the same crime”⁶⁹ in the criminal justice system due to discrimination from the “judges and juries themselves.”⁷⁰

Throughout American history, whites often have seen black men as dangerous and white women as delicate and vulnerable. This depiction of white women only needing protection affects the capacity for women of color or gender non-conforming people also to receive the same care and treatment that white women receive. Conversely, depicting black men as dangerous presumes guilt due to a fear perpetrated by harmful stereotypes.

Gender alone could indicate some disparities. Halley recognizes the potential gender discrepancy, especially with the use of substances. For the complainant, drugs and alcohol can affect how they give consent. For the respondent, however, being under the influence “has no mitigating effect on his conduct.”⁷¹ Halley describes a scenario where a male and female Harvard student has a sexual encounter. Both of them “feels intense remorse and moral horror about it afterward,”⁷² which results in them reporting it to TIX. Halley believes that the adjudicator and the public’s innate desire to believe a female complainant indicates the bias for complainants and “for women against men in the design of the Harvard paragraph on intoxication.”⁷³ She points out that there is now equal

⁶⁸ Laura Perry 2021

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Janet Halley 2015

⁷² Ibid.

⁷³ Ibid.

participation, regardless of the individual's gender, in substances that can severely impair judgment. Halley blames a feminist policy lens of believing women in situations where substances are involved in establishing a "predetermined victimhood and guilt"⁷⁴ dynamic. Even though one can argue that "in the campus drinking culture, men have more power than women,"⁷⁵ Halley still sees the risk of the "moral stigma and life-altering penalties on men who may well be innocent."⁷⁶ Halley sees the perception of women's victimhood with substances indicating that "women should not and do not bear any responsibility for the bad things that happen to them when they are voluntarily drunk, stoned, or both."⁷⁷ This victimhood perception reduces the amount of responsibility and agency that women have.

Though supporters of due process are concerned that black men may be at greater risk in TIX processes without enough accused protections, there is a greater prevalence of black women who are victims of sexual violence being further discriminated against and mistreated. According to the National Center on Violence Against Women in the Black Community, "for every black woman who reports rape, at least 15 black women do not report."⁷⁸ At least 35% of black women have experienced some form of sexual violence. From the age of twelve years, African American women experience higher rates of sexual violence than any other race from 2005-2010.⁷⁹ Moreover, according to the American

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ Ibid.

⁷⁸ "BLACK WOMEN AND SEXUAL ASSAULT" (The National Center on Violence Against Women in the Black Community, October 2018),

<https://ujimacommunity.org/wp-content/uploads/2018/12/Ujima-Womens-Violence-Stats-v7.4-1.pdf>

⁷⁹ Ibid.

Psychology Association, black women subsequently suffer worse psychological abuse due to sexual violence and rape culture than all other women.⁸⁰

In a research paper, Carolyn West and Kalimah Johnson discuss the intersections of black women and the violence they face in various settings, such as early education, IHEs, or detention centers. Specific to black women in IHEs, the majority of the perpetrators were “classmates (37%), acquaintances (29%), and friends (26%).”⁸¹ About “89.5% of Black college women reported that they had sustained emotional or psychological injuries as a result of rape.”⁸² Black survivors of sexual coercion report “lower rates of self-esteem”⁸³ if they hold “beliefs such as women are sexual objects and men are driven by sex.”⁸⁴ If black women believe that people view them as “sexually loose,”⁸⁵ they are more disposed to believe in victim blaming.

For his dissertation, Lawrence Henry conducted a study interviewing eight black women who have experienced sexual violence. He asked them questions to gauge their perception of themselves and to understand why they chose not to report the violence. An overwhelming factor in why black women chose not to report was that the institutions they attended were not supportive of black women. Many black women in his study feared being treated differently by the institutions and community around them, citing historical mistreatment of their intersecting identities. Black women faced a gap in

⁸⁰ Jameta Nicole barlow, “Black Women, the Forgotten Survivors of Sexual Assault,” *American Psychological Association, Inc.*, February 2020, <https://www.apa.org/pi/about/newsletter/2020/02/black-women-sexual-assault>.

⁸¹ Carolyn M. West and Kalimah Johnson, “Sexual Violence in the Lives of African American Women” (National Online Resource on Violence Against Women, March 2013), https://vawnet.org/sites/default/files/materials/files/2016-09/AR_SVAAWomenRevised.pdf.

⁸² Ibid.

⁸³ Ibid.

⁸⁴ Ibid.

⁸⁵ Ibid.

resources and support. Henry's dissertation and West and Johnson's research paper indicate a common thread of viewing black women as Jezebels. Black women labeled as Jezebels has led to sentiments that black women are "unrapable"⁸⁶ since they are "sexually insatiable."⁸⁷ These perceptions of black women and their sexuality thus cause additional barriers for black women to overcome when they are subject to sexual violence. Not only may there be a lack of resources, but also persisting rape culture regarding black women's bodies makes them one of the biggest targets in IHEs.

These beliefs about black women and their sexual lives subsequently affect them not receiving the same bystander intervention as other identities. In a study called "White Female Bystanders' Responses to a Black Woman at Risk for Incapacitated Sexual Assault," the researchers found that when white women were given stories of an incident of sexual violence, with the victim having a distinctively black name compared to a non-racial name, participants were "less likely to intervene in response to a Black woman at risk than in response to a woman whose race was unspecified."⁸⁸ Participants also felt "less personal responsibility to intervene," though they could correctly identify the risk that the black victim was facing. Participants "perceived that [the black victim] experienced more pleasure in the pre-assault situation."⁸⁹ This idea of pleasure in pre-assault scenarios goes back to viewing black women as Jezebels and a

⁸⁶ Lawrence William Henry, "A Silent Dilemma: The Challenges Black Collegiate Women Face Disclosing Sexual Victimization" (Nova Southeastern University Florida, 2020), https://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1160&context=shss_dcar_etd.

⁸⁷ Ibid.

⁸⁸ Jennifer Katz et al., "White Female Bystanders' Responses to a Black Woman at Risk for Incapacitated Sexual Assault," *Psychology of Women Quarterly* 41, no. 2 (February 10, 2017), <https://journals.sagepub.com/doi/10.1177/0361684316689367>.

⁸⁹ Ibid.

hyper-sexualization of black women. Additionally, it reinforces this idea that black women are not “worthy of protection”⁹⁰ as others may be.

The prevailing attitudes towards black women, leading to less bystander intervention and self-reporting from black victims, indicate how unsafe IHEs became for the most marginalized identities. Creating barriers such as higher evidentiary standards, requiring cross-examination, and reducing the number of responsible employees further reduces the chances that black victims would report sexual violence. If IHEs perceive black women as promiscuous and deserving of sexual violence, increasing evidentiary standards may have implicit biases against black women, making the standard even harder to meet. Putting black victims in adversarial cross-examinations would further victimize black women if they experience low self-esteem and are subject to rape culture on campus. Reducing the number of responsible employees on campus would reduce the number of trusted individuals that black victims may feel comfortable approaching to seek help. Though black men may benefit from due process protections, black women would not receive the care and protection they deserve.

Another issue with the TIX process was the desire to overcorrect and force a process on any incident reported, regardless of the survivor’s wishes. DeVos presented the opportunity to use alternative or informal resolutions. DeVos’s policy, as summarized in her “Summary of Major Provisions of the Department of Education's Title IX Final Rule” publication, was:

The Final Rule allows a school, in its discretion, to choose to offer and facilitate informal resolution options, such as mediation or restorative justice, so long as both parties give voluntary, informed, written consent to attempt informal

⁹⁰ Ibid.

resolution. Any person who facilitates an informal resolution must be well trained.

The Final Rule adds: - A school may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to a formal investigation and adjudication of formal complaints of sexual harassment. Similarly, a school may not require the parties to participate in an informal resolution process and may not offer an informal resolution process unless a formal complaint is filed.

At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint. - Schools must not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.⁹¹

Informal resolutions allow schools to use mediation and restorative justice (RJ) practices in adjudicating processes. If a complainant chooses this path, the school need not pull together the resources needed to conduct a formal resolution. Instead, trained mediators can help create a resolution that may result in the survivor feeling a greater sense of justice.

Katie Vail details what RJ is and what an informal process following RJ principles could look like in IHEs. Vail describes RJ as “a process through which the survivor, offender, and the affected community come together to discuss the harm that occurred and how the offender can make amends for their conduct.”⁹² For this to be successful, the offender must admit to their wrongdoing. The offender must have the desire to create a resolution with the survivor. There are four principles in RJ:

⁹¹ Department of Education, “Summary of Major Provisions of the Department of Education’s Title IX Final Rule,” n.d., <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-summary.pdf>.

⁹² Katie Vail, “THE FAILINGS OF TITLE IX FOR SURVIVORS OF SEXUAL VIOLENCE: UTILIZING RESTORATIVE JUSTICE ON COLLEGE CAMPUSES,” *Washington Law Review* 94, no. 4 (2019): 2085–2118.

- There must be “a space for inclusive decision making,” which ensures that all parties have the opportunity to recognize the harms experienced and what is necessary to rectify the situation.
- “There must be active accountability” from the respondent. The respondent has to take responsibility and actively work towards implementing the resolution.
- “The offender must repair the harm they created” by implementing the resolution and meeting the survivor's needs.
- The offender has a “duty to renew trust” by building the relationship again and obtaining the survivor’s trust.⁹³

With these principles in mind, schools must create a way to implement RJ. A school must present complainants with all the options that they have. If the student chooses the RJ process, the accused student must also agree to participate. Complainants can also stop the process if they believe it no longer advances what they need. According to Vail, there are four steps to a RJ conference: “(1) referral and intake; (2) preparation; (3) conference; and (4) monitoring and reintegration.”⁹⁴ Throughout the process, the respondent must play an active role in the process by “[admitting] responsibility for their actions, . . . prepare for the conference by creating a statement, meeting with facilitators, and brainstorming how they can address the harm they created and rebuild trust . . . [and] participate in a dialogue where they explain their conduct and work with the survivor and community members to create appropriate reparations.”⁹⁵ The administrators must

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

monitor compliance with the discussed resolutions to ensure that the conference was successful.

RJ conferences can be more effective because they provide agency to the survivor to help dictate their needs in their healing while still holding perpetrators responsible. Mutual healing and maintaining accountability create an environment where they can grow and learn to be better members of their communities. Shauntey James and Melanie Hetzel-Riggin say that RJ has the potential to “create an empowering experience for survivors, promotes social support, and may prevent psychological distress.”⁹⁶ If a complainant receives an “insensitive reaction”⁹⁷ to their experiences, it can severely impact their capacity to heal. In formal adjudication processes, if a complainant is subject to questioning or a process that could be traumatic, it might limit them from “[achieving] justice and [continuing] a healthy journey to recovery.”⁹⁸ James and Hetzel-Riggins view RJ as a way to avoid the traumas of a formal adjudication process while still getting justice and healing.

Additionally, Vail believes that RJ could “be used to target ‘rape culture’ and better educate other students”⁹⁹ by providing the opportunity to engage in conversation and learn how one’s actions and beliefs can harm others and perpetrate an environment of sexual violence.

There are many critics of informal resolutions and the use of RJ. According to Grace Watkins, a 2017 Notre Dame graduate and sexual assault survivor, RJ could send

⁹⁶ Shauntey James and Melanie D. Hetzel-Riggin, “Campus Sexual Violence and Title IX: What Is the Role of Restorative Justice Now?,” *Feminist Criminology* 17, no. 3 (December 28, 2021), <https://journals.sagepub.com/doi/10.1177/15570851211062643>.

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ Katie Vail 2019

inappropriate messages to survivors of sexual violence. Most universities use RJ to resolve roommate conflicts or conflicts where both parties could be at fault. Watkins says that “there is no shared blame in sexual assault.”¹⁰⁰ Using RJ or informal practices could be asking survivors to take up unnecessary labor in thinking about correcting the harm that occurred. Additionally, they would need to interact with the perpetrator when instructing perpetrators on what they must do to grow and when building a relationship with someone who caused such trauma in their life.

Watkins also sees the requirement of having conversations about the harm that occurred as “perpetuating the myth that sexual assault is simply a misunderstanding between two people, rather than what [it] really is: a violent abuse of power.”¹⁰¹ Suggesting that sexual violence occurs due to a misunderstanding creates this idea that we must excuse the perpetrator’s behavior because they could not have known that abusing an individual against their consent was something that they were not aware was immoral. Additionally, it may guilt the survivor into forgiving the perpetrator, as the perpetrator underwent the RJ process, so their apology should be accepted. It further suggests the idea that girls should forgive those who cause harm to them.

Watkins is concerned about the lack of guidance from the DOE. Since there are no standards, Watkins could see a potential rise of abuse as the perpetrators could use “tactics of manipulation and intimidation present in their relationship to dictate the terms of the resolution.”¹⁰²

¹⁰⁰ GRACE WATKINS, “Sexual Assault Survivor to Betsy DeVos: Mediation Is Not a Viable Resolution,” *TIME*, October 2, 2017, <https://time.com/4957837/campus-sexual-assault-mediation/>.

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

Watkins' attitudes toward mediation were similar to Bush and Obama's administrations. Both the Bush and Obama administrations' guidance on TIX policies says that even if the survivor voluntarily chooses to use mediation, it should not be allowed due to the potential harm that could come from it if not done correctly. During the Bush years, the Education Department effectively banned using mediation. A 2001 legislation states that "OCR has frequently advised schools, however, that it is not appropriate for a student who is complaining of harassment to be required to work out the problem directly with the individual alleged to be harassing him or her, and certainly not without appropriate involvement by the school (e.g., participation by a counselor, trained mediator..."¹⁰³

Critics can also see how using mediation and informal resolutions could threaten due process for respondents. James and Hetzel-Riggin say there is a sense of ambiguity in the legal protection granted to respondents in this process. A complainant may "defer back to the formal grievance process at any time within this informal process."¹⁰⁴ RJ can only be effective if "the responsible person accepts responsibility as a precondition of participation."¹⁰⁵ Once the perpetrator accepts guilt, there may be no protections of what they say as not being held in a court of law. There could be a more significant burden on the respondent regarding the legal ramifications of participating in the RJ process, even though that would contradict the purpose of RJ. Vail also makes a counterargument to using mediation as the potential "legal jeopardy"¹⁰⁶ facing perpetrators whose statements

¹⁰³ Office of Civil Rights, "REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES" (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html>.

¹⁰⁴ Shauntey James and Melanie D. Hetzel-Riggin 2021

¹⁰⁵ Ibid.

¹⁰⁶ Katie Vail 2019

during the mediation could be used against them in court later. Her solution is that the DOE should provide “future guidance regarding restorative justice and on when it is appropriate to use.”¹⁰⁷ Nevertheless, until this guidance is issued, if IHEs consider incorporating adequate protections for both the complainant and the respondent, RJ could cause more harm than good to the parties involved.

Rachael Goldman says that many accused people have sued universities under claims of having “due process rights violated by inadequate investigations, insufficient hearings, and hasty decisions by unqualified adjudicators.”¹⁰⁸ Halley describes the training of adjudicators at Harvard. Though most of the presentation focuses on the rules of the OCR and Harvard policies, one-third of the presentation is dedicated to research on tonic immobility, which “can cause the victim to appear incoherent and to have emotional swings, memory fragmentation, and ‘flat affect.’”¹⁰⁹ Her story ““may come out fragmented or ‘sketchy,’”¹¹⁰ and she can be “[m]isinterpreted as being cavalier about [the event] or lying.”¹¹¹ This training sets a precedent that adjudicators are to accept the statements of a complainant, regardless if the statements are incoherent. The incoherence could be a direct consequence of sexual violence. The excusal of incoherence gives the complainant more credibility than the respondent.

Additionally, if a complainant comes off as incoherent or fragmented, then adjudicators may be pre-disposed to think it is the result of having experienced sexual

¹⁰⁷ Ibid.

¹⁰⁸ Rachael A. Goldman, “When Is Due Process Due?: The Impact of Title IX Sexual Assault Adjudication on the Rights of University Students Notes & Comments,” *Pepperdine Law Review* 47, no. 1 (December 2019): 185–228.

¹⁰⁹ Janet Halley 2015

¹¹⁰ Ibid.

¹¹¹ Ibid.

violence. The association between incoherence due to sexual violence may not grant the respondent any chance to prove themselves innocent. The adjudicator will see incoherent statements as indications of sexual violence and that the respondent must be guilty.

Some even believe that Obama-era policies were policing, as Goldman puts it, “sexual conduct that is voluntary, non-harassing, nonviolent, and does not harm others.”¹¹² This perception of over-policing suggested to critics that the policy no longer addressed actual issues of “rape, sexual assault, and sexual harassment.”¹¹³ Halley described a scenario of over-policing when she assisted a student in a small liberal arts school in Oregon whom the TIX office was investigating. The school was investigating this student as he reminded “a fellow student... of the man who had raped her months before and thousands of miles away.”¹¹⁴ Though he was found innocent, the school invaded his privacy. The school conducted investigations “into all his campus relationships, seeking information about his possible sexual misconduct in them (an immense invasion of his and his friends’ privacy), and ... was ordered to stay away from a fellow student (cutting him off from his housing, his campus job, and educational opportunity).”¹¹⁵ This restriction severely affected the student’s life without giving him any chance to defend his side.

DeVos took particular issue with the vagueness of the definitions of sexual assault. Goldman states that the definitions of sexual assaults were “still ill-defined on university campuses.”¹¹⁶ Though the federal level has slowly changed the definition of

¹¹² Rachael A. Goldman 2019

¹¹³ Ibid.

¹¹⁴ Janet Halley 2015

¹¹⁵ Ibid.

¹¹⁶ Rachael A. Goldman 2019

rape, each state has a different definition of consent, which further complicates how IHEs establish policy.

Case laws and statutes can further narrow down the best practices for establishing school procedures. Federal guidelines established left and right limits, but states could establish their definitions and case laws to protect the due process in each state. Due process could thus vary from state to state. Without uniformity, some accused students may be subject to certain biases that others in different institutions may not be. If the guidelines and instructions from the Obama era were active, Middlebury College and the University of Pennsylvania would start TIX processes with a preconceived notion of believing the survivor over the accused, which already sets the accused student behind the survivor. It will unfairly burden the respondent to prove their innocence. DeVos strove to create a policy that would grant a presumption of innocence to counteract this difference in attitude when dealing with the accused student.

The Changes

Kamaria Porter, Sandra Levitsky, and Elizabeth Armstrong provide a history of the various TIX processes and demonstrate how policy and changing attitudes towards TIX reflect how schools adapted their conduct processes. In the beginning, schools just treated it as a disciplinary problem. Sexual violence was viewed “through the lens of education and moral learning.”¹¹⁷ In 1961, the Fifth Circuit established in *Dixon v. Alabama State Board of Education* (1961) that students deserve “due process”¹¹⁸ if they

¹¹⁷ Kamaria B. Porter, Sandra R. Levitsky, and Elizabeth A. Armstrong, “Gender Equity and Due Process in Campus Sexual Assault Adjudication Procedures,” *The Journal of Higher Education*, June 15, 2022, <https://doi.org/10.1080/00221546.2022.2082784>.

¹¹⁸ *Dixon v. Alabama State Board of Education*, 186 F. Supp. 945 (M.D. Ala. 1960) (n.d.).

are “at a tax-supported college [and] are expelled for misconduct.”¹¹⁹ In *Goss v. Lopez* (1975), the Supreme Court established that “students facing temporary suspension from a public school have property and liberty interests that qualify for protection under the Due Process Clause of the Fourteenth Amendment.”¹²⁰ These cases created a more legalistic bent to conduct processes. Universities began to take aspects of civil litigation and apply them to school processes. Institutions of higher education started to use an adversarial hearing model to adjudicate TIX.

Many schools adopted an adversarial hearing model to adjust to the case law guidance. Porter et al. describe this model as a hearing “staffed by volunteer members of the university”¹²¹ in which they are able “to challenge biases, assumptions, or mistakes, enhancing the impartiality and fairness of the proceedings.”¹²² This process is more “trial-like”¹²³ because “the university generally does not conduct an independent investigation. Instead, the parties themselves are responsible for gathering and producing evidence.”¹²⁴ If the panel finds the respondent guilty, then they give a sanction.

Though this process was good for protecting accused students’ rights, it did not provide any protections for victims. The parties were responsible for collecting their evidence, which caused extra burdens on both parties. Porter et al. say that cross-examinations during the panel would “be re-traumatizing for survivors of sexual assault.”¹²⁵ The complainant may be in a position to constantly “reveal personal

¹¹⁹ Ibid.

¹²⁰ Byron R. White, *GOSS ET AL. v . LOPEZ ET AL*, No. 73-898 (US Supreme Court January 22, 1975).

¹²¹ Kamaria B. Porter, Sandra R. Levitsky, and Elizabeth A. Armstrong 2022

¹²² Ibid.

¹²³ Ibid.

¹²⁴ Ibid.

¹²⁵ Ibid.

information to multiple people, and potentially in the presence of the student accused of perpetrating the violence,”¹²⁶ which can be invasive and traumatizing.

The single-investigator model was the second model that school administrators used. In this model, Porter et al. describe the process as a single “investigator [interviewing] the parties and witnesses, and [reviewing] documents and physical evidence.”¹²⁷ In this scenario, the parties do not have to interact with one another and do not need to take on the burden of collecting evidence themselves. In some models, the investigator determines and sets the sanction by themselves. The single-investigator model is streamlined through fewer people and allows an individual with investigatory expertise to make the decision. The process becomes quicker and reduces the trauma that the complainant undergoes. However, without the live hearing and cross-examination, the respondent may be denied crucial due process protections. Having one investigator be the fact-finder and decision-maker could also cause bias or other conflicts of interest.

The legalistic bent in the 1960s and 1970s inspired a desire to protect due process but recognizing the failure to protect survivors promoted the interest in a hybrid model. In the hybrid model, an investigator collects the evidence and presents it to a panel. In this panel, the parties themselves may have an opportunity to share statements or cross-examine by submitting questions to the panel or a neutral party. Though this process seems to take the best aspects of the investigator and adversarial hearing models, Vail recognizes that “students have expressed concerns with the code of conduct system

¹²⁶ Ibid.

¹²⁷ Ibid.

because of significant wait times, lack of due process, and confidentiality issues”¹²⁸ as a result of the hybrid option.

Porter et al. found that in a sample of 381 universities, about “20.5% (n = 78) used Civil Rights Investigative models,” “10.8% (n = 41)—relied on Adversarial Hearing models,”¹²⁹ and “62.2%, n = 237 described hybrid approaches.”¹³⁰ Only a few schools in this sample had incomplete processes described in their policies, and 0.8% or three schools had a dual process without any handoff between the adversarial hearing and single investigative model.¹³¹

The disappointment in extended processes with seemingly fewer protections for the accused students inspired DeVos to create a policy to create more protections in conduct processes. Carter describes the DOE’s goals in adjusting the TIX policies: “narrowed investigatory requirements, heightened evidentiary standards, and expanded rights for the accused.”¹³² The specific changes included:

- Narrowing the definition of sexual violence;
- Increasing the standard of evidence from a preponderance of the evidence (POE) to clear and convincing (C&C);
- Requiring live hearings and cross-examination;
- Starting TIX cases with a precedent of presumption of innocence for respondents;
- Reducing the number of responsible employees in IHEs.

¹²⁸ Katie Vail 2019

¹²⁹ Kamaria B. Porter, Sandra R. Levitsky, and Elizabeth A. Armstrong 2022

¹³⁰ Ibid.

¹³¹ Ibid.

¹³² Haley C. Carter 2021

DeVos worked to narrow the definition of sexual harassment under TIX. DeVos reduced the scope of the definition due to complaints of the inhibition of freedom of speech because of TIX. Attorney Monica Shah highlights two professors: a film professor named Laura Kipnis, who was being investigated “for writing an essay critical of sexual harassment policies,”¹³³ and Jammie Price, a tenured professor at Appalachian State University, who “was suspended after showing a film in class that was critical of the adult film industry.”¹³⁴ The broadness of the original definition jeopardized students at these institutions if they discussed sexual violence as they wished to. Sexual harassment, as defined by DeVos’s policy, was “unwelcome sexual conduct; or 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.”¹³⁵ The point of contention was small yet crucial. The new definition added the word “and” in the list of describing the sexual conduct as “severe, pervasive, *and* objectively offensive.” In the prior definition, if the sexual conduct met one of the standards, it could be considered as conduct that could restrict equal access to education. Using “and” meant that the conduct must meet all three standards in order to be considered something that could restrict equal access to education.

Including “education program or activity” would narrow the schools’ jurisdiction. According to Leah Butler, Heejin Lee, and Bonnie Fisher, sexual violence cases that

¹³³ Monica Shah, “What Is the Impact of the Narrowed Definition of ‘Sexual Harassment’ under the New Title IX Regulations?,” *Boston Lawyer Blog* (blog), May 12, 2020, <https://www.bostonlawyerblog.com/what-is-the-impact-of-the-narrowed-definition-of-sexual-harassment-under-the-new-title-ix-regulations/>.

¹³⁴ *Ibid.*

¹³⁵ Office for Civil Rights, and Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance” (n.d.), <https://www.govinfo.gov/content/pkg/FR-2018-11-29/pdf/2018-25314.pdf>.

occur in “off-campus housing, online, or among students studying abroad”¹³⁶ were no longer under the purview of TIX.

One of the implications of narrowing the definition of sexual violence is that the conflict of the sorts of behaviors that indicated sexual violence in the past would not be accounted for by the school policies. Shah explains how certain forms of harassment, such as verbal harassment, may not be covered under DeVos’s TIX policy. Shah says that “the new regulations make clear that schools may use other provisions of their student or faculty conduct codes to discipline students or faculty engaged in conduct that does not meet the new definition of sexual harassment.”¹³⁷ If a school chooses to adjudicate the issues that no longer fall under the purview of TIX but rather another process, then the students who undergo the second process may not have the sorts of “procedural protections”¹³⁸ such as “rights to notice, an advisor, access to evidence, live hearings, and cross-examination.”¹³⁹ Students and administrators would have to navigate a complicated “two-track disciplinary processes with various levels of procedural protections for different allegations,”¹⁴⁰ causing further stress to those involved.

DeVos heightened the evidentiary standard by increasing the standard from a preponderance of the evidence (POE) to clear and convincing (C&C). In her terms: “Use either the preponderance of the evidence standard or the clear and convincing evidence standard (and use the same standard for formal complaints against students as for formal

¹³⁶ Leah C. Butler, Heejin Lee, and Bonnie S. Fisher, “Less Safe in the Ivory Tower: Campus Sexual Assault Policy in the Trump Administration,” *Victims & Offenders* 14, no. 8 (October 28, 2019): 979–96.

¹³⁷ Monica Shah 2020

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

complaints against employees).”¹⁴¹ The new guidelines established that all TIX cases had to be under POE or C&C; there could not be specific scenarios where C&C ruled and others where POE ruled. The demand for uniformity would put many schools in an uncomfortable situation as there were discrepancies on how certain cases had different evidentiary standards. Cases with professors in certain schools had the C&C standard. Schools either have to reduce the standard of evidence of professor misconduct cases down to POE and potentially face the backlash or raise the standard of student misconduct cases.

Caroline Edgar notes that the Obama administration set the POE standard.¹⁴² Even before the DCL and Q&A, many institutions with sexual violence in their civil rights policies used the POE standard. William Kidder says that in POE, the evidence must convey a 50.1% chance that the incident occurred.¹⁴³ Federal cases of civil rights discrimination typically use POE. The POE standard keeps a relatively equal burden of proof on both parties, as either side needs to prove their side with evidence that supports a 50% chance that they were right. It can maintain that neither party is pre-determined to be more right or protected.

The proponents of POE in IHEs do not claim that innocence in a TIX process indicates anything for criminal guilt. Instead, an article from Berry Law Firm argues that

¹⁴¹ US Department of Education, “U.S. Department of Education Title IX Final Rule Overview,” n.d., <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf>.

¹⁴² CAROLINE EDGAR, “A PREPONDERANCE OF THE EVIDENCE: THE APPROPRIATE STANDARD IN TITLE IX SEXUAL HARASSMENT PROCEEDINGS,” *ADMINISTRATIVE LAW REVIEW ACCORD* 6, no. 2 (n.d.): 85–112.

¹⁴³ William C. Kidder, “(En)Forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration’s Proposed Standard of Evidence Regulation for Campus Title IX Proceedings,” *The Journal of College and University Law* 45, no. 1 (2019): 1–49.

a school's investigation "is not a legal matter."¹⁴⁴ The school's investigation can go forward without having law enforcement's involvement or charges pressed against the student. The educational institution must remedy the environment, but this does not mean that there have to be legal ramifications for the respondent. Because TIX is not a judicial matter and the DOE is not the same as the federal justice system, the standard of evidence does not need to match the federal system, as the goals and intentions are different. A police investigation and a TIX investigation can occur in the same case: two processes occur in two different institutions with two goals. The school's responsibility is to remedy the harm and make the school environment safe, whereas the police investigate the crime. The complainant, though they may be aware that sexual violence can constitute a crime, may opt-out of the criminal process. They do not necessarily want to see their respondent in prison but rather no longer in the same institution so that the complainant can continue their education safely. Thus, using the POE standard to adjudicate TIX and finding guilt may not necessarily lead to charges such as criminal charges unless there is a simultaneous police investigation as well.

In C&C, Kidder says that the evidence must convey a 67-80% confidence that the incident occurred.¹⁴⁵ This higher burden of proof would place a more significant burden on survivors. One criticism of increasing the standard of evidence is the potential for false negatives. A false negative would indicate that the item that an individual is testing or observing is not present even though it is. In the case of TIX, a student who had committed an act of sexual violence who, in a TIX case, is not found guilty would be a

¹⁴⁴ "CAN A TITLE IX ACCUSATION FOLLOW ME TO ANOTHER COLLEGE?," *Berry Law* (blog), May 24, 2022, <https://jsberrylaw.com/blog/can-a-title-ix-accusation-follow-me-to-another-college/>.

¹⁴⁵ William C. Kidder 2019

false negative. Critics of C&C in TIX believe that it would be the burden of survivors to absorb the effect of having more false negatives, as their perpetrators would still be free without facing the consequences they should have faced.

The Obama-era guidelines wanted to consider acts of sexual violence as a civil rights issue in schools, as sexual violence can create a hostile environment and hinder an individual's access to education. Carter says the opposite. Supporters of C&C believe that "sexual violence is often a criminal offense," so the acts "under [TIX] should be held to the criminal legal evidentiary standard."¹⁴⁶ Supporters of C&C recognize that the acts listed under TIX are criminal in the federal justice system. Since the federal justice system uses a much higher evidentiary standard (beyond a reasonable doubt) for these crimes, C&C supporters argue that the C&C should be the minimum standard.

The argument to change TIX to have C&C is that the respondent does not have enough due process if the standard of evidence is POE because such allegations of sexual violence can severely harm a respondent's life and career. The most severe consequences for a student in TIX adjudication are either suspension or expulsion. In the short term, getting a suspension or expulsion can stop one's progress toward a degree. The student's classes would be incomplete, which can reduce the GPA. The suspension or expulsion will be a permanent mark on their records. A Title IX Defense firm contends that "virtually every school you apply to will learn—either through a question on the Common Application, through a note on your transcript, or through a FERPA release—that you were expelled."¹⁴⁷

¹⁴⁶ Haley C. Carter 2021

¹⁴⁷ "What Happens If You Are Suspended or Expelled in a Campus Disciplinary Proceeding?," *Title IX Defense Blog* (blog), 2018,

Many credits might not transfer over regardless of transferring to a new IHE. Michelle Ball says that if the new institution does not accept these transfer credits, “the student would then have to start over in their education with new tuition expenses and a longer runway prior to graduation.”¹⁴⁸

A prior discipline charge does not follow the student only in education. If the student wants to pursue a professional degree – like law – they will not pass the moral application and review, which can prevent them from being a licensed lawyer. Other opportunities, such as obtaining a security clearance, can also be barred from the student. Ball says that a student who seeks employment by certain institutions such as “the military, law enforcement, or otherwise”¹⁴⁹ will also have a record of expulsion standing in the way of the opportunity.

A student cannot escape the process either. In the past, writes Ball, students who had a TIX investigation could transfer schools to stop the investigation. Now, schools can “continue the investigation... [and] likely find [the student] responsible in [their] absence.”¹⁵⁰ If the school finds the students guilty, they could “then send notice of your later disciplinary action to a school where [the student] have applied or transferred.”¹⁵¹ Since the students would no longer be present at the institution, they would not have a chance to defend themselves. Ball explains this consequence as being haunted by one’s charge.

<https://titleixlawfirm.com/what-happens-if-you-are-suspended-or-expelled-in-a-campus-disciplinary-procedure/>

¹⁴⁸ Michelle Ball, “What Happens If You Are Expelled From College?,” July 28, 2022, <https://edlaw4students.com/what-happens-if-you-are-expelled-from-college/>.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

But these are the effects of expulsion or suspension if a student is no longer interested in attending the same institution. If the student wants to return to the institution, there may be requirements that the student must meet to be re-accepted. Lori B. Tucker and Jake Goldberg describe the various responsibilities that students may have in order to return. The student would be required “to reapply, and ... will be required to meet any conditions that were also part of the sanctions, such as, therapy, anger management classes, substance abuse counseling, etc.”¹⁵² These may be responsibilities that the students must fund by themselves, which could be costly and time-consuming.

Additionally, the gap in schooling would be challenging to explain to potential employers. In order to fill the free time, the student would have to proactively find other sorts of opportunities that could prove that the student was still working towards self-development. The consequences of expulsion or suspension seriously affect one’s life. Understanding the consequences of such punishments could demand greater protection for respondents.

Nevertheless, some still argue that the consequences of suspension or expulsion do not affect one’s life enough to require a higher standard of evidence. Kidder claims that C&C, in federal courts, is used in cases to determine parental rights, withdrawal of life support, deportation, or involuntary civil detention.¹⁵³ These situations significantly affect an individual’s life and thus need a higher standard of evidence. The cases that use C&C differ from TIX as the stakes are not as high. The worst consequence of a TIX

¹⁵² Lori B. Tucker and Jake Goldberg, “Tips for Accused Students After a Campus Sexual Misconduct/Title IX Proceeding,” n.d., <https://www.aane.org/tips-accused-students-campus-sexual-misconduct-title-ix-proceeding/>.

¹⁵³ William C. Kidder 2019

process could be expulsion. Even though attending another institution may be more difficult, as the student would need to explain the presence of the conduct violation, it does not mean that the student cannot find an alternative institution or continue their degree. But the complainant's entire sense of security and self may be at such a risk. The health and economic ramifications of having been a victim of sexual violence are tremendous and irreversible that it becomes something that the survivor would have to carry with them for the rest of their lives.

One method of expanding the rights of the accused is by establishing live hearings and cross-examination in TIX processes. Suzannah C. Dowling explains cross-examinations in TIX processes. There are two court cases, one which supports the use of cross-examination and one that condemns its use in TIX processes. She explains how *Doe v. Baum* (2018) establishes the cross-examination requirement. In the case, the Sixth Circuit court recognized that the respondent Doe “had substantial interests at stake in both his reputation and his future educational and employment opportunities”¹⁵⁴ based on the outcome of the TIX process. The court also saw that the University of Michigan, the school the parties attended, already provided the opportunity for cross-examination in other misconduct cases, so incorporating cross-examination in TIX “would in no way add to the administrative burden.”¹⁵⁵ The Sixth Circuit views cross-examination as the best method to establish credibility.

This case highlights the benefits of cross-examination. For one, Dowling describes cross-examination as “the greatest legal engine ever invented for the discovery

¹⁵⁴ Suzannah C. Dowling, “(Un)Due Process: Adversarial Cross-Examination in Title IX Adjudications,” *Maine Law Review* 73, no. 1 (January 2021): 124–68.

¹⁵⁵ *Ibid.*

of truth.”¹⁵⁶ Adversarial cross-examination could be the best chance that a respondent has to build their credibility and demonstrate the faults of the complainant’s argument against them. Dowling even argues that adversarial cross-examination could be helpful in other legal cases as the testimony provided by the cross-examination could provide “evidence that could be used in future criminal prosecution.”¹⁵⁷ Since many civil trials use cross-examination, one could argue that adjudicating a case TIX is supposed to remedy a civil issue and thus could still use cross-examination, as it is present in federal civil courts.

The federal circuit courts split on this issue. The First Circuit ruling on *Haidak v. University of Massachusetts-Amherst* (1st Cir. 2019) indicates that cross-examination is unnecessary in school settings. In this case, James Haidak was in a relationship with Laura Gibney. Gibney’s mother reported to the university that Haidak assaulted Gibney. The school gave Haidak a no-contact order, but the couple ignored it. As a result, the university suspended Haidak for violating the no-contact order. Haidak decided to leave the institution. By the time the case was ready to be adjudicated, the institution sent Haidak the new policy: “under which charged students could no longer question other students directly, but instead could submit proposed questions for the Board to consider posing to the witness.”¹⁵⁸ The school found Haidak responsible for violating the no-contact order and expelled him. Haidak appealed, stating that there were “violations of his due process, equal protection, and Title IX rights”¹⁵⁹ as he was not allowed to cross-examine Gibney. Haidak understood that the First Circuit did not want unlimited

¹⁵⁶ Ibid.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid.

cross-examination in school disciplinary proceedings, but Haidak argued that “due process requires at least some opportunity for the accused to directly question opposing witnesses ‘whenever a university disciplinary proceeding turns on the witnesses’ credibility.”¹⁶⁰ The First Circuit court ruled that adversarial cross-examination was unnecessary to have due process and establish credibility. The court found no issue with having “a neutral party, such as the hearing panel, [that] can question the witness.”¹⁶¹

Dowling explains three major reasons why cross-examination is unnecessary in school proceedings. The first reason is that cross-examination would be unneeded in situations where it “does not turn on the credibility of witnesses.”¹⁶² In a case where the accused student has accepted the facts, cross-examination does not prove the credibility of the statements.

Dowling also says that cross-examination can be “overly burdensome and potentially harmful to the education process.”¹⁶³ Students may feel ostracized or unprotected, especially under tough questioning. Suppose the questioning is to address the credibility of a complainant’s experiences. In that case, it could leave the complainant and others who witness the process believing that rape culture on campuses would leave survivors and other students without support. The complainant would have to relive the trauma of their experiences and defend themselves in a way that could further cause harm, as they may have to justify their actions or lack thereof. The line of questioning could make the survivor feel a sense of guilt or shame, even though they are not at fault for being assaulted. The questioning would further contribute to having a hostile

¹⁶⁰ Ibid.

¹⁶¹ Ibid.

¹⁶² Ibid.

¹⁶³ Ibid.

environment in the institution, as subjecting the complainant to further trauma could exacerbate the issues they already face while attending the institution.

Schools without the capacity for cross-examination would then have the burden “that will accrue to the educational process in general by diverting school board members’ and school administrators’ attention from their primary responsibilities in overseeing the educational process to learning and applying the common law rules of evidence.”¹⁶⁴ The benefits of the evidence gained during adversarial cross-examination seem to be outweighed by the additional burden implementing cross-examination would put on the schools. Dowling’s final point is that the TIX process is “vastly different from criminal proceedings,”¹⁶⁵ and cross-examination is unnecessary to ensure due process in school procedures.

In the Obama-era regulations, the OCR discouraged parties' cross-examination. The OCR recognized that such a process could cause additional trauma for the survivor. However, in DeVos’s guidelines, post-secondary institutions are to “hold a live hearing and allow cross-examination by party advisors.”¹⁶⁶ DeVos believed that having live hearings and cross-examination would allow for more due process as the accused would have more access to evidence and be better able to mount a defense. Specifically for cross-examination, a respondent’s counsel could ask questions highlighting potential discrepancies in the complainant’s testimony.

This requirement could also be complex for IHEs and survivors. Lauren Bizier says that IHEs “are not equipped to properly handle the evidentiary rulings that are

¹⁶⁴ Ibid.

¹⁶⁵ Ibid.

¹⁶⁶ US Department of Education, n.d.

necessary to both safeguard due process rights of respondents and protect reporting students from trauma.”¹⁶⁷ Additionally, many survivors choose the TIX process rather than the criminal justice process to avoid the trauma of cross-examination while still obtaining the necessary justice to continue their education. cross-examination might discourage reporting incidents.

¹⁶⁷ Lauren Bizier, “Maintaining the Delicate Balance between Due Process and Protecting Reporting Students from Re-Traumatization during Cross-Examination: Title IX Investigations in the Wake of the Trump Administration’s Proposed Regulations Comments,” *Roger Williams University Law Review* 25, no. 2 (Spring 2020): 242–64.

Chapter 3: Investigation of Due Process

Court Cases Protecting Due Process

Multiple court cases slowly established what IHEs must do to protect the due process in TIX Processes. These cases are *Goss v. Lopez* (1975), *Mathews v. Eldridge* (1976), *The Board of Curators of the University of Missouri v. Horwitz* (1978), and *Plummer v. University of Houston* (2017).

Goss v. Lopez (1975) establishes the importance of due process in disciplinary policy violations. The Supreme Court held that schools must recognize and uphold due process when a student's entitlement to public education risks revocation. A disciplinary process could damage a student's reputation and career opportunities, so schools must protect students' rights. *Goss v. Lopez* (1975) ensured that students must be "given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version."¹⁶⁸ *Goss v. Lopez* (1975) addressed respondents denied their due process rights. This case created further guidelines for schools to follow to protect a respondent's due process rights.

Mathews v. Eldridge (1976) created a balancing test to establish standards of procedural due process. The Fourth Circuit of Appeals stated that procedural protections should be related to the situation. It listed three factors to determine if there is procedural due process:

1. If private interest will be affected by the decision

¹⁶⁸ *Goss v. Lopez*, 419 U.S. 565 (1975)

2. If there are procedural safeguards in place to ensure that there is no “erroneous deprivation of such interests through the procedures used”¹⁶⁹
3. If there are any extra-governmental or public interest burdens as a result of the decision¹⁷⁰

Mathews v. Eldridge (1976) was critical to developing procedural due process as it acknowledged that it could look different based on the situation it is addressing and created further guidelines to use to structure a TIX procedure to consider due process.

In *The Board of Curators of the University of Missouri v. Horwitz* (1978), the courts established that a university could use any process, without including a hearing, when determining a dismissal for academic issues. As long as it can be determined that the process is not arbitrary or capricious, it does not necessarily violate the Due Process clause.¹⁷¹ This case is essential to establishing due process in TIX processes because it establishes the idea of ensuring that a process that an IHE establishes has some flexibility as long as it is not an arbitrary process. This case’s applicability, however, is limited in the TIX process as a TIX process is not an academic policy violation but a disciplinary violation. The case most closely aligns with the disciplinary process and due process is *Goss v. Lopez* (1975).

In *Plummer v. the University of Houston* (2017), the question involves the constitutionality of the process that Plummer underwent regarding the sexual violence she perpetrated. Plummer had the opportunity to make opening and closing statements,

¹⁶⁹ Lewis F. Powell Jr., *Mathews v. Eldridge*, 424 U.S. 319 (1976), No. 74-204 (US Supreme Court February 24, 1976).

¹⁷⁰ *Mathews v. Eldridge*, 424 U.S. 319 (1976)

¹⁷¹ William Rehnquist, *Board of Curators, Univ. of Missouri v. Horowitz*, 435 U.S. 78 (1978), No. 76-695 (US Supreme Court March 1, 1978).

cross-examine the witness by submitting written questions, and had access to investigatory evidence several days before the hearing. Plummer, however, argued that she did not get adequate time with the evidence, was denied adequate confrontation rights with the victim, and there was a conflict of interest due to the multiple roles of an individual involved in the process. The Fifth Circuit of Appeals upheld the decision that Plummer did have a “constitutionally sufficient”¹⁷² process.

The Fifth Circuit of Appeals recognized that a university should not be a court of law, and it would not be feasible to treat it as such. Based on the evidence of this case and the policy, the university has a right to justify its sanctions. There should be a fair process, but the federal court system need not intervene in the specifics of it all.

This case is essential in establishing due process in TIX processes in IHEs as it affirmed the constitutionality of a process that allows for a semblance of cross-examination, live hearings, and adequate time with evidence. It also affirms that IHEs need not replicate the federal courts of law. It should provide some equitable process that allows for proper analysis of policy violations. However, it does not need to reflect the adjudication level in federal court systems.

Understanding the case law is relevant to establishing what the courts decide as due process. Since the TIX policies can be subject to litigation, historical cases provide ground rules of what is needed to have equitable processes. Knowing the balancing rules and the requirement of processes and an IHE’s decisions regarding conduct violations not being arbitrary and capricious is vital in analyzing the TIX policy and determining if it genuinely protects due process. Suppose the new policies fail to uphold these principles.

¹⁷² STEPHEN A. HIGGINSON, *Plummer v. University of Houston*, No. 15-20350 (5th Cir. 2017), No. 15-20350 (n.d.).

In that case, a party to the case can reasonably question whether the policy intended to protect due process or to favor one party over the other unfairly.

Due Process with the Adjudication Process

Due process, mentioned in both the Fifth and Fourteenth Amendments, protects the rights of citizens to fair treatment and ensures that officials operate within the constraints of the law. The Fifth Amendment protects individuals from the federal government, and the Fourteenth Amendment protects individuals from state governments. There are two types of due process: substantive and procedural. Substantive due process examines “governmental interference”¹⁷³ in one’s daily life. The Supreme Court established that the rights protected by substantive due process “are those deeply rooted in U.S. history and tradition, viewed in light of evolving social norms.”¹⁷⁴

Procedural due process protects and ensures the fairness of a procedure executed by the government against its citizens. Some aspects of protecting procedural due process include:

- An unbiased tribunal;
- Notice of issue and evidence for it;
- An opportunity to present own evidence;
- The right to know opposing evidence;
- Right to cross-examine witnesses;
- The right to have counsel;

¹⁷³ Legal Information Institute, “Substantive Due Process,” in *Wex* (Cornell University, n.d.), https://www.law.cornell.edu/wex/substantive_due_process.

¹⁷⁴ *Ibid.*

- Provide written findings and reasons for decisions.¹⁷⁵

It is challenging to navigate the due process in an IHE. Perry says that public IHEs “are state actors,”¹⁷⁶ and private institutions, if they accept federal funding, must also adhere to due process when creating conduct processes.

But as *Plummer* made clear, a university is not a court of law, nor is it appropriate to treat it as if it were. Respondents are not facing legal repercussions as a result of TIX investigations. As long as they have some “constitutionally sufficient”¹⁷⁷ process that is not arbitrary and capricious – as stated in *Horowitz* – it is appropriate. The court cases established necessary conditions to follow when creating conduct processes. *Goss* mandated a written notice; *Plummer* mandated a process that could include cross-examinations, live hearings, and adequate time with discovered evidence; *Matthews* mandated a balancing test to ensure due process protection with the application of all of these factors.

The American Association of University Professors (AAUP) published a journal article regarding some suggested procedures to be included in creating equitable TIX policies. Some of these suggestions include:

- Broad buy-in from a variety of campus constituencies in the creation and dissemination of policies;
- Definitions of sexual violence should work in line with local criminal justice systems;
- A single office should be responsible for the oversight of TIX procedures;

¹⁷⁵ Legal Information Institute, “Procedural Due Process,” in *Wex* (Cornell University, n.d.), https://www.law.cornell.edu/wex/procedural_due_process.

¹⁷⁶ Laura Perry 2021

¹⁷⁷ *Plummer v. University of Houston*, No. 15-20350 (5th Cir. 2017)

- The policies and procedures should cover all campus constituencies.¹⁷⁸

These suggestions pay attention both to the devastating effects of sexual violence in educational institutions and the potential impact of false accusations and poorly managed cases on the life of the respondent. The AAUP also promotes reduction of the number of responsible employees. However, they encourage other methods of supporting students by guiding them to access resources, acting as an advisor through TIX procedures, and ensuring that they take the report seriously and aim to help them.¹⁷⁹

A responsible employee, according to University of Texas Dallas' Employee Mandatory Reporting Requirements, is "a University employee who has the duty to report incidents of sexual misconduct to the Title IX Coordinator or other appropriate designee, or an employee whom an individual could reasonably believe has this duty."¹⁸⁰ The Responsible Employee should report any information that could help the TIX office to follow up with the situation, such as "the names of the complainant, respondent, and any witnesses; contact information for those individuals; the time, date and location of the incident(s); the nature of the misconduct; and any other relevant information."¹⁸¹ This person could be any faculty or supervisory staff, administrators, residential life staff, or if the employee has reasonable belief that they have "the duty to report incidents of sexual misconduct."¹⁸² The only individuals who may not be responsible employees are "physical and mental health care professionals and pastoral counselors"¹⁸³ as they are

¹⁷⁸ American Association of University Professors, "Campus Sexual Assault: Suggested Policies and Procedures," *Bulletin of the American Association of University Professors* 99 (August 2013): 92–100.

¹⁷⁹ Ibid.

¹⁸⁰ University of Texas at Dallas, "Title IX – Employee Mandatory Reporting Requirements: Frequently Asked Questions," n.d., <https://institutional-initiatives.utdallas.edu/title-ix/faq/>.

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid.

“prohibited by confidentiality laws from reporting any information... without the complainant’s permission.”¹⁸⁴

DeVos adopts this desire to reduce the role of faculty members as responsible employees. By limiting the number of responsible employees and narrowing the responsibility of who must be aware of sexual violence to solely the TIX coordinator, it would become difficult for larger institutions to respond to cases of sexual violence. Butler et al. say in their article that it would be “impractical for large institutions in which an unreasonable number of cases would fall under the purview of a single person.”¹⁸⁵ A potential situation to highlight how many different individuals could have disclosures could be, for instance, an athlete who discloses to a coach or a student in an affinity group disclosing to the organization’s head faculty member. These students could disclose to an individual they trust, but the reduction of responsible employees would indicate to the faculty members that they have no responsibility to report these cases to the TIX coordinator. Potentially these cases will not be followed up on and thus leave these students without the support they may need from their IHE.

When the TIX policies were published, there were issues regarding the need for cross-examination and the evidence obtained during the live hearing. *Victim Rights Law Center (VRLC) v. Cardona* (2021) vacated the language in the TIX policy that stated that “if a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a

¹⁸⁴ Ibid.

¹⁸⁵ Leah C. Butler, Heejin Lee, and Bonnie S. Fisher 2019

determination regarding responsibility...”¹⁸⁶ The implications of this language work two ways: if a complainant had responded to all questions posed by any party except for one, then none of the statements they made could count in determining the case. Additionally, attempting to meet the higher standard of evidence could become much more difficult if all statements made in the court are subject to dismissal as a result of the complainant not answering one question. On the respondent’s side, the respondent’s advisor could advise the student not to accept being cross-examined if there is a potential that a cross-examination could prove the student’s guilt.

The dismissal of all evidence due to the statements not being subjected to cross-examination and in the situation where the respondent could avoid any semblance of self-incrimination during a hearing by simply refusing the cross-examination made the policy seem arbitrary and capricious. On top of establishing a higher standard of evidence, the strict standards for admissible evidence would make the burden of proof much higher on the complainant than the respondent.

Vacating this language also allowed for the use of evidence from individuals who may not be present for cross-examination. According to the Department of Education, examples of this include “statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation’s relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing... police reports, Sexual Assault Nurse Examiner

¹⁸⁶ Suzanne B. Goldberg, “Letter to Students, Educators, and Other Stakeholders Re Victim Rights Law Center et al. v. Cardona Notice of Language Assistance,” September 24, 2021, <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>.

documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.”¹⁸⁷

Broadening the scope of admissible evidence would further help meet the higher standard of evidence.

The new DeVos definition of sexual harassment is:

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the school’s education program or activity.¹⁸⁸

Using “and,” to describe the categories that the unwelcome conduct must meet significantly reduced the scope of what is considered sexual violence. As Carter explains, it is much harder to prove that sexual harassment limits access to “programs” or “activities” than simply “resources and opportunities.”¹⁸⁹ The Supreme Court uses the latter standard to establish what environments sexual harassment could create hostility. The changes to the definition and creation of a higher bar of evidentiary standards can work together to make the TIX process one that survivors hesitate to use in order to get justice. This hesitation and lack of faith in the TIX process would mean that the TIX policy would eventually fail its original intention: to ensure that institutions receiving federal funding are free of any sexual discrimination.

¹⁸⁷ Ibid.

¹⁸⁸ Department of Education, n.d.

¹⁸⁹ Laura Perry 2021

Opinions of Critics

Critics had many opinions about changing the standard of evidence. The two main criticisms are that making the standard clear and convincing elevates sexual violence to be equivalent to issues that have a much more significant impact on one's life, such as termination of parental rights or end-of-life termination. It is challenging to execute a C&C standard in an IHE as they are not judicial courts with attorneys who understand the rules of evidence. Moreover, the higher standard of evidence shifts the effort more onto the complainant than the respondent. In *Herman & MacLean v. Huddleston* (1983), the Supreme Court stated that the POE standard of evidence allows for parties to "share the risk of error in roughly equal fashion."¹⁹⁰ Anything lower or higher than this standard indicates a preference for a party. POE keeps the balance of evidentiary burden equal, whereas clear and convincing tilts the burden more onto the complainant than the respondent.

¹⁹⁰ Thurgood Marshall, HERMAN & MacLEAN, Petitioner, v. Ralph E. HUDDLESTON et al. Ralph E. HUDDLESTON et al., Petitioner, v. HERMAN & MacLEAN., No. 81-680, 81-1076. (US Supreme Court January 24, 1982).

Figure 1: Preponderance of Evidence Evidentiary Standard

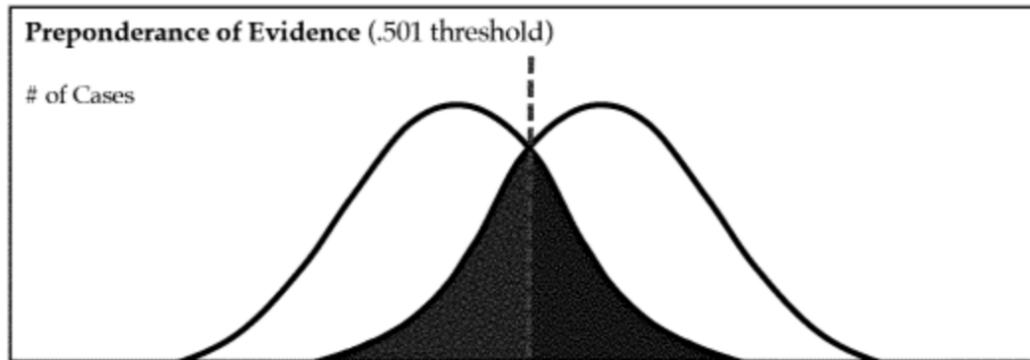
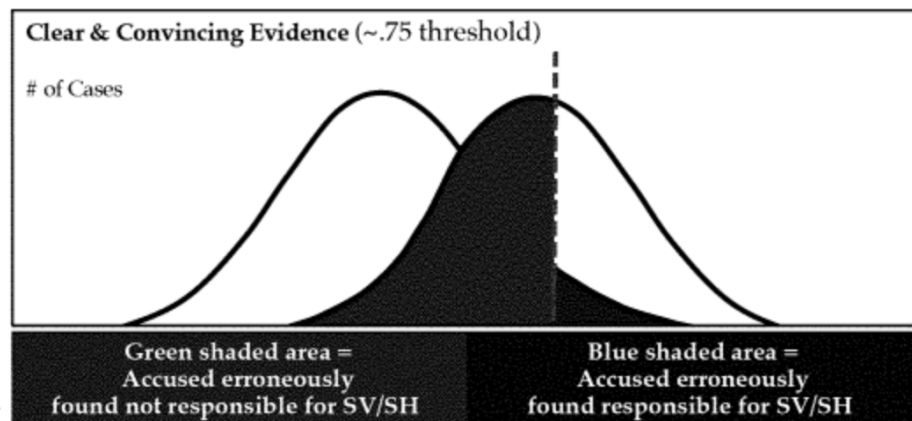


Figure 2: Clear and Convincing Evidentiary Standard



Adapted with permission from Allen et al., An Analytical Approach to Evidence (6th ed., 2016)

Figure 1 and 2: William C. Kidder, "(En)Forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings," The Journal of College and University Law 45, no. 1 (2019): 1-49.

In his article, William Kidder demonstrates the split of burdens and the potential for false positives and negatives to represent how the burdens are equal. In figure 1, the graph demonstrates how the POE standard is an equal split. The darkened part of the graph left of the dashed line, representing the 50.1% threshold, are the false negatives

(the cases in which the student accused of a TIX policy violation is innocent). On the right side of the threshold line, the darkened line indicates the false positive (the situation in which the student was accused but found not guilty).¹⁹¹ The unshaded parts of the graph to the left of the threshold line indicate students who are guilty and violated the policy. To the right of the threshold line are students who are guilty but found not to violate the policy. The equal shares can indicate how the threshold of 50.1 percent ensures a sense of burden to prove one's innocence, equivalent to the complainant's responsibility to prove the respondent's guilt.

Figure 2 indicates how the false positives and negatives shift due to the threshold increase. As mentioned, the clear and convincing standard is above 65% and less than 80%. For the graph, Kidder used the 75% standard to indicate the threshold for the graph.¹⁹² In this situation, the shaded part on the left side of the graph becomes substantially significant. The number of false negatives (a falsely accused student) reduces as there would be a greater number of cases that do not meet the clear and convincing threshold. On the other side of the threshold line, there would be fewer cases of false positives, as the higher standard would make it harder to prove the guilt of a falsely accused student.

Though this graph makes one believe that there is only a benefit to shifting the standard of evidence, as students with false accusations will no longer face as much fear of potentially being found guilty, the unshaded portion of the graph is more telling of the consequences for the community overall.

¹⁹¹ William C. Kidder 2019

¹⁹² Ibid.

Since the unshaded parts of the graph represent the portion of cases in which the student in the TIX process is guilty of a policy violation, having a significant portion of the unshaded graph on the left side of the threshold line means that there will be more students who are guilty of committing policy violations to be found not guilty. On the right side of the threshold line, fewer students, who are guilty of the policy violation, will be found guilty according to the clear and convincing standard. Reducing the number of students who are not guilty being found guilty could be seen as due process protection. However, many students who have committed the policy violation will get to walk free due to a higher standard of evidence. This would ultimately defeat the purpose of TIX in ensuring an IHE is free of hostility, as perpetrators would have an easier time returning to campus.

The clear and convincing standard emphasizes the consequences of false accusations more than what is genuinely needed. According to Dana Weiser's article, a false report "occurs when an individual deliberately fabricates a story and reports that a sexual assault occurred while knowing that no such crime occurred."¹⁹³ False reporting falls under the FBI's category of unfounded crimes in which the reported crime either did not happen or does not have enough evidence to support its existence. Though some studies indicate that over 41% of reports are false reports¹⁹⁴ Weiser indicates that these statistics are overreporting the prevalence of false reports as the methodology of these studies includes unrecommended practices on victims. For instance, the Kanin study reported that in the police department Kanin used, 41% of survivors filed false reports.

¹⁹³ Dana A. Weiser, "Confronting Myths About Sexual Assault: A Feminist Analysis of the False Report Literature," *Family Relations* 66, no. 1 (May 16, 2017): 46–60.

¹⁹⁴ *Ibid.*

However, this police department was basing this information on statistics of recanting one's report rather than investigating the claims made to check for falsification or using "discouraged interview tactics"¹⁹⁵ such as a lie detector test (which is wholly unbelievable with victims). Kanin's results were not comparable to other studies, which shows that the methods used were unreliable and unfit for the nature of the study.

Over-reporting these statistics can cause survivors to feel that justice systems will not help them, as they have a preconceived notion that they would lie. In their article, Charlie Huntington, Alan Berkowitz, and Lindsay Orchowski explain that when survivors feel that systems of justice will not support nor believe them, "the likelihood that perpetrators are brought to justice decreases, potentially allowing perpetrators to continue aggressing."¹⁹⁶

The overreported statistics can contribute to the idea of survivors being untrustworthy and subsequently support rape culture. Weiser believes "that disbelief of women is rooted in sexist and patriarchal social norms"¹⁹⁷ since communities are very male-centric and male-dominated. Even in many of the justice systems, most of the figures are men. The predominance of men in these spaces can lead to a desire to "excuse or sympathize with perpetrators rather than with victims of sexual assault."¹⁹⁸ The more an individual buys into the tenets of rape culture, the more likely they believe in the prevalence of false reporting. A study by Ashley Fansher, Tumelo Musamali, and Madison Self found that "rape myth acceptance was a significant predictor for fear of

¹⁹⁵ Ibid.

¹⁹⁶ Charlie Huntington, Alan D. Berkowitz, and Lindsay M. Orchowski, "False Accusations of Sexual Assault: Prevalence, Misperceptions, and Implications for Prevention Work with Men and Boys," in *Engaging Boys and Men in Sexual Assault Prevention* (Academic Press, 2022), 379–99, <https://www.sciencedirect.com/science/article/pii/B9780128192023000055>.

¹⁹⁷ Dana A. Weiser 2017

¹⁹⁸ Ibid.

false allegations in the full sample. Acceptance of rape myths indicates that an individual is less likely to believe a victim of sexual assault and to be supportive.”¹⁹⁹

Not only does rape culture affect the perceptions of survivors and the truth of their words, but it also inspires fear on campuses. In the same study by Fansher et al., they found that “males and individuals of color were significantly more likely to be fearful of false accusations for themselves and their friends compared to their counterparts.”²⁰⁰ More specifically, African Americans feared being viewed as “violent offenders”²⁰¹ due to false reporting. Understandably, black men have this heightened suspicion of the justice system. Weiser recognized the history of “black men [having] been wrongfully convicted of sexually assaulting women.”²⁰² Men at the intersection of marginalized racial and socioeconomic identities are more likely to be “scapegoated and judged harshly within the criminal justice system.”²⁰³ This fear of false accusations is further encouraged by the presence of rape culture and the idea that survivors are untrustworthy.

Even though this fear of being falsely accused is valid and rooted in discrimination, it ceases to look at racial minorities that report. The overreporting of false accusations will further discredit reports of sexual violence due to rape culture. Antuan Johnson’s article says that using the idea of racial bias in sexual violence should address both “men of color being accused but would also center their critiques on the unique vulnerability of women of color.”²⁰⁴ However, the new regulations focusing more on false

¹⁹⁹ Ashley K. Fansher, Tumelo Musamali, and Madison Self, “Fear and Consent: An Exploratory Study of Fear of False Accusations of Sexual Assault and Consent Seeking Practices,” *Journal of School Violence*, October 29, 2022, 1–14, <https://doi.org/10.1080/15388220.2022.2138410>.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Dana A. Weiser 2017

²⁰³ Ibid.

²⁰⁴ Antuan M Johnson, “Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism Notes,” *Georgetown Journal of Law & Modern Critical Race Perspective* 9, no. 1 (Spring 2017): 57–76.

accusations by raising the evidentiary standard would make it even more difficult for women of color to be believed when they report sexual violence.

Additionally, because complainants face a higher evidence bar, it could discourage them from reporting. Perry says that complainants avoid reporting due to “fear of not being believed.”²⁰⁵ Since the investigation process takes time and is emotionally draining, “students often feel discouraged from reporting an assault when they do not think they have a chance of being believed by the university.”²⁰⁶ Carter predicted an increase “in dismissal rates of sexual harassment claims”²⁰⁷ since the new regulations purportedly increased the “difficulty of reporting and proving sexual harassment for survivors.”²⁰⁸

POE is used in most civil cases in federal courts, including cases that adjudicate obtaining federal benefits and protection orders against abusers. These cases have civil ramifications without severely restricting the liberty of the parties involved.

Another argument critics bring up is that IHE courts never intended to replicate federal courts as their decisions do not have the same consequences. The most severe consequence of TIX adjudication is suspension or expulsion. As explained in Obama-era Q&A, “a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required.”²⁰⁹

²⁰⁵ Laura Perry 2021

²⁰⁶ Ibid.

²⁰⁷ Haley C. Carter 2021

²⁰⁸ Laura Perry 2021

²⁰⁹ Catherine E. Lhamon, “Questions and Answers on Title IX and Sexual Violence,” April 29, 2014, <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

Some people would counter that TIX processes can have a long-term effect on the respondent's reputation and career. Some people use the example of medical doctors and lawyers using clear and convincing standards. In these cases, however, Perry mentions that the professionals are "at risk of losing a professional license."²¹⁰ However, the TIX process does not limit students from continuing their education elsewhere. The respondent still has the opportunity to go to an IHE elsewhere or pursue career opportunities. The level of the institution the student may be able to attend may not be at the same academic level or reputation, or the career the individual chooses to pursue may not be as competitive as one wishes. However, their lives do not wholly stop due to a TIX sanction.

Undue Burden and Due Process

As for the procedural due process, DeVos fixes issues with specific TIX policies that began investigation processes with the presumption of guilt of the respondent or ensuring proper notification of the TIX case. There is, however, a newly created issue of procedural due process when increasing the standard of evidence. The issue with increasing the standard of evidence in IHEs to that of federal court systems is that IHEs need federal courts' powers to make meeting the higher standard of evidence more feasible. According to 28 U.S. Code § 2072, the Supreme Court has the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and

²¹⁰ Laura Perry 2021

courts of appeals.”²¹¹ One of these procedures and rules of evidence for cases at the federal level is to have the right to subpoena. In the Federal Rules of Civil Procedure, Rule 45 describes a subpoena as “A command... to produce documents, electronically stored information, or tangible things requires the responding person to permit inspection, copying, testing, or sampling of the materials.”²¹² The court can demand a subpoena for a hearing, trial, deposition, or discovery of evidence.

Not all universities have subpoena power. Some IHEs may allow for subpoenas as a result of their honor code. The University of Virginia at Wise has an honor code that allows their court proceedings to submit subpoenas to an academic advisor. Upon approval, the individual must comply or would be violating conduct policies.²¹³ If an IHE does not have this system in which an honor code requires compliance with subpoenas, IHEs cannot get additional evidence, such as text messages, from parties.

TIX coordinators and investigators are thus left to look at a smaller amount of evidence with a higher standard of evidence. Even if evidence exists that could change the outcome, since they do not have access to it, institutions must decide a case without the necessary information to meet the evidentiary standard. The current system would require extra steps to protect a respondent’s due process, but IHEs are not empowered to have the same powers as the court system it is replicating. Not empowering IHEs with subpoena power or other federal court system privileges causes new procedural due process restrictions. Presenting the evidence necessary to meet new standards and

²¹¹ “Rules of Procedure and Evidence; Power to Prescribe,” 28 U.S. Code § 2072 § (n.d.), <https://www.law.cornell.edu/uscode/text/28/2072>.

²¹² Legal Information Institute, “Rule 45. Subpoena,” in *Wex*, Federal Rules of Civil Procedure (Cornell University, n.d.), https://www.law.cornell.edu/rules/frcp/rule_45.

²¹³ UVA Wise, “The University of Virginia’s College at Wise Honor System,” n.d., <https://www.uvawise.edu/sites/default/files/attachments/pages/2020-07/Honor-System-Honor-Court-Constitution-2019.pdf>.

thresholds would not be possible. Additionally, a decision based on the evidence presented would not be accurate to the overall amount of evidence available yet unattainable to an IHE adjudication process. Forcing TIX to have extra due process protections reminiscent of a federal court without also providing powers that a federal court system would have would thus do an overall disservice to due process rights for all parties involved.

On top of the new procedural due process issue created by higher standards of evidence without the same evidentiary powers, the other policy changes could cause an undue burden on the respondents. Undue burden is a test that checks for obstruction of personal liberty rights. The undue burden test came after *Whole Woman's Health v. Hellerstedt* (2016). The test checks three aspects:

- Further a valid state interest;
- Confers benefits that outweigh benefits;
- It is based on credible evidence.²¹⁴

The first part of the *Hellerstedt* test is checking to see if the policy meets a valid state interest. The new TIX policies intend to further valid state interests by protecting accused students' due process rights. A false accusation could destroy accused students' reputations and careers. However, Dana Weiser finds that "empirical evidence indicates that false reports of sexual assault account for less than 10% of cases reported."²¹⁵ In comparison, about eighty percent of cases go unreported to the police, and in 2010, about

²¹⁴ Center for Reproductive Rights, "THE UNDUE BURDEN STANDARD AFTER WHOLE WOMAN'S HEALTH v. HELLERSTEDT," July 26, 2018, <https://reproductiverights.org/wp-content/uploads/2020/12/WWH-Undue-Burden-Report-07262018-Edit.pdf>.

²¹⁵ Dana A. Weiser 2017

ninety-five percent of cases went unreported to TIX offices. Lack of reporting has led to about eighty-nine percent of IHEs that have no reported cases of sexual violence.²¹⁶ IHEs not having reported cases of sexual violence does not match the statistic of how prevalent sexual assault is on campuses. If incidents happen but they go unreported, then the campuses fail to ensure that IHEs remain safe environments free of discrimination.

According to Know Your IX, most perpetrators will commit serial sexual violence. One incident of sexual violence is most likely part of a series of incidents. A study called “Repeat Rape and Multiple Offending Among Undetected Rapists” by David Lisak and Paul Miller found that repeat rapists cause the most violence in IHEs. In this study, the authors interviewed 1,882 men in “a mid-sized, urban commuter university where students are diverse both in age and ethnicity.”²¹⁷ Of these men, 120, or 6.4% of the men’s population, perpetrate “rape or attempted rape.”²¹⁸ The total number of rapes this small group of men committed was 483 rapes. But forty-four of the 120 men admitted to only one rape. So the seventy-six other perpetrators committed the remainder of 439 rapes, with each committing an average of about six rapes. These perpetrators did not limit the violence to just sexual violence. Lisak and Miller found that “70 of the 120 (58.3%) admitted to other acts of interpersonal violence, including battery, physical abuse and/or sexual abuse of children, and sexual assault short of rape or attempted rape.”²¹⁹ In total, the 120 individuals committed 1,225 acts of violence. Out of the 3,698 acts that the 1,882 individuals were responsible for, the 76 repeat perpetrators committed 1,045 acts.

²¹⁶ Ibid.

²¹⁷ David Lisak and Paul M. Miller, “Repeat Rape and Multiple Offending Among Undetected Rapists,” *Violence and Victims* 17, no. 1 (2002): 73–84.

²¹⁸ Ibid.

²¹⁹ Ibid.

To put it in context, Lisak and Miller found that the repeat perpetrators are “4% of the [population of men]... [and they] accounted for 28% of the violence. Their violence was nearly ten times that of non-rapists.”²²⁰ If the majority of perpetrators are repeat offenders, and they continue to spread other forms of violence, then having TIX policies with harsher requirements and substantial false negatives would mean that more perpetrators that commit the majority of the violence would be free. The campus environment would have to absorb the risk of having perpetrators continue their violence. Current and future survivors would be at greater risk of experiencing violence again.

State interest cares about advancing equal rights and safe learning environments by executing the TIX policy. Creating a hostile environment is against the valid state interest, as state interest, in this situation, must comply with TIX in order to receive federal funding and support.

The second part of the *Hellerstedt* test checks if there are more significant burdens than benefits to the complainant party. In the situation of a TIX case, there are disparate economic and health consequences to survivors due to sexual violence. Know Your IX uses publications by the White House Council on Women and Girls, a federally funded study on incapacitated rape, and a Yale Law Journal article to express the economic and health burdens caused by sexual violence. Know Your IX finds that thirty-four percent of survivors experience Post-Traumatic Stress Disorder, thirty-three percent experience depression, and forty percent self-medicate with drugs and alcohol. Due to these health consequences, rape survivors accrue costs anywhere between \$87,000 to \$240,776 to access “medical treatment, counseling, and harder to quantify impacts on

²²⁰ Ibid.

quality of life.”²²¹ Additionally, survivors could suffer from the potential costs of missed schooling during recovery from the violence.

The burdens of being a victim of sexual violence are already high. Increasing the evidentiary standard places the burden of proof on survivors. This burden would discourage them from reporting and absorbing the burdens of being victims of sexual violence without accessing the resources that a TIX office could provide. Limiting the number of responsible employees increases the burden on survivors of finding and reaching out to the correct faculty member to report. This individual may be someone the survivor does not know or feels uncomfortable with. These burdens add a sense of fear while also balancing the physiological and psychological consequences of being victims of sexual violence and also absorbing the burden of reaching out to the right resources.

Under a limited definition of sexual violence, the survivor must determine if the violence they experienced meets the standard of sexual violence. Not meeting one aspect of the definition could cause the dismissal of the entire case. This definition causes burdens on IHEs to either absorb the sorts of cases that are no longer included in TIX into their civil rights policies or choose not to do so and run the risk of potential legal ramifications.

Establishing the credibility of evidence involves collecting witness statements, reports, other findings, evidence on character, or evidence gathered by law enforcement.²²² Both parties should have access to any collected evidence, their right to

²²¹ Know Your IX, “Statistics,” n.d., <https://www.knowyourix.org/issues/statistics/>.

²²² Grand River Solutions, “COLLECTING AND MAINTAINING EVIDENCE IN TITLE IX INVESTIGATIONS: REQUIREMENTS AND BEST PRACTICES,” June 2021, https://www.georgefox.edu/title-ix/_assets-resources/title_ix_training_materials_2021/collecting-and-maintaining-evidence-in-title-ix-investigations.pdf.

present information, and the limitations that institutions have in collecting legally protected evidence.²²³ DeVos attempted to make the process more transparent so that respondents know what evidence they have against them. But the policy of discrediting evidence during cross-examination is counterproductive to establishing credibility as it creates an additional obstacle for parties attempting to submit evidence.

The DeVos policies create issues with due process for complainants. This burden is more so than the due process violations on respondents from the Obama-era policies. Though certain protections should be maintained to ensure that the respondent's due process is protected, the next administration should reconsider TIX due to the undue burden on complainants.

²²³ Ibid.

Chapter 4: Conclusion

The Balance of Substantive and Procedural Due Process

Rachael Goldman makes a series of arguments for DeVos’s TIX policies. One is that TIX “dismantles constitutional due process rights for the accused with the imposition of a mere preponderance of the evidence standard for purported felony-level criminal conduct.”²²⁴ But one should not conflate TIX with the criminal justice models because its goal is different. Nancy Cantalupo writes that the “Secretary General of the United Nations has stated, “[v]iolence against women is a form of discrimination and a violation of human rights . . . [that] can only be eliminated . . . by addressing discrimination, promoting women's equality and empowerment, and ensuring that women's human rights are fulfilled.”²²⁵ TIX works to create “rights and remedies for victims and ending not only harassment and violence but also its discriminatory effects.”²²⁶ In contrast, whereas the criminal justice system works “to keep the abstract community as a whole safe from violence”²²⁷ through incarceration. Because the goals, level of sanctions, and realm for adjudication are different, the requirement for due process need not be the same. Various cases (*Horwitz* and *Plummer*) have established that as long as a college attempts to have a “constitutionally sufficient” process, it does not need to adapt any other practices from the federal system to ensure due process.

Goldman also argues that even though TIX attempts to rectify civil discrimination, TIX processes do not always provide “fundamental protections that are

²²⁴ Rachael A. Goldman 2019

²²⁵ Nancy Chi Cantalupo, “For the Title IX Civil Rights Movement: Congratulation and Cautions Collection: A Conversation on Title IX,” *Yale Law Journal Forum*, February 19, 2016, 281–303.

²²⁶ *Ibid.*

²²⁷ *Ibid.*

typically absent from campus tribunals, including impartial judges, unbiased juries of one's peers, representation by counsel, mandatory 'discovery' processes to ensure that all parties have access to relevant information, restrictions on unreliable evidence like hearsay or prior bad acts, and sworn testimony under penalty of perjury."²²⁸ DeVos's new rule ensured that accused students would enjoy the presumption of innocence. But, with the understanding that most schools conduct some hybrid model that allows for a discovery process through an investigator, provides parties access to the evidence, and has the hearing in a panel format with a mix of administrators and a jury of peers. Accordingly, there is no basis for the vague assumption that accused students lack these protections. Potentially, the DOE could consider mandating a hybrid process so that all schools could provide these protections. The solution should not consist solely of an adversarial cross-examination, as it is not receptive to the experiences of victims and their risk of trauma. But having a neutral party help coordinate the cross-examination and a panel-style hearing can take advantage of the best aspects of both the single investigatory model and adversarial cross-hearing model.

Goldman suggests that TIX procedures do not protect accused students from "the moral reprehensibility, societal stigma, and grave punishment typical in sexual assault cases."²²⁹ As an earlier chapter explained, however, the prevalence of rape culture on campuses creates an inclination not to believe survivors. Perpetrators may find more sympathy from institutions that share common identities with the perpetrator. Additionally, the emotional, physical, and economic consequences of being a victim can equal or outweigh the consequences of being an accused student. Whereas accused

²²⁸ Rachael A. Goldman 2019

²²⁹ Ibid.

students can transfer schools, albeit with difficulty, they can continue their academic careers. On the other hand, survivors would have to deal with mental and physical health repercussions, potential time lost from taking a leave of absence or transferring colleges to heal from trauma, and the backlash from their community if it buys into rape myths. Perpetrators can transfer out of a college. Victims cannot transfer out of their memories.

Goldman also believes that the lower standard of evidence would encourage victims to “report their experiences and ease convictions,”²³⁰ and this also increases the risk of false accusations. Goldman acknowledges that “four out of every five female, college-aged victims did not report her sexual assault to the police.”²³¹ Increasing the standard would choose to report incidents even harder, as the higher threshold could subject survivors to a process that could be retraumatizing and ultimately fruitless. As mentioned in the previous chapter, false reporting rates are over-reported. Belief in the prevalence of false reporting would only further perpetuate the rape myth as it continues to push the idea that survivors cannot be trusted.

Though there should be due process for accused students, a process that deters survivors from reporting undermines the purpose of TIX. The balance between procedural fairness and substantive due process is murky. Without careful consideration of how various policy changes could affect the balance could cause one party – survivors – to absorb more of the burden than the other. Policy amendments such as ensuring the presumption of innocence for accused students, for one, ensure procedural due process as the parties would be subject to an impartial trial. Another policy that could ensure due process protections is to enforce a model of conduct hearings that allows a single

²³⁰ Ibid.

²³¹ Ibid.

investigator to do the fact-finding and a live hearing with a neutral party aiding in cross-examination. That way, parties could still establish credibility without causing further trauma. Keeping the standard of evidence at POE allows for an equal share of the burden. Increasing the definition of sexual harassment would allow schools to streamline conduct violations through one process rather than ensuring those violations fall under a school conduct policy (which may not have the same procedural due process protections as a TIX process).

Cardona and the New Policy

When President Biden came into office, he appointed Miguel Cardona as the Secretary of Education. Cardona proposed new changes to the TIX policies. The new regulations state that IHEs have the “option to conduct live hearings with cross-examination or have the parties meet separately with the decisionmaker and answer questions submitted by the other party when a credibility assessment is necessary.”²³² This policy removes the requirement of having a live hearing with a cross-examination if the IHE chooses not to do so. Removing the hearing requirement would spare complainants of the trauma from confronting perpetrators in an adjudication process.

The new regulations also revert the definition of sexual assault to “unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity.”²³³

²³² Department of Education, “Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,” Pub. L. No. ED-2021-OCR-0166 (2022), <https://www.regulations.gov/docket/ED-2021-OCR-0166/document>.

²³³ Ibid.

Cardona’s definition would allow a greater scope of activities to be considered under TIX once again. Incorporating the term “limits” would expand the sorts of cases – such as stalking – that TIX can adjudicate. It is easier to prove a limitation from a program rather than denial. Additionally, the new definition would not require the three standards of harassment to be severe, pervasive, and objectively offensive in order for it to be considered sexual harassment. It simply needs to create a hostile environment, which could be easier to prove.

Cardona would require schools to address reports of sexual violence off campus, outside an educational program, or the US. A school is not allowed to wait until it has “‘actual knowledge’ of the harassment”²³⁴ but rather if they have any report. Addressing the “actual knowledge” portion of DeVos’s policy ensures that schools cannot simply sweep TIX misconduct under the rug since they did not have a report given to the TIX coordinator. All employees have to take the initiative to intervene as they can. The responsibility to respond to any sexual violence leads to expanding the number of responsible employees, as a school is now subject to following up with any report of misconduct.

Cardona would also allow the TIX coordinator to be a decision-maker rather than having to bring in an independent investigator or panel. This change could benefit schools as they would have an individual trained and solely focused on TIX conduct violations to handle all the issues. They would have the background knowledge and capacities to adjudicate. One could argue, however, that there could be bias in the adjudication of the process if it is all handled internally with the TIX coordinator.

²³⁴ Ibid.

Cardona would maintain the requirement that adjudication processes must begin with “a ‘presumption that the respondent is not responsible until a determination is made at the conclusion of the grievance procedures.’”²³⁵

Cardona also reinstated the POE standard.²³⁶ Using this lower standard of evidence allows the school to make decisions according to the evidence they can legally obtain. The school would still be responsible for gathering the evidence.

These changes reverse significant changes that DeVos made. Increasing the definition, returning to the POE standard, and setting the grounds to have more responsible employees ensures that the school remains responsible for the sorts of sexual violence that occur on its campus and has the power to rectify hostile environments. Yet, a conduct process is not the only way a school can target sexual violence.

Other Interventions on College Campuses

Power Conscious Framework

Schools should be mindful of the messages they send with prevention programming. Notably, without addressing the effects of discrimination and its role in perpetuating sexual violence, prevention programming cannot be effective. It would fail to address the root cause of why sexual violence exists on college campuses in the first place. Chris Linder writes that when a campus addresses sexual violence, it must focus on the root of the issue. The campus “must interrogate, name, and challenge oppression,

²³⁵ Ibid.

²³⁶ Ibid.

including racism, sexism, homophobia, transphobia, ableism, and others.”²³⁷ A

power-conscious approach to sexual violence has six core tenets:

- 1) Engage in critical consciousness and self-awareness;
- 2) Consider history and context when examining issues of oppression;
- 3) Change behaviors based on reflection and awareness;
- 4) Name and call attention to dominant group members’ investment in and benefit from systems of domination and divest from privilege;
- 5) Name and interrogate the role of power in individual interactions, policy development, and implementation of practice; and
- 6) Work in solidarity to address oppression.”²³⁸

Most of these principles can also be replicated in a restorative justice approach to sexual violence – engaging in self-awareness, changing behaviors due to this awareness, and working in solidarity with those who are oppressed by listening to and implementing their needs.

Linder notes the Centers for Disease Control (CDC) and its approach to preventing sexual violence. The CDC sees three levels of prevention: primary, secondary, and tertiary. Linder describes the primary level as focusing “on stopping perpetration or victimization before it happens,”²³⁹ the secondary level as “intervening immediately after violence has occurred to protect the victim,”²⁴⁰ and the tertiary level as “the long term, after the sexual violence has occurred– attempting to prevent further violence and harm

²³⁷ Chris Linder, *Sexual Violence on Campus: Power-Conscious Approaches to Awareness, Prevention, and Response* (Emerald Publishing, 2018).

²³⁸ Ibid.

²³⁹ Ibid.

²⁴⁰ Ibid.

to the community.”²⁴¹ As a secondary-level intervention, a TIX process attempts to address the harm immediately. But focusing on the primary and tertiary levels can help establish an environment of mutual care and end rape culture and sexual violence on college campuses.

IHEs should focus on the perpetrators or potential perpetrators when considering how to frame topics of sexual violence. Linder says that most school programs focused on men see them as potential “allies to address sexual violence, rather than as potential victims or as potential perpetrators.”²⁴² Linder claims that she wants to have programming to affirm that men are not only perpetrators but can also be victims. However, she follows up with a statement that “failing to directly engage perpetrators and potential perpetrators of sexual violence results in less-than-effective strategies for preventing sexual violence on college campuses.”²⁴³ Though it is important to teach men that they can be both victims and perpetrators, it is still essential to show that men can be allies in the fight against sexual violence.

According to Linder’s model, students of opposing identities could view men as the dominant force on college campuses that perpetrate rape culture. Without programming that changes the perspective of how men can intervene, it may be hard to appeal to the dominant group of college campuses that they must help prevent sexual violence. These programs still attempt to show the power that a perpetrator may have in hostile school environments while still encouraging intervention. Linder seemingly fails to consider that perpetrators could be anyone, though one could argue that most are men.

²⁴¹ Ibid.

²⁴² Ibid.

²⁴³ Ibid.

Suppose IHEs maintain this idea that men are the main perpetrators or would be potential perpetrators. IHEs would then ignore individuals with abusers that we would stereotypically not consider as a perpetrator. It is crucial to view sexual violence from the lens of all types of discrimination. But anyone can leverage their privilege over others to perpetuate violence. Yes, it is important to focus programming on those who historically have benefited the most from rape culture and have dominant identities on college campuses. But pushing a message that the campus must solely focus on this group of individuals as potential perpetrators could lead to other perpetrators not being considered a threat to school environments as they do not fit the mold of a power-dominant abuser.

Linder wants schools to focus not only on drugs, alcohol, and miscommunication being the reasons for sexual violence but also on that sexual violence perpetrates “dominance and control.”²⁴⁴ Schools must also move away from typical victims being “cisgender, heterosexual, nondisabled white women”²⁴⁵ as this could cause the erasure of others who could be potential victims.

Linder calls for an abolitionist approach to sexual violence on college campuses. Though this may not be applicable in the immediate sense, using tenets of her framework on power-conscious frameworks allows for programming to heed the underlying power structures that may make sexual violence rampant on college campuses. The frameworks guide the creation of programming to be conscious of the intersecting effects of discrimination. Without recognizing why sexual violence is on college campuses, prevention programming would fail to rectify the problems that perpetuate violence.

²⁴⁴ Ibid.

²⁴⁵ Ibid.

Prevention Programming and Healthy Relationships

In line with the CDC advocating for primary and tertiary intervention forms, one way that college campuses can address sexual violence is through prevention programming. Moira Carmody and Kerry Carrington further advocate the idea of power-conscious interventions by addressing the language used on college campuses and how it contributes to rape culture. They focus on “challenging those cultural norms that normalize intimate sexual violence as ‘natural’ or ‘exaggerated’ expression of innate male sexuality.”²⁴⁶ Carmody and Carrington argue that men must understand the “possibility of sexual intimacy without sexual assault.”²⁴⁷ Men must “reflect upon and unlearn the language and myths of rape culture – that women ask for it, that if she gets raped it’s her fault – it’s all her responsibility to say ‘no.’”²⁴⁸ College programming should include lessons on why it is essential to “reject the language that constructs women as orifices”²⁴⁹ and replace it with the language of respect. Such efforts could include workshops focused on teaching healthy dating habits or making consent a healthy part of sexual encounters.

Carmody and Carrington emphasize the importance of “developing ethical sexual practice... [in which] both women and men are required to re-evaluate their cultural expectations of each other in relation to intimate relations and to take explicit responsibility for their sexual desires and practices.”²⁵⁰ This emphasis on teaching healthy

²⁴⁶ Moira Carmody and Kerry Carrington, “Preventing Sexual Violence,” *The Australian and New Zealand Journal of Criminology* 33, no. 3 (December 2000): 341–61.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.*

²⁴⁹ *Ibid.*

²⁵⁰ *Ibid.*

sexual ethics on college campuses would help dismantle the rape culture that makes college campuses hostile.

Bystander Intervention

Schools should conduct bystander intervention training. Colleges believe one of the best ways to prevent sexual violence is by empowering the community to intervene in suspicious situations. Alison Cares and colleagues find that there can be changes in attitudes regarding sexual violence and the community's responsibility to intervene due to the training. However, certain factors, such as gender and the structure of the college campus, could affect outcomes.²⁵¹ Cares et al. provided bystander intervention training to first-year students at two different college campuses'. They focused on first-year students as "first year female students are at a particularly high risk for experiencing sexual assault and second, first-year students were targeted to capitalize on the start of the developmental transition to adulthood."²⁵² This vulnerable time in which first-year students can change their behavior norms would be the best time to instill bystander intervention training to adequately express the individual responsibility the students have with sexual violence.

The study found that the students had increased "bystander efficacy for 12 months...higher scores on contemplation and intent to help (suggesting progression to higher stages of readiness to help...)." ²⁵³ The researchers found that most of the changes

²⁵¹ Alison C. Cares et al., "Changing Attitudes About Being a Bystander to Violence: Translating an In-Person Sexual Violence Prevention Program to a New Campus," *Violence Against Women* 21, no. 2 (February 2015): 165–87, <https://doi.org/10.1177/1077801214564681>.

²⁵² Ibid.

²⁵³ Ibid.

would happen to students on campus 1 (a rural residential campus) of their study but not campus 2 (an urban commuter campus).

The urban commuter college was predominantly male, with a student body of “almost 60% male, with the first-year class being over 60% male.”²⁵⁴ Male students at this school commented that “this imbalanced ratio gave women power in dating and social relations, it also may create a campus social context that is heavily determined by male peer norms”²⁵⁵ and subsequently rape culture. The urban commuter highlights how, when a campus has a majority of individuals with a societally dominant identity, they can dictate cultural norms. For the bystander intervention to be more effective, it would take preventative programs, as described by Carmody and Carrington, to first address the presence of rape culture from a power-conscious lens before bystander intervention programs can affect men and rape culture.

Rory Newlands and William O’Donohue make four recommendations that could help with prevention programming: “prevention programs with men, risk-reduction programs with women, mixed-gender programs, and community-level programs (such as bystander-prevention/social-norms campaigns), with these approaches sometimes combined.”²⁵⁶ The authors argue that the “most effective and cost-efficient means of reducing rates of sexual violence”²⁵⁷ would be to focus on risk-reduction programming with women. They find that women are more motivated to changes to their behavior as

²⁵⁴ Ibid.

²⁵⁵ Ibid.

²⁵⁶ Rory Newlands and William O’Donohue, “A Critical Review of Sexual Violence Prevention on College Campuses,” *Acta Psychopathologica* 2, no. 2 (2016), <https://doi.org/10.4172/2469-6676.100040>.

²⁵⁷ Ibid.

they are more interested in avoiding sexual violence. Cares et al. also found that “women are socialized to think about the risk of sexual assault... they see sexual violence as a problem... and have already thought about what to do about it.”²⁵⁸

Newlands and O’Donohue say that the “preponderance of data supporting the efficacy of risk-reduction programs for women far outweighs any data about gains made by prevention programs for men.”²⁵⁹ Men do not have the same investment in avoiding sexual violence, so their efficacy rates and desire to change their behavior are much lower. Therefore, programming highlighting the dangers of alcohol consumption about sexual violence and introducing the need to teach self-defense seem to help with risk management.

This article explains that the data proves the efficacy of risk-reduction techniques toward women and potential victims as more effective than programming that targets men and potential perpetrators. But there is no further thought into why the former approach to prevention programming is detrimental compared with the latter. Linder explains in her book that college campuses must acknowledge “that sexual violence is about oppression and the interlocking systems of it, rather than about women’s bad decisions related to alcohol.”²⁶⁰ The focus should not be on the actions of the victim but rather on the dominant identity itself and how the privilege and power that comes with it lends itself to creating an environment of sexual violence. Individuals of the dominant identity do not enjoy call-outs or having to self-reflect on how they contribute to violence. The lack of call-outs is why there is less programming focusing on why being a

²⁵⁸ Alison C. Cares et al. 2015

²⁵⁹ Rory Newlands and William O’Donohue 2016

²⁶⁰ Chris Linder 2018

perpetrator is terrible and why there is more programming about avoiding being victimized. Carmody and Carrington call on prevention programming to focus on creating a campus with “a cultural intolerance for unethical sexual practices.”²⁶¹ Teaching potential victims to avoid drinking or going to certain places on college campuses shifts the responsibility of avoiding sexual violence onto the victim. It is the responsibility of potential perpetrators not to be violent.

Though Newlands and O’Donohue find that programming on risk reduction for women is cost-effective for colleges, suggesting it as the best solution would put a band-aid on the issue. Telling survivors to avoid becoming victims does not tackle the presence of rape culture.

Institutions must use power-conscious frameworks to create programming that addresses the root of issues. Why is there a presence of rape culture on college campuses? Who uses rape culture to help maintain the status quo, and who suffers from mistreatment? How does this harm the overall educational institution? Interrogating the uncomfortable truths that may arise from these questions would allow for IHEs to address these root issues. Programming that shifts focus to dismantle rape culture or addressing implicit biases in bystander intervention, or teaching healthy sexual ethics, could work towards creating a long-lasting campus culture that curbs sexual violence.

²⁶¹ Moira Carmody and Kerry Carrington 2000

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