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Conflicting Definitions of Sexual Assault and Consent: The Ramifications of Title IX Male Gender Discrimination Claims Against College Campuses

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consent as defined by the legislature and case law, compared to college and university policies.

This note will examine the history of Title IX and its influence on women and girls in academia for the past 40 years. It will look at the OCR's Dear Colleague Letter, implemented to address statistics on college sexual violence, and the major criticism surrounding the letter, including violations of the accused's due process rights. This note will also explore the current wave of litigation where accused students are seeking redress in federal District Courts against their schools for mishandling the sexual assault claims against them. Through these Title IX male gender discrimination cases, this note will also look at colleges' and universities' ability to conduct thorough investigations, as well as fair and orderly trials. What will be seen is that aggressive and unclear requirements have fostered a definitional problem, creating an inevitable conflict between educational institutions, the legislature, and the judiciary as to what sexual assault and consent means.

This definitional disconnect is meaningful because it leads to unreliable outcomes and has a disproportionate impact on minority men. The integrity of the college adjudication system is questioned when definitions of sexual assault are disregarded in order to assign blame. Victims and the accused cannot trust their respective school to investigate and adjudicate their claims properly. Cases involving heinous acts of sexual violence are being mishandled and victims are not receiving the redress they deserve. Conversely, finding an accused student responsible for sexual misconduct carries a seriousness within both a university judicial system and larger society. An accused student's good name, reputation, honor, integrity, and liberty are at stake.⁴ Additionally, this disconnect is significant, because patterns of campus sexual misconduct allegations have shown a disproportionate adverse impact on minority men. They reveal the need to ensure that Title IX enforcement initiatives do not perpetuate racial biases.

II. HISTORY OF TITLE IX

Title IX, a small, yet significant provision in federal law—only 37 words—has changed our education system in unimaginable ways. Signed

4. It is not the intention of this note to make light of sexual assault or violence against victims on college campuses. This note strongly supports protecting victims of sexual misconduct (and all victims of sexual violence), by providing an environment where students are safe from sexual harassment. Nonetheless, "unfair proceedings that lead to unreliable outcomes benefit no one. Both victims and the accused suffer when allegations of serious felonies are adjudicated in campus judiciaries that are underprepared and ill-equipped to handle such grave matters." See Samantha Harris, *Campus Judiciaries on Trial: An Update from the Courts*, 165 HERITAGE FOUNDATION: LEGAL MEMORANDUM (Oct. 6, 2015), <http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts>.

into law by President Richard M. Nixon on June 23, 1972,⁵ Title IX prohibits discrimination based on sex in public education programs and activities receiving federal financial assistance, including state and local educational agencies.⁶ School districts, postsecondary institutions, charter schools, for-profit schools, libraries, museums, and vocational rehabilitation agencies,⁷ all have a legal obligation to operate in a nondiscriminatory manner. There are several ways an educational agency can engage in discriminatory conduct in violation of Title IX, including sex-based harassment, discrimination based on pregnancy or parenting students, and failure to provide equal opportunity in athletics, recruitment, admissions, counseling, and financial aid.⁸

Title IX's impact on the U.S. education system is far and wide. Despite the absence of words "athletics" or "sports" in the statute, Title IX has provided tremendous sporting opportunities for women and girls at both the K-12 and the intercollegiate level.⁹ Since its inception, the number of girls playing varsity sports rose from one in twenty-seven girls to one in two and a half girls.¹⁰ There are now a total of 2.8 million girls playing high school sports.¹¹ At the collegiate level, the number of female athletes at NCAA schools increased from less than 30,000 to over 193,000.¹²

Title IX has also provided women and girls equal access to higher education, academia, and career paths not traditionally available to women.¹³ From 1972 to 1994, the percentage of law degrees earned by women rose dramatically from seven percent to forty-three percent.¹⁴ Medical degrees rose from nine percent to thirty-eight percent and dental degrees rose from one percent to thirty-eight percent.¹⁵ Under Title IX, gender stereotypes

5. Iram Valentin, *Title IX: A Brief History*, EQUITY RESOURCE CTR., (Aug. 1997), available at <http://files.eric.ed.gov/fulltext/ED414271.pdf>.

6. 20 U.S.C. § 1681.

7. OFFICE FOR CIVIL RIGHTS, TITLE IX & SEX DISCRIMINATION (last updated Apr. 2015), http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

8. *Id.*

9. Steve Wulf, *Title IX: 37 Words that Changed Everything*, ESPNW (April 29, 2012), <http://espn.go.com/espnw/title-ix/article/7722632/37-words-changed-everything>.

10. BRIDGING THE GENDER GAP: THE POSITIVE EFFECTS OF TITLE IX, ATHNET (last visited May 3, 2016), <http://www.athleticscholarships.net/title-ix-college-athletics-3.htm>.

11. *Id.*

12. Maya Dusenbery & Jaeah Lee, *Charts: The State of Women's Athletics, 40 Years After Title IX*, MOTHER JONES (June 22, 2012), <http://www.motherjones.com/politics/2012/06/charts-womens-athletics-title-nine-ncaa>. See also Erin Irick, *Student-Athlete Participation - 1981-82 — 2010-11 NCAA Sports Sponsorship and Participation Rates Report*, NCAA (Oct. 2011), <http://www.ncaapublications.com/productdownloads/PR2012.pdf>.

13. Emma Chadband, *Nine Ways Title IX Has Helped Girls and Women in Education*, NEATODAY (June 21, 2012), <http://neatoday.org/2012/06/21/nine-ways-title-ix-has-helped-girls-and-women-in-education-2/> (school administrators cannot legally dictate which students can take which classes based on gender).

14. TITLE IX: 25 YEARS OF PROGRESS, ARCHIVED INFORMATION (June 1997), <http://www2.ed.gov/pubs/TitleIX/part4.html>.

15. Chadband, *supra* note 13.

were challenged in the classrooms and in the learning materials students received.¹⁶ It was no longer legal to expel a pregnant student and schools were encouraged to create separate programs for student-parents, as long as enrollment is voluntary and the program is comparable to normal curriculum.¹⁷ Also, under Title IX, schools have a legal obligation to prevent and address any reported allegations of sexual harassment.¹⁸ Administrators are no longer able to dismiss claims of sexual harassment as trivial or simply as “boys being boys.”¹⁹

Despite the tremendous progress Title IX has made, women and girls still have not achieved full equality to their male counterparts. Women now make up more than half of all college undergraduates, but still do not receive an equal portion of athletic opportunities; schools spend proportionally less money on female sports.²⁰ In 1972, ninety percent of female teams were coached by women; however, today that number has dropped to about forty-three percent.²¹ Degrees in science, technology, engineering, and math (STEM) continue to be underrepresented by women,²² particularly engineering.²³

Additionally, the statistics on campus sexual violence, shows more prevention is needed. Eighty-four percent of female survivors report being sexually assaulted during their first four semesters on college campus and thirteen percent of women report being stalked during their time in college.²⁴ More than fifty percent of the victims say they do not report the event

16. Chadband, *supra* note 13 (“Textbooks showed girls as nurturing wives and mothers, while boys were shown as powerful and aggressive”).

17. *Id.*

18. *Id.*

19. *Id.*

20. Dusenbery, *supra* note 12 (“[I]n 2010, at NCAA Division I schools, women composed almost 53 percent of the aggregate student body but were under 46 percent of the schools’ student athletes. Women’s teams received just 41.4 percent of the money spent on head coach salaries, just 36.4 percent of the recruiting dollars, and just 39.6 percent of overall athletic expenses—a figure that’s remained virtually unchanged for several years.”). *See also* Nicole M. Bracken & Erin Irick, *NCAA Gender-Equity Report 2004-2010*, NCAA, (Jan. 2012), <http://www.ncaapublications.com/productdownloads/GEQS10.pdf>.

21. *Id.*

22. Britt Lewis, *A 37-Word Game Changer: Title IX Turns 40*, ASU NOW: ACCESS, EXCELLENCE, IMPACT (Nov. 5, 2012), <https://asunow.asu.edu/content/37-word-game-changer-title-ix-turns-40>.

23. David Beede et al., *Women in STEM: A Gender Gap to Innovation, Economic and Statistic Administration*, (August 2011), <http://www.esa.doc.gov/sites/default/files/womeninstemagaptoinnovation8311.pdf>. *See also* Lewis, *supra* note 22 (“The National Organization for Women reported in 2001 that just 17 percent of all doctoral degrees in engineering and 18 percent of all doctoral degrees in computer science were earned by women, whereas women earned 65 percent of all doctoral degrees in education”).

24. Alyssa Peterson & Ivy Yan, *STATISTICS ON GENDER-BASED VIOLENCE, KNOW YOUR IX: EMPOWERING STUDENTS TO STOP SEXUAL VIOLENCE*, (last visited Apr. 27, 2016), <http://knowyourix.org/statistics/>.

because they do not consider it “serious enough.”²⁵ While Title IX has significantly improved opportunities for women and girls in athletics and academics for over the past 40 years, these current statistics on campus sexual violence show more work is needed.

A. DEAR COLLEAGUE LETTER

The OCR took aggressive and controversial steps to help prevent high rates of sexual harassment in our education system. On April 4, 2011, Russlynn Ali²⁶ wrote a Dear Colleague Letter (“DCL”)²⁷ to all school districts, colleges, and universities receiving federal financial assistance.²⁸ The letter put forth recommendations to address sexual misconduct allegations of students by school employees, by other students, or by third parties.²⁹ It states sexual harassment and sexual violence of students, “interferes with students’ right to receive an education free from discrimination,” and schools are responsible for taking immediate and effective steps to end student-on-student sexual harassment and violence.³⁰

Building on the OCR’s earlier guidelines,³¹ primary, secondary, and postsecondary institutions must comply with three procedural requirements set out in the letter. They must distribute notice of nondiscrimination to students, employees, and other members of the campus community.³² They must designate a Title IX coordinator to oversee compliance and handle complaints, and they must adopt and publish Title IX grievance procedures that provide “prompt and equitable resolution of student and employee sex discrimination complaints.”³³ When colleges and universities conduct

25. Cantor, *supra* note 1 (noting that this statistic includes victims of the “most serious incidents” (e.g., forced penetration)).

26. Russlynn Ali is the former DOE’s Assistant Secretary for Civil Rights. She was the head of the OCR and the primary civil rights adviser to the Secretary of Education. See U.S. DEP’T OF EDUC. PRINCIPAL OFFICE FUNCTIONAL STATEMENTS: OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., (last visited Apr. 27, 2016), http://www2.ed.gov/about/offices/list/om/fs_po/ocr/intro.html.

27. In general, “Dear Colleague” letters refer to official correspondence distributed in bulk to committee members, officers, congressional staff organizations. R. Eric Petersen, “Dear Colleague” Letters: A Brief Overview, RS21667 CRS Report for Congress, Jan. 4, 2005, <http://faculty.washington.edu/jwilker/353/353Assignments/dearcolleague.pdf>. However, in this context “Dear Colleague” letters refer to documents written to educational administrators that explain the OCR’s legal positions and enforcement priorities.

28. Russlynn Ali, *Dear Colleague Letter on Title IX Coordinators*, (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

29. *Id.* at 1.

30. *Id.*

31. *Id.* at 2 (“This letter supplements the 2001 Guidance by providing additional guidance and practical examples regarding the Title IX requirements as they relate to sexual violence”).

32. *Id.* at 5.

33. *Id.*

investigations of a sexual assault, they must use a preponderance of the evidence standard.³⁴

B. CRITICISM OF THE DEAR COLLEAGUE LETTER & TITLE IX ENFORCEMENT

Since its implementation, critics have condemned both the DCL and the OCR's enforcement of the letter for numerous reasons. First, the DCL placed immense pressure on schools to comply despite the OCR's suggestion that the letter is a guide. Second, the DCL requires schools to investigate allegations of sexual misconduct, which raise issues with school administrator's ability to investigate and adjudicate these cases. Lastly, the DCL failed to address how Title IX would interact with constitutional due process rights for the accused.

1. Mandate or Recommendation?

Many critics of the DCL challenge whether the letter is a mandate or recommendation. As a guidance document, the DCL effectively conveys the OCR's expectations. The DOE maintains that the letter is a guide.³⁵ Ali has explained the letter is not brand new regulation, but provides clarity on "a few of the more vexing requirements that have long confounded colleges."³⁶ The letter lacks the force of congressionally made law,³⁷ however, colleges and universities who have not followed the letter, are found to be in violation of Title IX, threatened with loss of federal funding, and required to change their policies to better reflect the recommendations outlined in the letter.³⁸

The DOE investigated Princeton University for failing to apply the preponderance of the evidence standard—which requires a more than fifty percent chance the accused committed the act charged—in adjudicating sexual assault cases.³⁹ The investigation was prompted by three

34. Ali, *supra* note 28, at 10–11.

35. *Id.* at 1.

36. Allie Grasgreen, *Call to Action on Sexual Harassment*, INSIDE HIGHER ED, (Apr. 4, 2011), https://www.insidehighered.com/news/2011/04/04/education_department_civil_rights_office_clarifies_colleges_sexual_harassment_obligations_title_ix.

37. The Dear Colleague letter does not hold any legal authority, but courts pay great attention to these types of letters because of deference. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *See, e.g., Mansourian v. Regents of the Univ. of Cal.*, 602 F.3d 957, 965 (9th Cir. 2010) (noting that the Ninth Circuit and other circuits "have held that both the [1979] Policy Interpretation and [the OCR letter] are entitled to deference").

38. Jake New, *Colleges Frustrated by Lack of Clarification on Title IX Guidance*, INSIDE HIGHER ED, (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>.

39. Jake New, *The Wrong Standard*, INSIDE HIGHER ED (Nov. 6, 2014), <https://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard-proof-sexual-assault-cases-last-legs>. (noting institutions have been slow to adopt the OCR's recommendation to apply the preponderance of the evidence standard to campus sexual misconduct investigations). *See* Samuel R. Bagenstos, *What Went Wrong With Title IX?*, WASH. MONTHLY (Sept. 2015), http://www.washingtonmonthly.com/magazine/september/october_2015/features/what_went_wrong_with_title_ix057187.php?page=all (criticizing the

complaints.⁴⁰ In two complaints, the accused students were not found responsible for sexual assault and the accusers were not permitted to appeal the decision.⁴¹ Had the accused been found responsible, Princeton's policies would have allowed the accused to appeal.⁴² In the third complaint, the accused was allowed to stay on campus during a lengthy appeals process (totaling nine months) after he was suspended for sexually assaulting another student.⁴³ In all three cases, the clear and convincing standard of proof—which requires a roughly seventy-five percent chance that the accused is responsible—was used to determine if a student had committed sexual assault.⁴⁴ Princeton was the last Ivy League institution to use the clear and convincing standard.⁴⁵ Although the preponderance of evidence standard has not been codified by Congress,⁴⁶ the DOE determined Princeton violated Title IX and threatened to pull federal funding if they did not comply with this standard and the other standards outlined in the DCL.

There are several unintended consequences of requiring institutions to comply with the DCL. The letter put pressure on colleges and universities to assign blame to accused students of sexual misconduct despite a lack of evidence. An example of this comes from a case at Hobart and William Smith University. Anna, a freshman at the university, reported being raped at two different settings on campus in the same night: first at a fraternity house party and then later at the “Barn,” a school facility hosting a campus-wide party.⁴⁷ There were no questions as to whether Anna was raped, however, the Board, applying the preponderance of the evidence standard, could not hold the accused or the fraternity responsible for wrongdoing because there was not enough evidence.⁴⁸ Anna could not establish the

preponderance of the evidence standard as inconsistent with the beyond a reasonable doubt standard of proof required in criminal prosecutions. The application of the preponderance standard makes “[m]istaken findings of guilt . . . a real possibility because the federal government is forcing schools to use a lowered evidentiary standard”).

40. *Id.*

41. New, *supra* note 38.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014), <http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html>.

48. Janet Halley, *Comment, Trading the Megaphone for the Gavel in Title IX Enforcement: Backing off the Hype in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 104 (2015) (noting Anna's injuries reported by emergency room personnel showed she was raped, almost certainly by more than one man. The issue was figuring out how many people were involved, whether the encounters were consensual, and, if one or more sexual assaults occurred, who was responsible for them. Three students were suspected and questioned by the Board, but with no direct evidence identifying them and with Anna unable to remember even being at the Barn, the university could not hold any particular student responsible).

identity of her rapist.⁴⁹ It was reasonable for the university to not hold students responsible for expellable offenses based on a guess.⁵⁰ However, Hobart and William Smith came under investigation by the DOE for possible violations of Title IX.⁵¹ This, and the overwhelmingly amount of backlash the university received,⁵² sent an alarming message to colleges and universities: not only must they comply with the standards put forth in the DCL, but they have to assign blame to one or more students despite their lack of direct evidence.⁵³

Additionally, requiring all institutions to comply with the DCL places a heavy burden on some institutions, compared to others. While large private universities have been the most vocal about their criticism of the DCL and Title IX enforcement,⁵⁴ public and private small regional schools may bear the brunt of Title IX enforcement. Large private universities have hefty endowments and other resources necessary to hire consultants, administrators, outside investigators, and policy makers to meet the OCR's demands. Smaller state schools or private regional schools rely on government funding or student tuition fees to operate. They may not have the budget to carry out investigations and adjudications to the level required by the OCR and as a result, student tuition fees may increase, in order to meet the demand. The DCL laid out mandatory compliance standards, but did not provided clarity on how schools should comply with these standards.

2. Administrators as Investigators and Adjudicators of Sexual Assault Claims

The DCL mandates that any school employee, designated to serve as Title IX coordinators, have adequate training on what constitutes sexual violence and harassment.⁵⁵ However, the letter does not provide an explanation of what "adequate training" means. It raises questions as to who provides these sexual assault trainings? Are these trainings sufficient? Are they costly? Are they focused on addressing sexual assault or Title IX compliance? It calls into question if these colleges and universities are competent to handle sexual assault investigation matters.

Yale Law School Professor Jed Rubenfeld does not believe colleges and universities are competent to investigate and adjudicate allegations of sexual misconduct.⁵⁶ Allowing professors and administrators to create campus

49. Halley, *supra* note 48, at 104.

50. *Id.*

51. *Id.*

52. Bogdanich, *supra* note 47. See, e.g., *Rape on Campus: Anna's Trauma*, N.Y. TIMES (July 15, 2014), <http://www.nytimes.com/2014/07/16/opinion/the-rape-case-hobart-and-william-smith-and-readers-respond.html> (discussing readers' responses to Anna's story).

53. Halley, *supra* note 48, at 104.

54. New, *supra* note 38.

55. Ali, *supra* note 28, at 7.

56. Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html>.

sexual assault and harassment policies (heavily influenced by DCL recommendations) and preside over campus trials, is inherently unreliable and error-prone.⁵⁷ Rubinfeld states, “professors and administrators . . . know little about law or criminal investigations. At one college, the director of a campus bookstore served as a panelist.”⁵⁸

The policies authored by professors and administrators are riddled with extreme and confusing definitions of sexual assault and consent that inherently disadvantage the accused. For example, Hampshire, Mount Holyoke, and Smith University have the following policy regarding consent while under the influence: “[an] agreement given while under the influence of alcohol or other drugs is not considered consent”; “if you have not consented to sexual intercourse, it is rape.”⁵⁹ Under this policy, if both students are under the influence of drugs and alcohol and engage in consensual sex with each other, have they both raped each other? Rubinfeld asked a similar question to a Dean at Duke University, who responded, “[a]ssuming it is a male and female, it is the responsibility in the case of the male to gain consent.”⁶⁰ Rubinfeld points out the difference:

In fact, sex with someone under the influence is not automatically rape. That misleading statement misrepresents both the law and universities’ official policies. The general rule is that sex with someone incapacitated by alcohol or other drugs is rape. There is—or at least used to be—a big difference. Incapacitation typically means you no longer know what’s happening around you or can’t manage basic physical activity like walking or standing.⁶¹

How do misleading statements, such as the ones regarding consent at Hampshire, Mount Holyoke, and Smith University, increasingly find their way into university policies? The answer is a complex one. However, it is worth looking at the substance of the trainings professors and administrators receive that may influence their thoughts about sexual assault. Harvard Law School Professor Janet Halley, critiques a copy of Harvard PowerPoint slides shown to colleagues at a required sexual harassment training.⁶² A third of the PowerPoint slides advanced a theory of “tonic immobility.” A victim of sexual assault may experience trauma, which in turn causes neurological changes, and can result in tonic immobility.⁶³ Tonic immobility can cause the victim to appear incoherent, to have a severe reduction in emotional expressiveness (“flat affect”), and to have emotional swings and memory

57. Rubinfeld, *supra* note 56.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. Halley, *supra* note 48, at 108.

63. *Id.*

fragmentation.⁶⁴ In Halley's opinion, the documents were aimed to convince Harvard personnel to believe complainants, regardless of if they seemed unreliable and incoherent.⁶⁵

Halley warns of the dangers of schools employing "advocacy-based definition[s] of sexual harassment" in university policies. An employee at Harvard brought repeated complaints to Harvard's Title IX office of sexual harassment against male faculty.⁶⁶ She accused one male faculty member of sexual assault after he physically bumped into her in the tight quarters of a copy room.⁶⁷ She also claimed unwanted sexual conduct by another male faculty member for hallway eye contact that lasted too long.⁶⁸ Eventually, the employee disclosed she had been the victim of sexual abuse as a child and was cautious about her personal security.⁶⁹ Although her experiences of sexual harassment were severe and persistent to her, they failed to meet the reasonableness standard.⁷⁰ They highlight issues that arise with advocacy-based definitions that do not meet the OCR's or the legal standard of proof.

C. LACK OF DUE PROCESS FOR THE ACCUSED

Lastly, the DCL failed to address how Title IX should interact with applicable due process requirements for the accused.⁷¹ Many colleges and universities have adjudicated allegations of sexual assault among their students based on DCL standards.⁷² However, the manner in which colleges and universities handle these trials is the subject of increasing attention and controversy.⁷³ Institutions are failing to provide accused students adequate opportunity to discover the facts charged, to confront witnesses, to present a defense at an adversary hearing, and to ensure adequate representation for the accused.⁷⁴ As a result, some male accused students have successfully sued their respective schools for depriving them of due process under the Fifth and Fourteenth Amendments. Although state governmental entities are

64. Halley, *supra* note 48, at 108.

65. *Id.* at 109.

66. *Id.* at 114.

67. *Id.*

68. *Id.*

69. Halley, *supra* note 48, at 114.

70. *Id.* at 114–15.

71. Matthew R. Triplett, *Note, and Sexual Assault of College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 507 (2012).

72. Harris, *supra* note 4.

73. *Doe v. Brown Univ.*, No. 15-144 S, 2016 U.S. Dist. LEXIS 21403 (D.R.I. Feb. 22, 2016).

74. *See Rethink Harvard*, *supra* note 3 (criticizing new procedures at Harvard for handling complaints of sexual misconduct, based on the DOE's recommendations. Twenty-eight professors at Harvard Law School alleged the new procedures, "lack the most basic elements of fairness and due process" and "are overwhelmingly stacked against the accused"). *See also* Harvard University Sexual and Gender-Based Harassment Policy (July 1, 2014), http://hls.harvard.edu/content/uploads/2014/09/harvard_sexual_harassment_policy_1.pdf.

generally immune from federal lawsuits (with some notable exceptions, including Title IX claims),⁷⁵ federal law allows public university students to sue individual people—such as university administrators—for depriving them of their constitutional rights while acting pursuant to their official duties.⁷⁶

Luke,⁷⁷ a student at Colgate University, is an example of an accused student whose due process rights were violated. In October 2014, three female students accused Luke of sexual misconduct.⁷⁸ One student accused him of “digitally penetrating” her without her consent.⁷⁹ Another student claimed he touched her buttocks and breasts without her consent and exposed his penis and forced her to touch it.⁸⁰ The third student claimed Luke “digitally penetrated” her, touched her breast, exposed his penis, forced her touch it, and rubbed his penis against her thigh.⁸¹ All of these incidents allegedly occurred two and half to three years prior.⁸² All three complaints were filed following a campus rally on sexual assault, organized by one of the accusers.⁸³

Five months passed before the school contacted Luke again about the sexual assault allegations.⁸⁴ He was then given one week to review an 85-page investigation file and to prepare his defense.⁸⁵ He was only allowed to view the file while in the Associate Dean’s office.⁸⁶ A hearing panel—which included an administrator who spoke at the sexual assault rally—reviewed

75. The Eleventh Amendment to the U.S. Constitution, states “the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.” U.S. CONST. amend. XI. Essentially, states are immune from suits for money damages and equitable relief, however, the Supreme Court ruled that federal courts may enjoin state officials from violating federal law.

76. 42 U.S.C. § 1983 (1996) provides, in relevant part: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....” Claims brought under this statute are commonly referred to as “section 1983 claims.”

77. Luke is not his real name. He asked *Newsweek* not to use his real name because he feared the allegations would destroy his reputation.

78. Max Kutner, *The Other Side of College Sexual Assault Crisis*, NEWSWEEK (Dec. 10, 2015), <http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html>.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

all three accusations at once and found Luke responsible for all.⁸⁷ Luke was expelled 39 days before he was set to graduate.⁸⁸

Luke filed a lawsuit against Colgate University and the Board of Trustees in August 2015.⁸⁹ Luke shared that he originally had complete faith the school would conduct a fair and proper investigation, but realized administrators did not have the capacity to provide fair process.⁹⁰ He also shared his overwhelming frustration with the limited time frame he was given to prepare his defense: “[W]hile the three complainants had three years to come up with their case and the investigator had five and a half months to come up with her case . . . I was given less than a week to read through an 85-page file and come up with a defense.”⁹¹

Generally speaking, students in public university disciplinary proceedings are constitutionally entitled, at a minimum, to notice and an opportunity to be heard.⁹² It is apparent through the mishandling of Luke’s case that institutions are abandoning these principles in order to abide by confusing and ever-changing obligations under Title IX. Ending or hobbling someone’s access to education through suspension and expulsion infringes on their liberty. Standards of Due Process and liberty are a developing area in Title IX. However, in all other areas of society where one’s liberty may be at stake, a higher legal standard is required.

III. DEFINING SEXUAL ASSAULT AND CONSENT IN LIGHT OF GROWING TITLE IX MALE GENDER DISCRIMINATION CLAIMS

Traditionally, courts have granted significant deference to colleges and universities in disciplinary decision-making and have been reluctant to interfere with university adjudication systems.⁹³ However, “recent decisions suggest that this may be starting to shift and that courts, particularly state courts, may be increasingly willing to step in when unjust university proceedings threaten a student’s educational and career prospects.”⁹⁴ These

87. Kutner, *supra* note 78.

88. *Id.*

89. *Id.* See *Doe v. Colgate Univ.*, No. 5:15-CV-1069 (LEK/DEP), 2016 U.S. Dist. LEXIS 48787, at *1 (N.D.N.Y. Apr. 12, 2016) (granting “Luke’s” motion to proceed under the pseudonym “John Doe.” He argued that he should be permitted to proceed under a pseudonym, “given the highly sensitive and personal nature of the litigation and the fact that revealing his identity makes him vulnerable to retaliation.”).

90. *Id.*

91. *Id.*

92. Samantha Harris, *Due Process Legal Update: Students’ Title IX and Due Process Claims Move Forward, But Challenges Remain*, FIRE (Nov. 5, 2012), <https://www.thefire.org/due-process-legal-update-students-title-ix-and-due-process-claims-move-forward-but-challenges-remain/>.

93. Harris, *supra* note 4.

94. *Id.* See also *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979) (holding Title IX is enforceable through an implied private right of action); *Franklin v. Gwinnett County*

lawsuits, however, remain an uphill battle, and often do not survive a university's motion to dismiss.⁹⁵ The cases that do survive, serve as examples of colleges and universities who apply a different standard of sexual assault and consent as compared to the legislature and the DOE.

To survive a motion to dismiss the accused student must state a claim upon which relief can be granted.⁹⁶ There are two categories of gender bias claims courts recognize. The accused must claim either an erroneous outcome resulted from a flawed proceeding or selective enforcement.⁹⁷ The first category is a claim that the plaintiff was innocent and wrongly found to have committed an offense.⁹⁸ Plaintiffs claiming an erroneous outcome was reached must allege "particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding. If no such doubt exists based on the record before the disciplinary tribunal, the claim must fail."⁹⁹ The complaint may allege evidentiary weaknesses behind the finding, for example, a motive to lie on the part of a complainant or witnesses or other reasons to doubt the veracity of the charge.¹⁰⁰ A complaint may also allege particular procedural flaws affecting the proof.¹⁰¹

The second category of claims is selective enforcement claims. Here, the plaintiff alleges, regardless of the student's guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student's gender.¹⁰² Proving that a school not only discriminated against a male student, but also did so because the student is male, is difficult. It must be shown, that a woman accused in a similar situation, would have gotten more favorable treatment. It is almost an impossible standard, because it is rare that a woman is accused of sexual assault.¹⁰³ It is clear plaintiffs alleging Title IX violations must be able to show facts such as "statements touching upon gender made by members of the disciplinary panel or the university at large, or perhaps cite patterns—not

Pub. Sch., 503 U.S. 60 (1992) (holding monetary damages and injunctive relief are available for an action brought to enforce Title IX).

95. *Id. See, e.g., Doe v. Salisbury Univ.*, CIVIL NO. JKB-15-517, 2015 U.S. Dist. LEXIS 110772, at *41-*42 (D. Md. Aug. 21, 2015) (denying motion to dismiss); *Doe v. Washington and Lee Univ.*, No. 6:14-CV-00052, 2015 WL 4647996, at *10 (W.D. Va. Aug. 5, 2015) (denying motion to dismiss); *Doe v. Univ. of Massachusetts-Amherst*, Civil Action No. 14-30143-MGM, 2015 WL 4306521, at *7 (D. Mass. July 14, 2015) (granting motion to dismiss); *Sahm v. Miami Univ.*, Case No. 1:14-cv-698, 2015 U.S. Dist. LEXIS 65864, at *12 (S.D. Ohio May 20, 2015) (granting motion to dismiss); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 374-76 (S.D.N.Y. 2015) (granting motion to dismiss); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 751 (S.D. Ohio 2014) (denying motion to dismiss).

96. FED. R. CIV. P. 12(b)(6).

97. *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2nd Cir. 1994).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* at 715.

103. *Id.*

a single instance—of decision-making that would also demonstrate the influence of entrenched gender discrimination.”¹⁰⁴

A. DEFINITIONS OVERWHELMINGLY STACKED AGAINST THE ACCUSED

Syed Yusuf, a student at Vassar College, sued his school claiming an erroneous outcome from a discriminatory school disciplinary hearing. Yusuf alleged that his roommate, James Weisman, brutally attacked him.¹⁰⁵ When Yusuf pursued criminal prosecution against Weisman,¹⁰⁶ Yusuf claimed Weisman's girlfriend, Tina Kapur, retaliated against him by bringing false sexual harassment charges.¹⁰⁷ Kapur accused Yusuf of trying to pull a towel off her.¹⁰⁸

Yusuf maintained his innocence and claimed he had records proving he was elsewhere at the time of the incident.¹⁰⁹ At the disciplinary hearing, the panel did not allow the introduction of these records.¹¹⁰ Kapur could not identify the dates the alleged incidents took place and when asked by Yusuf to be more specific, the Chair of the College Regulations Panel, Faith Nichols, admonished, “[w]e are not concerned with when the event occurred, only whether it could have occurred.”¹¹¹ Following the hearing, Nichols told Yusuf: “The panel did not believe you. You see, at the first trial [of Weisman], we heard [Kapur] say that you harassed her, and that charges. . . would be forthcoming. Thus, it was easy for us to believe her [at the second trial].”¹¹² The panel suspended Yusuf for a semester.¹¹³ He appealed to the

104. *Blank v. Knox Coll.*, 2015 U.S. Dist. LEXIS 8205, *11 (C.D. Ill. Jan. 26, 2015) (granting college's motion to dismiss plaintiff's Title IX claim).

105. Yusuf, 35 F.3d at 715.

106. In addition to a criminal prosecution, the university conducted a disciplinary hearing for Weisman, referred to in the opinion as the “first trial.” Yusuf testified against Weisman at the hearing. He was not questioned about the alleged assault and battery, but instead about his relationship with Kapur. They asked if Yusuf's relationship with Kapur was abusive and if they were ever sexually involved.

107. *Id.*

108. Kutner, *supra* note 78 (explaining that neither the Yusuf opinion or complaint elaborate on the nature of the sexual assault charges against Yusuf. However, in an interview with *Newsweek*, Yusuf told reporters that his accuser claimed he had tried to pull the towel off her as she came out of the shower).

109. Yusuf, 35 F.3d at 712.

110. *Id.* Yusuf submitted to Nichols a list of twelve witnesses he wished to call at the hearing. Yusuf was not permitted to call all twelve witnesses because there were “too many.” The list was reduced to seven, deleting several key witnesses in the process. Additionally, Yusuf's “most crucial” witness, Omar Salaam, was away from campus and could not be present for the hearing. Yusuf offered a statement from Salaam discrediting the accuser's testimony. The Chair advised Yusuf that the statement would not be permitted because it could not be subjected to cross-examination.

111. *Id.* at 713.

112. *Id.* The “second trial” here, refers to Yusuf's disciplinary hearing.

113. *Id.*

Dean of Student Life, but lost.¹¹⁴ Yusuf then sued Vassar for gender discrimination.¹¹⁵

As part of Yusuf's claim, he alleged that Vassar has "historically and systematically rendered verdicts against males in sex harassment cases, solely on the basis of sex" and male respondents are "discriminated against solely on the basis of sex."¹¹⁶ They are invariably found guilty, regardless of the evidence, or lack thereof.¹¹⁷ Yusuf's complaint further alleged that various actions by Nichols prevented him from fully defending himself.¹¹⁸

Initially, Yusuf's case was dismissed.¹¹⁹ Yusuf appealed and the U.S. Court of Appeals reinstated his gender claim.¹²⁰ As the court stated in its opinion, "[t]he allegations concerning the circumstances surrounding the charge against Yusuf and the conduct of the disciplinary proceeding sufficiently put into question the correctness of the outcome of that proceeding. The allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection . . ."¹²¹ Although Yusuf and Vassar eventually settled the larger gender discrimination claim before trial,¹²² this case set precedent. It was the first time a court supported a claim of erroneous outcome from a discriminatory school disciplinary hearing.¹²³

Wells, a former student-athlete at Xavier University, also successfully overcame a motion to dismiss on an erroneous outcome claim.¹²⁴ In July 2012, Wells and other students played a game of truth or dare, where Wells claimed a female upperclassman exposed her breast, removed her pants, and gave him a lap dance.¹²⁵ He also alleged that she invited him to her room and asked him for a condom.¹²⁶ Wells maintains that they both engaged in a consensual sexual encounter.¹²⁷ However, later that day, the female upperclassman reported to campus police that Wells raped her.¹²⁸ Multiple witnesses who saw her shortly thereafter indicated her demeanor was completely normal.¹²⁹ An examination at the university's hospital showed no trauma as a result of the sexual encounter.¹³⁰ In a later criminal

114. Yusuf, 35 F.3d at 713.

115. *Id.*

116. *Id.*

117. *Id.*

118. Yusuf, 35 F.3d at 716.

119. *Id.* at 711.

120. *Id.* at 715.

121. *Id.* at 716.

122. Kutner, *supra* note 78.

123. *Id.*

124. Wells, 7 F. Supp. 3d at 752.

125. *Id.* at 747.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

investigation, the prosecuting attorney allegedly doubted the rape accusations against Wells, and attempted to communicate his doubts to the university's president, who did not answer the prosecutor's messages.¹³¹ A hearing was held on August 2, 2012, and the board found Wells responsible for a "serious violation of the Code of Student Conduct."¹³² Wells was expelled.¹³³

Wells brought a Title IX discrimination claim in federal district court against Xavier and the university's President, for making him the "scapegoat to demonstrate a better response to sexual assault on campus."¹³⁴ In early 2012, the OCR investigated Xavier University for allowing a male student, accused of sexual assault against two women, to remain on campus.¹³⁵ A month later, the OCR opened another investigation with regard to a third alleged sexual assault case.¹³⁶ Ultimately Xavier and the OCR entered into an agreement to establish training and reporting programs to address sexual assault and harassment on campus.¹³⁷ As a result, Wells alleged the university was reacting against him, as a male, to demonstrate to the OCR that they would take action, since they had failed to do so in the past.¹³⁸ The court denied the university's motion to dismiss, holding that Wells had sufficiently alleged "a pattern of decision making"—based on his gender—"that has ultimately resulted in an alleged false outcome that he was guilty of rape."¹³⁹ The complaint sufficiently alleged the university rushed to judgment, failed to train UCB members, ignored the Prosecutor's recommendations, and denied Wells counsel and witnesses.¹⁴⁰

In another case, Brian Harris survived a motion to dismiss in an amended complaint against St. Joseph's University ("SJU").¹⁴¹ In his complaint, Harris alleged "the head of SJU's ethics department and a member of the Community Standards Title IX Board stated to [Harris'] father that SJU had 'adopted a policy favoring female accusers as SJU was concerned about Title

131. Wells, 7 F. Supp. 3d at 748.

132. *Id.*

133. *Id.*

134. *Id.* at 747.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 751.

139. *Id.*

140. *Id.* See Amanda Lee Meyers, *Dez Wells, Xavier Settle Lawsuit*, CINCINNATI INQUIRER (Apr. 24, 2014), <http://www.cincinnati.com/story/sports/college/xavier/2014/04/24/dez-wells-xavier-settle-lawsuit/8111709/> (noting that Wells and Xavier University eventually settled. University spokesperson, Kelly Leon, said in March 2014 "the university would be vindicated once all the facts became known. By settling the lawsuit, the university avoids a public trial").

141. Susan Kruth, *Saint Joseph's Settles Title IX Lawsuit Brought by Expelled Student*, THE TORCH (Jan. 8, 2015), <https://www.thefire.org/saint-josephs-settles-title-ix-lawsuit-brought-expelled-student>. See *Harris v. St. Joseph's Univ.*, No. 13-3937 (E.D. Pa. May 12, 2014).

IX charges by female students.”¹⁴² Harris eventually settled with the university.¹⁴³

An accused student at Washington and Lee University showed evidence that the university’s Title IX officer spoke favorably about an article that argues sexual assault “occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations that she did not outwardly express.”¹⁴⁴ The court stated a reasonable fact finder could plausibly determine that the accused student was wrongly found responsible for sexual misconduct motivated by gender bias.

The above cases exemplify a large source of contention between what the legislature and case law define as sexual violence, compared to the definitions and policies put in place on individual college and university campuses. The DOE defines sexual violence as:

[P]hysical 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.¹⁴⁵

Schools are disregarding the definitions and legal standards in place by denying accused males key opportunities to present a defense. Accused males must have the opportunity to present a defense to prove the allegations against them did not occur or occurred consensually. By denying accused males their right to present a defense, educational institutions are in fact denying these males the opportunity to show their conduct did not rise to the standard set in place by the DOE and the legislature.

The above cases did not apply the standards offered by the DOE to their respective disciplinary proceeding. Administrators have shown a complete disregard for the evidentiary standards in place to protect both parties: students accused of sexual assault and student victims of sexual assault. The few evidentiary standards that do appear in these cases, are applied inconsistently, for example, allowing, “out of court statements” for female victims, but not accused males, under the pretext that these statements have not been subjected to cross-examination.¹⁴⁶ Administrators have ignored law enforcement recommendations that advise dismissal of claims against accused males. Administrators are not properly trained on investigating and

142. Samantha Harris, *Judge Dismisses Student’s Title IX Claim Against Case Western Reserve University*, FIRE (Sept. 16, 2015), <https://www.thefire.org/breaking-news-judge-dismisses-students-title-ix-claim-against-case-western-reserve-university/>.

143. Kruth, *supra* note 141.

144. Washington and Lee, No. 6:14-CV-00052 at *28–*29.

145. Ali, *supra* note 28, at 1–2.

146. *See* Yusuf, 35 F.3d at 712.

adjudicating sexual assault cases and they receive biased training in favor of female victims. It is ironic that in an effort to prove to the OCR that universities are being more proactive in responding to female sexual assault claims, they have essentially abandoned the rights of accused males and now find themselves liable for the very thing they were trying to avoid.

B. DEFINITIONS PERSUADED BY PUBLIC OUTCRY

The public heavily influences definitions of sexual assault and consent. It is not a rare occurrence that institutions, relying on state funding and private endowments, will be swayed by public opinion as it makes controversial decisions. Some Title IX male gender discrimination cases argue that their respective university allowed public opinion to sway the outcome of their proceeding. What is absurd is when an accused male student is found not guilty of any sexual misconduct, but because of media attention, is still held responsible.

Appalachian State University football player, Lanston Tanyi's, argued public outcry in his case against Appalachian for violations of his due process rights and Title IX gender discrimination.¹⁴⁷ In September 2011, Tanyi and his roommate were involved in a sexual encounter with a female student, identified as "Student A."¹⁴⁸ Five days later, Tanyi and his roommate received letters from the Dean of Students, ordering them to have no contact with another female student ("Student B").¹⁴⁹ Student B claimed Tanyi, his roommate, and three other "big and black" athletes raped her five months prior.¹⁵⁰ Tanyi claimed he had no idea who Student B was.¹⁵¹ The school charged Tanyi with various violations of the student code, including sexual misconduct, harassment, and hostile communications.¹⁵²

At the disciplinary hearing on Student A's allegations, Tanyi and his roommate were tried together.¹⁵³ The university assigned them a philosophy graduate student as their adviser, while Student A was assigned a licensed attorney.¹⁵⁴ Tanyi and his roommate were found responsible, and Tanyi was suspended.¹⁵⁵ Tanyi appealed, arguing that he was entitled to a hearing separate from his roommate, who Tanyi found out during Student A's hearing had a disciplinary record at the university.¹⁵⁶ At first his appeal was denied, but after speaking with the Chancellor of the university, Tanyi was

147. Tanyi v. Appalachian State Univ., No. 5:14-CV-170RLV, 2015 U.S. Dist. LEXIS 95577, at *1 (W.D.N.C. July 22, 2015).

148. *Id.*

149. *Id.*

150. *Id.* at *2.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at *3.

156. *Id.*

granted a hearing.¹⁵⁷ He was found not responsible and allowed to return to campus.¹⁵⁸

The university also held a hearing on Student B's allegations and Tanyi was also exonerated.¹⁵⁹ However, after a Facebook post by Student A alleging that the university was attempting to protect its football players from rape allegations gained significant media attention, Student B appealed the university's ruling, and the university granted her a new hearing.¹⁶⁰ The night before the second hearing, Tanyi learned that Student B was adding an allegation that he had harassed her in the weeks leading up to her appeal.¹⁶¹ At the second hearing, Tanyi was again exonerated of the sexual assault charges, but he was found responsible on the new harassment charge.¹⁶² On the basis of that finding, he was banned from playing football.¹⁶³ However, the District Court found no articulate or legitimate reasons for Appalachian to re-hear Student B's rape allegations.¹⁶⁴ The court found this to be "fundamentally unfair to Tanyi."¹⁶⁵

Public outcry from a Facebook post heavily influenced the university's decision to re-hear Student B's case. From a legal standpoint, it is improper to allow the media and public opinion to dictate bringing additional charges to the accused. The decision to bring new harassment charges must be supported by evidence, otherwise it leads to unreliable outcomes. It calls into question the validity of the new harassment charge because it is not clear if this charge stems from a legitimate incident of harassment, or out of retaliation to the accused male student. It can also set a negative precedent to claimants that regardless of a sound investigation, if the claimant does not like the outcome, he or she can gain an appeal or seek justice through public shaming the accused.

In another case that garnered widespread media attention, an accused male was found not responsible for any sexual misconduct, but was made the "poster boy" for alleged campus rapists. In *Nungesser v. Columbia University*, accused student, Paul Nungesser, alleged his school violated Title IX by allowing his accuser to publicly shame him.¹⁶⁶ In April 2013, fellow student Emma Sulkowicz accused Nungesser, a sophomore at the

157. Tanyi, No. 5:14-CV-170RLV at *3.

158. *Id.* at *4.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* at *5.

164. *Id.* at *16-17.

165. *Id.* (ruling in favor Tanyi's due process allegation, but dismissed his Title IX claim for failing to offer more than his "subjective belief" that the university's actions against him were due to his gender).

166. *Nungesser v. Columbia Univ.*, No. 1:15-cv-3216-GHW, 2016 U.S. Dist. LEXIS 32080, at *1 (S.D.N.Y. Mar. 11, 2016).

time, of rape.¹⁶⁷ He maintains that he and Sulkowicz engaged in consensual intercourse.¹⁶⁸ After an investigation and hearing, Nungesser was found not responsible for rape.¹⁶⁹

Despite a finding of innocence, Nungesser argued that Sulkowicz tried to brand him as a “serial rapist” during and after the investigation.¹⁷⁰ Sulkowicz successfully encouraged the president of the co-ed fraternity, to which she and Nungesser were both members, to notify its alumni board that an alleged rapist was living at the fraternity house.¹⁷¹ Sulkowicz also encouraged other Columbia students to file complaints of sexual misconduct against him. Two female students and one male student eventually filed complaints, but Nungesser was found not responsible for all three complaints.¹⁷² Sulkowicz then went to reporters.¹⁷³ She spoke to the New York Post and a student news blog, who did not identify Nungesser, but put in information easily identifiable by most of his peers on campus.¹⁷⁴ Two weeks after the news blog story, Columbia’s President announced a change to the school’s policies: They would release data on sexual assault complaints on campus.¹⁷⁵ Nungesser argues this change was prompted by the student blog.¹⁷⁶

In May 2014, during Nungesser’s junior year, the university’s student newspaper published a story that named Nungesser as Sulkowicz’s alleged rapist.¹⁷⁷ A “rapist list” that included Nungesser’s name appeared in multiple bathrooms on campus and was distributed at several Columbia events.¹⁷⁸ In his senior year, Sulkowicz undertook the “Mattress Project,” a thesis project that involved carrying her mattress around campus with her, in protest of Nungesser’s presence on campus.¹⁷⁹ Professor Jon Kessler approved the project and Sulkowicz received class credit.¹⁸⁰ Both Kessler and Columbia’s president made public statements in favor of the Mattress Project.¹⁸¹ During graduation in May 2015, Sulkowicz carried the mattress across the stage as

167. Nungesser, No. 1:15-cv-3216-GHW at *2.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.* at *3–4.

172. *Id.* at *4.

173. *Id.*

174. *Id.* at *5.

175. *Id.*

176. *Id.*

177. *Id.* at *6.

178. *Id.*

179. *Id.* at *7.

180. *Id.*

181. *Id.*

she received her diploma, although the school banned graduating students from bringing large objects to the ceremony.¹⁸²

As a result of these events, Nungesser argued that his social and academic experience at Columbia suffered.¹⁸³ He states that he was precluded from attending on-campus career recruiting events and was unable to obtain employment in the U.S., forcing him to return home to Germany after graduation.¹⁸⁴ Nungesser argued that the school allowed Sulkowicz to commit gender-based harassment by permitting Sulkowicz to carry the mattress in school buildings and on school-provided transportation; by helping her develop her thesis project and giving her credit for it; and by making public statements in support of her project.¹⁸⁵

Sulkowicz's Mattress Project garnered national and international publicity.¹⁸⁶ Although Nungesser was not responsible for any sexual misconduct allegations against him, he was still vilified by the media and his classmates. The implications of allowing the public to determine Nungesser's guilt are significant. Again, it is unreliable. It is difficult for not only the accused, but for the victims to trust a system to investigate and adjudicate fairly, if the determination of guilt can be swayed by public opinion. There are standards and definitions in place to protect the integrity of the college adjudication system. Additionally, rape is a very serious accusation that can follow a person throughout life even if they were acquitted of the charge. Nungesser's college experience was damaged, his reputation suffered, and his future career prospects are slim.¹⁸⁷ This event will follow him the rest of his life. Through the gambit of Title IX male gender discrimination cases, definitions of sexual assault and consent that are influenced by public outcry are unreliable and damaging to a person's reputation. If anything, these cases serve, as the wake-up call higher education needs to start protecting all students.

C. RACIAL IMPLICATIONS FOR MALE ACCUSED STUDENTS

The aforementioned cases—Yusuf, Wells, Tanyi, and Nungesser—raise issues of discrimination and bias in disciplinary proceedings based on race, nationality, and color. Both Wells and Tanyi are black males. Yusuf was a foreign student from Bangladesh¹⁸⁸ and Nungesser is a German national.¹⁸⁹ Critics have voiced concern over the racial bias apparent in Title IX campus

182. Nungesser, No. 1:15-cv-3216-GHW at *7.

183. *Id.* at *10.

184. *Id.*

185. *Id.* The case was decided in March 2016. The court granted Columbia's motion to dismiss in its entirety without prejudice. It is unknown if Nungesser will file second amended complaint. *See also* Kutner, *supra* note 78.

186. *Id.*

187. *Id.*

188. Yusuf, 35 F.3d at 711.

189. Nungesser, No. 1:15-cv-3216-GHW at *3.

tribunals. At Harvard University, Halley observes, “[c]ase after . . . case that has come to my attention, including several in which I have played some advocacy or adjudication role, has involved black male respondents.”¹⁹⁰ Institutions showing racial bias grant immediate credibility to accusers, who are often white females, without any due process for the accused, who are often minority men.¹⁹¹ This racial bias is rooted in American racial history and mirrors larger issues apparent in our criminal justice system.

Black men accused of sexual assault are at a historical, social, and cultural disadvantage. American history is laced with cases where black men have been accused of sexually assaulting white women only to find out the accused men were not wrongdoers at all.¹⁹² The story of Emmett Till¹⁹³ and the Central Park Five,¹⁹⁴ are examples of black males facing grave consequences after being wrongfully accused of sexually assaulting white women. The American classic, *To Kill a Mockingbird*, tackled the controversial topic of white women who willingly had sex with black men, but later disavowed it as rape.¹⁹⁵ Out of this history, coupled with the over-criminalization, mass incarceration, and law enforcement bias against black males,¹⁹⁶ a legacy of racial bias against black males in rape accusations emerged and is reinforced in society today. Black males facing rape accusations are at a disadvantage because it is easier for everyone in the adjudicative process to put the blame on them.

For most students, college is the first time they are away from their homes and families. Young adults may find difficulty in navigating the complexities of the college social scene, especially when it involves matters relating to sex, sexuality, and gender. This is especially true for black males, who are at a cultural disadvantage to their white male counterparts. Black males that are first generation college students may not have the resources and support to help them thrive in college. They may not have the same access to information to guide them on their college journey, compared to other students whose families have experienced college life.

Minority men are also at a disadvantage because adjudicators, who are typically white, do not see themselves or their children in the accused men. Investigations and hearings may be swifter and the discipline may be harsher towards men of color because panel members of a different race may be less

190. Halley, *supra* note 48, at 107.

191. THE HISTORY, USES, AND ABUSES OF TITLE IX, AAUP (June 2016), <https://www.aaup.org/file/TitleIXreport.pdf>.

192. Halley, *supra* note 48, at 105–106.

193. See generally STEPHEN J. WHITFIELD, *A DEATH IN THE DELTA: THE STORY OF EMMETT TILL* (1988).

194. Robert D. McFadden & Susan Saulny, *A Crime Revisited: The Decision; 13 Years Later, Official Reversal in Jogger Attack*, N.Y. TIMES (Dec. 6, 2002), <http://www.nytimes.com/2002/12/06/nyregion/a-crime-revisited-the-decision-13-years-later-official-reversal-in-jogger-attack.html>.

195. *Id.* at 106. See HARPER LEE, *TO KILL A MOCKINGBIRD* (1960).

196. AAUP, *supra* note 191, at 19.

sympathetic to the extreme consequences suspension and expulsion can have for these men. For example, Yusuf argued in his case against Vassar that his race was a factor in the university's decision to find him guilty.¹⁹⁷ He asserted that all panel members were white, that they favored Weismann and Kapor, and that there were disparities in the punishment Weismann received compared to his.¹⁹⁸ Although the court dismissed Yusuf's racial discrimination claim because he failed to provide specific factual support,¹⁹⁹ it serves as an example of the distinct power dynamic at play. Typically an older, highly educated, sophisticated, white male or female is adjudicating claims against a younger, student of color.

Despite the extensive amount of campus-climate surveys and statistics on sexual assault on college campuses, institutions do not monitor or report the race of students involved in sexual assault investigations to the DOE.²⁰⁰ The DOE and OCR have not required college and universities to ensure racial equality in these proceedings.²⁰¹ However, given the implicit bias pervading college sexual assault investigations and the disparate impact it has on men of color, examination of the racial impact on Title IX bureaucracy is overdue.²⁰²

IV. CONCLUSION: PROPOSED SOLUTIONS TO THE PROBLEM

To combat the definitional problem that has fostered in Title IX regulation, more guidance by the judiciary, the legislature, and the DOE is needed. The judiciary can help solve the definitional problem by setting precedent. A common "theme" in the aforementioned cases, is that once an accused male plaintiff survives a motion to dismiss, the plaintiff and university settle the case before trial. Brett Sokolow, Executive Director of the Association of Title IX Administrators and President of the National Center for Higher Education Risk Management, offers that colleges and universities will not allow these cases to go to trial to make sure that precedent is never set.²⁰³ Courts can provide some clarity as to whether the adjudication practices, policies, and definitions on college campuses are proper, however, they are unable to address these problems because institutions, their attorneys, and insurance companies, will not allow litigation to get to the end.²⁰⁴ A plaintiff—either an accused student or victim—must refuse a settlement, no matter what, and insist on their day in

197. Yusuf, 35 F.3d at 714.

198. *Id.*

199. *Id.*

200. AAUP, *supra* note 191, at 19.

201. Halley, *supra* note 48, at 106–107.

202. AAUP, *supra* note 191, at 19.

203. Kutner, *supra* note 78.

204. *Id.*

court.²⁰⁵ Until then, the solution to the definitional disconnect may come from the legislature.

State legislatures should put in place clear standards for schools to adhere to. Several states have enacted legislation to hold colleges and universities to a higher standard for ensuring safety on their campuses.²⁰⁶ The initiatives are not only aimed at reforming the adjudicative process on college campuses, but also at preventing sexual assault from occurring in the first place.²⁰⁷ Most notably, are the affirmative consent standards in place in California and New York.

In 2014, the California Legislature enacted SB 967 to make “yes means yes” the consent standard on college campuses.²⁰⁸ The law established that consent is a voluntary, affirmative, and conscious agreement to engage in sexual activity that can be revoked at any time.²⁰⁹ A previous relationship does not constitute consent, and coercion or threat of force can also not be used to establish consent.²¹⁰ Affirmative consent can be given either verbally or nonverbally.²¹¹ The legislation also requires preventative education during student orientations, and increased access to counseling resources and trainings for adjudication panels.²¹² This law protects both parties by ensuring there is a mutual understanding between both partners.²¹³

In 2015, New York State also signed into law an affirmative consent standard with “enough is enough.” This legislation requires all colleges to adopt a set of comprehensive procedures and guidelines, including a uniform definition of affirmative consent, a statewide amnesty policy, and expanded access to law enforcement.²¹⁴ A statewide amnesty policy ensures that students reporting incidents of sexual assault are granted immunity for certain campus policy violations, such as drug and alcohol abuse.²¹⁵ This law also includes the creation of a new “sexual assault victims unit” within

205. Kutner, *supra* note 78.

206. *Yes Means Yes & Affirmative Consent*, EROC (last visited May 8, 2016), <http://endrapeoncampus.org/yes-means-yes/>.

207. *Id.*

208. Kevin de León & Hannah-Beth Jackson, *Why we Made 'Yes Means Yes' California law*, WASH. POST (Oct. 13, 2015), <https://www.washingtonpost.com/news/in-theory/wp/2015/10/13/why-we-made-yes-means-yes-california-law/>.

209. EROC, *supra* note 206.

210. *Id.*

211. *Id.*

212. de León, *supra* note 208.

213. *Id.*

214. *New York State, Enough is Enough: New, Uniform Sexual Assault Policy to Protect New York's College Students* (last visited May 8, 2016), <https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses>.

215. *Id.*

the State Police that will have advanced training in responding to sexual assaults and related crimes on college campuses.²¹⁶

California and New York's approaches are groundbreaking efforts towards preventing sexual violence on college campuses.²¹⁷ However, California, New York, and Illinois are the only states where their governor has signed affirmative consent standards into law.²¹⁸ The majority of states have no statewide or citywide affirmative consent standards,²¹⁹ and only a small number of university systems nationwide have incorporated affirmative consent standards into their school policies.²²⁰ State legislatures, the DOE, and universities should adopt affirmative consent standards in order to have a more clear and cohesive definition of consent, so as not to confuse students and administrators adjudicating claims of sexual assault.

Lastly, the definitional disconnect may be reformed by making changes to the DOE regulation. The DOE can encourage or even mandate university Title IX offices to monitor compliance only, not investigate or adjudicate cases. In place of professors and administrators, colleges and universities should enlist the assistance of independent, outside investigators who are both competent and neutral in investigating claims. Ideally, attorneys experienced in sexual assault cases would interview witnesses and gather evidence with the aid of former law enforcement agents or private investigators.²²¹ These outside investigators must show fairness to all parties involved and must be on the lookout for racial bias and disproportionate impact on minorities. They will then provide recommendations to colleges and universities based on their investigation.

Encouraging precedent to be made in the judiciary, advocating for affirmative consent standards nationwide, and reforming the current DOE standards, are a few ways to combat this definitional disconnect of sexual assault and consent.

216. *New York State*, *supra* note 214.

217. de León, *supra* note 208.

218. *Affirmative Consent, Affirmative Consent Laws (Yes Means Yes) State by State* (last visited May 8, 2016), <http://affirmativeconsent.com/affirmative-consent-laws-state-by-state/>.

219. *Id.*

220. EROC, *supra* note 206 (listing public and private university systems that have an affirmative consent standard: University of Minnesota, University of California, Texas A&M, University of Virginia, Indiana University, Stanford University, Yale University, University of Illinois, Urbana-Champaign, and University of New Hampshire).

221. Shaylan Wu, *Improving Campus Sexual Assault Investigations: Will Independent Investigators Help or Hurt*, HUFFINGTON POST (Aug. 21, 2014), http://www.huffingtonpost.com/shanlon-wu/improving-campus-sexual-assault_b_5516402.html.