

To: United States Department of Education

From: Merle H. Weiner, Philip H. Knight Professor of Law, University of Oregon

Re: ED-2021-OCR-0166

Date: August 14, 2022

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I offer these comments to assist the Department of Education (the Department) in its effort to create regulations regarding educational institutions' legal obligations under Title IX.

### **My Qualifications**

I am a law professor with a strong interest in Title IX. My teaching, scholarship, and service involve Title IX. I teach a class on Gender-Based Violence and the Law in which I discuss Title IX. My scholarship includes, among other things, two lengthy articles on topics implicated by these regulations: *See, e.g., A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71 (2017), and *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J. L & FEM. 123 (2017). The former article was cited extensively in the Commentary to the 2020 Final Rule.<sup>1</sup> It was also cited in the Notice of Proposed Rulemaking for the proposed regulations.<sup>2</sup>

My service to the University of Oregon as well as to the legal profession also revolves around gender-based violence and, at times, Title IX. For twenty years, I was the faculty director of the University of Oregon's Domestic Violence Clinic, and in that role oversaw the creation and operation of Student Survivor Legal Services (SSLS), a Clinic program that provides free legal services solely to students who allege that they have been victims of sexual misconduct. I have been involved in crafting various campus policies on this topic, on my own campus and generally, including through the Members Consultative Group of the American Law Institute (*Project on Sexual and Gender-Based Misconduct on Campus: Procedural Framework and Analysis*) and as a peer reviewer for the American Bar Association's Commission on Domestic and Sexual Violence (*Project on Improving Campus Student Conduct Processes for Domestic, Dating, Sexual and Stalking (DSVST) Violence*). I have been a longtime member of the Oregon Attorney General's Advisory Committee on Crime Victim and Survivor Services. My service has taught me that it is vitally important to respect and support survivors and, that by doing so, survivors will typically make decisions that align with the institution's interests.

The following comments are offered in my professional capacity, but not as a spokesperson for my institution.

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<sup>1</sup> *See* Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30040-30041, nn. 124, 126, 132, 147-50, 153, 155, 157, 495, 569, 1171 (May 19, 2020).

<sup>2</sup> Notice of Proposed Rulemaking, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41438 (July 12, 2022).

## Overall Impression

In all but one respect, the proposed regulations are a major improvement over the existing regulations. They will substantially further the goals of Title IX. However, because the proposed regulations permit and sometimes require mandatory reporting by large segments of the workforce at institutions of higher education, the proposed regulations will undermine survivors' autonomy, and thereby hurt some of the very people that Title IX is meant to benefit, as well as undermine some institutions' efforts to increase reporting on campus. While the Department's proposal may be grounded in good intentions, the Department can hold institutions of higher education accountable for sex discrimination without harming some survivors in the process and while respecting all survivors' autonomy. In fact, because the mandatory reporting provisions will negatively and unnecessarily impact a large subset of student survivors, at a minimum, the mandatory reporting provisions are contrary to the purpose of Title IX. As such, some sections of the proposed regulations are arguably *ultra vires*,<sup>3</sup> arbitrary and capricious,<sup>4</sup> and unconstitutional.<sup>5</sup>

This comment starts by discussing mandatory reporting and then offers smaller recommendations for fine-tuning some other aspects of the proposed regulations. I hope that my comments on mandatory reporting, in particular, prove useful because the Department's views on this topic are "tentative."<sup>6</sup>

## Mandatory Reporting (proposed regulation 106.44)

In my opinion, the approach to reporting that is most consistent with Title IX is found neither in the existing regulations nor the proposed regulations. The existing regulations, while respecting survivor autonomy, allow schools to ignore some sexual misconduct on campus for which they should be responsible and inadequately guide schools in formulating an appropriate reporting policy. The proposed regulations have the opposite problem. They require schools to abandon progressive policies that accommodate *all* survivors' needs<sup>7</sup> and, consequently, the proposed regulations inadequately respect survivor autonomy.

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<sup>3</sup>See *Oestereich v. Selective Serv. Sys. Loc. Board No. 11*, 393 U.S. 233, 238 (1968) (indicating that an *ultra vires* claim in equity is appropriate when agency action amounts to a "clear departure by the [agency] from its statutory mandate").

<sup>4</sup> See Administrative Procedures Act, 5 U.S.C. § 706(2)(A) (2018). See also *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

<sup>5</sup> Suffice it to say without developing the argument here, negatively impacted students will have claims related to the violation of their speech, association, and privacy.

<sup>6</sup> Notice of Proposed Rulemaking, *supra* note 2, at 41438.

<sup>7</sup> A progressive policy is described in my article *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71 (2017)[attached as appendix 1], and aspects of it will be discussed in these comments. In short, a progressive policy requires employees to whom a disclosure is made to inquire specifically about the survivor's reporting preference and then follow the survivor's choice (unless a very narrow exception applies, i.e. a minor is involved or there is an imminent risk of physical harm). The employee must also inform the survivor of confidential support services. Employees must tell the survivor that without a report, the institution will not know of the incident to respond, and that there are rules against retaliation. Employees who have received a disclosure must also file an annual deidentified report with the institution so that the institution can learn information outside of the formal reporting process in order to provide students an educational experience free of gender discrimination. One such progressive

This comment briefly describes the change in the law, identifies five fallacies embodied in the proposed regulations, and then suggests a way both to respect survivor autonomy *and* hold institutions to a high standard for addressing, remedying, and preventing sexual misconduct.

### A. A Short History of the Department’s Position on Reporting Obligations

**Prior to the existing regulations**, the Department’s guidance identified “responsible employees”<sup>8</sup> who would trigger the educational institution’s obligation to respond to disclosures of sexual misconduct. The definition of “responsible employee” was confusing and broad,<sup>9</sup> and led most institutions to label virtually every employee as a mandatory reporter.<sup>10</sup> These “wide-net” mandatory reporting policies were criticized for many reasons,<sup>11</sup> including that they suppressed survivors’ disclosures to individuals on campus who could connect the survivor with support services.<sup>12</sup> Yet the earlier Guidance had the advantage of imputing to the institution information that had been conveyed to an employee, or that the employee should have known about, for purposes of holding the institution accountable to address it. The 2001 Guidance, in particular, provided that a school had to act to address sexual harassment “if a responsible employee ‘knew, or in the exercise of reasonable care should have known’ about the harassment.”<sup>13</sup>

The **existing regulations** attempt to address the harmful effects of a broad approach to reporting by stating that a recipient’s response obligations were only triggered when the Title IX Coordinator “or any official with authority to institute corrective measures” had “actual knowledge”<sup>14</sup> of the alleged sexual misconduct. The commentary specifically said that

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policy exists at the University of Oregon. *See generally* Prohibited Discrimination and Retaliation Policy, at <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/prohibited-discrimination-and-retaliation>.

<sup>8</sup> *See* U.S. Dep’t of Educ., Off. for C.R. (OCR), Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, at 13 (now rescinded), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (2001 Guidance) (“responsible employees” include “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment...or an individual who a student could reasonably believe has this authority or responsibility”).

<sup>9</sup> Merle H. Weiner, *A Principled and Legal Approach to Title IX Reporting*, 85 TENN. L. REV. 71, 76, 79-80 (2017).

<sup>10</sup> *Id.* at 77-78.

<sup>11</sup> *See e.g.*, American Association of University Professors, *The History, Uses, and Abuses of Title IX*, AAUP BULLETIN 84- 85 (June 2016)(“[A]n overly broad definition of faculty members as mandatory reporters, adopted by colleges and universities without consultation with the faculty, disregards compelling educational reasons to respect the confidentiality of students who have sought faculty advice or counsel....Some institutions have in addition adopted policies requiring that course syllabi include statements informing students of faculty reporting obligations relating to sexual harassment and discrimination. The chilling effect such requirements pose constitutes a serious threat to academic freedom in the classroom.”).

<sup>12</sup> Weiner, *supra* note 9, at 102.

<sup>13</sup> 2001 Guidance, *supra* note 8, at 13.

<sup>14</sup> “Actual knowledge” only existed if the disclosure was made to the Title IX coordinator or to any other “official of the recipient who has authority to institute corrective measures on behalf of the recipient.” 34 C.F.R. § 106.30(a).

“postsecondary institutions...[can] decide which of their employees must, may, or must only with a student’s conduct, report sexual harassment to the recipient’s Title IX Coordinator.”<sup>15</sup> While this formula gave institutions breathing room to develop reporting policies that allow survivors’ more autonomy (by limiting the number of individuals who had to report to the Title IX office), this formula left schools with too much discretion regarding which employees must respond to disclosures and too little direction on what the response must be. In addition, it made it less likely that OCR could hold institutions accountable for a failure to respond adequately to disclosures because the existing regulations only required that a school act in a way that was not “deliberately indifferent”<sup>16</sup> once it had “actual knowledge.”

The **proposed regulations** acknowledge the balance between survivor autonomy and institutional responsibility is not yet right. While “respect for complainants’ autonomy” is acknowledged to be important,<sup>17</sup> so too are “clear legal obligations that enable robust administrative enforcement of Title IX violations.”<sup>18</sup> The Department rightly says that the reporting mandate under the existing regulations is “too narrow and insufficient to ensure that recipients meet their obligation under Title IX to operate their education programs or activities free from sex discrimination.”<sup>19</sup> Consequently, the proposed regulations have identified broad categories of employees who have, or may have, obligations to report.<sup>20</sup> The proposed regulations unambiguously require schools to impose mandatory reporting obligations on a large segment of their workforces. With regard to student-survivors in particular, that mandate amounts to an expansive obligation for virtually all employees to report all evidence of all sexual misconduct. That is coupled with a broad obligation to “take prompt and effective action to end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects.”<sup>21</sup>

The proposed regulations are presented as a necessary compromise between respecting survivor autonomy and ensuring institutional accountability.<sup>22</sup> For example, the commentary discusses a fear that recipients will ignore sexual harassment simply because allegations are not reported to the right employee<sup>23</sup> and emphasizes the need for institutions to “operate its education program or activity free from sex discrimination at all times,” a duty that exists “regardless of who has notice of any discriminatory conduct.”<sup>24</sup>

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<sup>15</sup> Final Rule, *supra* note 1, at 30030.

<sup>16</sup> See 34 C.F.R. § 106.44(a).

<sup>17</sup> “The Department remains committed to...respect for complainants’ autonomy....” Notice of Proposed Rulemaking, *supra* note 2, at 41432.

<sup>18</sup> *Id.* at 41437.

<sup>19</sup> *Id.* at 41438.

<sup>20</sup> *Id.* at 41572 (proposed rule 34 C.F.R. § 106.44).

<sup>21</sup> *Id.* (proposed rule 34 C.F.R. § 106.44(a)).

<sup>22</sup> *Id.* at 41437 (the proposed regulations “more effectively achieve these objectives while ensuring that all recipients provide a nondiscriminatory educational environment consistent with their duty under Title IX”).

<sup>23</sup> *Id.* at 41437 (stakeholder comment).

<sup>24</sup> *Id.* at 41433.

The proposed regulations do not adequately reconcile the conflict between these two objectives. The conflict can be further reduced with different reporting requirements. A new approach is essential because the proposed regulations never adequately justify subordinating the wellbeing of known survivors to unknown potential victims facing remote risks.

**B. The proposed regulations’ problematic reporting structure rests on five fallacies with respect to post-secondary students.<sup>25</sup>**

1. *The proposed regulations incorrectly presume that survivor autonomy does not affect educational opportunity.*

The proposed regulations have the goal of ensuring survivors of sexual assault do not have their education impacted by what happened. The proposed regulations express a commitment to survivor autonomy,<sup>26</sup> but never articulate why such autonomy is important. Autonomy is important not only because post-secondary students are adults and are entitled to control over their own lives.

Critically, autonomy is important for survivors because it is a key component of regaining a sense of wellbeing following sexual violence, domestic violence, or stalking.<sup>27</sup> Some survivors cannot recover from their victimization if they lack control over who knows about their victimization and/or what those actors will require of the victim.<sup>28</sup> Therefore, a survivor’s control over who knows the fact of victimization is sometimes essential to the survivor’s ability to continue with the survivor’s education. For reasons described in the next section, some survivors will lack

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<sup>25</sup> These comments do not address the line drawn between proposed regulation 34 C.F.R. §106.44(c)(1) and (c)(2), *i.e.*, between elementary/secondary schools and institutions of higher education. For younger students, the proposed regulations require reporting by all employees who are not confidential employees. The Department rightly identifies some reasons to treat younger children differently. *See* Notice of Proposed Rulemaking, *supra* note 2, at 41437. In addition, it is likely that younger students would think that any person to whom they disclose would address the problem.

<sup>26</sup> *See supra* note 17.

<sup>27</sup> *See* Weiner, *supra* note 9, at 93-95 (“Yet control matters greatly to a survivor's recovery, often reducing symptoms of post-traumatic stress disorder (PTSD). Research has shown that it is present control, rather than past control (understanding why the assault occurred) or future control (controlling whether one will be assaulted again in the future), that furthers recovery most. Professor of psychology Ellen Zurbriggen explained: “Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one's own fate and future.” Domestic violence survivors have the same need. Mills explained that victims who lack control are disempowered and that hinders their recovery: “No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.” Apart from the harm caused by questioning a survivor's judgment and undermining her sense of control, the institution's response can also produce psychological harm when it acts against the survivor's wishes. This type of institutional betrayal can increase a survivor's post-trauma psychological symptoms, and produce educational disengagement. Students at Knox College who were opposed to wide-net reporting policies described instances of this phenomenon: ‘Survivors who have trusted faculty members to keep information confidential have seen those professors turn around and tell the administration. ... [S]urvivors on this campus have been routinely forced through an often abrasive process for which they were emotionally unprepared.’”(citations omitted).

<sup>28</sup> *See Id.* The harm from such a position was also well stated in a letter submitted to you during this comment process by Kathryn J. Holland, Liz Hutchison, Courtney E. Ahrens, Rebecca L. Howard, Allison, E. Cipriano, Rachael Goodman-Williams for the Academic Alliance for Survivor Choice (ASC).

such control if the proposed regulations are adopted. This reality will cause the proposed Title IX regulations to undermine one of its goals: to remedy the effects of sexual harassment so that survivors can continue with their education.

In addition, the proposed regulations will interfere with some students' autonomy and affect their access to education, regardless of students' emotional wherewithal. The *Chronicle of Higher Education* published an opinion piece with a good example:<sup>29</sup> A student who was sexually assaulted by another student doesn't want to report, but wants to tell her trusted professor why she is unable to make progress on her thesis. The student may want and need that person's understanding and support, and the faculty member would give it. While indirect ways may exist for the student to convey the information to the professor without reporting (perhaps through a confidential intermediary, if the school has one), the student is unclear about what disclosures to whom might trigger a report and a loss of privacy and control. Therefore, the student stays silent and, consequently, will lose educational opportunities.

Simply, paternalism and taking away choice at a crucial time disrespects and harms victims of sex discrimination. It can result in the loss of education opportunities. Therefore, mandatory reporting for adult survivors is directly contrary to the purpose of Title IX.

2. *The proposed regulations incorrectly presume that they adequately protect adult survivors' autonomy.*

The proposed regulations address survivor autonomy predominantly in two ways and both of these mechanisms are inadequate. First, the proposed regulations allow schools to provide confidential employees who have no reporting obligations.<sup>30</sup> The proposed regulations correctly acknowledge that providing support for survivors can increase voluntary reporting. The Department notes, "making confidential employees available may also result in more individuals feeling comfortable to seek the support they need to address the immediate effects of sex-based harassment or other sex discrimination and ultimately find the confidence to make the recipient aware of incidents that may otherwise have gone unreported."<sup>31</sup>

While the approach to confidential employees is commendable and should be retained, it does not solve the problem caused by mandatory reporting. First, the regulations do not mandate the provision of confidential employees, only permit their existence, and some institutions may lack this option for their students. Second, students may not want to report yet to the institution but may want to discuss their situation with an employee who is not a "confidential" employee under the proposed regulations. The proposed regulations deny survivors this option. As such, some survivors may disclose their victimization to no one on campus at all. This reality keeps the student isolated, and the school cannot help the survivor by connecting the survivor to services, nor can the school address the sexual misconduct. Third, students may not know whether the person to whom they disclose is a confidential employee, and some students will be harmed by either the surprise

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<sup>29</sup> Kathryn J. Holland, Jennifer J. Freyd, and Elizabeth A. Armstrong, *Mandatory Reporting is Exactly Not What Victims Need*, THE CHRONICLE OF HIGHER EDUCATION, July 22, 2022, at <https://www.chronicle.com/article/mandatory-reporting-is-exactly-not-what-victims-need>.

<sup>30</sup> Notice of Proposed Rulemaking, *supra* note 2, at 41573 (proposed regulation 106.44(d)(2))

<sup>31</sup> *Id.* at 41443.

that the trusted employee will report against their wishes and/or the resulting loss of control. Fourth, the benefits of getting students to confidential resources (*e.g.*, attending to students' needs and facilitating voluntary reporting) can be better achieved by requiring *all* employees to refer students to these resources independent of the employee's reporting obligations, instead of waiting for the Title IX Coordinator to do so after an unwanted report.<sup>32</sup>

Second, the proposed regulations try to protect the survivor's autonomy by relying on the Title IX Coordinator to respect survivors' wishes regarding the filing of a complaint. The problem with this solution is threefold. First, forwarding information to the Title IX Coordinator against the survivor's wishes is itself a violation of autonomy and control. Second, the Title IX Coordinator need not honor the survivor's wishes.<sup>33</sup> Third, a student may not trust that the Title IX Coordinator will respect the student's wishes because the school has already refused to honor the student's initial wish not to forward the information to the Title IX Coordinator.

The inadequacy of these two mechanisms (the availability of confidential resources and mandating the Title IX Coordinator's general response) is obvious from the fact that both of these protections were official policy during the era of the earlier Guidance,<sup>34</sup> and yet reporting rates were very low<sup>35</sup> and survivors and students spoke out against the system.<sup>36</sup>

Somewhat ironically, the proposed regulations themselves reflect an appreciation that the two protections are not sufficient to respect a survivor's autonomy. Otherwise, the regulations would not treat employee-survivors and student-survivors differently for reporting purposes. With respect to employee-survivors, the proposed regulations give schools discretion to forego mandatory reporting and instead provide the survivor with information on how to report.<sup>37</sup>

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<sup>32</sup> Kathryn J. Holland et al., Editorial, *Reporting is Not Supporting: Why Mandatory Supporting, not Mandatory Reporting, Must Guide University Sexual Misconduct Policies*, 118 Proc. Nat'l Acad. Sci. USA (2021), at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8719867/> (recommending a policy of mandatory supporting, not reporting).

<sup>33</sup> See Notice of Proposed Rulemaking, *supra* note 2, 41573 (proposed regulation 106.44(f)(5)); *Id.* at 41445. The proposed regulations say the standard to act against the survivor's wishes is if there is "an immediate and serious threat to the health or safety of a complainant or other persons or would prevent the recipient from affording a nondiscriminatory environment for all students." The Title IX Coordinator has wide discretion to determine if that standard is met by weighing numerous factors, including, *inter alia*, a pattern of conduct by the respondent, seriousness of the misconduct, age and relationship of the parties, and scope of the alleged gender discrimination.

<sup>34</sup> See Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., to Colleague 5 (Apr. 4, 2011) ("If the complainant requests confidentiality or asks that the complaint not be pursued, the school should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation."); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE 22 (Apr. 24, 2014) (mentioning professional and pastoral counselors can be confidential employees with no reporting obligations); *Id.* at E-1, E-2 (giving schools discretion to keep the victim's identity confidential).

<sup>35</sup> See *supra* note 46.

<sup>36</sup> See, *e.g.*, *Students Challenge Mandatory Reporting Requirements*, THE KNOX STUDENT (March 4, 2015), <http://www.theknoxstudent.com/news/2015/03/04/studentschallenge-mandatory-reporting-requirements/#.V93cTrU5GGY>. For a more recent study of students' views of mandatory reporting, see Kathryn J., Holland et al., "A Victim/Survivor Needs Agency": Sexual Assault Survivors' Perceptions of University Mandatory Reporting Policies, *Analyses of Social Issues and Public Policy* 1 (2020), at <https://doi.org/10.1111/asap.12226>.

<sup>37</sup> See Notice of Proposed Rulemaking, *supra* note 2, at 41572 (proposed regulation 106.44(c)(2)(iii)(A), (B)).

Similarly, for employee-survivors, institutions may not require the employee to report their own victimization to the Title IX office even if the school has a policy that otherwise requires employees to report other employees' victimization.<sup>38</sup> This is because "not all employee-complainants may feel comfortable reporting sex discrimination to the recipient's Title IX Coordinator."<sup>39</sup>

The expressed reason for the difference in treatment between these categories of survivors is a gross generalization that will be false for some students and some employees. The commentary says "students ... may be less capable of self-advocacy than employees."<sup>40</sup> Similarly, employee-survivors are not required to self-report because they "can reasonably be expected to have more information and capacity than students to notify the Title IX Coordinator... because employees are required to be trained on the recipient's reporting requirements."<sup>41</sup> Critically, the commentary does not identify a difference in the importance of autonomy to these two groups of survivors — or consider the wide variation in age and experience within those two groups — but rather bases the different treatment on a perceived difference in their ability to report to the Title IX coordinator. Even if employee status were an accurate proxy for capability and knowledge, the alternative solution to this difference is not to treat students like employees and merely give them the Title IX Coordinator's phone number. Rather, the special student status and vulnerabilities of some students should be addressed by requiring any employee to whom any survivor discloses to inquire if the survivor wants the employee to report, and then to report.

3. *The proposed regulations incorrectly presume that mandatory reporting will not inhibit reporting for some students.*

Commendably, the proposed regulations recognize the underreporting problem,<sup>42</sup> and require institutions to address barriers to reporting.<sup>43</sup> The Title IX Coordinator must monitor barriers to reporting and take steps reasonably calculated to address the barriers. These efforts will hopefully help remedy the well-documented low rates of disclosure to any employee on campus.<sup>44</sup>

What the recommendations fail to consider, however, is the fact that mandatory reporting *itself* can be a huge barrier to reporting; yet schools are not required to ensure that their reporting policies do not inhibit reports. That omission presumably exists either because the Department

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<sup>38</sup> *Id.* at 41573 (proposed regulation 106.44(c)(4)).

<sup>39</sup> *Id.* at 41441.

<sup>40</sup> *Id.* at 41438.

<sup>41</sup> *Id.* at 41441 Yet, if the employee-complainant discloses to another employee, that employee must follow the school's policy and either report or provide information on how to report. *Id.*

<sup>42</sup> *Id.* at 41435 ("[A] longstanding concern of the Department has been that information about conduct that may constitute sex discrimination under Title IX may be underreported to officials of recipients who are able to take effective steps to address it.").

<sup>43</sup> *Id.* at 41572 (proposed regulation 34 C.F.R. § 106.44(b)(1), (2)). See also *Id.* at 41435 (listing items that should be monitored pursuant to proposed regulation 106.44(b)).

<sup>44</sup> See, e.g., David Cantor et al., Ass'n of Am. Univs., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct, at A7-34 tbl 22 (rev'd 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7\\_\(01-16-2020\\_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf)



doesn't think that mandatory reporting inhibits reporting (despite research findings to the contrary), or the Department believes that requiring schools to address other barriers to reporting will somehow offset the harmful effects of the mandatory reporting policy. Evidence contradicts the first assumption and there is no evidence to support the second. In fact, the second assumption is illogical: the retraumatization of forced reporting can't be undone by other interventions.

As to the first assumption, the commentary to the proposed regulations suggests that the Department is, in fact, skeptical that mandatory reporting stymies reporting. The proposed regulations cite my 2017 article (as cited by the 2020 Amendments) to suggest that there is conflicting evidence on whether mandatory reporting, on balance, inhibits or facilitates reports.<sup>45</sup> My article cited the conflicting research,<sup>46</sup> but I went on in that article to argue that the studies could be read together to suggest that mandatory reporting would inhibit on-campus disclosure overall. After all, the students in the study who said mandatory reporting would increase their own reporting had an entirely different reaction once the researchers explained the potential problems with such a policy. Then the students thought the policy *would* hinder students' reports.<sup>47</sup> Consequently, if those students were survivors in an institution with a mandatory reporting policy and they experienced firsthand the drawbacks identified by the researchers for the survey respondents, then they presumably would not report.

More importantly, since 2017, there has been additional research to support the fact that mandatory reporting inhibits some students' reports (something that even the Mancini study found for some students). For example, research by Amie Newins and colleagues found that 17% of students were less likely to disclose if their school had a mandatory reporting.<sup>48</sup> This was especially

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<sup>45</sup> See Notice of Proposed Rulemaking, *supra* note 2, at 41438.

<sup>46</sup> Weiner, *supra* note 9, at 103-04 ("Research by Christina Mancini and her colleagues in 2015 surveyed 397 undergraduates and found that 56% of the students surveyed said they would be more likely to report their sexual victimization under a mandatory reporting law, and only 15% of the students said they would be deterred from reporting under a mandatory reporting law. In contrast, a study by Melissa Barnes and Jennifer Freyd in 2016-17 of 486 undergraduates found that most students would be less likely to talk to a university employee about an unwanted sexual experience if the university had a wide-net reporting policy.")

<sup>47</sup> Weiner, *supra* note 9, at 104 ("What exactly explains these divergent results is unclear. However, the responses of those surveyed by Mancini about their own behavior may have been overly optimistic for two reasons. First, the policy may not have been contextualized for respondents. Without context, many people assume mandatory reporting is a good idea. In fact, it appears that the researchers asked about the effect that mandatory reporting would have on the survey respondents themselves first, and then later asked about its likely effect on others. It was only when they asked questions about others that they gave respondents information about the potential negative effects of mandatory reporting. Consequently, the order of the questions may have affected the results. Second, the difference in responses may have had something to do with the likelihood that the respondents saw themselves as survivors. Mancini acknowledged that such information is important to explore. Other studies have found differences in receptiveness to mandatory reporting between the general populations and survivors.") (footnotes omitted); *Id.* ("Interestingly, survey respondents in the Mancini study saw their own response as likely to be different than others' responses. Most students, 57.2%, thought victims might reduce their help seeking behavior if a school had a wide-net reporting policy and 64.7% thought such a policy might re-traumatize victims.") (footnotes omitted).

<sup>48</sup> Amie R. Newins et al., *Title IX Mandated Reporting: The Views of University Employees and Students*, 8 (11) BEHAV. SCI. 106 (2018), <https://doi.org/10.3390/bs8110106> (reporting "students varied in how mandated reporting requirements influenced their disclosure likelihood (17.2% indicated they were less likely to disclose, 53.9% indicated it was unchanged, and 28.9% indicated they were more likely to disclose)").

true for survivors of sexual assault.<sup>49</sup> Similarly, an empirical study by Dhara Amin revealed that “40% of respondents stated that they were significantly less likely or somewhat less likely to report personal sexual victimization due to mandatory reporting laws,” and this number greatly outnumbered the percentage of students who suggested mandatory reporting would increase their reporting.<sup>50</sup> While some students in both studies expressed more willingness to report when the school had a mandatory reporting policy, the research is still inconsistent on whether there is a net gain or loss in overall reporting.

The “empirical uncertainty,” including about the net effect of mandatory reporting policies on the rate of disclosures, led the American Law Institute to endorse institutional discretion with regard to internal reporting obligations.<sup>51</sup> It said, “Absent more empirical research, it is uncertain whether imposing mandatory reporting obligations on most school employees would increase or decrease schools’ knowledge of incidents of sexual assault and related misconduct.”<sup>52</sup> It also said, “Whether a very broad internal reporting obligation will have the anticipated positive effect is not clear.”<sup>53</sup> As a result, the American Law Institute wisely refused to endorse mandatory reporting.

Of course, the most important take away from the existing research is that mandatory reporting affects students’ willingness to disclose differently, and that a large number of students will not disclose when their school has a mandatory reporting policy. This conclusion was evident in *all* the studies regardless of the net effect. The American Law Institute and the Department’s proposed regulations both fail to recognize that the options to address the two different types of student response are not only mandatory reporting or complete discretion to institutions. As my article stated, “Universities should try to increase the number of reports by developing a policy that can accommodate *both* the students who would be more inclined and less inclined to report with a mandatory reporting policy.” The way to accommodate all students is to require reporting when the survivor wants it and to have a different institutional response, but not to do nothing, when the survivor does not want a report. In fact, employees who receive a disclosure should always be required to do several things: 1) specifically ask the survivor if the survivor wants the employee to report; 2) follow the student’s choice; 3) tell the survivor that without a report the institution will

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<sup>49</sup> *Id.* (“survivors of sexual assault were more than two times more likely to indicate that knowledge of mandated reporting decreased their likelihood of disclosure (vs increased)”).

<sup>50</sup> DHARA MINESH AMIN, STUDENTS’ AWARENESS, KNOWLEDGE, AND PERCEPTIONS OF MANDATORY REPORTING OF SEXUAL VICTIMIZATION ON COLLEGE CAMPUSES, A dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy at Virginia Commonwealth University 99 (2019) (“While 86% of respondents supported or strongly supported the use of mandatory reporting laws at universities, only 23% stated that they were somewhat more likely or significantly more likely to disclose personal sexual victimization with compelled disclosure enacted. Furthermore, 40% of respondents stated that they were significantly less likely or somewhat less likely to report personal sexual victimization due to mandatory reporting laws (Figure IV). An additional 37% of students reported that mandatory reporting laws would have no impact on their decision to disclose personal sexual victimization.”)

<sup>51</sup> AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, Tentative Draft No. 1 §3.5 cmt. 5 (April 2022)(approved by membership May 2020) (“The decision whether to require all faculty to be nonconfidential mandatory reporters should be one that is left largely to the college’s or university’s informed independent judgment, exercised within the context of the institution’s statutory obligation to prevent a hostile environment in which students face barriers due to sex in pursuing their education.”).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

not know of the incident and will be unlikely to ever address it; 4) refer the survivor to confidential supportive resources; and 5) tell the survivor how to report to the Title IX Coordinator if the student later decides to report.

Requiring recipients to adopt such a policy would align with OCR’s desire to hold schools accountable for all of the barriers to reporting identified by the Department.<sup>54</sup> For example, schools must ensure the employee communicates promptly and the school investigates as required *when the student wants action*. The school must provide supportive measures. Yet addressing these sorts of barriers will not eliminate the barrier that a mandatory reporting policy itself creates for some survivors. The Department inadequately addresses the problem of reporting barriers when it mandates schools to adopt a reporting policy that is known to discourage a large segment of students from reporting.

4. *The proposed regulations incorrectly presume that ex ante categories about who should report advances institutional responsibility.*

The proposed regulations identify individuals who should have the obligation to report when a student discloses sexual misconduct. Under proposed section 106.44(c)(2)(i), those who have authority to institute corrective measures would always have an obligation to report. Under proposed section 106.44(c)(2)(ii), those who have “responsibility for administrative leadership, teaching, or advising” would always have an obligation to report when the incident involves a student victim. Under proposed section 106.44(c)(2)(iii), the same group may not have obligation to report if the victim is an employee, although these individuals may have an obligation to provide the employee-victim with information about the Title IX coordinator and how to report. In no case is a confidential employee obligated to report, but instead must provide information on how to report.

The aforementioned categories have many problems. They will catch people by surprise and be perceived as unfair, thereby lessening the policy’s overall effectiveness. Imagine, for example, a survivor who clearly wants to speak with a confidential employee and not report, but the survivor does not know of the “confidential” category or who falls within it. To learn if such a person exists, the survivor asks a trusted professor and, in the process, discloses the context for the inquiry. To deprive this survivor of her autonomy, even though the survivor clearly desires to access a confidential resource and not yet report to the Title IX office, and yet grant autonomy to the survivor who just happens to know of a confidential resource and the protection afforded a conversation with that person, is irrational.

Similarly, imagine a student who wants a report to be made to the Title IX office but speaks with a confidential resource instead of going to an employee with the obligation to report. While the confidential employee might report for the student when the student asks for this to occur, nothing in the regulations mandates it. Nor might the student even consider asking for help reporting. Under the proposed regulations, confidential employees only need provide the person

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<sup>54</sup> The Department, based on stakeholders’ reports, identified a number of ways in which a recipient’s response can contribute to the underreporting problem, including “a failure to communicate promptly, to investigate as required, to address violations of restrictions on contact, or to respond effectively to retaliation,” if complainants “feared being disciplined for violating the recipients code of conduct,” and insufficient supportive measures. Notice of Proposed Rulemaking, *supra* note 2, at 41435-36.

with contact information for the Title IX Coordinator and explain how to report.<sup>55</sup> A student may experience the same insufficient response if the student discloses to an employee who does not fall within the Department’s categories of mandatory reporters and the school requires the employee only to give information about how to report.<sup>56</sup> These employees’ responses may decrease the likelihood that the students will ever report. It would be better if all employees had to ask the survivor if the survivor would like the employee to report and then follow the survivor’s wishes.

The Department can eliminate the irrationality inherent in categories by requiring *all* employees to report when a survivor wants a report to be made, but only then, and also requiring all employees to give information on how to report if the student chooses not to do so immediately. In this way, there will never be a disconnect between the survivor’s needs and the employees’ obligations.

Apart from the problem with categories generally, the Department’s particular categories are problematic. They are both too narrow and too wide. Typically, very few individuals in an institution have “authority to institute corrective measures.”<sup>57</sup> Even the president of a university may not have the “authority to institute corrective measures” because cases have to be processed through the Title IX office to ensure respondents’ due process.<sup>58</sup> This is part of the reason the existing regulations are so inadequate. When used as the sole category of who must report to the Title IX coordinator, this category is much too small. There may be employees who lack the authority to institute corrective measures, but who have “actual knowledge” that should be imputed to the institution.<sup>59</sup>

The proposed regulations try to solve that problem by expanding mandatory reporting obligations to “employees with responsibility for administrative leadership, teaching, and advising in the recipient’s education program or activity.”<sup>60</sup> Yet, this category is too wide. The commentary to the proposed regulations describes these employees as people “responsible for providing aid,

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<sup>55</sup> See *Id.* at 41573 (proposed regulation 106.44(d)(2)).

<sup>56</sup> Recipients can decide either to impose a mandatory reporting requirement or not for employees in category 106.44(c)(2)(iii) and 106.44(c)(2)(iv), including dining hall employees and public safety officers. See *id.* at 41439. There is no obligation that institutions inform survivors of the employee-by-employee designation, increasing the opportunity for surprise.

<sup>57</sup> In this sense, the commentary is wrong when it says that this category aligns with individuals who have “actual knowledge.” Notice of Proposed Rulemaking, *supra* note 2, at 41572 (proposed regulation 106.44(c)(2)(i)). That is, while the category of employees “with the authority to institute corrective measures” is “generally consistent with the definition of ‘actual knowledge....,’”<sup>57</sup> the reverse is not necessarily true.

<sup>58</sup> *Id.* at 41569 (proposed regulation 106.8(b)(2))(recipient must adopt grievance procedures). As the proposed regulations recognize, those employees who would fall in this category is “a fact-specific determination that rests on the recipient’s own policies....” *Id.* at 41439. The regulations suggest that this category is likely the same as an “appropriate person” under case law (*e.g.* someone “with authority to take corrective action to end the discrimination”). *Id.*

<sup>59</sup> *Id.* at 41438.

<sup>60</sup> *Id.* at 41572 (proposed regulation 106.44(c)(2)(ii))

benefits, or services to students.”<sup>61</sup> It includes a tremendous number of people.<sup>62</sup> The Department says this category is “likely” to align with student expectations,<sup>63</sup> but that claim is totally unsupported. The commentary cites no empirical evidence that describes student expectations. In fact, student expectations may be exactly the opposite for some of the identified categories of mandatory reporters. For example, survivors who are athletes may go their own coaches for support, not to report, and would be caught by surprise when the coach reports.<sup>64</sup> Similarly, a student may disclose to a graduate student who teaches a class, seeing that graduate student as a friend instead of an authority figure. The absence of empirical evidence means that it is impossible to align the categories with students’ expectations *ex ante*.

While some students’ expectations may be shaped by their school’s policies, this fact operates in both directions, if it operates at all. That is, if students’ expectations are in fact shaped by a school’s policies (so the student is likely to know who is a mandatory reporter), then students’ expectations could also be shaped if the policy informs students that certain employees will not automatically report, but will instead ask the student if the student desires the employee to report and then follow the student’s wishes. Moreover, since students often do not know the details of school policies,<sup>65</sup> it is likely that neither of the above scenarios is realistic for many students. A policy that requires the employee to always ask the survivor if the employee should report, and then follow the student’s wishes, never is out of line with the student’s actual expectations.

Despite the benefits of abandoning categories and requiring all employees to report when the survivor so desires, the Department might envision some benefits from requiring a few categories of mandatory reporters.<sup>66</sup> Then who should they be? Although there is no empirical evidence, perhaps students would expect the highest administrative officers in a school to report regardless of a student’s wishes because their job is to protect the school’s reputation. Consequently, if there is to be a category of mandatory reporters, then these people should be designated as such. However, all

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<sup>61</sup> *Id.* at 41438.

<sup>62</sup> In terms of those with teaching responsibility, it includes “any employee with ultimate responsibility for a course, which could include full-time, part-time, and adjunct faculty members as well as graduate students who have full responsibility for teaching and grading students in a course.” *Id.* at 41439 Those with responsibility for advising would include not only academic advisors, but “advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient.” *Id.* at 41439.

<sup>63</sup> *Id.* at 41438 (“In light of this responsibility, it is likely that a student would view these employees as persons who would have the authority to redress sex discrimination or to whom they could provide information regarding sex discrimination with the expectation that doing so would obligate the recipient to act.”). It continues, “The same is true for employees with administrative roles who are not student-facing (e.g., a director of an employee benefit program).” *Id.* at 41438

<sup>64</sup> The Notice of Proposed Rulemaking suggests that employees “with responsibility for public leadership would include deans, coaches, public safety supervisors, and other employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans and directors of programs or activities.” *Id.* at 41439

<sup>65</sup> Weiner, *supra* note 9, at 95 & nn.115-116 (citing research).

<sup>66</sup> Perhaps having some mandatory reporting signals an institutional commitment to address sexual misconduct? Perhaps identifying some mandatory reporters makes it easier for survivors to report because there are additional avenues for accessing the Title IX office? However, these two benefits are illusory if the alternative policy is that all employees must always ask the survivor if the employee should report for the survivor and then follow the survivor’s wishes.

other employees should still have the obligation to ask if they should report for the survivor and then follow the survivor's wishes.

To ensure that a survivor is never surprised by an employee's designation as a mandatory reporter, the regulations should ensure that students and employees are told at Title IX trainings who are the mandatory reporters. Schools should also have to ensure the mandatory reporters are clearly identified as such. Recommended techniques for making obvious an employee's reporting status could include the following: posting it on the employee's office door; including it in the employee's email signature line; and including it in the school directory.

5. *Finally, the proposed regulations incorrectly presume that honoring survivor autonomy in the reporting context undermines OCR's ability to hold institutions accountable for fulfilling their Title IX obligations.*

The proposed regulations implicitly assume that OCR cannot enforce the obligation in 106.44(a), to "take prompt and effective action to end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects," unless the institution's employees have an automatic obligation to inform the Title IX office of an incident. That is false.

Assume the Department were to forego mandatory reporting for most employees, but instead required mandatory reporting for a small number of high-ranking administrators and required every other employee to ask directly whether the survivor wants the employee to report and then to follow the survivor's answer, among other things. To be clear, institutions would still be deemed to have "actual knowledge" of incidents in any of the following situations.

- 1) When a disclosure occurs to a high-ranking administrative official at an institution regardless of the administrator's ability to "institute corrective measures on behalf of the recipient" and regardless of the survivor's desire to have a report filed.
- 2) When notice is given to the school's Title IX Coordinator.<sup>67</sup>
- 3) When any employee is asked by the student to report.

If a survivor decides not to report to the institution but has disclosed sexual misconduct to an employee, an institution can still be deemed to have "actual knowledge" if the employee to whom the survivor disclosed failed to do any of the following:

- 1) Ask the survivor if the employee should report the matter to the Title IX Coordinator and then follow that instruction;
- 2) Tell the survivor that without a report the institution will not know of the incident and will be unable to address it;
- 3) Tell the survivor that there are rules against retaliation;

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<sup>67</sup> My comment raises the possibility, without taking a position on the matter, that an institution might also be deemed to have actual knowledge when it knew, or should have known, of the incident independent of the survivor's report. However, there is obviously much merit to the position embodied in the proposed regulation 34 § 106.45(a)(2)(iv) (limiting right to file a complaint for sex-based harassment to the complainant or the person who can act on the complainant's behalf, and not a third-party).

- 4) Provide the survivor with information so that the student can report to the Title IX office if the student later decides to do so;
- 5) Provide the survivor with information on how to access confidential support services.

To facilitate the Department's oversight, the Department could issue additional guidance recommending that institutions provide their employees with compliance worksheets to document, in a deidentified manner, that employees followed these steps.<sup>68</sup>

In addition, if the institution does not do any of the following, it will be out of compliance with Title IX:

- 1) Provide a confidential resource on campus to assist and support employees as they follow the above rules.
- 2) Require employees to submit an information sheet at the end of the year to the Title IX office that contains deidentified information on the disclosure so that office can use the information to help improve its policies and prevent sex discrimination through education and safety measures.<sup>69</sup>

In addition, an institution would not be in compliance with Title IX if it failed to implement any of the other parts of the regulations, including the following:

- 1) Responding appropriately once the Title IX Coordinator or the highest-level administrators have information.<sup>70</sup>
- 2) Monitoring and reducing barriers to reporting.<sup>71</sup>

Admittedly, these alternative reporting obligations would also mean that an institution would not have an obligation to address, remedy, and prevent sexual misconduct if a student disclosed to an employee, but also instructed the employee not to report, and both the employee and the institution followed all necessary procedures. Constructive notice would not exist. Yet the Department and the courts<sup>72</sup> have never imputed to the institution all information received by employees. For example, under the existing and proposed administrative rules, an institution isn't

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<sup>68</sup> The University of Oregon provides such worksheets to its employees. *See* [https://investigations.uoregon.edu/files/assisting\\_employee\\_checklist\\_10.01.21\\_v2.pdf](https://investigations.uoregon.edu/files/assisting_employee_checklist_10.01.21_v2.pdf).

<sup>69</sup> Presumably, such a requirement could extend to employees who attend Take Back the Night events. At the University of Oregon, all employees who have received a disclosure from a survivor must complete and submit a form at the end of the year that provides unidentifiable information about the misconduct to help the institution maintain an educational environment free of sex discrimination.

<sup>70</sup> *Id.* at 41573 (proposed regulation 106.44(f)).

<sup>71</sup> *Id.* at 41572 (proposed regulation 106.44(b)).

<sup>72</sup> Courts have recognized that not all "responsible employees" are an "appropriate person" for purposes of imposing civil liability on the institution. *See, e.g., American Law Instit., supra* note 51, at 90 (§3.5 Rptr's Notes).

deemed to have notice of sexual misconduct if the disclosure is made to a confidential resource.<sup>73</sup> This was also true in earlier Guidance<sup>74</sup> The Department found it justifiable to say disclosures to a confidential employee is not actual knowledge because survivors receive important benefits from confidential resources. Survivors will receive tremendous benefits by allowing them to treat any employee as a confidential employee, but also by allowing them to demand the person file a report on their behalf.

While there would be more institutional accountability under the Department's proposed rules, that accountability would come at survivors' expense. This instrumental view of survivors is never appropriate. Institutional accountability is not the be-all-and-end-all. Other values exist, including doing no harm to the person who is ostensibly protected by the Title IX regulations. If institutional accountability were the ultimate objective, then the Department might require institutions to have surveillance cameras in students' dorm rooms, to segregate students permanently by gender, or to require schools to interrogate all students individually about their observations on campus. These outrageous measures might reveal or reduce sexual misconduct, but they would undermine other values. That is what is wrong with mandatory reporting.

Finally, some will claim that a trained Title IX Coordinator is better situated than individual employees to interact with the survivor. Of course, the Department's proposed regulations do not stop survivors from going to particular employees; rather, they just undermine some survivors' choice to disclose to a trusted source. Because all employees might come into contact with survivors even under the Department's proposed policy, all employees should be trained how to respond appropriately to a disclosure.<sup>75</sup> Moreover, the reporting scheme recommended by this comment is not complicated and employees can reasonably be expected to comply.<sup>76</sup>

The Department's choice of reporting mandates isn't limited to models from either the Obama or Trump era. President Biden has an opportunity to ensure survivors are not harmed by the Title IX regulations as he improves ways to hold institutions accountable for their violations of Title IX.

## **Non-Reporting Proposed Provisions**

I now suggest some revisions to the other parts of the proposed regulations.

### **34 C.F.R. § 106.2 (Definitions)**

#### **Sex-based Harassment, Specific Offenses (3), p. 41568-69**

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<sup>73</sup> See Notice of Proposed Rulemaking, *supra* note 2, at 41573 (proposed regulation 106.44(d)(2)). Under existing regulations, this result exists because most employees do not have an obligation to report and are, therefore, treated as confidential. See, e.g., Final Rule, *supra* note 1, at 30040.

<sup>74</sup> See U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, at 22 (2014) (now rescinded) (2014 FAQs), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

<sup>75</sup> See *infra* text accompanying note 77.

<sup>76</sup> It would be beneficial for the Department to require institutions to have their reporting protocol on the Web so that it is easily accessible to all employees. Also, ideally, the Department would require schools to make a confidential resource available to assist and support employees following the institution's policy.



It would help if the definition of dating violence specified whether it requires a crime of violence. There is confusion because dating violence is defined as “violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim,” but domestic violence is defined as “felony or misdemeanor crimes of violence....” Sexual assault is also defined as offenses captured “under the uniform crime reporting system.”

**Supportive Measures, p. 41569.**

The term “party” in line two of the definition is undefined. It probably means complainant or respondent, but using those terms would make it clear.

**34 C.F.R. § 106.8 (d)(1), (2), (3), (4), Training, p. 41570.**

I am concerned that those in the Title IX office as well as those involved with the grievance procedures (such as investigators and decisionmakers) aren’t required to receive basic training on domestic violence and sexual violence. Critical background information for those involved in grievance proceedings includes training on myths and misconceptions as well as basic information, such as the various types of power and control that can exist in a domestic violence relationship. Without training, decisionmakers are more likely to draw inaccurate conclusions.

I am also concerned that there is no requirement that all employees who are reporters have any training on how to respond to the survivor. An appropriate response can encourage a survivor to move forward with the Title IX process as well as assist the survivor with healing.<sup>77</sup> The appropriate response is not complicated, but the recipient of information should, at a minimum, respond with kindness and without judgment.

**34 C.F.R. § 106.10 Scope, p. 41571**

I recommend that the definition include “sex harassment” and “marital status.”

**34 C.F.R. § 106.21(c)(2)(iii) Admissions, p. 41571**

This section should be amended to include “current, potential, or past pregnancy or related conditions.” This is especially important in a post-*Dobbs* world.<sup>78</sup> In addition, it should prohibit not only inquiries about “marital status,” but also “family status and parental status.” After all, more often than not women are the custodial parents and a school might use such information to

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<sup>77</sup> See Weiner, *supra* note 9, at 89 n. 75 (citing research). The University of Oregon policy says, “As a caring community, and to promote a compassionate campus community, the university expects all employees to do the following when responding to disclosures of Discriminatory Misconduct under this Policy: \* Listen to what the person wants to tell you before providing supportive resources, referrals, and information, including those resources listed at the end of this Policy ...\* Be sensitive to the needs of the person who allegedly experienced the conduct, without being judgmental, dismissive, condescending, discriminatory, or retaliatory...” See Prohibited Discrimination and Retaliation Policy, at <https://policies.uoregon.edu/vol-5-human-resources/ch-11-human-resources-other/prohibited-discrimination-and-retaliation>, at VI.

<sup>78</sup> *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2288 (2022).

discriminate against women with stereotypical fears about commitment. Pre-admission inquiries related to pregnancy or related conditions and family status more generally should be prohibited.

**34 C.F.R. § 106.2; 34 C.F.R. § 106.44(g) Supportive measures.**

I am quite surprised that the Department mentions so few services in its definition of “supportive measures” in both of the two aforementioned sections, although this definition is similar to the definition in the existing regulation.<sup>79</sup> While “counseling” is expressly mentioned, other services such as medical or advocacy (legal and lay) are not. In light of the importance of such measures,<sup>80</sup> this omission is troubling. Because a recipient need only provide what is “available and reasonable,” the listing of such services would only encourage, but not mandate, institutions to adopt them. I strongly suggest that these services get added to the list.

**34 C.F.R. § 106.44(k) Discretion to offer informal resolution in some circumstances, p. 41574.**

The availability of an informal resolution process poses legal risks for both the complainant and the respondent and a recipient should provide notice of that fact under (k)(2), specifically informing the students that they may want to get legal advice before selecting the option. Frankly, the requirement of “voluntary consent”<sup>81</sup> is meaningless without ensuring the consent is informed and it will not be informed without such advice. While the proposed regulations require institutions to explain many of the implications of the process to the students,<sup>82</sup> some of the differences between the grievance process and an informal process will not be explained without legal advice. For example, one of the terms that can be included in the informal resolution agreement is “restrictions on contact.”<sup>83</sup> This presumably includes no contact by the complainant too, especially because the following section specifically mentions only the respondent (i.e., “restrictions on the respondent’s participation” in programs).<sup>84</sup> The acceptability of a mutual no-contact order is a substantial difference from what is allowable under the grievance procedures: recipients may only impose consequences on a respondent following a determination that the respondent violated the recipient’s prohibition on sex discrimination.<sup>85</sup> Although the complainant must agree to the informal resolution agreement, without legal advice the complainant may not understand the risks involved in agreeing to a no-contact order.<sup>86</sup> Similarly, while statements made

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<sup>79</sup> See 34 C.F.R. § 106.30.

<sup>80</sup> See *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEM. 123 (2017) [attached as appendix 2]. See also text accompanying notes 83-87, *infra*.

<sup>81</sup> *Id.* (proposed rule 34 C.F.R. § 106.44(k)(2)).

<sup>82</sup> See, e.g., *Id.* at 41574 (proposed regulation 34 C.F.R. § 106.44 (k)(3)).

<sup>83</sup> See Notice of Proposed Rulemaking, *supra* note 2, at 41575 (proposed regulation 34 C.F.R. § (k)(5)(i)).

<sup>84</sup> *Id.* (proposed regulation 34 C.F.R. § (k)(5)(ii)).

<sup>85</sup> *Id.* at 41567 (proposed regulation 34 C.F.R. § 106.2, Disciplinary Sanctions).

<sup>86</sup> See generally Elizabeth Topliffe, Note, *Why Civil Protection Orders Are Effective Remedies for Domestic Violence But Mutual Protective Orders Are Not*, 67 IND. L.J. 1039, 1060-64 (1992); Jacquie Andreano, Note, *The Disproportionate Effect of Mutual Restraining Orders on Same-Sex Domestic Violence Victims*, 108 CALIF. L. REV. 1047, 1058-1062 (2020).

in an informal process may not be used if grievance procedures are resumed,<sup>87</sup> nothing stops those materials from being used in a court of law. Therefore, casual statements by a complainant might undermine her credibility in a civil or criminal proceeding. Similarly, admissions may prove problematic for the respondent.

**Miscellaneous.**

The commentary to the proposed regulations sometimes uses the term “report” when the word should be “disclose” or “disclosures.” People do not typically “report” sex discrimination to a confidential employee, but they “disclose” it. Similarly, there are not confidential reports, but confidential disclosures.<sup>88</sup>

Thank you for the opportunity to comment on the proposed regulations.

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<sup>87</sup> See Notice of Proposed Rulemaking, *supra* note 2, at 41574 (proposed regulation 34 C.F.R. § 106.44(k)(3)(vii)).

<sup>88</sup> See, e.g., *Id.* at 41441 (“Under proposed § 106.44(d), a confidential employee would not be expected to report what they learn about sex discrimination to the Title IX Coordinator, but the recipient would be required to take certain steps to ensure that persons who *report* sex discrimination to a confidential employee understand the employee’s confidential status and how to report sex discrimination to the Title IX Coordinator. Ensuring that some employees are able to receive confidential *reports* of sex discrimination, including sex-based harassment, is a longstanding priority for the Department and would be consistent with the practices of many schools both before and since the 2020 amendments.”)(italics added).

Appendix 1

A PRINCIPLED AND LEGAL APPROACH TO  
TITLE IX REPORTING

MERLE H. WEINER\*

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\* Philip H. Knight Professor of Law. I really appreciate the insightful comments on an earlier draft of this Article offered by Katharine K. Baker, Katharine Bartlett, Deborah Brake, Caroline Forell, Jennifer Freyd, Darci Heroy, Liz Hutchison, Kasia Mlynski, Kathryn Moakley, and David Schuman. I also am very grateful for the valuable research assistance provided by Ashlea Allred, Anna Titus, Ben Molloy, and Amanda Reilly.

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*Institutions of higher education identify "responsible employees" to further their compliance with Title IX. Responsible employees typically report instances of campus gender-based violence to the institution, usually to the Title IX coordinator. Unfortunately, most colleges and universities make virtually every employee a responsible employee. This "wide-net" approach to reporting, sometimes referred to as universal mandatory reporting, produces two categories of related unintended consequences: (1) it weakens the autonomy of victims when they need their autonomy most, thereby undermining their sense of institutional support and aggravating their psychological and physical harm from the assault; and (2) because of*

*these negative consequences, it deters some victims from accessing the help they need and from invoking university processes designed to hold their perpetrators accountable.*

*After describing the drawbacks of wide-net reporting policies, this Article examines whether current law and guidance permits colleges and universities to limit the number of responsible employees. It argues that recent guidance from the Office for Civil Rights (OCR) increases institutional discretion beyond what existed even under Obama-era guidance and allows institutions to move away from wide-net reporting policies. Nonetheless, because some troubling language still remains in OCR guidance, this Article urges the Trump administration to inform colleges and universities expressly that they can narrow the number of responsible employees.*

*The Article then describes in detail the components of a legally sufficient and principled reporting policy. The Article identifies key principles that should guide an institution's formulation of policy, discusses which employees should be made responsible employees, and analyzes several tricky categories of employees. To facilitate reporting and to support survivors, the Article recommends that all employees be obligated both to report for a survivor if the survivor wants to report and to offer the survivor access to confidential support services. Several other aspects of reporting policies that deserve consideration are also highlighted.*

*Finally, the Article argues that institutions cannot credibly justify their wide-net policies by invoking concerns about liability. No reliable estimates exist about the relative liability risks attending different types of policies. The purported institutional advantages of wide-net reporting policies, including the simplification of matters for employees and the removal of perpetrators from campus, appear overstated. Moreover, the liability risks associated with wide-net policies, including the increased institutional vulnerability when employees do not report or when students do not want them to report, are typically ignored.*

*The Article concludes by urging colleges and universities to revise their reporting policies to better advance the goals of Title IX.*

## I. THE CURRENT SITUATION

Betsy DeVos, the U.S. Secretary of Education, said during her confirmation hearings that “sexual assault in any form or in any place

is a problem.”<sup>1</sup> She vowed that if she were confirmed, she would work to understand “the past actions [of the Office for Civil Rights within the Department of Education] and the current situation better, and to ensure that the intent of the law is actually carried out in a way that recognizes both the rights of the victims as well as those who are accused.”<sup>2</sup>

To live up to her pledge, Secretary DeVos should give attention to the topic of “responsible employees.” These are the employees who are required to report disclosures of gender-based violence to their institutions. An examination of this topic reveals that guidance on this issue from the Office for Civil Rights (OCR) has been, and continues to be, confusing and harmful. The recent withdrawal of both the 2011 *Dear Colleague Letter*<sup>3</sup> and the 2014 *Questions and Answers on Title IX and Sexual Violence*,<sup>4</sup> along with the concurrent dissemination of the 2017 *Dear Colleague Letter*<sup>5</sup> and the 2017 *Questions and Answers on Campus Sexual Misconduct*,<sup>6</sup> have not fixed the problem. Rather, the Department of Education needs to promulgate new regulations or guidance that can facilitate colleges’ and universities’ adoption of better reporting policies.<sup>7</sup>

Others should join Secretary DeVos and study the topic of responsible employees. Otherwise, members of Congress who are concerned about campus sexual violence may inadvertently codify an interpretation of the Title IX guidance that has harmed survivors.<sup>8</sup>

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1. *Education Secretary Confirmation Hearing*, 115th Cong. (2017), available at <https://www.c-span.org/video/?421224-1/education-secretary-nominee-betsy-devos-testifies-confirmation-hearing> (transcript from closed captioning) (statement from Betsy DeVos, at 1:16:49, in response to Senator Bob Casey, Jr.).

2. *Id.*

3. Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

4. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE (Apr. 24, 2014) [hereinafter “2014 Q&A on Title IX and Sexual Violence”], <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

5. Letter from Candice Jackson, Acting Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleague (Sept. 22, 2017) [hereinafter “2017 Dear Colleague Letter”], <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

6. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON CAMPUS SEXUAL MISCONDUCT (2017) [hereinafter “2017 Q&A on Campus Sexual Misconduct”], <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

7. See 2017 Dear Colleague Letter, *supra* note 5, at 2 (noting that the Department will engage in rulemaking on the topics previously addressed by the withdrawn guidance).

8. This would be the case if the Campus Accountability and Safety Act, S. 856, 115th Cong. (2017), <https://www.congress.gov/bill/115th->

In addition, campus administrators may miss their opportunity to maneuver within existing guidance to create more effective and victim-centered reporting policies and to seek regulatory guidance from OCR that would insure the longevity of those improved reporting policies.

### A. Legal Background

Responsible employees are an important part of an institution's Title IX compliance regime. Schools have a duty to address gender discrimination, including gender-based harassment,<sup>9</sup> and specifically sexual violence<sup>10</sup> and domestic violence.<sup>11</sup> This obligation arises once the school "knows or reasonably should know of an incident of sexual misconduct."<sup>12</sup> A school is deemed to know about the misconduct once

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congress/senate- bill/856/text, is adopted. The bill would define responsible employee in a new section of the Higher Education Act: "[T]he term 'higher education responsible employee' means an employee of an institution of higher education who— (A) has the authority to take action to redress sexual harassment; or (B) has the duty to report sexual harassment or any other misconduct by students or employees to appropriate school officials." *Id.* at § 125. Any attempt to codify the Obama-era guidance as legislation at the state level may also create this problem.

9. Title IX of the Education Amendments of 1972 obligates institutions of higher education to address discrimination on the basis of sex. *See* 20 U.S.C. §§ 1681–88 (2012). The law applies to any educational program or activity that receives federal financial assistance, and its protection extends to the entire institution. Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988). In the 1980s, sexual harassment was identified as a form of gender discrimination covered by Title IX. *See* OCR Policy Memorandum from Antonio J. Califa, Director of Litigation, Enforcement, and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981), *cited in* U.S. DEPT OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 2 (Sept. 1988) (on file with author).

10. Sexual misconduct is now a well-recognized type of sexual harassment addressed by Title IX. *See* Merle H. Weiner, *Legal Counsel for Survivors of Campus Sexual Violence*, 29 YALE J.L. & FEM. 123, 188–90 (2017). "Sexual violence," which the executive branch now call "sexual misconduct," covers a range of behavior, including "sexual battery" and "sexual coercion" as well as "rape" and "sexual assault." *See* 2011 Dear Colleague Letter, *supra* note 3, at 1. The most prevalent sexual misconduct is "unwanted sexual contact and sexual coercion . . . followed by incapacitated rape and attempted or completed forcible rape." *See* Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research From 2000-2015*, TRAUMA, VIOLENCE & ABUSE 11 (2016).

11. *See* 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 2 ("[W]hen addressing allegations of dating violence, domestic violence, sexual assault, or stalking, institutions are subject to the Clery Act regulations as well as Title IX").

12. 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 1–2. Once a school has notice, "it should take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been



a responsible employee knows about it or in the exercise of reasonable care should know about it.<sup>13</sup>

The Department of Education defined who is a responsible employee in its *2001 Revised Sexual Harassment Guidance*. It said:

A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.<sup>14</sup>

This definition was reiterated in guidance issued by OCR during the Obama administration,<sup>15</sup> and again in 2017 when the Department of Education replaced the Obama-era guidance with new guidance.<sup>16</sup>

Responsible employees typically report student disclosures of gender-based misconduct to the Title IX coordinator, who then takes further action. A report to the Title IX coordinator was, in fact, required by the 2014 OCR guidance.<sup>17</sup> That guidance also required the responsible employee to relay everything that the student disclosed to him or her, including the victim's and perpetrator's names.<sup>18</sup> This obligation existed even if the student did not want the school to take further action.<sup>19</sup> The report would typically lead the

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created, and prevent harassment from occurring again." U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 15 (2002) [hereinafter "2001 Revised Guidance"], <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

13. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,042 (Mar. 13, 1997) [hereinafter "1997 Guidance"], <https://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf>; 2001 Revised Guidance, *supra* note 12, at 13.

14. 2001 Revised Guidance, *supra* note 12, at 13.

15. See 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 15–16.

16. See 2017 Dear Colleague Letter, *supra* note 5, at 2 (reaffirming a commitment to the 2001 Revised Guidance, *supra* note 12).

17. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 14 (a responsible employee must "report incidents of sexual violence to the Title IX coordinator or other appropriate school designee").

18. *Id.* at 16.

19. Only an employee with special training, such as the Title IX coordinator, could consider the survivor's request for confidentiality. See 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 18–20.

Title IX coordinator to initiate an investigation and perhaps disciplinary proceedings,<sup>20</sup> and, at times, a call to the police.<sup>21</sup>

Most schools developed their reporting policies in response to pre-2017 guidance. When the Department of Education in 2017 signaled a willingness to give institutions of higher education more discretion to craft their internal policies, the question arose whether schools could now alter their reporting policies, and if so, what would be permissible. Because OCR left intact the definition of “responsible employee” from 2001, the answer is less clear than it should be.

### B. Factual Landscape

Today the overwhelming majority of institutions of higher education designate virtually *all* of their employees as responsible employees and exempt only a small number of “confidential” employees.<sup>22</sup> Kathryn Holland, Lilia Cortina, and Jennifer Freyd recently examined reporting policies at 150 campuses and found that policies at 69% of the institutions made all employees mandatory reporters, policies at 19% of the institutions designated nearly all employees as mandatory reporters, and only 4% of institutional

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20. The Title IX coordinator was supposed to try to respect the student’s request for confidentiality, but the Title IX coordinator could not assure it because the school needs to be able to investigate and prevent the recurrence of sexual violence. *See* 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 18–20. This position continues even after the withdrawal of the Obama-era guidance. Older guidance expressed the same idea. *See* U.S. DEP’T OF EDUCATION, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 9–10 (2008) (“The school should take all reasonable steps to investigate and respond to the complaint in a manner consistent with a request for confidentiality from a student.”); *id.* (noting factors the school should weigh in accessing the request for confidentiality against its responsibility to provide a safe and nondiscriminatory environment for all students).

21. Some schools report to the police, although an internal procedure may exist before that occurs. *See, e.g.*, UNIV. OF VA., POLICY ON SEXUAL AND GENDER-BASED HARASSMENT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 9 (2015), <http://uvapolicy.virginia.edu/policy/HRM-041>; Jeremy D. Heacox, S-A: *Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L.J. 48, 61 (2012) (noting “[Marquette] university now reports any allegations of sexual assault to the sensitive crimes unit of the local police department”). Reporting to law enforcement is sometimes in response to a state law mandate. *See, e.g.*, Jessica Horton Act, S.C. CODE ANN. § 59-154-10 (2015); VA. CODE ANN. § 23.1-806 (F), (G) (West 2016); WIS. STAT. ANN. § 940.34 (West 2017).

22. KATHRYN J. HOLLAND, LILIA M. CORTINA & JENNIFER J. FREYD, *Compelled Disclosure of College Sexual Assault*, AMERICAN PSYCHOLOGIST 10 (2017), <http://dynamic.uoregon.edu/jjf/articles/hcfaccepted2017.pdf>.

policies named a limited list of reporters.<sup>23</sup> The authors concluded, “[T]hese findings suggest that the great majority of U.S. colleges and universities—regardless of size or public vs. private nature—have developed policies designating most if not all employees (including faculty, staff, and student employees) as mandatory reporters of sexual assault.”<sup>24</sup> At some institutions, these reporting obligations have even been incorporated into employees’ contracts.<sup>25</sup>

The number of institutions with broad policies, sometimes known as universal mandatory reporting or required reporting,<sup>26</sup> and hereafter called “wide-net” reporting policies, has grown over time. Approximately fifteen years ago, in 2002, only 45% of schools identified some mandatory reporters on their campuses, and these schools did not necessarily categorize almost every employee in that manner.<sup>27</sup> The trend since then is notable, particularly because it contravenes the advice from a Congressionally-mandated study, published in 2002 by the National Institute of Justice.<sup>28</sup> The authors of that study suggested that wide-net reporting policies were unwise.<sup>29</sup> After examining almost 2,500 institutions of higher education, they warned:

Any policy or procedure that compromises, or worse, eliminates the student victim’s ability to make her or his own informed choices about proceeding through the reporting and adjudication process—such as mandatory reporting requirements that do not

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23. *Id.* at 8–9. The remaining 8% of the policies “provided an *ambiguous* definition. They did not designate all employees as mandatory reporters, but also did not clearly identify those who were.” *Id.* at 9.

24. *Id.* at 10.

25. Sine Anahita, *Trouble with Title IX*, AAUP (May–June 2017), <https://www.aaup.org/article/trouble-title-ix#.WSRpshot6ao.email> (discussing University of Alaska, Fairbanks) (“[I]n 2016, the mandatory reporting rule appeared in our individual contracts . . . . The new contract language did not go through regular governance processes but simply appeared unannounced.”).

26. This reporting scheme is different than several other mandatory schemes with which it is often confused, including the following: a state requirement that child abuse be reported, typically to the state child protection agency; the Clery Act’s requirement that de-identified information about certain crimes be reported to the Clery Act coordinator for crime statistic purposes; and a state requirement that law enforcement take certain actions, such as arrest, in response to certain criminal acts, such as domestic violence.

27. See HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, *CAMPUS SEXUAL ASSAULT: HOW AMERICA’S INSTITUTIONS OF HIGHER EDUCATION RESPOND* 88 (Oct. 2002).

28. *Id.*

29. See KARJANE, FISHER & CULLEN, *supra* note 27.

include an anonymous reporting option or require the victim to participate in the adjudication process if the report is filed—not only reduces reporting rates but may be counterproductive to the victim’s healing process.<sup>30</sup>

*C. Explanation for the Rise in Wide-Net Reporting Policies*

What caused this expansion of wide-net reporting policies? No statutory change explains it. In fact, the term “responsible employee” does not exist, and has never existed, in Title IX itself. Nor is the increase due to a change in the administrative regulations. The regulations mention the phrase “responsible employee” only once and the phrase has always had a very narrow meaning. Specifically, the regulations say:

*Designation of responsible employee.* Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph.<sup>31</sup>

This regulation is commonly understood to require schools to designate a Title IX coordinator.<sup>32</sup>

Guidance from OCR in 2001, and reiterated by the agency in 2014, expanded who must be labeled a responsible employee, and the language set the backdrop for the explosion in wide-net policies. The 2014 guidance, like the 2001 guidance, contained three criteria that defined responsible employees:

Who is a “responsible employee”?

Answer: According to OCR’s 2001 Guidance, a responsible employee includes any employee: who has the authority to

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30. *See id.* at vi, xi, xiii, 81.

31. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106.8(a) (2014). This regulation also requires recipients to publish grievance procedures providing for prompt and equitable resolution of complaints.

32. *See* 2011 Dear Colleague Letter, *supra* note 3, at 7.

take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.<sup>33</sup>

The criteria in the 2001 and 2014 guidance, and the documents themselves, did not require institutions to make almost every employee a responsible employee. So what happened? Several extra-legal factors are likely to blame. First, trade publications and others started talking about the second category of employee that appeared in the OCR guidance: an employee “who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee . . . .”<sup>34</sup> The question was raised whether this language meant all employees had to be made responsible employees.<sup>35</sup> For example, John Gaal and Laura Harshbarger, writing in the *Higher Education Law Report* asked, “And does OCR really mean that *any* employee who has *any* ‘misconduct’ reporting duty is a ‘responsible employee’? . . . We simply do not know.”<sup>36</sup> Administrators started concluding, erroneously, that any employee who has an obligation to report any other misconduct at the institution must be labeled a responsible employee. Several OCR resolution letters issued at the end of 2016 bolstered this broad interpretation.<sup>37</sup>

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33. See 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 15.

34. *Id.*

35. John Gaal & Laura Harshbarger, *Responsible Employees and Title IX*, HIGHER EDUC. L. REP. (May 12, 2014), <http://www.higheredlawreport.com/2014/05/responsible-employees-and-title-ix/>.

36. *Id.* (emphasis added).

37. See *infra* text accompanying notes 263–80.

Second, professional organizations made available templates for wide-net reporting policies,<sup>38</sup> and encouraged their adoption.<sup>39</sup> The press helped disseminate the templates.<sup>40</sup> Well-known attorneys recommended these wide-net reporting policies to general counsel.<sup>41</sup> Institutions likely adopted the wide-net reporting policies because it was easy to do so, no alternative approach was similarly touted,<sup>42</sup> faculty were often not involved in the policy decisions,<sup>43</sup> and administrators found comfort in following the crowd.<sup>44</sup>

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38. A model reporting policy by ATIXA, for example, says, “The College has defined all employees, both faculty and professional staff, as mandatory reporters, except those designated as ‘confidential.’” ASSOCIATION OF TITLE IX ADMINISTRATORS, MANDATORY REPORTERS: A POLICY FOR FACULTY, TRUSTEES, AND PROFESSIONAL STAFF 4 (2015) [hereinafter ATIXA], [https://atixa.org/wordpress/wp-content/uploads/2012/01/Mandatory-Reporters-Policy-Template\\_1215.pdf](https://atixa.org/wordpress/wp-content/uploads/2012/01/Mandatory-Reporters-Policy-Template_1215.pdf). Previously ATIXA took the position that many mandatory reporters could file Jane Doe reports to keep the information about the victim from the Title IX coordinator. Brett A. Sokolow, *Mandatory Reporting for Title IX: Keep it Simple*, CHRONICLE OF HIGHER EDUC. (Sept. 23, 2013), at <http://www.chronicle.com/article/Mandatory-Reporting-for-Title/141785/>. For-profit businesses may have incentives to create and solve Title IX problems, whether or not those problems actually exist.

39. ATIXA, *supra* note 38, at 1 (“The language of the [Clery] Act would allow the College to exclude some faculty some of the time and many professional staff from the obligation to report. Such an approach, however, risks creating confusion for faculty and staff, takes a minimalist approach to the ethical obligation to inform our community about serious crimes, and makes the institution more vulnerable to enforcement action.”).

40. See Colleen Flaherty, *Faculty Members Object to New Policies Making all Professors Mandatory Reporters of Sexual Assault*, HIGHER EDUC. L. REP. (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual> (providing a hyperlink to a wide-net reporting policy template from ATIXA). Flaherty also quotes many people who find fault with wide-net policies.

41. GINA M. SMITH & LESLIE M. GOMEZ, EFFECTIVE IMPLEMENTATION OF THE INSTITUTIONAL RESPONSE TO SEXUAL MISCONDUCT UNDER TITLE IX AND RELATED GUIDANCE 12–13, 19 (June 19–22, 2013), [http://www.higheredcompliance.org/resources/resources/05D\\_13-06-38.pdf](http://www.higheredcompliance.org/resources/resources/05D_13-06-38.pdf).

42. Legal scholarship on this particular topic has been almost non-existent. One article recommended moving away from blanket mandatory reporting policies that injure victims’ emotional safety, but the article did not engage with OCR guidance, offer principles for deciding who should be a mandatory reporter, or discuss the impact of a narrower policy on the institution’s legal liability. See generally Jill C. Engle, *Mandatory Reporting of Campus Sexual Assault and Domestic Violence: Moving to a Victim-Centric Protocol that Comports with Federal Law*, 24 TEMP. POL. & CIV. RTS. L. REV. 401 (2015).

43. AM. ASS’N OF UNIV. PROFESSORS, *The History, Uses, and Abuses of Title IX* 69, 87 (2016) [hereinafter AAUP], at <https://www.aaup.org/file/TitleIXreport.pdf>.

44. See Judith Newcombe & Clinton Conrad, *A Theory of Mandated Academic Change*, 52 J. HIGHER EDUC. 555, 566 (1981) (mentioning how administrative leadership looks to other institutions to see the perceptions and reactions to new

*D. Title IX Justification for Wide-Net Reporting Policies*

Institutions with wide-net reporting policies defend these policies by claiming that they are best for survivors.<sup>45</sup> Administrators cite examples of employees who failed to report sexual harassment or violence despite survivors' wishes for reports,<sup>46</sup> and claim that wide-

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mandates); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 148 AM. SOC. REV. 147, 151 (1983) (noting that “[u]ncertainty is also a powerful force that encourages imitation” among organizations). See, e.g., Eilis Donohue, *College to Update Policy on Title IX Reporting*, THE MISCELLANY NEWS (Sept. 26, 2106), <http://miscellanynews.org/2016/09/28/news/college-to-update-policy-on-title-ix-reporting/> (citing Vassar’s Interim President Jonathan Chenette regarding Vassar’s shift to a policy that has almost all employees labeled as responsible employees) (“Other [higher education] institutions have moved to designating faculty and almost all employees as responsible reporters. In our region, the following is a partial list of institutions designating all faculty as responsible reporters: Wesleyan, Bard College, Marist College, Mount Saint Mary College and Sarah Lawrence.”).

45. The terms “survivor,” “victim,” and “complainant” are used interchangeably throughout the Article to refer to the person who alleges to be a victim of sexual violence. The terms survivor and victim are not meant to imply that the allegations have been founded. Occasionally, the Article employs pronouns. The female pronoun is used to refer to the survivor and the male pronoun is used to refer to the alleged perpetrator. These pronouns reflect the generally gendered nature of campus sexual misconduct. See Christopher Krebs et al., *Campus Climate Survey Validation Study Final Technical Report*, BUREAU OF JUSTICE STATISTICS 69–71 (2016), <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=5540> (“Based on significance tests conducted to compare prevalence rates between males and females, the prevalence of sexual assault, sexual battery, and rape were significantly lower for males than females at each of the nine participating schools.”). However, the use of these pronouns is not meant to imply that same-sex sexual violence or female-on-male sexual violence does not exist.

46. This fact pattern is apparent in case law but also in the media and literature. See, e.g., *McGrath v. Dominican Coll. of Blauvelt*, 672 F. Supp. 2d 477, 483–84 (S.D.N.Y. 2009) (rejecting motion to dismiss claim for deliberate indifference when allegations stated that various administrators did not move forward with Title IX process, among other things); Patrick Redford, *Lawsuit: Text Messages Show How Baylor Coaches Turned Football Program into Disciplinary ‘Black Hole,’* DEADSPIN (Feb. 2, 2017, 11:20 PM), <http://deadspin.com/lawsuit-text-messages-show-how-baylor-coaches-turned-f-1791947070> (detailing text messages sent between football coaches that suggest allegations of sexual assault by football players would be kept from judicial affairs); LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY’S CONTINUED BETRAYAL OF THE VICTIM X* (1989) (relaying the story of an eighth-grader who was sexually assaulted in a high school in 1958 and how the principal’s “casual attitude” to her report lead her to fear that her perpetrator would soon return to school, causing her to transfer from the school, and experience “the second rape —apathy from those she told and the need to flee for her own sense of safety”). High profile cases like that involving Jerry Sandusky and others at Penn State also were part of the background. See FREEH SPORKIN & SULLIVAN, LLP, *REPORT OF THE SPECIAL INVESTIGATIVE COUNSEL REGARDING THE ACTIONS OF THE*

net reporting policies minimize the opportunity for such inappropriate responses. Relatedly, administrators claim that wide-net reporting policies help institutions identify victims in order to offer them resources and support.<sup>47</sup> Studies show that most administrators do not believe that wide-net reporting policies create a barrier to reporting,<sup>48</sup> but rather they believe the policies encourage reporting.<sup>49</sup> Finally, proponents of wide-net reporting policies claim that these policies allow them to collect data on the prevalence of sexual assault and to ensure that perpetrators are identified and disciplined.<sup>50</sup>

These particular justifications make wide-net reporting policies appear consistent with the spirit of Title IX, insofar as they seem consistent with institutional commitments to reduce campus sexual violence. Consequently, when students at Knox College petitioned for a policy that would limit the number of responsible employees, the president of the college responded, “If you’re looking for a critique of our policy, you’re not going to find it in Title IX.”<sup>51</sup>

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PENNSYLVANIA STATE UNIVERSITY RELATED TO THE CHILD SEXUAL ABUSE COMMITTED BY GERALD A. SANDUSKY (2012), [http://health-equity.lib.umd.edu/3956/1/REPORT\\_FINAL\\_071212.pdf](http://health-equity.lib.umd.edu/3956/1/REPORT_FINAL_071212.pdf).

47. Flaherty, *supra* note 40 (“Despite the language about risk and exposure, [“Brett Sokolow, president and chief executive of the NCHERM Group, a risk management firm that advises colleges and universities on issues including sexual assault, [and] also...executive director of the Association of Title IX Administrators, or ATIXA”], said these new policies are about more than shielding institutions from high-profile lawsuits alleging they’ve dropped the ball on sexual assault. “That may be the motivation for some institutions, perhaps, but for most institutions, we want to know about what’s happening so we can address it,” he said, estimating that “many dozens” have moved to this kind of policy. “There are so many resources on college campuses that we can direct victims to, to give a quality response.”); *see also* AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, COUNCIL DRAFT NO. 1 § 3.5 cmt. (2017) [hereinafter ALI, COUNCIL DRAFT NO. 1]; *cf.* Jane K. Stoeber, *Mirandizing Family Justice*, 39 HARV. J.L. & GENDER 189, 233 (2016) (“Mandatory reporting laws are premised on the State’s interest in protecting vulnerable individuals, assuming they lack the decisional capacity to protect themselves.”).

48. KARJANE, FISHER & CULLEN, *supra* note 27, at 77, 79 (finding approximately 59% of administrators thought policies with “designated mandatory reporters” had “no effect” on the likelihood of assaults being reported and 29% perceived it only “somewhat discourages”).

49. *Id.* at 92 (noting, however, that these views are not confirmed by student victims).

50. *See, e.g.*, SMITH & GOMEZ, *supra* note 41, at 13 (discussing “central record keeping for the assessment of patterns”).

51. *Students Challenge Mandatory Reporting Requirements*, THE KNOX STUDENT (March 4, 2015), <http://www.theknoxstudent.com/news/2015/03/04/studentschallenge-mandatory-reporting-requirements/#.V93cTrU5GGY>.



*E. A New View: Wide-Net Reporting Policies are Inconsistent with the Spirit of Title IX*

This Article argues that wide-net reporting policies are in fact inconsistent with the spirit of Title IX. Even if wide-net policies were once thought beneficial to help break a culture of silence around sexual violence in the university setting,<sup>52</sup> the utilitarian calculus has now changed and these policies do more harm than good. Part II articulates the harm survivors experience when they are involuntarily thrust into a system designed to address their victimization: these policies undermine their autonomy and sense of institutional support, aggravating survivors' psychological and physical harm. These effects can impede survivors' healing, directly undermining Title IX's objective of ensuring equal access to educational opportunities and benefits regardless of gender. In addition, Part II argues that because of the negative consequences of reporting, wide-net reporting policies discourage students from talking to *any* faculty or staff on campus.<sup>53</sup> Fewer disclosures result in fewer survivors being connected to services and fewer offenders being held accountable for their acts. Holding perpetrators accountable is critical for creating a climate that deters acts of violence. Because wide-net policies chill reporting, these policies violate the spirit of Title IX.

Part III then debunks the myth that the law requires wide-net reporting policies. Nothing requires colleges and universities to designate all campus employees as responsible employees, not Title IX, not the related regulations, and not OCR guidance. The American Law Institute (ALI), in a draft of its *Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis*, said as much in its discussion of faculty reporting obligations: "Nothing in the official OCR regulations or guidance appears to require that all faculty be designated as mandatory reporters."<sup>54</sup> The

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52. Jessica Bennett, *Title IX Complaint Against Yale: Women Allege a "Culture of Silence" on Campus*, DAILY BEAST (April 2, 2011), <http://www.thedailybeast.com/title-ix-complaint-against-yale-women-allege-a-culture-of-silence-on-campus>.

53. See *infra* notes 133–34, 147–61 and accompanying text.

54. See ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5 reporters' notes.

American Association of University Professors (AAUP) took a similar position,<sup>55</sup> as have some Title IX experts.<sup>56</sup>

Part III reviews the relevant OCR guidance to determine the contours of institutional discretion. Its examination starts in 1997 in order to give context to the later description of responsible employees. It argues that schools have had the ability, even before 2017, to adopt more narrowly tailored policies. The 2017 guidance signals OCR's intention to allow schools continued leeway to adopt nuanced policies. However, because the 2017 guidance also reiterates problematic language from the 2001 guidance, Part III encourages OCR to clarify further that narrower reporting policies are, in fact, permissible.

Part IV describes a reporting policy that is legally sufficient, but much better for survivors than a wide-net reporting policy. It draws on the work of a Senate Work Group at the University of Oregon (UO) that identified principles to guide the development of such a reporting policy.<sup>57</sup> Under the UO's policy, all employees are "responsible," but their responsibilities differ and do not necessarily require reporting to the Title IX coordinator. "Designated reporters" are the mandatory reporters. They have administrative prominence in the institution, and students generally expect these employees to take action to address sexual violence. Other employees are either confidential employees or "student-directed employees." The former have a legal privilege to keep student communications private. Student-directed employees lack a statutory privilege, but they are required by the reporting policy to keep a student's disclosures private absent the student's request for the employee to report. Both confidential and

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55. AAUP, *supra* note 43, at 84 ("College and university administrations often designate all faculty members as mandated reporters, although Title IX does not require such a broad sweep.")

56. See, e.g., Cherie A. Scricca, *Identifying and Training Responsible Employees—Training on the Front Lines*, NACUA 2015 ANNUAL CONFERENCE 2–3 (June 29, 2015) ("Thus current OCR Guidance documents appears to take the view that a school may choose how to identify Responsible Employees, as long as they are clearly identified and the school adequately publicizes that information."); see also REPORT OF THE UNIVERSITY OF OREGON PRESIDENT'S REVIEW PANEL 31 (2014), [https://president.uoregon.edu/sites/president2.uoregon.edu/files/reviewpanelreport\\_web.pdf](https://president.uoregon.edu/sites/president2.uoregon.edu/files/reviewpanelreport_web.pdf) ("Title IX does not require universal mandatory reporting. Rather, it specifies that University community members have clear information regarding which individuals are and are not offices of notice . . . . Accordingly, it appears that the University has considerable discretion in designating who is and is not a mandatory reporter under Title IX.")

57. This author chaired that Work Group. Other members of the group were Phyllis Barkhurst, Melissa Barnes, McKenna O'Dougherty, Jennifer Freyd, Bill Harbaugh, and Darci Heroy. Missy Matella and John Bonine were not officially members, but both were active participants.

student-directed employees must ask the student if the student wants the employee to report the incident to the Title IX coordinator and/or to connect the student with confidential support services, and then the employee must follow the student's direction.

Part V argues that a narrowly tailored policy poses no more liability risk for an institution than a wide-net policy. It suggests that proponents of a wide-net policy overstate its advantages for funneling complaints to a person with knowledge about the multiple legal regimes implicated by a disclosure (e.g., Title VII,<sup>58</sup> Title IX, and Clery<sup>59</sup>) and for removing perpetrators from campus. In addition, it argues that proponents of wide-net reporting policies often ignore the liability risks that these policies create for institutions, including when employees fail to report when they should, and when employees report against survivors' wishes. Part V concludes that wide-net reporting policies provide no discernable liability advantages.

The analysis that follows should prove useful to institutions that take seriously the ALI's suggestion that they use their "informed independent judgment" to determine who should be designated as mandatory reporters.<sup>60</sup> It should assist university presidents in their efforts to move their institutional policies forward in thoughtful ways.<sup>61</sup> It should also help policy makers at OCR draft future guidance and regulations as well as policy makers in Congress formulate new laws.<sup>62</sup> It may also head off improvident state-lawmaking efforts to expand mandatory reporting policies (such as by making certain students mandatory reporters<sup>63</sup>) and to redress the withdrawal of the Obama-era guidance with imprecise laws.<sup>64</sup>

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58. 42 U.S.C. § 2000e-e-17 (2012).

59. 20 U.S.C. § 1092(f) (2012).

60. See ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5 cmt.

61. See Newcombe & Conrad, *supra* note 44, at 573 (arguing, *inter alia*, that college presidents, in particular, have an important role in implementing mandates under Title IX).

62. See *id.* at 574–75 (arguing, *inter alia*, that government intervention to enforce Title IX mandates is particularly important when there are forces working at cross purposes and that new guidance has to be done carefully to avoid unintended consequences).

63. S.B. No. 576, 2017 Leg., 85th Sess. (Tex. 2017) (requiring officers of student organizations to report to the "institution's chief executive officer"). This bill was left pending in the house committee. See *Texas Legislature Online - 85(R) History for SB 576*, TEXAS LEGISLATURE ONLINE HISTORY, <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=85R&Bill=SB576>.

64. See S. 706 § 2(a), (o), 190th Gen. Ct. of the Commonwealth (Mass. 2017), at <https://malegislature.gov/Bills/190/S706> (codifying the definition of responsible employee found in the 2001 revised guidance and imposing reporting obligations on those responsible employees).

## II. THE PROBLEM WITH WIDE-NET REPORTING POLICIES

Wide-net reporting policies have unintended consequences.<sup>65</sup> For students who disclose their victimization, these policies infringe their autonomy (that is, self-determination<sup>66</sup>) and aggravate the psychological and/or physical harm caused by the violence itself. Undoubtedly, these categories of injury overlap; interfering with a survivor's autonomy can contribute to psychological and/or physical harm, and psychological or physical harm can impede a person's exercise of autonomy. Subpart A discusses these types of injury in order to explore them in more depth. While these categories may not capture all of the harm that might exist, they probably come close.<sup>67</sup>

Subpart B describes how wide-net reporting policies also create an atmosphere that discourages some survivors from disclosing to anyone on campus. Because of the negative effects of disclosing in a system that removes a survivor's autonomy (and can harm a survivor psychologically and physically), wide-net reporting policies inhibit reporting by victims themselves,<sup>68</sup> even if they may increase reporting by employees. Fewer disclosures by survivors create two problematic effects. First, the institution's ability to connect survivors with support and services decreases. Second, the institution's ability to hold perpetrators accountable also decreases. If perpetrators are not held accountable, then the campus culture inadequately deters sexual violence and, in fact, makes victimization possible.

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65. See generally Jennifer Freyd, *The Problem with "Required Reporting" Rules for Sexual Violence on Campus*, HUFFINGTON POST BLOG (Apr. 25, 2016), [https://www.huffingtonpost.com/jennifer-j-freyd/the-problem-with-required\\_b\\_9766016.html](https://www.huffingtonpost.com/jennifer-j-freyd/the-problem-with-required_b_9766016.html); Michele Moody-Adams, *The Chilling Effect of Mandatory Reporting of Sexual Assault*, THE CHRON. OF HIGHER EDUC. (March 11, 2015), <http://www.chronicle.com/blogs/conversation/2015/03/11/the-chilling-effect-of-mandatory-reporting-of-sexual-assault/>.

66. See Catriona Mackenzie & Natalie Stoljar, *Introduction: Autonomy Refigured*, in RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 3, 5 (Catriona Mackenzie & Natalie Stoljar eds., 2000). I recognize the feminist critiques, including those that invoke "relational autonomy," i.e., that women's autonomy is limited and shaped by the "impact of social and political structures, especially sexism and other forms of oppression." See Carolyn McLeod & Susan Sherwin, *Relational Autonomy, Self-Trust, and Health Care for Patients Who are Oppressed*, in RELATIONAL AUTONOMY 259, 260.

67. Other harm might include, for example, the financial and reputational harm caused if her disclosure is forwarded to the criminal justice system and she is charged with making a false claim because the investigation does not convince the police that an assault occurred. See, e.g., Lisa Avalos, *Prosecuting Rape Victims While Rapists Run Free: The Consequence of Police Failure to Investigate Sex Crimes in Britain and the United States*, 23 MICH. J. GENDER & L. 1, 14–16 (2016).

68. See *infra* notes 133–34, 147–61 and accompanying text.

A. *For Those Who Disclose: Infringed Autonomy, Loss of Control, Psychological Harm, and Physical Harm*

When virtually all faculty and staff are made mandatory reporters, a survivor often cannot disclose her victimization to her preferred confidant without triggering a potential university investigation, and sometimes also a criminal investigation.<sup>69</sup> Nor can she stop those effects when a third party reports an incident without her knowledge or against her wishes, which is not uncommon,<sup>70</sup> or when she inadvertently discloses to a mandatory reporter herself.

1. Infringed Autonomy

A wide-net reporting policy constrains a survivor's choices and thereby affects her autonomy.<sup>71</sup> While the infringement of an adult victim's autonomy is often assumed to be self-evidently problematic,<sup>72</sup> some may question whether such an infringement is, in fact, problematic in the university setting. After all, universities limit student choice all the time and no one thinks much about it. For example, students cannot take any course at any time, but must typically fulfill certain prerequisites and take classes when and where they are offered.<sup>73</sup> Why then is it problematic to require a survivor to talk to a designated confidential resource if she wants her conversation about her victimization to remain confidential?

First, that arrangement, while perhaps reasonable at first glance, affects a particularly important choice and consequently impacts a

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69. See *supra* note 45 for an explanation about why this author uses the female pronoun.

70. See, e.g., Persis Drell, *Provost Reports on Title IX Process*, STANFORD (May 31, 2017, 10:00 AM), <https://parents.stanford.edu/2017/05/31/provost-reports-on-title-ix-process/> (noting that during the first fifteen months of the pilot process for addressing Title IX complaints related to sexual harassment, stalking, relationship violence and sexual violence involving students, there were 65 reports initiated by students that went through the process and 61 unverified reports, "mostly from third parties, of prohibited conduct in which complainants did not want to come forward").

71. HOLLAND, CORTINA, & FREYD, *supra* note 22, at 19 ("[E]ven when university officials do everything possible to respect requests for confidentiality, Responsible Employee reports made against a survivor's wishes already disregarded that individual's desire for confidentiality and autonomy.").

72. See, e.g., Benjamin Pomerance, *Finding the Middle Ground on a Slippery Slope: Balancing Autonomy and Protection in Mandatory Reporting of Elder Abuse*, 16 MARQ. BENEFITS & SOC. WELFARE L. REV. 439, 473, 491 (2015).

73. See, e.g., UNIV. OF ORE. SCHOOL OF JOURNALISM AND COMM'NS, *Academic Requirements*, <http://journalism.uoregon.edu/students/undergrad/academic/requirements/>.

survivor's autonomy more than other restricted student choices.<sup>74</sup> The decision in whom to confide is a critical one, touching upon aspects of freedom of association, freedom of speech, and privacy. Simply, speaking privately with the person of one's choice about a sexual assault is an important part of liberty. It can affect one's self-definition and self-direction.<sup>75</sup>

Second, the survivor's situation makes the availability of a preferred confidant very important. Constrained choices affect people differently depending upon their circumstances.<sup>76</sup> Allowing a survivor to choose her support person in the aftermath of a sexual assault is a particularly significant exercise of autonomy. Stated another way, violations of autonomy are cumulative, with each violation compounding the harmful effects of the other.<sup>77</sup> Laura Hanson, a rape victim, spoke of this reality when she criticized wide-net reporting policies.<sup>78</sup> She said such a policy "puts adults in a position they would not normally be in. As an adult, you don't expect

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74. See generally Sarah E. Ullman & Liana Peter-Hagene, *Social Reactions to Sexual Assault Disclosure, Coping, Perceived Control and PTSD Symptoms in Sexual Assault Victims*, 24 J. COMMUNITY PSYCHOL. 495, 496, 504 (2014) (explaining that negative social reactions, including an attempt to control the victim's actions, can negatively affect a survivor's recovery).

75. See *id.* For example, a confidant's advice, and even the confidant's reaction, can have a long-term effect on the survivor's recovery. If a person does not listen, validate, and have positive regard, then the survivor has a higher self-perceived threat of stigma and is less likely to disclose to law enforcement, which in turn can increase the rate of sexual revictimization. See Audrey K. Miller, et al., *Stigma-Threat Motivated Nondisclosure of Sexual Assault and Sexual Revictimization: A Prospective Analysis*, 35 PSYCHOL. OF WOMEN Q. 119, 125–26 (2011).

76. See Camilla Mortensen, *Rape Survivors Testify Against Required Reporting*, EUGENE WEEKLY.COM (May 26, 2016, 3:00 AM) (citing psychology professor Jennifer Freyd), <http://www.eugeneweekly.com/20160526/news-features/rape-survivors-testify-against-required-reporting>.

77. See generally McLeod & Sherwin, *supra* note 66, at 259. The authors explain that people need "a certain degree of self-trust to be able to act autonomously." *Id.* at 261. This includes trusting one's "capacity to choose effectively," *id.* at 263, trusting one's ability to "act on the decisions," *id.* at 264, and trusting "the judgments . . . that underlie [the] choices." *Id.* Unfortunately, "abuse can prevent the development of or can destroy existing self-trust of all the three main types, resulting in the diminished autonomy of the agent." *Id.* at 272. The authors then explain, albeit in the context of medical care providers, "If health-care professionals, especially physicians, further consolidate their already disproportionate power in relation to patients, especially those from oppressed groups, they exacerbate a problematic power differential and further reduce the already limited autonomy of their patients." *Id.* at 267. The goal should be to empower victims so they can restore their autonomy. *Id.* at 276.

78. Mortensen, *supra* note 76.

decisions to be taken away from you, especially in a situation where you are already vulnerable.”<sup>79</sup>

The impact of a constrained choice will affect survivors differently.<sup>80</sup> Victims of campus sexual assault have to make many choices,<sup>81</sup> including whether to speak to a university employee at all.<sup>82</sup> A wide-net policy may not affect all survivors negatively because some survivors would never tell anyone at the university, others would prefer to tell someone who is labeled “confidential” under a wide-net reporting policy, and still others would want to tell a mandatory reporter. Yet some survivors will find that a wide-net reporting policy limits their ability to seek out support and comfort, to begin their recovery, to obtain needed resources, and to continue their education.<sup>83</sup> A policy that maximized victim choice, in contrast, would permit all survivors to flourish. Leigh Goodmark calls such a policy “anti-essentialist.”<sup>84</sup> She explains, “Creating space for choice honors the differences between women, recognizing that race, class, sexual orientation, disability status, and a multiplicity of other variables color how a particular woman might want to respond to a particular incidence of violence at a particular moment in time.”<sup>85</sup>

Apart from wide-net reporting policies’ effect on the autonomy of particular survivors, these policies indirectly affect the autonomy of all women. The ALI recognized that institutions of higher education have a “mission” to socialize their students as they respond to campus

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79. *Id.*

80. *Cf.* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 819 (1999) (noting constraints on autonomy make some women “afraid to live, work, or walk in particular areas, or reluctant to engage in particular practices or voice particular views” or “stunt women’s tastes, values, and conceptions of themselves”).

81. Kathy Abrams noted that commentators overlook the many choices that exist and that are part of self-direction. *Id.*

82. *Id.* (discussing partial autonomy). *See also* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U.L. REV. 1, 26–27 (2009).

83. Consequently, wide-net reporting policies only serve women who want to report to the Title IX office or who have confidants that are already designated as confidential by the institution, but they disserve all other survivors. *See id.* (“The problem with policies like mandatory arrest is that they reify two goals—safety and perpetrator accountability—and marginalize autonomy”).

84. *Id.* at 45, 1 (“Domestic violence law and policy prioritizes the goals of policymakers and battered women’s advocates—safety and batterer accountability—over the goals of individual women looking for a way to address the violence in their relationships. The shift of decision making authority has profoundly negative implications for the autonomy of women . . .”).

85. *Id.* at 46

sexual assault.<sup>86</sup> In calling for due process within disciplinary hearings, the ALI said: “schools are modeling a way of thinking and behaving to their students.”<sup>87</sup> Of course, colleges and universities should model respect for adults’ autonomy as well as for due process. Both are foundations of our constitutional democracy.<sup>88</sup>

When a school takes away choice from an adult survivor, the school signals the acceptability of paternalism; women are not competent to make decisions about their own lives, but need someone else to do it for them. It also signals the acceptability of selfishness; administrators can elevate the institution’s interests above the survivor’s interests, not unlike the way that the perpetrator elevates his interests over the survivor’s. As if these messages weren’t bad enough, the university’s response also signals a lack of equal regard for women as a class because most survivors of sexual violence on campus are women,<sup>89</sup> and university employees are often not required to report against the wishes of other crime victims.<sup>90</sup>

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86. See ALI, COUNCIL DRAFT NO. 1 *supra* note 47, at §1.2 reporters’ notes, §1.7 reporters notes.

87. See ALI, COUNCIL DRAFT NO. 1 *supra* note 47, at § 1.2 reporters’ notes; see also *id.* at § 1.7 cmt. (“When an accusation of sexual assault or related forms of misconduct is made . . . the processes for investigation and resolution have educative functions insofar as they convey to participants and observers the university’s or college’s view about fair procedures . . . .”) Schools must also help students “understand[] the plurality of viewpoints that may exist on the same subject and how to evaluate them.” *Id.* at § 1.4 reporters’ notes.

88. JOHN LOCKE, A LETTER CONCERNING TOLERATION 26–27 (J. Brook 1796) (1796).

89. See Krebs *supra* note 45, at 69–71.

90. This will vary by school, but many mandatory reporting policies are directed toward gender-based violence in particular. At some campuses, employees are not mandatory reporters for most crimes, other than gender-based harassment, sexual assault, dating violence, domestic violence and stalking. See, e.g., UNIV. OF OREGON, ANNUAL CAMPUS SECURITY AND FIRE SAFETY REPORT, 19 (2016) (describing “Required Reporters”). The disparate treatment was recognized by the National Association of Student Personnel Administrators in the context of mandatory reporting to law enforcement. See NATIONAL ASSOCIATION OF STUDENT PERSONNEL ADMINISTRATORS, AN OPEN LETTER TO ELECTED LEADERS OF THE 50 UNITED STATES 3 (2015), [https://www.naspa.org/images/uploads/main/Joint\\_omnibus\\_bill\\_statement\\_letterhead.pdf](https://www.naspa.org/images/uploads/main/Joint_omnibus_bill_statement_letterhead.pdf) (“Mandatory referral thus singles out an entire subgroup of adult violence victims from other adults with the same abilities and treats them legally as children. The fact that those infantilized in this manner are mainly women and girls makes these bills particularly contrary to Title IX’s purposes.”); see *infra* text accompanying notes 466–68, 473.



## 2. Loss of Control

Apart from the fact that wide-net reporting policies remove survivors' ability to access their preferred confidants, wide-net reporting policies also leave survivors without the ability to control their situation in certain instances.<sup>91</sup> If a survivor inadvertently discloses to an employee who has a reporting obligation or if someone else discloses the survivor's situation to an employee with such an obligation, then the survivor cannot, herself, stop the process from moving forward.<sup>92</sup>

This Subpart discusses how the survivor is harmed by a loss of control in the aftermath of a victimization. The mere fact of control is particularly important to a survivor's healing. In addition, a survivor can experience institutional betrayal when a trusted confidant reports against the survivors' wishes, and such betrayal can cause harm too. Finally, survivors can experience professional, social and even physical retaliation, either by the perpetrator or by third parties, when a report is made. In short, a survivor's inability to decide for herself whether or not to report an incident can cause her both serious psychological and physical consequences.

### a. Psychological Harm

In her 1999 *Harvard Law Review* article, Linda Mills criticized mandatory interventions in domestic violence cases because of the unintended consequences.<sup>93</sup> She argued that mandatory interventions often inflict emotional abuse on the survivor,<sup>94</sup> thereby allowing the state to "inadvertently replicate the very violence it aims to eradicate."<sup>95</sup> Mandatory interventions would "effectively revictimize the battered woman, first by reinforcing the batterer's judgments of her, and then by silencing her still further by limiting

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91. See *supra* note 20; *infra* note 249.

92. See *supra* note 20; *infra* note 249.

93. Linda G. Mills, *Killing Her Softly: Intimate Abuse and the Violence of State Intervention*, 113 HARV. L. REV. 550 (1999).

94. Mills suggested that this emotional abuse had severe effects. *Id.* at 612 ("[T]hese [mandatory arrest and prosecution] policies reinforce the negative dynamics of rejection, degradation, terrorization, isolation, missocialization, exploitation, emotional unresponsiveness, and confinement intrinsic to the battering relationship. State perpetuation of these dynamics systematically denies the battered woman the emotional support she needs to heal. Although we can never precisely measure the effects of this state violence, studies of emotional trauma's impact on its victims suggest that this form of abuse would have long-term and devastating effects.").

95. *Id.* at 554.

how she could proceed.”<sup>96</sup> Mills labeled mandatory arrest, prosecution, and reporting as themselves “forms of abuse.”<sup>97</sup> She criticized professionals’ “. . . unwavering support for mandatory interventions that render victims helpless”<sup>98</sup> and advocated for an empowerment model instead,<sup>99</sup> whereby victims would be connected to services and afforded emotional support.<sup>100</sup>

Mills’ analysis applies well to campus survivors who are domestic violence victims, even though in the campus context an educator and not a police officer might be the one to remove her control.<sup>101</sup> It needs only a slight modification when applied to survivors of campus sexual violence. Power dynamics can differ when the perpetrator is an acquaintance, and not an intimate partner, and the sexual assault is an isolated incident. Nonetheless, acquaintance assaults are “psychologically debilitating . . . because they call into question a woman’s behavior, judgment, and sense of trust in ways that other rapes do not.”<sup>102</sup> An institutional response that overrides the survivor’s own preferences also calls into question a woman’s judgment, and thereby produces additional harm. The insensitivity found in the criminal justice system is often described as the “second rape,” and wide-net reporting policies convey a similar insensitivity.<sup>103</sup>

In addition, removing the survivor’s choice about reporting removes the survivor’s ability to control her situation in the aftermath of her victimization. Yet control matters greatly to a

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96. *Id.* at 556.

97. *Id.* at 554.

98. *Id.* at 556.

99. *Id.* at 555 (“I argue that mandatory state interventions rob the battered woman of an important opportunity to acknowledge and reject patterns of abuse and to partner with state actors (law enforcement officers, prosecutors, and medical professionals) in imagining the possibility of a life without violence.”); *see also* Goodmark, *supra* note 82, at 29 (“If, as most scholars agree, domestic violence is characterized by a power imbalance between the parties, restoring power to women who have been battered should be a priority when crafting domestic violence law and policy. For that reason, empowerment has been a central, though not always well-defined, theme in the battered women’s movement.”).

100. Mills, *supra* note 93, at 555. Mills suggests a survivor-centered approach characterized by acceptance, respect, reassurance, engagement, resocialization, empowerment, and liberation. *Id.* at 597–607.

101. *See id.*

102. Deborah Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11, 16 (2007).

103. MADIGAN & GAMBLE, *supra* note 46, at 127.

survivor's recovery,<sup>104</sup> often reducing symptoms of post-traumatic stress disorder (PTSD).<sup>105</sup> Research has shown that it is present control, rather than past control (understanding why the assault occurred) or future control (controlling whether one will be assaulted again in the future), that furthers recovery most.<sup>106</sup> Professor of psychology Ellen Zurbriggen explained: "Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one's own fate and future."<sup>107</sup> Domestic violence survivors have the same need. Mills explained that victims who lack control are disempowered and that hinders their recovery: "No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be

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104. KARJANE, FISHER & CULLEN, *supra* note 27, at 83 ("[H]aving just experienced a profoundly disempowering event, victims of sexual assault need to reassert their ability to control basic aspects of their lives and environments."); Ryan M. Walsh & Steven E. Bruce, *The Relationships Between Perceived Levels of Control, Psychological Distress, and Legal System Variables in a Sample of Sexual Assault Survivors*, 17 VIOLENCE AGAINST WOMEN 603, 611 (2011) ("[R]esults suggest that an important factor against post traumatic stress and depressive symptomology within these domains is a perception by victims that they are in control of their recovery process as those in the present study who felt they were in control of their recovery also endorsed significantly lower levels of both PTSD and depressive symptomology."); Patrica A. Frazier, Heather Mortensen & Jason Steward, *Coping Strategies as Mediators of the Relations among Perceived Control and Distress in Sexual Assault Survivors*, 52 J. OF COUNSELING PSYCHOL. 267, 273 (2005) ("Perceived control over the recovery process was associated with less distress because it was associated with less use of social withdrawal and greater use of cognitive restructuring.").

105. Ullman & Peter-Hagene, *supra* note 74, at 504 ("Our results revealed that perceived control over recovery and maladaptive coping mediated the effects of positive and negative social reactions to assault disclosure on PTSD symptoms."); see also Liana C. Peter-Hagene & Sarah E. Ullman, *Social Reactions to Sexual Assault Disclosure and Problem Drinking: Mediating Effects of Perceived Control and PTSD*, 29 J. OF INTERPERSONAL VIOLENCE 1418, 1433 (2014) ("The current findings suggest that enhancing perceived control over recovery may be important for reducing PTSD."); cf. Janine M. Zweig & Martha R. Burt, *Predicting Women's Perceptions of Domestic Violence and Sexual Assault Agency Helpfulness: What Matters to Program Clients?* 13 VIOLENCE AGAINST WOMEN 1149, 1171 (2007) (noting that survivors find services more helpful when they feel in control of their interactions with the provider).

106. See generally Patricia A. Frazier, *Perceived Control and Distress Following Sexual Assault: A Longitudinal Test of a New Model*, 84 J. OF PERSONALITY AND SOC. PSYCH. 1257 (2003).

107. Letter from Eileen Zurbriggen, Professor of Psychology, et al. to Daniel Hare, Chair, Academic Senate of the University of California System (Oct. 26, 2015), <http://ucsfca.org/wp-content/uploads/2015/10/UCSC-faculty-comments-on-SVSH-policy-10.26.15.pdf> (discussing reporting against the survivor's wishes).

in her immediate best interest.”<sup>108</sup>

Apart from the harm caused by questioning a survivor’s judgment and undermining her sense of control, the institution’s response can also produce psychological harm when it acts against the survivor’s wishes. This type of institutional betrayal<sup>109</sup> can increase a survivor’s post-trauma psychological symptoms,<sup>110</sup> and produce educational disengagement.<sup>111</sup> Students at Knox College who were opposed to wide-net reporting policies described instances of this phenomenon: “Survivors who have trusted faculty members to keep information confidential have seen those professors turn around and tell the administration. . . . [S]urvivors on this campus have been routinely forced through an often abrasive process for which they were emotionally unprepared.”<sup>112</sup>

In an ideal world, no student would ever be surprised when his or her disclosure results in a report to the Title IX office because the student would want that to occur. In fact, OCR used its 2014 guidance to try to minimize surprises. Institutions were to tell students which employees were obligated to report to the Title IX office; responsible employees were to tell a student before the student disclosed that the employee was not a confidential resource,<sup>113</sup> and true “confidential employees” were exempted from having reporting obligations.<sup>114</sup>

Even with these rules, students sometimes think they are talking to an employee who will keep their information private, but they are not. Students don’t necessarily know the details of the reporting policy,<sup>115</sup> just

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108. Mills, *supra* note 93, at 577 (citing JUDITH LEWIS HERMAN, *TRAUMA AND RECOVERY* 133 (1997)); KARJANE, FISHER, & CULLEN, *supra* note 27, at 83 (citing the “widely” held view of advocates that mandatory reporting policies are detrimental to the healing process because they take control away from the victim).

109. Institutional betrayal is the term for “when the university exacerbate[s] sexual violence victimization” through its own action or inaction. Marina N. Rosenthal, Alec M. Smith, & Jennifer J. Freyd, *Still Second Class: Sexual Harassment of Graduate Students*, 40 *PSYCH. OF WOMEN Q.* 364, 369 (2016); *id.* at 374 (reporting that one of the most commonly reported types of institutional betrayal is “making it difficult to report the experience”).

110. Carly P. Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 *J. OF TRAUMATIC STRESS* 119 (2013). Mills speaks of the degradation the survivor experiences when her views are disregarded. Mills, *supra* note 93, at 589–90.

111. See CARLY P. SMITH, MARINA N. ROSENTHAL & JENNIFER J. FREYD, *THE UO SEXUAL VIOLENCE AND INSTITUTIONAL BETRAYAL CAMPUS SURVEY* 34–36 (Oct. 24, 2014), <http://dynamic.uoregon.edu/jjf/campus/SmithRosenthalFreydGSU22-24October2014.pdf>.

112. *Students Challenge Mandatory Reporting Requirements*, *supra* note 51.

113. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 16–17.

114. *Id.* at 22–24.

115. UNIV. OF NOTRE DAME, 2016 SEXUAL CONDUCT AND CAMPUS CLIMATE

as they don't know the intricacies of most other school policies.<sup>116</sup> An employee isn't always able to warn a student about the employee's reporting obligations either. Sometimes the employee does not know of this responsibility at the time of the disclosure, forgets this responsibility, or lacks time to give a warning before the student blurts out information. Students also sometimes disclose their victimization over email or in a term paper before the employee has an opportunity to give a meaningful warning.<sup>117</sup>

Even when a warning is given, the warning may not mean much to the survivor depending upon the effects of traumatic distress and/or alcohol and drugs. For example, some survivors return to their dorms inebriated and speak in an altered state to a resident assistant, not fully comprehending the implications of a disclosure even if a warning is given. Some of these survivors may later regret having communicated information about their sexual assault, but their change of heart is irrelevant. Instead, the student experiences institutional betrayal. These survivors are drawn into an unwanted process and that itself causes them distress.

#### b. Physical Harm

Mandatory reporting can also expose survivors to physical harm, both from their perpetrators as well as from others. To the extent that a report becomes known by the perpetrator, he might respond with violence. Focus groups on mandatory reporting in other contexts reveal that victims of intimate partner violence often face retaliation by their abusers when their disclosures trigger police involvement.<sup>118</sup>

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QUESTIONNAIRE REPORT 2 (2016) (reporting that only 39% of students agreed with the statement, "You know how to report such incidents to the University administration."). Approximately half of the students thought the university's policies with respect to sexual assault, dating violence, domestic violence, and stalking were clear. *Id.* at 3.

116. Cf. JOY D. BONNER, IS STUDENTS' KNOWLEDGE OF THE STUDENT CONDUCT CODE ASSOCIATED WITH THEIR CONDUCT-CODE BREAKING BEHAVIORS ON CAMPUS? 26 (2017) (on file with the University Honors Program Theses, Georgia Southern University), <http://digitalcommons.georgiasouthern.edu/cgi/viewcontent.cgi?article=1315&context=honors-theses> (reporting that while "79.2% students are aware of the code's existence . . . only 55.3% of students participating in the study reported ever reading the code").

117. See Anahita, *supra* note 25.

118. Cris M. Sullivan & Leslie A. Hagen, *Survivors' Opinions About Mandatory Reporting of Domestic Violence and Sexual Assault by Medical Professionals*, 20 *AFFILIA* 346, 352-53 (2005) ("Many of the women talked about the retaliatory violence they experienced at the hands of their abusers and said that the retaliation assault was often more violent than the original beatings. These participants believe that it

A batterer who feels he is losing control over his victim can be particularly dangerous.<sup>119</sup> The college student who commits both sexual and physical violence “may be especially prone to anger and needs for power and control.”<sup>120</sup> In fact, these perpetrators are known for their high rate of post-separation violence.<sup>121</sup> At worst, the new violence can be lethal.<sup>122</sup> Because an educational institution cannot guarantee the student’s protection,<sup>123</sup> policies that make virtually every employee a mandatory reporter put some survivors in harm’s way.<sup>124</sup>

People associated with the perpetrator may also retaliate against the victim. Retaliatory behavior can extend beyond harassment to

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should be a victim’s choice to have the hospital contact the police . . . ”).

119. Walter S. DeKeseredy, *Abusive Endings: Separation and Divorce Violence Against Women*, 22 DOMESTIC VIOLENCE RPT. 53 (Apr./May 2017); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64–65 (1991) (“At least half of women who leave their abusers are followed and harassed or further attacked by them. In one study of interspousal homicide, more than half of the men who killed their spouses did so when the partners were separated. . . . Men who kill their wives describe their feeling of loss of control over the woman as a primary factor . . . ”); Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence after the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 108 (2004) (“[T]he risk of assault is highest immediately following separation and when women attempt permanent separation through legal or other action.”); Kathryn Oths & Tara Robertson, *Give Me Shelter: Temporal Patterns of Women Fleeing Domestic Abuse* 66 HUMAN ORGANIZATION 249, 253 (2007) (“Many times a woman . . . fear[s] continued or escalated violence with the imminent release of her abuser from jail or when he [is] served an arrest warrant or protection order.”).

120. Jennifer Katz & Hillary Rich, *Partner Covictimization and Post-Breakup Stalking, Pursuit, and Violence: A Retrospective Study of College Women*, 30 J. FAM. VIOL. 189, 191 (2015).

121. *Id.* at 196.

122. Ruth E. Fleury, Cris M. Sullivan & Deborah I. Bybee, *When Ending the Relationship Doesn’t End the Violence: Women’s Experiences of Violence by Former Partners*, 6 VIOLENCE AGAINST WOMEN 1363, 1371 (2000) (noting that 72% of the women in study who were assaulted post-separation experienced “severe or potentially lethal violence”; 25% of the women experienced this type of violence “more than once a month”).

123. See Mia M. McFarlane, *Mandatory Reporting of Domestic Violence: An Inappropriate Response for New York Health Care Professionals*, 17 BUFF. PUB. INT. L.J. 1, 23 (1998–99) (“The inability of the system to protect domestic violence victims from retaliation by their abusers is one reason for opposing mandatory reporting.”).

124. See, e.g., Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence Injuries*, 74 FLA. B.J. 78, 79 (2000). In addition, a campus inquiry may cause a perpetrator to destroy evidence needed for a successful prosecution or other legal action that would have advanced the victim’s safety.

include other criminal behavior, such as threats to physical safety.<sup>125</sup> A lawsuit against Baylor University, for example, alleged that members of the football team sent harassing text messages and burglarized the survivor's apartment after she reported.<sup>126</sup> While the law prohibits retaliation by the perpetrator and third parties,<sup>127</sup> the law, unfortunately, does not deter all such acts. The same can be said about separation violence; the law proscribes it, but it still occurs.

Finally, reporting can trigger social ostracism and/or professional disadvantages for the victim. Consider the graduate student who experiences sexual harassment by someone within a small department, or by someone who sits on her dissertation committee, or by someone whose work drew her to the university.<sup>128</sup> Reporting may cost her the soft benefits that are critical in academia, such as references, connections, and support.<sup>129</sup> Or consider the student who accuses the college's star football player of sexual misconduct. The social repercussions can be devastating.<sup>130</sup>

The social ostracism and the professional repercussions that constitute retaliatory conduct can be sufficiently severe that even if not accompanied by physical violence, a survivor's health can suffer.<sup>131</sup> A survivor may rightly perceive that prohibitions against

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125. See *Goodwin v. Penridge School Dist.*, Case 2:17-cv-02431-LDD, ¶2 (E.D. Pa. May 30, 2017), <https://nwlc.org/wp-content/uploads/2017/05/Goodwin-v.-Penridge-Complaint-Filed-5.30.17.pdf> (alleging “[a]fter Miss Goodwin reported the rape to officials at PHS, the rapist and his friends embarked on a years-long campaign of physical and verbal sexual harassment against her, shoving her in the halls; calling her a ‘bitch’ and threatening her over text message”).

126. Devon Sayers & Darran Simon, *Baylor University Lawsuit Alleges Gang Rape*, CNN, (May 18, 2017, 1:00 AM), <http://www.cnn.com/2017/05/17/us/baylor-university-gang-rape-lawsuit/index.html>.

127. See Letter from Seth M. Galanter, Acting Assistant Secretary for Civil Rights, U.S. Dep’t of Educ., to Colleague (Apr. 24, 2013), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.pdf>; 2001 Revised Guidance, *supra* note 12, at 17.

128. Nancy C. Cantalupo & William C. Kidder, *A Systematic Look at a Serial Problem: Sexual Harassment of Students by University Faculty*, UTAH L. REV. (forthcoming Spring 2018).

129. *Id.* (relaying graduate student’s experience of sexual harassment, including “anxiety over what the professor might do to prevent her from graduating and/or securing positive references for jobs or other academic appointments,” and noting that these impacts are “quite common”).

130. See, e.g., *THE HUNTING GROUND* (Chain Camera Pictures 2015) (vividly illustrating the attacks launched against Erica Kinsman when she accused Jameis Winston, former Florida State University quarterback, of sexual assault).

131. See generally Carly P. Smith & Jennifer J. Freyd, *Insult, Then Injury: Interpersonal and Institutional Betrayal Linked to Health and Dissociation*, J. OF AGGRESSION MALTREATMENT & TRAUMA 1 (2017); Lillia M. Cortina & Vicki J. Magley, *Raising Voice, Raising Retaliation: Events Following Interpersonal*

retaliation cannot effectively remedy or prevent such ostracism or the loss of particular professional benefits.

Although a Title IX coordinator might defer to a survivor who wishes to remain anonymous or to have no further action taken,<sup>132</sup> the absence of a guarantee, as well as not always heeding her preference, can cause survivors to suffer real repercussions. Consequently, survivors should be able to decide for themselves if they want to report.

*B. For Those Who Don't Disclose: Isolation, Lack of Support, Inability to Hold Perpetrators Accountable*

In light of the potential negative effects from disclosing and the lack of control over the process, it should not be surprising that wide-net reporting policies reduce the likelihood that some survivors will report their victimization to the institution. Field research by Heather Karjane, Bonnie Fisher, and Francis Cullen found that “any policy or procedure that students (particularly student victims) perceived as a risk to their ability to control information about their victimization functioned as a barrier to reporting.”<sup>133</sup> The 2014 *Report of the University of Oregon's President's Review Panel* similarly noted that the “overwhelming majority of students” with whom the panel spoke said that “a broad, and certainly a universal, mandatory reporting requirement serves as a serious disincentive to reporting incidents of sexual misconduct.”<sup>134</sup>

Any policy that decreases the number of disclosures to the university is problematic. For the survivor, her silence increases the

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*Mistreatment in the Workplace*, 8 J. OF OCCUPATIONAL HEALTH PSYC. 247, 262 (2003) (demonstrating that those who were highly mistreated at work suffered psychological and physical distress from retaliation); HUMAN RIGHTS WATCH, EMBATTLED: RETALIATION AGAINST SEXUAL ASSAULT SURVIVORS IN THE US MILITARY 26 (May 18, 2015) (noting “[m]any considered the aftermath of the assault—bullying and isolation from peers or the damage done to their career as a result of reporting—worse than the assault itself”).

132. See *supra* note 20.

133. KARJANE, FISHER, & CULLEN, *supra* note 27, at 85; Sam Staley, *Title IX Privacy Ban Thwarts Campus Sexual Assault Policies*, THE BEACON (Mar. 10, 2016, 10:10 AM), <http://blog.independent.org/2016/03/10/title-ix-attack-on-privacy-thwarts-campus-sexual-assault-policies/>; NATIONAL INSTITUTE OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 8 (2005) (“[A]ny policy that compromises or restricts the victim’s ability to make informed choices about how to proceed may deter reporting.”).

134. REPORT OF THE UNIVERSITY OF OREGON PRESIDENT’S REVIEW PANEL, *supra* note 56.



chance that she will be isolated and without support.<sup>135</sup> Rana Tahir, a 2013 graduate of Knox College, articulated this harm well. She said:

Knox is a small school . . . . If a survivor's friends are also friends with the assailant which is often the case, he or she may be uncomfortable or scared to talk to a friend. If he or she can't turn to a professor or other mentor, then we've basically isolated someone who shouldn't have to face what can be a traumatic experience alone.<sup>136</sup>

A wide-net policy also makes it less likely the survivor will access the support and resources that she may need for educational success. The policy may scare the survivor away from approaching any services on campus,<sup>137</sup> or may keep her from talking to an employee who can inform her of them. This means, for example, that she may never receive the college's assistance in protecting herself from encountering the perpetrator,<sup>138</sup> or benefit from an on-campus legal service that could help her navigate the overlapping civil, criminal, and disciplinary systems.<sup>139</sup>

Isolation can also affect her physical well-being.<sup>140</sup> For example, her physical injuries may worsen if she delays seeking help because she is worried about mandatory reporting. She may lose the opportunity to use an emergency contraceptive or a post-exposure prophylaxis for AIDs. She may never get the psychological support she needs and, as a result, may self-medicate or engage in self-

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135. See Mills, *supra* note 93, at 591–92 (suggesting that the isolation caused by compulsory processes can mimic the social isolation imposed by the batterer and thereby undermine recovery).

136. *Students Challenge Mandatory Reporting Requirements*, *supra* note 51.

137. See University of Oregon's Organization Against Sexual Assault, *Statement Regarding UO Responsible Employee Duty to Report Sexual Harassment and Sexual Assault Policy* (May 10, 2016), <http://uooasa.weebly.com/news-and-events/statement-regarding-uo-responsible-employee-duty-to-report-sexual-harassment-and-sexual-assault-policy> ("Required reporting discourages survivors of harassment, abuse, and violence from seeking help from on-campus resources and from their fellow students, staff, and faculty.")

138. See RANA SAMPSON, ACQUAINTANCE RAPE OF COLLEGE STUDENTS 13 (2011) ("Many drop out of school because, if they stay, they might regularly face their attacker in class, in their dorm, in the dining hall, or at campus functions and events. Since most victims do not report, colleges cannot intervene to protect them from reencountering their attackers.")

139. See Weiner, *supra* note 10, at 201–05 (describing such a service at University of Oregon).

140. Andrea C. Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREV. MED. 279, 281 (2000).

harm.<sup>141</sup> She may delay a sexual assault examination, and thereby hurt her ability to hold the perpetrator accountable and later experience the psychological and physical consequences associated with remorse.<sup>142</sup>

A policy that decreases the number of disclosures to the university also means the university is less able to provide survivors with the support and information that may increase their willingness to report. This is a terrible effect because universities typically cannot hold perpetrators accountable for their sexual misconduct unless their victims disclose it and cooperate with the investigation.<sup>143</sup> Currently, only about 10% of students talk to any campus employee about their victimization.<sup>144</sup>

A reporting rate of only 10% inadequately deters gender-based violence. If only a small number of victims ultimately report gender-based violence, a would-be perpetrator knows that he has excellent odds that he will never be held accountable. This situation

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141. KARJANE, FISHER, & CULLEN, *supra* note 27, at 137 (noting that underreporting means “victims of sexual assault are unlikely to secure the counseling and support they need to cope with and heal from this potentially traumatic event in their lives making it more probable that they will engage in ‘self-blame,’ self-medication (e.g., disordered eating and excessive drinking) and other self-destructive behaviors”).

142. Cf. Isabelle Bauer et al., *Regret Intensity, Diurnal Cortisol Secretion, and Physical Health in Older Individuals: Evidence for Directional Effects and Protective Factors*, 22 *PSYCHOLOGY AND AGING*, 319, 328 (2007) (noting the health effects of intense regret among older individuals).

143. Some would also claim that this is a problem because universities then lack fuller information about what is actually happening on campuses. Katharine Baker’s recent article provocatively suggests that people aren’t talking enough about how bad the conduct actually is. Katharine K. Baker, *Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of It All*, 66 *J. LEGAL EDUC.* 777, 778 (2017). She posits that until nonconsensual sexual activity is understood better in all of its forms, there is unlikely to be consensus on how campuses should be addressing it. More information would help efforts to understand and address the phenomenon better.

144. JENNIFER J. FREYD, MARINA N. ROSENTHAL, & CARLY P. SMITH, PRELIMINARY RESULTS FROM THE UO SEXUAL VIOLENCE & INSTRUMENTAL BEHAVIOR CAMPUS SURVEY 19 (Sept. 2014), <http://dynamic.uoregon.edu/jjf/campus/UO-campus-results-30Sept14.pdf>; Rosenthal, Smith, & Freyd, *supra* note 109 at 370 (noting only 6.4% of graduate students report their sexual harassment by faculty/staff); Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 *J.C. & U.L.* 613, 680 (2009) (“The fact that 90% of campus sexual violence survivors are exercising their veto [not to report] demonstrates that we are not taking their needs into sufficient consideration when crafting our responses.”). The Review Panel said, “Students tell us that as long as they believe that the University uses this broad mandatory reporting requirement, they will be reluctant to make reports to anyone whom they believe will pass the information on.” REPORT OF THE UNIVERSITY OF OREGON PRESIDENT’S REVIEW PANEL, *supra* note 56.

inadequately deters first-time offenders and leaves perpetrators on campus to reoffend.<sup>145</sup> That is, a campus may become more dangerous *because of* its mandatory reporting policy. In contrast, when victims have choices, victims are more likely to share information and cooperate with authorities.<sup>146</sup>

Wide-net reporting policies clearly inhibit the willingness of some students to talk to a university employee about an unwanted sexual experience.<sup>147</sup> This effect is not surprising in light of studies on the effect of mandatory reporting in other contexts. Studies document that women sometimes refuse to seek medical care when their doctors

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145. This assumes that the perpetrators are conscious of the climate. There is some evidence that climate may affect behavior. See Sarah R. Edwards, Kathryn A. Bradshaw, and Verlin B. Hinsz, *Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders*, 1 VIOLENCE & GENDER 188, 190–91 (2014) (finding nearly one-third of men endorsed intentions to use force to obtain sex if nobody would ever know and there wouldn't be any consequences).

146. You Have Options (YHOP) is a law enforcement program that allows survivors who talk to the police to decide whether to obtain information only or to direct a partial or complete investigation. According to YHOP, the ability of a victim to control decisions, such as whether an arrest is made, ultimately provides investigators with more accurate information and increases survivors' willingness to identify their assailant or participate in the criminal process. YOU HAVE OPTIONS PROGRAM, at <http://www.reportingoptions.org/about> (last visited Nov. 22, 2017). In fact, according to YHOP founder Detective Carrie Hull, "We shifted our focus as a team to what does a survivor want, and out of that came better healing, but also identifying way more perpetrators." Katie Van Syckle, *The Tiny Police Department in Southern Oregon that Plans to End Campus Rape*, THE CUT (Nov. 9, 2014), <http://nymag.com/thecut/2014/11/can-this-police-department-help-end-campus-rape.html>. The U.S. military utilizes a similar model by offering restricted and unrestricted reporting options. Restricted reporting is rated more favorably by military survivors. See Michelle A. Mengeling et al., *Reporting Sexual Assault in the Military: Who Reports and Why Most Servicewomen Don't*, 47 AMER. J. OF PREVENTATIVE MED., 17, 18, 20–22 (2014); see also KARJANE, FISHER, & CULLEN, *supra* note 27, at 94 ("Policies that respect the victim's need (and ability) to make his or her own decision at each and every juncture of the process of seeking information, support, treatment, and, possibly, justice within the campus and/or the criminal justice system have been found to facilitate students coming forth and reporting the crime.").

147. See Melissa L. Barnes & Jennifer J. Freyd, *Who Would You Tell?: College Student Perspectives Regarding Sexual Violence Reporting on Campus*. Poster presented at the 22nd International Summit on Violence, Abuse & Trauma, San Diego, CA, 21-27 September 2017 (finding 58% of undergraduates surveyed would be inclined to disclose to a university employee about an unwanted sexual experience if they knew the university had a policy that required all employees to report the sexual violence incident to a university official); see also Christina Mancini et al., *Mandatory Reporting in Higher Education: College Students' Perception of Laws Designed to Reduce Campus Sexual Assault*, 41 CRIM. JUST. REV. 219, 225, 229–30 (2016) (finding 15% would be deterred from reporting under a mandatory reporting policy). For a fuller discussion of these studies, see *infra* text accompanying notes 150–61.

are mandatory reporters,<sup>148</sup> or forego calling the police when a state has a mandatory arrest law.<sup>149</sup>

Yet the evidence about the effect of wide-net reporting policies on students' disclosures to their colleges and universities is not totally consistent. Two conflicting studies are most relevant. Research by Christina Mancini and her colleagues in 2015 surveyed 397 undergraduates and found that 56% of the students surveyed said they would be more likely to report their sexual victimization under a mandatory reporting law, and only 15% of the students said they would be deterred from reporting under a mandatory reporting law.<sup>150</sup> In contrast, a study by Melissa Barnes and Jennifer Freyd in 2016–17 of 486 undergraduates found that most students would be less likely to talk to a university employee about an unwanted sexual experience if the university had a wide-net reporting policy.<sup>151</sup> Interestingly, survey respondents in the Mancini study saw their own

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148. Virginia Daire, *The Case Against Mandatory Reporting of Domestic Violence Injuries*, 74 FLA. B.J. 78, 79 (2000) (“Mandatory reporting can actually discourage battered women from seeking medical care or from confiding in their physicians.”); see Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREVENTATIVE MED. 279, 283–84 (2000) (finding that 2/3 of survey respondents felt mandatory reporting would decrease a women's likelihood of disclosing and those who were survivors of intimate partner violence and who had not disclosed their abuse to a health care provider reported being less likely to reveal abuse to a health care provider under a mandatory reporting regime); Sullivan & Hagen, *supra* note 118, at 350 (60 out of 61 survivors of intimate partner violence in a focus group strongly opposed mandatory reporting by health professionals).

149. Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. OF PUB. ECON. 85, 95 (2009) (finding that reporting declined by about 12% in mandatory arrest states); Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to Police Notification*, 21 VIOLENCE AGAINST WOMEN 65, 77, 81 (2015) (finding that violence is “significantly more likely to be reported to law enforcement when victims perceive mandatory arrest policies favorably” but may suppress reports for other victims; concluding “mandatory arrest policies may be increasing perceptions among women that the costs of reporting are too high for the consideration of involving law enforcement”); see also Laura Dugan, *Domestic Violence Legislation: Exploring its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY AND PUB. POL'Y 283, 302–03 (2003) (“[M]andatory arrest appears to reduce the chances that police discover an incident . . . , suggesting that by assuring arrest, persons are less inclined to seek police assistance.”) (finding that third parties, rather than victims, are less likely to report).

150. Mancini et al., *supra* note 147, at 226, 229–30.

151. See also Barnes & Freyd, *supra* note 147 (finding “[s]tudents indicated they would be more inclined to disclose when considering a policy requiring respect for student decisions about reporting to the university (75%) compared to a policy requiring employees to forward disclosures (42%)”).

response as likely to be different than others' responses.<sup>152</sup> Most students, 57.2%, thought victims might reduce their help seeking behavior if a school had a wide-net reporting policy and 64.7% thought such a policy might re-traumatize victims.<sup>153</sup>

What exactly explains these divergent results is unclear. However, the responses of those surveyed by Mancini about their own behavior may have been overly optimistic for two reasons. First, the policy may not have been contextualized for respondents. Without context, many people assume mandatory reporting is a good idea.<sup>154</sup> In fact, it appears that the researchers asked about the effect that mandatory reporting would have on the survey respondents themselves first, and then later asked about its likely effect on others. It was only when they asked questions about others that they gave respondents information about the potential negative effects of mandatory reporting.<sup>155</sup> Consequently, the order of the questions may have affected the results.

Second, the difference in responses may have had something to do with the likelihood that the respondents saw themselves as survivors.<sup>156</sup> Mancini acknowledged that such information is important to explore.<sup>157</sup> Other studies have found differences in receptiveness to mandatory reporting between the general populations and survivors.<sup>158</sup> A 2015 internet survey conducted by

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152. Mancini et al., *supra* note 147, at 229.

153. *Id.*

154. Thanks to Kathryn Holland for this insight.

155. See Mancini et al., *supra* note 147, at 226 ("Students were asked to indicate their approval toward MR, perceptions of how faculty might respond to their obligation to report, and possible outcomes of the laws. Concerning this last point, we aimed to incorporate both the assumed positive effects advanced by advocates (e.g., reduced sexual assault, greater victim assistance) and the potential unintended consequences of the policies (e.g., diminished victim autonomy, increased trauma for victims).").

156. Since both surveys used convenience samples, it is unlikely there were more survivors in the pool of respondents at one of the universities. However, it is possible that the perceived risk of victimization differed given the levels of information on campus about the problem of sexual assault.

157. *Id.* at 232 ("Similarly, it seems particularly important to examine whether views of MR laws differ across students depending on either their prior victimization experience or their actual or perceived risk of future sexual victimization.").

158. See, e.g., Michael A. Rodríguez et al., *Mandatory Reporting of Domestic Violence Injuries to the Police: What Do Emergency Department Patients Think?*, 286 J. AM. MED. ASS'N 580, 581 (2001) (finding approximately 29% of nonabused emergency room patients opposed mandatory reporting but approximately 44% of abused patients opposed it); Andrea Carlson Gielen et al., *Women's Opinions About Domestic Violence Screening and Mandatory Reporting*, 19 AM. J. PREVENTATIVE MED. 279, 283 (2000) (finding a higher proportion of abused women than nonabused

the National Alliance to End Sexual Violence and Know Your IX found that “[a]lmost 90% of survivors responded ‘yes,’ they should retain the choice whether and to whom to report.”<sup>159</sup> It is notable, however, that Barnes and Freyd did not find that student opinions differed depending upon whether the respondents had an unwanted sexual experience on campus.<sup>160</sup>

Holland, Cortina, and Freyd conclude that the conflicting research suggests that “[m]any questions remain unanswered and deserve the attention of psychological science.”<sup>161</sup> Until this happens, universities and colleges should assume that mandatory reporting inhibits disclosures in light of the evidence that suggests it does, at least for some victims. Universities should try to increase the number of reports by developing a policy that can accommodate *both* the students who would be more inclined and less inclined to report with a mandatory reporting policy. Part IV proposes such a policy.

Wide-net reporting policies cause various types of harm, but do survivors benefit in any way from such policies? Do they surface more incidents so that campuses can help survivors and confront perpetrators? Do they permit data collection that is accurate and helpful?<sup>162</sup> If these benefits exist, they have not been empirically demonstrated. Ten years ago, Deborah Rhode identified the lack of research to justify campus sexual assault policies.<sup>163</sup> That problem

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women preferred a policy that allowed the women to decide whether to report).

159. *Survivor Survey on Mandatory Reporting*, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, <http://endsexualviolence.org/where-we-stand/survivor-survey-on-mandatory-reporting> (finding that 79% of respondents believed required reporting to police would chill disclosures and reports; 72% of respondents were concerned about losing control over the investigative process due to required reporting).

160. See also Barnes & Freyd, *supra* note 147.

161. HOLLAND, CORTINA & FREYD, *supra* note 22, at 12. The conflicting research cited by the authors consists of three studies, but only one was exactly on point. See *id.* at 10–12.

162. The small number of cases captured by a reporting policy presents an inaccurate view of what is actually happening on campus. Campuses need to conduct anonymous campus climate surveys to assess what is happening on campus. See Amy Becker, *91% of Colleges Reported Zero Incidents of Rape in 2014*, AMER. ASSOC. UNIV. WOMEN, <http://www.aauw.org/article/clery-act-data-analysis/> (Nov. 23, 2015) (“Schools should consider conducting climate and victimization surveys, which are critical tools for schools to better document both reported and unreported incidents of sexual violence, understand why survivors are not reporting, and assess administrative and cultural issues on campus that undermine reporting.”).

163. Deborah Rhode, *Social Research and Social Change: Meeting the Challenge of Gender Inequality and Sexual Abuse*, 30 HARV. J.L. & GENDER 11, 16 (2007) (“Sexual assault policies and education programs are a standard fixture of campus life, but as with sexual harassment training, no body of research establishes their effectiveness.”).

continues. In 2017, Holland, Cortina, and Freyd noted, “A review of the literature reveals limited research to support assumptions regarding the benefits of compelled disclosure.”<sup>164</sup> In fact, Holland, Cortina and Freyd argue that many of the assumptions behind these policies are either unproven or wrong. The commentary to the ALI Draft on the *Project on Sexual and Gender Based Misconduct on Campus* also recognized the lack of empirical data to support the claim that mandatory reporting policies produce more information about perpetrators for universities.<sup>165</sup>

Most important, many of the purported benefits from wide-net reporting policies do not necessitate a wide-net policy to achieve them. It is undoubtedly a problem when a survivor wants her college to take action against her perpetrator and the employee to whom she discloses fails to report the incident to the Title IX office. However, all employees can have reporting obligations when the survivor wants them to forward her information to the institution, and this requirement can exist without the adoption of a wide-net reporting policy. Similarly, it is important to get resources to survivors, yet institutions can make resources accessible to survivors independent of a wide-net reporting policy. Universities can obligate their employees to inform survivors about resources and to refer survivors to confidential resources who can talk further about available options. But institutions can do this without adopting wide-net reporting policies.

### III. OCR GUIDANCE REDUX: WIDE-NET REPORTING POLICIES ARE NOT REQUIRED

Given that wide-net reporting policies are bad for student survivors, can colleges and universities move away from them? As suggested above, neither Title IX nor the related regulations expressly state that an institution of higher education must adopt a wide-net reporting policy.<sup>166</sup> To the extent that campus administrators have a contrary idea, it stems from OCR guidance and particularly its phrase “other misconduct.” The guidance suggests that employees who have an obligation to report other misconduct must also report gender-based violence. Administrators claim that

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164. HOLLAND, CORTINA & FREYD, *supra* note 22, at 24; *see also* Mancini et al., *supra* note 147, at 231 (observing “virtually no research exists to speak to how victims have fared under MR policies”).

165. *See* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5.b cmt (noting the “empirical uncertainty”).

166. *See supra* text accompanying notes 31–36.

limiting who are responsible employees would require them to change all of the institution's policies related to other misconduct. Administrators also cite a few OCR resolution letters that seem to disapprove of more narrowly tailored reporting policies.

While a verbatim reading of OCR guidance supports the administrators' conclusion, this Part argues that the object and purpose of Title IX, as well as the history of the OCR guidance, provides a strong argument that a verbatim reading is not required. This part argues that schools can reduce the number of responsible employees without changing every other misconduct policy first. This conclusion is based on a careful analysis of pre-2017 OCR guidance, and is buttressed by the agency's 2017 *Q&A on Campus Sexual Misconduct*. In addition, as discussed below, the OCR resolution letters are not cause for concern. When read in context, they suggest the type of narrower reporting policy that could satisfy OCR.

Nonetheless, because there are mixed signals, OCR should make it clearer that Title IX does not require an institution to adopt a wide-net reporting policy. It should declare that an institution violates Title IX if its reporting policy discourages reporting.

#### A. Unraveling the "Other Misconduct" Knot

As explained earlier, the 2001 guidance contains the "other misconduct" language.<sup>167</sup> The 2001 guidance, which remains in force even after the dissemination of the 2017 guidance,<sup>168</sup> describes three categories of employees who should be labeled as responsible employees. The second prong led schools to adopt wide-net reporting policies: a responsible employee is any employee "who has the duty to report to appropriate school officials sexual harassment or other misconduct by students or employees."<sup>169</sup> This "other misconduct" category sweeps in a lot of employees because faculty must typically report academic misconduct,<sup>170</sup> researchers must often report

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167. See *supra* text accompanying note 14.

168. See 2017 Dear Colleague Letter, *supra* note 5, at 2; 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 1. The Department also sent out the 2001 Revised Guidance as part of a 2006 Dear Colleague Letter that addressed sexual harassment. Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Dep't of Education, Office for Civil Rights, to Colleague (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

169. 2001 Revised Guidance, *supra* note 12, at 13. The 2014 guidance modified the wording slightly. See *infra* text accompanying note 222.

170. See UNIVERSITY OF OREGON, FACULTY GUIDE FOR ADDRESSING ACADEMIC MISCONDUCT AND REPORTING § 2.3, <http://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> (last visited June 30, 2017).



research misconduct,<sup>171</sup> and campus security authorities must report offenses set out in the Clery Act.<sup>172</sup> At some universities, everyone has the obligation to report fraud and economic waste.<sup>173</sup>

The breadth of the second prong is made even more sweeping when read in combination with the third prong. The third prong requires that responsible employees include those employees “who a student could reasonably believe has this . . . responsibility.”<sup>174</sup> So, for example, a professor who was exempt from reporting academic misconduct would still be a responsible employee if a student could reasonably believe that the professor had an obligation to report academic misconduct.

Of course, even an expansive reading of the guidance doesn’t *require* that everyone at the institution be labeled a responsible employee for Title IX purposes. An institution could insulate some employees from a Title IX reporting duty by narrowing its other misconduct policies and informing students of the change.

Yet, this approach would not be the best. An institution would probably find it onerous to change its other policies. The changes might undermine those other policies or cost the institution a substantial amount of money. For example, a school couldn’t change who is a campus security authority unless it were willing to forego federal funds. Similarly, a school could not eliminate its research misconduct policies unless it were willing to forego federal funding from entities like the National Science Foundation. It would be ridiculous for a university to change all of these other policies in order to fix the reporting policy problem for survivors of gender-based violence. It is no wonder that schools default to wide-net reporting policies.

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171. UNIVERSITY OF OREGON, UO POLICY STATEMENT 09.00.02, ALLEGATIONS OF RESEARCH MISCONDUCT § 2 (last updated Feb. 24, 2012), <http://policies.uoregon.edu/vol-2-academics-instruction-research/ch-6-research-general/allegations-research-misconduct> (stating “members at all levels of the academic community (students, postdoctoral fellows, faculty, and staff) have a responsibility to encourage high research integrity and report instances of what they, in good faith, believe to be a lack of integrity in scholarship and research”); NSF Research Misconduct, 45 C.F.R. § 689.4 (requiring NSF awardees to address research misconduct).

172. 20 U.S.C. § 1092(f) (2016); *see also* The U.S. DEPARTMENT OF EDUCATION, OFFICE OF POSTSECONDARY EDUCATION, HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING (June 2016), <https://www2.ed.gov/admins/lead/safety/handbook.pdf>.

173. UNIVERSITY OF OREGON, UO INTERNAL MANAGEMENT DIRECTIVE, FRAUD WASTE AND ABUSE REPORTING (last updated July 1, 2014), <http://policies.uoregon.edu/fraud-waste-and-abuse-reporting-0>.

174. 2001 Revised Guidance, *supra* note 12, at 13.

However, OCR's 2001 guidance (and the OCR resolution letters<sup>175</sup>) do not foreclose schools' ability to adopt more narrowly tailored reporting policies, even without the schools changing their policies that address other misconduct. Although the guidance is an interpretive rule that indicates how OCR will interpret the law, a school will not lose federal funding automatically if the school violates the guidance. That remedy is not a first step, but a last step, for a violation of Title IX.<sup>176</sup> In fact, OCR has never eliminated federal funding for an institution's inadequate Title IX policy; rather, OCR works with the institution to refine the policy to meet the requirements of Title IX.<sup>177</sup> Even if a school persisted in defiance of OCR's directions, it is not clear that it would lose its funding. The 2001 OCR guidance is a "significant guidance document"<sup>178</sup> and is therefore not law.<sup>179</sup> To the extent that its provision about responsible

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175. As for the legal weight of the letters of finding, *see* note 254 *infra*.

176. *See* *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 288 (1998) (explaining that "an agency may not initiate enforcement proceedings until it 'has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.' [20 U.S.C. § 1682]. The administrative regulations implement that obligation, requiring resolution of compliance issues 'by informal means whenever possible,' 34 CFR § 100.7(d) (1997), and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and 'the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance,' § 100.8(d); *see* § 100.8(c).").

177. Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding For Botching Campus Rape Cases*, HUFFINGTON POST (July 14, 2014, 5:54 PM), [https://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit\\_n\\_5585654.html](https://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html).

178. DEPT OF EDUC., SIGNIFICANT GUIDANCE DOCUMENTS 7 (October 7, 2016), <https://www2.ed.gov/policy/gen/guid/significant-guidance3.docx>. Although the 2001 revised guidance was created after notice and public comment, *see* Administrative Procedure Act, 5 U.S.C. § 553 (rule making), it is unlikely to be a legislative rule. *See* *Texas v. United States*, 201 F. Supp. 3d 810, 829–30 (N.D. Tex. 2016) (discussing the difference between legislative rules, interpretative rules, and general statements of policy). The 2001 revised guidance does not create a binding "line in the sand" by which agency discretion is removed. *Id.* at 830. However, the notice and comment should make the 2001 revised guidance less susceptible to court invalidation for being arbitrary and capricious. *See* 5 U.S.C. § 706(2)(a) (final agency action is to be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law").

179. *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3,432, 3,436 (Jan. 25, 2007) (mentioning the non-legally binding nature of a significant guidance document). OCR's guidance is not binding on courts, although it is persuasive. *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 n.8 (D. Conn. 2006) ("The OCR's guidance constitutes a body of informed judgment from the federal agency charged with administering Title IX's policies. While it is not binding on this court, this court can look to the OCR for guidance."); *Equity in Athletics, Inc. v. Dep't*

employees conflicts with Title IX or the Title IX regulations, an institution could ask a court to invalidate it.<sup>180</sup> For these reasons, campuses have breathing room to act like problem solvers and innovators, and develop narrower, more ethical, and more effective reporting policies.

Nonetheless, administrators might still be reluctant to abandon a school's wide-net reporting policy unless they believed a narrower approach was consistent with the guidance. After all, OCR holds institutions accountable for noncompliance with its guidance.<sup>181</sup> While an institution could try to invalidate the guidance in court, this option is probably unrealistic. Institutions settle with OCR;<sup>182</sup> they do not challenge its guidance.<sup>183</sup> In addition, an OCR investigation is a time-consuming and expensive process that an institution should try to avoid. Therefore, most administrators will need some assurance that a narrower reporting policy is consistent with the guidance before they abandon their schools' wide-net reporting policies.

For this reason, this section demonstrates how the other misconduct language in the guidance can be read to allow a more

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of Educ., 504 F. Supp. 2d 88, 108–09 (W.D. Va. 2007) (although “not subject to the APA’s notice and comment procedures,” the guidance is “entitled to deference and is ‘controlling unless plainly erroneous or inconsistent with the regulation’”).

180. Guidance can be challenged if it is “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citing *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 359 (1989) (quoting *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945))). Arguably the guidance on responsible employees is inconsistent with the regulation. *See supra* text accompanying note 31.

181. *See SMITH & GOMEZ, supra* note 41, at 977 (“recent enforcement efforts by OCR have held institutions accountable for the tenets set forth in these guidance documents”).

182. *See* Catherine Y. Kim, *Presidential Control Across Policymaking Tools*, 43 FLA. ST. U.L. REV. 91, 121 (2015) (“there has not been a single instance over the past quarter century in which an enforcement decision [by OCR] resulted in the final agency action necessary for judicial review,” citing 5 U.S.C.A. § 704).

183. Joe Cohn, *Second Department of Education Official in Eight Days Tells Congress Guidance is Not Binding*, FIRE, (Oct. 2, 2015), <https://www.thefire.org/second-department-of-education-official-in-eight-days-tells-congress-guidance-is-not-binding/> (quoting Senator Lankford saying, “The challenge that I hear over and over again from institutions of higher education is, they have a tremendous number of guidance documents that are coming to them, and they do not feel the freedom to be able to come back to Education, the Department of Ed, and say this smells a lot like a regulation to me because this is also where a stream of funding comes from. And so, they feel like they have to take it. Where other entities, obviously private businesses, they get a guidance document come down, they file lawsuits, and they challenge, and they push back on it. Institutions of higher education are actually leaning back and saying, I don’t feel the freedom to be able to challenge this for fear that we’ll also have other things.”).

nuanced reporting policy. Paying attention to Title IX's object and purpose and the history of the guidance allows one to reach this conclusion. In fact, a close reading of the guidance from 1997 to 2017 demonstrates the following: not every employee has to be a responsible employee; students' expectations are critical for defining when other misconduct policies matter to the identification of responsible employees; institutions can relax the application of the other misconduct criterion if it would otherwise cause student survivors to be deprived of the support they need on campus; and responsible employees do not always need to pass on detailed information to the Title IX coordinator in contravention of the survivor's wishes. All of this suggests that the guidance should not constrain schools' ability to craft more nuanced and ethical reporting policies.

#### 1. 1997 Guidance

OCR started using the term "responsible employee" in 1997 to mean something more than it meant in the Title IX regulations, i.e., more than a Title IX coordinator.<sup>184</sup> OCR initially left the term undefined even as it was simultaneously suggesting who at a school might be a responsible employee. From the start, it was clear that not all employees were necessarily responsible employees. In fact, OCR framed its analysis in the 1997 guidance by articulating and rejecting two positions advanced by those who commented on the proposed guidance:

[S]ome commenters stated that OCR should find that a school has received notice only if 'managerial' employees, 'designated' employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a responsible employee for purposes of notice.<sup>185</sup>

Instead of adopting either of these positions, OCR suggested that responsible employees would include those so designated by the school, as determined by "the authority actually given to the employee,"<sup>186</sup> as well as personnel not so "designated" if "it would be

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184. See *supra* text accompanying notes 31–32.

185. 1997 Guidance, *supra* note 13, at 12034, 12036–37.

186. *Id.* at 12037, 12050 n.65.

reasonable for a student to believe the employee is an agent or responsible employee” based on “the age of the student.”<sup>187</sup> It gave a very useful example involving young children: “For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person’s formal status in the school administration.”<sup>188</sup>

The guidance provided some additional examples of responsible employees, although it did not say whether these individuals would be responsible employees because they were so designated or because students might expect them to be. These employees included “a principal, campus security, bus driver, teacher, an affirmative action officer, or staff in the office of student affairs.”<sup>189</sup>

The 1997 guidance did not use the language “other misconduct” to identify a responsible employee. Rather, the 1997 guidance was focused on what now is understood as the first and third categories of the 2001 guidance, as mentioned above.<sup>190</sup> Specifically, it was focused on who has the authority to take action to redress sexual violence and whom a student could reasonably believe has this authority. In addition, the 1997 guidance was not focused on sexual violence in analyzing who should be a responsible employee (in fact, it hardly focused on sexual violence at all for any purpose). The 1997 guidance only mentioned “sexual assault” twice, once in connection with the inappropriateness of mediation,<sup>191</sup> and once in connection with potential interim measures, such as offering the student different classes or housing.<sup>192</sup> Finally, the 1997 guidance acknowledged the concern of some commenters that failing to respect a student’s wish for confidentiality could discourage reporting.<sup>193</sup> It encouraged schools “to honor a student’s request that his or her name be withheld, if this can be done consistently with the school’s obligation to remedy the harassment and take steps to prevent further harassment.”<sup>194</sup> It emphasized that the school’s response needed to be “reasonable.”<sup>195</sup>

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187. *Id.* at 12037.

188. *Id.*

189. *Id.* at 12040.

190. *See supra* text accompanying note 33.

191. 1997 Guidance, *supra* note 13, at 12045.

192. *Id.* at 12043.

193. *Id.* at 12037.

194. *Id.*

195. *Id.* at 12043.

## 2. 2001 Revised Guidance

OCR gave more content to the concept of a responsible employee in its 2001 guidance, although OCR made no additional references to sexual assault. The 2001 guidance was meant to revise the 1997 guidance and provide more direction to those institutions that were subject to Title IX, especially in light of the Supreme Court cases of *Gebser v. Lago Vista Independent School District*<sup>196</sup> and *Davis v. Monroe County Board of Education*.<sup>197</sup> In those cases, the Supreme Court held that Title IX liability would exist only if an “appropriate person” had “actual knowledge” of the sexual harassment and acted with “deliberate indifference.”<sup>198</sup> An appropriate person was defined as “an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf.”<sup>199</sup> In *Davis*, the Supreme Court indicated that the principal was the only official in that case who might trigger liability for the defendant, even though teachers also knew a fifth-grader was sexually harassing another fifth-grader.<sup>200</sup> But the Supreme Court

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196. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 274 (1998).

197. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 629 (1999). That case involved a fifth-grader who for months was subjected to sexual harassment by a classmate. The school did virtually nothing to stop the abuse, leading the victim to suffer in her studies and contemplate suicide. *Id.* at 634. The perpetrator’s actions deprived the victim of an educational opportunity because the violence was “severe, pervasive, and objectively offensive.” *Id.* at 650. In finding the school board violated Title IX, the Supreme Court explained that the school board was not directly responsible under Title IX for the child’s acts. *Id.* Rather, the school board was responsible for “its own decision to remain idle in the face of known student-on-student harassment in its school[]” *Id.* at 661. The school did not “respond to known peer harassment in a manner that [was] not clearly unreasonable.” *Id.* at 648–49. The school had the “authority to take remedial action,” and the school had “control over the harasser and the environment,” *id.* at 644, but the school did too little to stop the abuse. To the Court, these facts constituted deliberate indifference and subjected the school district to liability. *Id.* at 647; *see also* 2001 Revised Guidance, *supra* note 12, at i–ii (“Purpose and Scope of Revised Guidance”).

198. *Davis*, 526 U.S. at 650; *Gebser*, 524 U.S. at 290.

199. *Gebser*, 524 U.S. at 290; *see also Davis*, 526 U.S. at 654 (holding that the Board of Education could be liable if the petitioner could show “both actual knowledge and deliberate indifference on the part of the Board”).

200. In *Davis*, the fifth-grade girl, who was harassed by another fifth-grade child, repeatedly reported the incidents to her classroom teacher, her physical education teacher, and another teacher. *Davis*, 526 U.S. at 633–34. The mother also talked to two of the teachers, and one teacher said she had told the principal. *Id.* at 634. At one point the girl and her friends wanted to talk to the principal, but were rebuffed by a teacher. *Id.* The mother did eventually talk to the principal, but his response was inadequate. *Id.* In holding that the school board might be liable, and that the lawsuit was wrongly dismissed, the Court did not expressly say that only notice to the

emphasized that its holding did not limit whose inaction might subject a school to *administrative* enforcement.<sup>201</sup>

After *Gebser* and *Davis*, OCR wanted to make clear that administrative enforcement could in fact be triggered by the inaction of people who were not within the Court's narrow definition of appropriate persons.<sup>202</sup> OCR's position made perfect sense in light of *Davis*; after all, many teachers in *Davis* knew of the harassment, and the child and parent would have reasonably thought they would take action (in fact, one teacher told the parent that she would report the matter<sup>203</sup>). OCR's response also made sense because in neither case was there a written policy telling students and parents who were the responsible employees.<sup>204</sup> Consequently, for the first time, the 2001 guidance embodied the other misconduct language. It said:

A responsible employee would include any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.<sup>205</sup>

Now, it is possible that OCR intended to create a broad category comprised of employees with "any" reporting duty in addition to the category of employees with disciplinary authority or the duty to report sexual harassment. If so, the other misconduct language could

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principal could give rise to liability in the case. *Id.* at 631. However, when the Court applied the law to the facts, the Court implied that was true. It only mentioned that the "multiple victims . . . were sufficiently disturbed by [the male child's] misconduct to seek an audience with the school principal." *Id.* at 653–54. It did not mention that alerting the teachers was sufficient. *Id.* *Gebser* also involved a minor. *Gebser*, 524 U.S. at 274. In that case, there was no question whether the principal was an official who might trigger Title IX liability for the district, but there was no evidence that he had actual notice of the sexual relationship between the student and the teacher. *Id.* The Court rejected the Title IX claim against the school district. *Id.*

201. 2001 Revised Guidance, *supra* note 12, at 3 ("The Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private actions for monetary damages. *See, e.g., Gebser*, 524 U.S. 283, and *Davis*, 526 U.S. at 639. The Court acknowledged, by contrast, the power of Federal agencies, such as the Department, to 'promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate,' even in circumstances that would not give rise to a claim for money damages. *See, Gebser*, 524 U.S. at 292.").

202. *See also* 2001 Revised Guidance, *supra* note 12, at 34 n.74.

203. *Davis*, 526 U.S. at 634.

204. *Id.* at 635; *Gebser*, 524 U.S. at 291.

205. 2001 Revised Guidance, *supra* note 12, at 13.

be read as an independent basis on which to identify a wide range of responsible employees for purposes of administrative enforcement. However, the other misconduct language in prong two is better understood as a subset of the third prong. A student might reasonably think that a person has the authority to redress the harassment or the duty to report sexual harassment to appropriate school officials if the person has an obligation to report other types of misconduct. In fact, OCR gave no reason why the other misconduct category should itself constitute an independent basis for identifying a responsible employee. Such language was not necessary to address the factual situation in *Gebser* or *Davis*, other than to help shed light on who a student might reasonably believe had the authority to take action to redress the harassment or the responsibility to report the incident to the appropriate school officials.

Reading the other misconduct language as subordinate to the third prong makes sense in light of the guidance's language describing the highly fact dependent way in which a responsible employee is identified under the third prong. A "reasonable belief" rests on people's expectations and the factors that influence those expectations. A footnote explained that "factors such as the age and education level of the student, the type of position held by the employee, and the school's practices and procedures, both formal and informal" would determine whether someone was a responsible employee or whether it would be reasonable for the student to believe the person was a responsible employee, even if the person was not.<sup>206</sup>

The Department of Education reaffirmed its commitment to the 2001 revised guidance in 2017.<sup>207</sup>

### 3. 2011 Dear Colleague Letter

In 2017 the Department of Education withdrew the 2011 *Dear Colleague Letter* and the 2014 *Q&A on Title IX and Sexual Violence*,<sup>208</sup> although these documents still shed important light on how the 2001 revised guidance might be interpreted going forward. That is, the 2011 and 2014 guidance provided institutions with flexibility to identify a smaller number of responsible employees. Because this aspect of the 2011 and 2014 guidance is consistent with the 2017 guidance, the 2011 and 2014 guidance helps one predict what OCR might actually allow going forward.

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206. *Id.* at 33 n.74.

207. *See* 2017 Dear Colleague Letter, *supra* note 5.

208. *Id.* at 1.



The 2011 *Dear Colleague Letter* emphasized a school's responsibility to address student-on-student sexual violence—a form of sexual harassment—when such acts came to the school's attention. Yet, interestingly, the 2011 *Dear Colleague Letter* gave scant attention to the issue of who is a responsible employee. While the 2011 *Dear Colleague Letter* referred generally to the 2001 guidance, and said that it “supplements” the 2001 guidance, it did not expressly incorporate any of the language about responsible employees [from the 2001 guidance].<sup>209</sup>

One can only guess why not. Perhaps OCR thought the 2001 guidance was clear and no further elaboration was necessary. Or perhaps someone at OCR recognized that the 2001 guidance—with its other misconduct language and the potential for that language to be broadly interpreted—seemed ill-suited for situations that involved sexual violence perpetrated against adults. After all, OCR recognized that sexual violence raised “unique concerns,”<sup>210</sup> but the 2001 guidance, like the 1997 guidance before it, focused mostly on children when discussing responsible employees, although admittedly, the guidance was supposed to apply to “students at every level of education.”<sup>211</sup>

Although the 2011 *Dear Colleague Letter* did not address the topic of responsible employees outright, it indicated that not everyone had to be a responsible employee and that the other misconduct language was not an independent basis for identifying a responsible employee. The 2011 letter expressly stated that campus law enforcement employees should not report unless the complainant consents. The 2011 *Dear Colleague Letter* said, “Schools should instruct [school] law enforcement unit employees both to notify complainants of their right to file a Title IX sex discrimination complaint with the school in addition to filing a criminal complaint, and to report incidents of sexual violence to the Title IX coordinator if the complainant consents.”<sup>212</sup> The implication, of course, is that campus law enforcement need not be responsible employees even though the *sin qua non* of a campus police officer's job is to report other misconduct to school authorities.

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209. 2011 *Dear Colleague Letter*, *supra* note 3, at 2.

210. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at i (discussing that the 2011 *Dear Colleague Letter* “[p]rovides guidance on unique concerns that arise in sexual violence cases . . .”).

211. *Id.* at 5. The discussion of confidentiality again suggested that a reasonable response may differ when a student does not want to file a complaint and asks that her information be held private. *Id.* at 17.

212. 2011 *Dear Colleague Letter*, *supra* note 3, at 7.

The 2011 *Dear Colleague Letter* also implied that other employees who might have obligations to report other types of misconduct were similarly not necessarily responsible employees for purposes of Title IX. This interpretation emerges from the letter's discussion of the need to train people "to report harassment to appropriate school officials."<sup>213</sup> Such training is required for those who were "likely to witness or receive reports of sexual harassment and violence, including teachers, school law enforcement unit employees, school administrators, school counselors, general counsels, health personnel, and resident advisors."<sup>214</sup> The inclusion of campus law enforcement in this group—after OCR explicitly said that they should defer to the complainant's wishes before reporting—suggests that others in the group might similarly not have to report automatically, i.e., in defiance of the survivor's wishes.

The emphasis on the importance of respecting a survivor's autonomy was evident not only in the quotation about campus law enforcement, but also in other parts of the 2011 letter. In fact, the importance of respecting the survivor's autonomy was emphasized much more than in the prior guidance. It was evident, for example, in the following places: the importance of having clear grievance procedures so students could invoke the process only if they chose to do so;<sup>215</sup> the importance of obtaining the complainant's consent before an investigation began;<sup>216</sup> and the requirement that the school take "all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or request not to pursue an investigation."<sup>217</sup> OCR warned, "A school should be aware that disregarding requests for confidentiality can have a chilling effect and discourage other students from reporting sexual violence."<sup>218</sup>

Finally, the 2011 *Dear Colleague Letter* made clear that OCR wanted schools to structure their response so that survivors would come forward to report. In particular, OCR encouraged schools to change their disciplinary policies to afford amnesty to victims or third parties when the incidents also involved alcohol, drugs, or other violations of school or campus rules.<sup>219</sup>

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213. *Id.* at 4.

214. *Id.*

215. *Id.*

216. *Id.* at 5.

217. *Id.*

218. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 19.

219. 2011 Dear Colleague Letter, *supra* note 3, at 15.

In sum, prior to 2014, there was little attention given to who a responsible employee should be for purposes of reporting sexual or domestic violence. However, the following was clear: (1) not everyone had to be a responsible employee; (2) responsible employees had to include those employees with authority to redress the situation or the obligation to report and those employees who students would reasonably think had such authority or responsibility; (3) the different expectations of elementary-age students and college-age students would lead to different “responsible employees” at the various levels of schooling; (4) some employees who had obligations to report other misconduct did not have to report to the Title IX coordinator absent the survivor’s consent; (5) a school needed a “reasonable response” when it received notice of harassment; (6) schools had to respect survivor’s autonomy in formulating policy; and (7) schools should try to eliminate barriers to reporting.

#### 4. 2014 Guidance

The guidance on responsible employees changed in 2014. At that time, in response to requests for technical assistance, the Office for Civil Rights used a question and answer format to “further clarify the legal requirements and guidance articulated in the [*Dear Colleague Letter*] and the 2001 guidance.”<sup>220</sup> OCR specifically asked and answered the question “Who is a ‘responsible employee?’”<sup>221</sup> At the most basic level, its response was simply to reiterate the 2001 guidance:

Answer: According to OCR’s 2001 Guidance, a responsible employee includes any employee: who has the authority to take action to redress sexual violence; who has been given the duty of reporting incidents of sexual violence or any other misconduct by students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.<sup>222</sup>

Yet a closer reading of the 2014 guidance provides many clues about how OCR might interpret the other misconduct language going forward. Three points are notable. First, and significantly, the 2014

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220. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at ii.

221. *Id.* at 2.

222. *Id.* at 15. The wording was slightly different from the 2001 revised guidance, but that did not alter the meaning.

guidance reinforced the idea that not all employees needed to be labeled responsible employees. OCR said, “A school must make clear to all of its employees and students *which staff members* are responsible employees so that students can make informed decisions about whether to disclose information to those employees.”<sup>223</sup> It also very clearly indicated that RAs might be responsible employees at some institutions, but not at others.<sup>224</sup>

However, OCR also made clear that *all* employees, even if they are not responsible employees, had obligations to tell complainants about reporting options, available services, etc. After the sentence about schools’ obligations to make clear which staff members are responsible employees, OCR said:

A school must also inform *all* employees of their own reporting responsibilities and the importance of informing complainants of: the reporting obligations of responsible employees; complainants’ options to request confidentiality and available confidential advocacy, counseling, or other support services; and complainants’ right to file a Title IX complainant with the school and to report a crime to campus or local law enforcement.<sup>225</sup>

The contrast between the responsibilities of all employees and the responsibilities of responsible employees again suggests that the categories can differ. Although every employee had obligations when a survivor discloses, the obligations did not necessarily include reporting the disclosure to the institution.

Second, the 2014 guidance signaled that the other misconduct language should in fact be subsumed into the language about whom a student could reasonably believe has the authority to take action to redress sexual violence or the duty of reporting incidents to the Title IX coordinator. OCR again made clear that student expectations were very relevant to identifying a responsible employee and those expectations were influenced by many factors. The 2014 guidance stated:

Whether an employee is a responsible employee will vary depending on factors such as the age and education level of

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223. *Id.* (emphasis added).

224. *Id.* at 17.

225. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 15 (emphasis added).

the student, the type of position held by the employee, and consideration of both formal and informal school practices and procedures. For example, while it may be reasonable for an elementary school student to believe that a custodial staff member or cafeteria worker has the authority or responsibility to address student misconduct, it is less reasonable for a college student to believe that a custodial staff member or dining hall employee has this same authority.<sup>226</sup>

While OCR never explicitly said that the other misconduct language is subordinate to the language about “student expectations,” neither did it say that the other misconduct language trumps the language about student expectations when students would not reasonably expect someone to be a responsible employee. In fact, one way to make sense of the quotation in the previous paragraph is to recognize that other misconduct policies inform student expectations, they do not independently confer responsible employee status. After all, custodial staff or dining hall employees may be obligated to report student theft of custodial supplies or food, or vandalism in the dorm rooms or the cafeteria, but college students know that custodial staff and dining hall employees lack the authority to take action to redress sexual assault or the responsibility to report sexual assault to the Title IX coordinator.

The relevance of other misconduct policies to assessing students’ reasonable expectations was reinforced in OCR’s discussion of resident assistants (RAs). OCR said that RAs were obligated to report sexual assault if RAs had the obligation to report other misconduct, and OCR gave as examples “drug and alcohol violations or physical assault.”<sup>227</sup> However, if RAs did not have such an obligation and if schools “clearly informed” students that RAs were available for confidential discussions,<sup>228</sup> then RAs need not be responsible employees. The guidance makes perfect sense if students’ reasonable expectations determine who has reporting obligations. Students’ reasonable expectations would be shaped by RAs’ obligation to report drug and alcohol violations and physical assault because those acts are of the same general type as sexual violence.

Moreover, students’ expectations can be shaped by the school’s communications. Since OCR explicitly recognized that practices

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226. *Id.* at 15.

227. *Id.*

228. *See id.*

and procedures (which are generally contained in policies) shape student expectations about who is a responsible employee, OCR would probably agree that practices and procedures can also shape student expectations about who is not a responsible employee. That is, practices and procedures can operate in both directions. By resolving ambiguities, practices and procedures either create student expectations or negate them. After all, college students are adults. They know that institutional policies allocate responsibilities to different people.

The benefit of subsuming the other misconduct language into the prong on students' reasonable expectations is that most employees would not be responsible employees even if they were obligated to report other misconduct. For a student to have a reasonable expectation that an employee would report sexual assault based upon the employee's obligation to report other misconduct, the student would have to know the following: that the employee has an obligation to report other misconduct; that the other misconduct is similar enough to sexual assault to give rise to a reasonable expectation; and that an institutional policy, about which the student might reasonably know, did not absolve the employee of an obligation to report sexual misconduct.

This interpretation allows colleges to require particular employees to report fraud and waste, but not sexual misconduct. Most college students would not know about the fraud and waste policy and, if they did, they would be old enough to know that the obligation to report fraud and waste is very different than the obligation to report sexual assault. If there were any ambiguity, a written policy could clarify it. The approach just described for interpreting other misconduct aligns with OCR's desire to enhance survivors' autonomy. For example, in 2014, OCR mentioned a number of steps that schools should take to increase survivors' autonomy,<sup>229</sup> building upon its advice in the 2011 *Dear Colleague Letter*.<sup>230</sup>

Third, the 2014 guidance also suggested, for the first time, that the other misconduct rule could be disregarded altogether in those instances in which students would be harmed by not being able to report confidentially to someone who might otherwise have an obligation to report other misconduct. In fact, OCR gave schools

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229. See, e.g., *id.* at 16 (emphasis added) (schools "should make every effort to respect this request" for confidentiality). OCR said expressly, "OCR strongly supports a student's interest in confidentiality in cases involving sexual violence." *Id.* at 18 (emphasis added).

230. See *supra* text accompanying notes 215–18.

permission to exempt certain employees from a reporting obligation even though they might have obligations to report other misconduct. The 2014 guidance explicitly exempted from reporting responsibilities not only certain professionals who provide “counseling, advocacy, health, mental health, or sexual assault-related services to students who have experienced sexual violence,”<sup>231</sup> but also certain nonprofessionals who “provide assistance to students who experience sexual violence.”<sup>232</sup> These “include all individuals who work or volunteer in on-campus sexual assault centers, victim advocacy offices, women’s centers, or health centers (non-professional counselors or advocates), including front desk staff and students.”<sup>233</sup> These individuals could be freed of reporting obligations because OCR “wants students to feel free to seek their assistance and therefore interprets Title IX to give schools the latitude not to require these individuals to report incidents of sexual violence in a way that identifies the student without the student’s consent.”<sup>234</sup> OCR mentioned that “these non-professional counselors or advocates are valuable sources of support for students,” and “strongly encourages schools to designate these individuals as confidential sources.”<sup>235</sup> These exemptions from the responsible employee designation indicated that the other misconduct language should be applied in a way that is consistent with the goals of Title IX itself.

All in all, a comprehensive examination of OCR guidance prior to 2017 suggests that the other misconduct language could and should be interpreted in a way that furthers OCR’s goals of increased reporting and respecting survivors’ autonomy. Consequently, a policy that limited the number of responsible employees appeared acceptable so long as the policy clearly specified who had reporting obligations and the responsible employee designation generally matched students’ reasonable expectations. Universities were never required to change all of their other misconduct policies (for academic misconduct, fraud/waste, and whatever else) in order to exempt some employees from mandatory reporting obligations.

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231. 2014 Q&A on Title IX and Sexual Violence, *supra* note 4, at 22. The employees were exempt because “OCR recognizes the importance of protecting the counselor-client relationship, which often requires confidentiality to ensure that students will seek the help they need.” *Id.*

232. *Id.* at 23.

233. *Id.*

234. *Id.*

235. *Id.*

## 5. 2017 Guidance

In 2017, the Department of Education withdrew the 2011 and 2014 guidance.<sup>236</sup> In its place, the Department issued two new significant guidance documents in the form of a new *Dear Colleague Letter* and a *Q&A on Campus Sexual Misconduct*.<sup>237</sup> There are four notable points about these documents with respect to responsible employees.

First, the 2017 guidance reiterated OCR's endorsement of the 2001 revised guidance.<sup>238</sup> The 2001 revised guidance was cited throughout the *Q&A* document and called out specifically in the new *Dear Colleague Letter*.<sup>239</sup> In addition, the 2017 guidance cited directly to the section of the 2001 revised guidance that defined responsible employees, i.e., the section that mentioned other misconduct as part of the definition.<sup>240</sup>

Second, the 2017 guidance contains language that suggests that OCR will interpret the 2001 revised guidance in a sensible manner, and will not require that the responsible employee category comprise every employee who has an obligation to report any misconduct. The 2017 *Q&A* specifies that each school must have a Title IX coordinator, but "other employees *may* be considered 'responsible employees.'"<sup>241</sup> This permissive language softens the more mandatory language in the 2001 revised guidance.

Third, OCR has shifted away from the troubling language in the 2014 guidance that required a responsible employee to pass on all information on to the Title IX coordinator, whether desired by the survivor or not.<sup>242</sup> In 2017, OCR emphasized that the school must "respond appropriately."<sup>243</sup> In addition, OCR described the function of a responsible employee as follows: "to help the student to connect to the Title IX Coordinator."<sup>244</sup> It is not "help" if the student doesn't want to connect to the Title IX coordinator; in such a situation,

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236. 2017 *Dear Colleague Letter*, *supra* note 5, at 1.

237. *Id.* at 2 (noting that the document is a "significant guidance document"); 2017 *Q&A on Campus Sexual Misconduct*, *supra* note 6, at 7 (noting that the document is a "significant guidance document").

238. 2017 *Dear Colleague Letter*, *supra* note 5.

239. *See, e.g.*, 2017 *Q&A on Campus Sexual Misconduct*, *supra* note 6, at nn. 2, 5, 9, 10, 12, 13, 14, 15, 17, 24, 30; *see also* 2017 *Dear Colleague Letter*, *supra* note 5, at 2.

240. *See, e.g.*, 2017 *Q&A on Campus Sexual Misconduct*, *supra* note 6, at 1.

241. *Id.* at 2.

242. *See supra* text accompanying notes 17–19.

243. 2017 *Q&A on Campus Sexual Misconduct*, *supra* note 6, at 1.

244. *Id.* at 2 (emphasis added).



reporting can harm.

In fact, this part of the 2017 guidance is reminiscent of language in the 1997 guidance and the 2001 revised guidance. Those documents defined responsible employees for purposes of identifying who counts as giving notice to the institution for purposes of taking corrective action;<sup>245</sup> they did not specify *what* the responsible employee must do with the information once received, especially when the survivor did not want to report further.<sup>246</sup> Rather the earlier guidance said that the school needed to have “a reasonable response,”<sup>247</sup> and emphasized that a reasonable response depended on such factors as the age of the student and the desire of the student for confidentiality.<sup>248</sup> While the response could not “preclude the school from responding effectively to the harassment and preventing harassment of other students,”<sup>249</sup> a reasonable response to a survivor who was not ready to report might only require the following if there were no imminent risk of physical harm to others: inform the student that Title IX prohibits retaliation;<sup>250</sup> offer services that would allow the student to resume her education; defer to the student’s wishes until she wanted to report; and help the student report whenever she chose to do so. If this response would be reasonable or appropriate for a responsible employee, then a school should be able to remove employees from the responsible employee category so long as the employees must still respond in this way.

Fourth, despite the fact that the Obama-era guidance has been withdrawn, the parts of that guidance that softened the harsh language from the 2001 guidance should not, and need not, be forgotten. After all, the 2017 guidance suggests that the Obama-era guidance was problematic because it “impose[d] new mandates related to the procedures to which educational institutions investigate, adjudicate and resolve allegations of student-on-student sexual misconduct.”<sup>251</sup> OCR’s desire to give schools more flexibility to

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245. 1997 Guidance, *supra* note 13, at 12036–37; 2001 Revised Guidance, *supra* note 12, at 13.

246. 1997 Guidance, *supra* note 13, at 12043–44; 2001 Revised Guidance, *supra* note 12, at 17.

247. 1997 Guidance, *supra* note 13, at 12043; 2001 Revised Guidance, *supra* note 12, at 17.

248. 1997 Guidance, *supra* note 13, at 12034, 12043; 2001 Revised Guidance, *supra* note 12, at 17.

249. 1997 Guidance, *supra* note 13, at 12043.

250. *Id.*; 2001 Revised Guidance, *supra* note 12, at 17.

251. 2017 Dear Colleague Letter, *supra* note 5, at 1. In fact, the new guidance expressly addressed some of the most controversial topics, such as the burden of proof. See 2017 Q&A on Campus Sexual Misconduct, *supra* note 6, at 5 (indicating the

address sexual misconduct means that schools should be able to disregard those parts of the Obama-era guidance that imposed new reporting mandates,<sup>252</sup> but rely on those parts that softened the 2001 revised guidance.

Even if one disagrees with much of what has been argued in this Part, and particularly the conclusion that the other misconduct language should be considered subordinate to the third prong (that focuses on whether a student could reasonably believe an employee had the necessary authority or duty), one could still interpret the language “other misconduct” narrowly and avoid its application to most employees. In context, the language may only refer to misconduct relevant to Title IX. The internal tensions within the guidance and the other textual clues outside of the definition suggest a reading that aligns with the general purpose of Title IX as a whole. Although the 2014 guidance made this interpretation challenging because it said that an RA would be a responsible employee if the RA had an obligation to report “drug and alcohol violations or physical assault,”<sup>253</sup> that guidance has now been withdrawn.

Overall, campuses have a solid basis for moving forward with a more narrowly tailored reporting policy, i.e., one that is developed with victims’ needs in mind.

### *B. Resolutions and Letters of Findings*

Despite the above analysis and the fact that schools can move away from wide-net reporting policies and remain compliant with Title IX, schools have sometimes been afraid to do so because of signals from OCR that it prefers wide-net reporting policies. The signals have come largely in the form of school-specific letters of findings and resolutions. As this section will suggest, the importance of these signals has been overblown. Not only are the letters and resolutions in which these signals appear not policy guidance,<sup>254</sup> but

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acceptability of either a preponderance of the evidence standard or a clear and convincing evidence standard). It also mentioned appeals by survivors, *id.* at 7 (noting that a school can allow only the respondent to appeal), and the timeframe for a prompt investigation, *id.* at 3 (noting that there is “no fixed time frame” by when a school must complete its investigation).

252. See, e.g., *supra* text accompanying notes 17–19.

253. See *supra* text accompanying note 227.

254. *OCR Complaint Processing Procedures*, U.S. Dep’t of Educ. Office for Civil Rights, at 2 (last updated Feb. 2015), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> (“Letters of findings are not formal statements of OCR policy and they should not be relied upon, cited, or construed as such.”). Sometimes, but not always, their limited scope is reflected in the letters of findings themselves. For

the specifics of the letters and resolutions make them less than definitive on the particular issue in question.

University of Montana's well-publicized resolution was perhaps the first such document.<sup>255</sup> It caught people's attention because OCR called it a "blueprint"<sup>256</sup> and attorneys who advise universities highlighted its importance.<sup>257</sup> This resolution required University of Montana to label virtually all of its employees as responsible employees with obligations to report to the Title IX coordinator.<sup>258</sup>

Yet, the resolution's treatment of reporting obligations is less proscriptive than other parts of the resolution because of the context that prompted the new reporting policy.<sup>259</sup> The mandatory reporting provision was adopted "for the purpose of ensuring that individuals subject to discrimination are consistently and promptly receiving necessary services and information,"<sup>260</sup> not for purposes of discipline. Moreover, it was necessary because the University of Montana previously had multiple departments addressing sexual harassment complaints in an uncoordinated fashion.<sup>261</sup> The letter of findings discussed how the Dean of Students handled a complaint against a student and how the Title IX coordinator handled another complaint against the same student, but neither were aware that multiple complaints existed.<sup>262</sup> This context suggests that OCR might have

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example, the Hunter College letter, discussed *infra*, made clear, "This letter is not a formal statement of OCR policy and should not be relied upon, cited, or construed as such." Letter to Jennifer J. Raab, President, Hunter College of the City University of New York, from Timothy C. Blanchard, Office for Civil Rights, Region II, Case No. 02-13-2052 (Oct. 31, 2016), p. 24 [hereinafter Hunter Letter of Findings].

255. See Resolution Agreement, Univ. of Montana-Missoula, OCR Case No. 10126001, DOJ DJ Number 169-44-9, at 4 (May 8, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf>.

256. See also Letter of Findings to Univ. of Montana, Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001, p. 1 (May 9, 2013) [hereinafter Letter of Findings], at <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> ("The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.").

257. Smith & Gomez, *supra* note 41, at 6.

258. Resolution Agreement, University of Montana-Missoula, OCR Case No. 10126001, DOJ DJ Number 169-44-9, at 4 (May 8, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf> ("a requirement that all employees who are aware of sex-based harassment, except for health-care professionals and any other individuals who are statutorily prohibited from reporting, report it to the Title IX coordinator regardless of whether a formal complaint was filed").

259. See generally *id.*

260. *Id.* at 8.

261. Letter of Findings, *supra* note 254, at 2-3.

262. *Id.* at 27.

been satisfied if all reports from responsible employees went to one source, e.g., the Title IX coordinator, and if all students were connected with services even if they elected not to report. The particular solution chosen by the University of Montana to address its problems was not the only possible solution.

Institutions have similarly interpreted other case-specific letters and resolutions as sending a signal, although a close examination of the letters and resolutions raises questions about the signal they exactly send. For example, on October 12, 2016, a regional office of OCR entered findings of fact and a resolution with Wesley College.<sup>263</sup> OCR had “concerns” regarding Wesley College’s designation of responsible employees.<sup>264</sup> The college had “three reporting categories: (1) confidential reporting, (2) formal reporting, and (3) quasi-confidential reporting.”<sup>265</sup> OCR had no problems with the first and second categories. The first category referred to “campus counselors, the employee assistance program, and on-campus clergy/chaplains.”<sup>266</sup> The second category—the formal reporting option—was triggered when a report was made to members of the Title IX Team.<sup>267</sup> The third category—quasi-confidential reporting<sup>268</sup>—caused concerns.

The third category was described in the *Student Handbook* as such:

You can seek advice from certain resources who are not required to tell anyone else your private, personally identifiable information unless there is cause for fear for your safety, or the safety of others. These resources include those without supervisory responsibility or remedial authority to address sexual misconduct, such as [Resident Advisors], faculty members, advisors to student organizations, career services staff, admissions officers, student activities personnel, Student Life staff members, and many others . . . . Some of these resources, such as RAs, are instructed to share Incident Reports with the supervisors, but they do not share any personally identifiable information about your report

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263. Letter to Robert E. Clark II, President, Wesley College from Beth Gellman-Beer, Supervising Attorney, OCR Phila., U.S. Dep’t of Educ., The Office for Civil Rights, Case No. 03-15-2329 (Oct. 12, 2016) [hereafter “Wesley College Letter”].

264. *Id.* at 28.

265. *Id.* at 13.

266. *Id.*

267. *Id.* at 14.

268. *Id.*

unless you give permission, except in the rare event that the incident reveals a need to protect you or other members of the community.<sup>269</sup>

In analyzing the policy, OCR had “concerns that the quasi-confidential category detailed in the Student Conduct Procedures is overly inclusive; to the extent there are staff and persons who may receive confidential reports at the College, the number should be very limited.”<sup>270</sup> OCR mentioned that confidentiality is permissible for those with professional licenses, those in a pastoral role, and those “who work or volunteer in an on-campus sexual assault center, survivor advocacy office, health center, or similar entity.”<sup>271</sup>

On October 31, 2016, the same regional office of OCR entered findings of fact and a resolution with Hunter College.<sup>272</sup> Through its “Procedure A,” Hunter College limited its responsible employees to employees so designated.<sup>273</sup> In particular, it had a narrow list of responsible employees.<sup>274</sup> Its policy read:

“Responsible Employees” have a duty to report incidents of sexual/gender-based harassment and sexual violence to the Title IX Coordinator. They are identified as the Title IX Coordinator and his/her staff; Office of Public Safety employees; the Dean of Students and all of the staff housed in those offices; Residence Life staff in housing owned or operated by CUNY or a CUNY college, including all Resident Assistants; the college President, Vice Presidents, and Deans; Athletic staff; Department Chairpersons and Executive Officers; Human Resources staff; Office of General Counsel employees; attorneys of CUNY colleges and their staff; labor designees of CUNY colleges and their staff; faculty members leading or supervising students on off-campus trips; faculty or staff advisors to student groups; employee managers; SEEK/College Discovery staff; Childcare Center staff of CUNY colleges; and, Directors of “Educational Opportunity Centers” affiliated with CUNY colleges.<sup>275</sup>

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269. *Id.* at 14.

270. *Id.* at 15.

271. *Id.*

272. *See* Hunter Letter of Findings, *infra* note 254.

273. *Id.* at 7–9.

274. *Id.* at 8.

275. *Id.*

OCR stated the following about this list: “OCR has concern that Procedure A’s definition of ‘responsible employees’ is too narrow and thus may result in instances where the College fails to discharge its obligations under 34 C.F.R. § 106.31.”<sup>276</sup> OCR did not elaborate further. Therefore, it is not clear if OCR thought a key administrator was omitted from the list or if it wanted the school to have a wide-net reporting policy.

Apart from the ambiguous message sent by OCR’s findings, the Wesley and Hunter letters must be kept in perspective for other reasons. OCR was “concerned,” but it never said the colleges’ reporting policies violated the law.<sup>277</sup> In fact, in the Wesley case, OCR so much as admitted that Wesley’s “quasi-confidential” category did *not* violate the law: “Pursuant to the *Title IX Policy and Procedures*, most resources on campus fall in the middle of these two extremes, meaning that neither the College, *nor the law*, requires them to divulge private information that is shared with them, except in rare circumstances.”<sup>278</sup> In addition, OCR did not make Wesley College eliminate the “quasi-confidential” category of employee as part of the official resolution.<sup>279</sup> Similarly, OCR did not make Hunter College change its reporting policy as part of its resolution.<sup>280</sup>

What makes the meaning of the OCR’s response even more unclear is that it appears as if Wesley College did not defend the quasi-confidential category of employees or explain that it was an integral part of a well-thought out approach to meeting survivors’ needs and increasing survivors’ reporting. In fact, when OCR interviewed college staff, none “were aware of the quasi-confidential reporting category.”<sup>281</sup> Two Title IX team members could not describe the category and they were “unsure of the intent of this category” because they thought virtually all employees were responsible employees.<sup>282</sup> OCR also noted that there was “conflicting information” about reporting obligations and confidential reporting,

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276. *Id.* at 11 (citing 2001 Revised Guidance, *supra* note 12) (defining “responsible employee”). 34 C.F.R. § 106.31 (2001) is the general regulation that requires institutions not to discriminate against persons on the basis of sex in educational programs or activities receiving federal financial assistance.

277. *See generally* Hunter Letter of Findings, *supra* note 254; Wesley College Letter *supra* note 263.

278. Wesley College Letter, *supra* note 263, at 14 (emphasis added).

279. *See generally id.*

280. *See* Hunter Letter of Findings, *supra* note 254, at 23–24 (bulleted list).

281. Wesley College Letter, *supra* note 263, at 15.

282. *Id.* at 14.

and the policy did “not adequately describe the ‘quasi-confidential’ reporting option.”<sup>283</sup>

Most important, the Wesley College and Hunter College policies were nothing like the policy that this Article will recommend in the next Part. No one in the quasi-confidential category at Wesley College nor anyone outside the responsible employee category at Hunter College was *required* to inquire whether the student wanted to report and then required to follow the student’s wishes.

Overall, neither the law nor OCR guidance, including OCR’s letters of finding and resolutions, unambiguously require wide-net reporting policies. Institutions of higher education can, and should, narrow the breadth of their responsible reporting policies. Doing so would be consistent with OCR’s desire that institutions be victim-focused in designing their reporting policies.<sup>284</sup>

### C. OCR Should Clarify the Guidance

While OCR guidance can and should be read as giving institutions flexibility to design more narrowly tailored reporting policies without having to alter a slew of unrelated “other misconduct” policies, the guidance is not altogether clear. Contrast the current murky language with OCR’s language in the 1980s and 1990s. At that time, OCR called it an “exemplary procedure” for a school to afford the complainant “a variety of sources of initial, confidential, and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint . . . .”<sup>285</sup>

The ambiguity perpetuated by the more recent guidance will inevitably deter some schools from revising their reporting policies. As a result, OCR should make explicit that it will permit schools to limit those employees who need to report disclosures to the Title IX

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283. *Id.* at 15.

284. Sokolow, *supra* note 38 (“The Office for Civil Rights realizes that its instructions are being misinterpreted, and the office’s lawyers have been working to assure campuses that counselors and advocates are not required reporters, and that *the goal is to be as victim-driven as possible* in how campuses respond to notices. Yes, there will be cases in which a campus must pursue an investigation despite a victim’s unwillingness; after all, the campus must be protected from those who pose a threat.”) (emphasis added); *see also id.* (comment of W. Scott Lewis) (“Rachel Getman from the OCR Program Legal Group has publicly addressed this issue twice this year, in exactly the way Brett stated.”).

285. U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 4 (1988); U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT’S NOT ACADEMIC 3 (1995). The 1997 and 2008 versions of this pamphlet do not contain this language.

coordinator when the survivor does not want such a report to be made. OCR can do this in various ways, but it would make good sense for OCR to explain that the “other misconduct” category will be interpreted as a subset of the third category, e.g., students’ reasonable expectations, and that students’ reasonable expectations will be assessed in light of the school’s policies and procedures and the age of the student.

This clarification would encourage schools to revise their wide-net reporting policies so that they do not undermine victims’ autonomy and cause victims’ additional psychological and physical harm. As schools adopt reporting policies that are tailored to meet survivors’ needs, survivors’ disclosures and reporting should increase. OCR’s recent letter to University of New Mexico observed: “Increased reporting is a positive signal.”<sup>286</sup> It can show “students’ awareness of, and confidence in, the University’s procedures to address sexual harassment and sexual assault.”<sup>287</sup> As reporting increases, deterrence becomes more likely because schools will be able to hold perpetrators accountable.

#### IV. A BETTER POLICY

What should a more nuanced policy look like? Specifically, whom should the institution designate as a responsible employee, and, if not everyone, what are the duties of the employees who are not responsible employees? The need for some deeper thinking is evident from the debate in the popular press about whether faculty should be labeled as “responsible employees.” In fact, many faculty around the country do not want to be categorized as responsible employees.<sup>288</sup>

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286. Letter to President Frank, Univ. of New Mexico from U.S. Dep’t of Justice, at 4 (April 22, 2016).

287. *Id.*

288. See Carmel Deamicis, *Which Matters More: Reporting Assault or Respecting a Victim’s Wishes?*, THE ATLANTIC (May 20, 2013), at <https://www.theatlantic.com/national/archive/2013/05/which-matters-more-reporting-assault-or-respecting-a-victims-wishes/276042/> (“A chorus of voices clamor in contention, professors angrily arguing against the new policy. Given the sensitive nature of sexual harassment charges, many staff members can’t believe the school is asking them to violate their students’ trust.”); Flaherty, *supra* note 40 (“But while faculty members overwhelmingly support their institutions’ transparency and accountability goals, many feel that mandatory reporting will hurt the cause more than help it.”); Moody-Adams, *supra* note 65 (“Faculty members have rightly expressed concern that universal mandated-reporter policies are ‘basically one-sided,’ serving institutional needs but not addressing the needs of students.”); Maia R. Silber, *Some Professors Uneasy About Obligation to Report Sexual Assaults*, PITTSBURGH-POST GAZETTE (July 25, 2016), <http://www.post-gazette.com/news/education/2016/07/25/Pitt-Students->



The American Association of University Professors (AAUP) has adopted this view too, and in articulating reasons for that position emphasized that faculty members are “differ[ent]” from “most other staff members” on campus in terms of “their degree of responsibility for the academic and personal well-being of students.”<sup>289</sup> An observer might reasonably question whether faculty members have more or less responsibility than others for students’ “personal” and “academic” well-being, and what significance, if any, that should make to the responsible employee designation. Similarly, an observer might wonder if the American Law Institute’s reason for initially segmenting out faculty from other employees made any sense at all. At one point, the ALI reporters claimed that there are “educational reasons to allow faculty to maintain student confidentiality . . . including that some students may be more comfortable reporting to faculty whom they know rather than a service provider whom they have not yet encountered.”<sup>290</sup> Is “comfort” an educational reason, and, if so, is such “comfort” limited to interactions with faculty?<sup>291</sup>

While discussions about faculty are often at the center of the debate about responsible reporting, these conversations simply raise the broader question about who exactly should be a responsible employee and why. Because most institutions make virtually “all employees” mandatory reporters, the answer to the question of who must report has implications for more than just faculty; employees who fail to abide by their school’s mandatory reporting policies can face termination.<sup>292</sup> Moreover, academic freedom is not the only

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and-Professors-Wonder-Whether-Schools-Should-Require-Faculty-to-Report-Sexual-Assaults/stories/201607130205.

289. AAUP, *supra* note 43, at 84 (arguing faculty should not be included because “faculty members differ from most other staff members in their degree of responsibility for the academic and personal well-being of students”).

290. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, PRELIMINARY DRAFT NO. 1 § 3.3 cmt. (2015). The latest draft has sensibly broadened this language to include staff. ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.5 reporters’ notes.

291. There may be other educational reasons to segment out faculty, such as the impact of mandatory reporting on teaching, especially “in areas involving the study of gender and sexuality.” AAUP, *supra* note 43, at 85.

292. See, e.g., ARIZ. STATE UNIV., ACADEMIC AFFAIRS MANUAL (ACD) 401: PROHIBITION AGAINST DISCRIMINATION, HARASSMENT, AND RETALIATION (revised May 23, 2016), <https://www.asu.edu/aad/manuals/acd/acd401.html> (making termination a potential sanction if an employee’s violation of the reporting policy is proven by a preponderance of the evidence); OKLA. STATE UNIV., SEXUAL MISCONDUCT, DISCRIMINATION, AND HARASSMENT POLICY (effective July, 1, 2015), <http://www.ou.edu/content/dam/eoo/documents/SMDH%20Policy%20Final%203-8->

reason to exclude faculty from the list of mandatory reporters,<sup>293</sup> and these other reasons may apply to non-faculty employees as well. After all, anecdotal evidence suggests that sexual assault survivors approach certain staff members repeatedly because of their expertise as well as their kindness and accessibility. A policy focused on survivors should not make those employees mandatory reporters because they should remain an accessible resource for survivors. The same concern articulated previously about institutional betrayal applies to staff as well as to faculty.<sup>294</sup>

According to Colby Bruno, Managing Attorney at the Victim Rights Law Center, the question of who should be a “responsible employee” is “the single most question we get asked.”<sup>295</sup> For institutions that want to have a more tailored policy, the OCR guidance is fairly unhelpful in isolating who should be on the list of responsible employees. It lacks principles to guide schools in making intelligent decisions. Rather, as noted above, its unartful definition of responsible employee has caused many schools to adopt wide-net reporting policies.<sup>296</sup>

#### A. Principles That Should Guide A School in Formulating Policy

When a Senate Work Group on Responsible Reporting at the University of Oregon tackled these questions (full disclosure, I chaired the Work Group),<sup>297</sup> it articulated some first principles to guide its efforts to develop a good reporting policy. These principles are worth sharing because they are generalizable to other institutions, although with 5,300 institutions of higher education in the United States, ranging from “beauty schools to Harvard,”<sup>298</sup> they may not be useful to every institution. They are as follows:

- 1) Be consistent with the core mission of the university.
- 2) Be based on data, when that data exists.

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2017.pdf (indicating that a failure of “supervisors, managers and faculty members with administrative duties or student supervisory duties” to “promptly report” sexual misconduct, discrimination and harassment, to the Sexual Misconduct Officer may result in disciplinary action up to and including termination”).

293. AAUP, *supra* note 43, at 85.

294. *See supra* text accompanying notes 109–112.

295. Deamicis, *supra* note 288.

296. *See supra* text accompanying notes 33–44.

297. *See supra* note 57 (identifying the other members).

298. Jeffrey J. Selingo, *How Many Colleges and Universities Do We Really Need*, WASH. POST (July 20, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/>.

- 3) Be guided by the spirit of Title IX: to protect educational equity.
- 4) Do no harm.
- 5) Recognize that student survivors are adults and have autonomy.
- 6) Respect academic freedom.
- 7) Protect from liability university employees who are acting pursuant to the policy.
- 8) Stay grounded in the reality of how the university deals with reports of sexual violence.
- 9) Be cognizant of the legal and national context in which the policy will operate.<sup>299</sup>

These principles can help guide discussion, although various principles can pull in opposite directions at times. When the principles have to be balanced against each other, survivors' needs should be given significant weight. After all, Title IX is meant to serve them. This orientation is also justified given what we already know about how wide-net reporting policies negatively impact survivors and the absence of clearer data about the effects of reporting policies on reporting practices. After extensive study, Karjane, Fisher, and Cullen concluded, "Protocols for reporting sexual assault and rape should first consider the needs of victims themselves in terms of their healing process . . . [R]esponse and reporting policies should be designed to allow victims as much decision-making authority in the process as possible."<sup>300</sup>

### *B. An Approach that Furthers Those Principles*

Several aspects of a good policy became obvious as the Work Group deliberated. First and foremost, institutions should abandon the terminology "responsible employee." Everyone at the institution should be "responsible" to help address sexual violence. While employees' responsibilities can differ, everyone should still have responsibilities.<sup>301</sup>

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299. University Senate's Responsible Reporting Work Group, *White Paper on the Proposed Responsible Reporting Policy*, UNIV. OF OREGON, Appendix B (Nov. 11, 2016) (on file with author).

300. KARJANE, FISHER, & CULLEN, *supra* note 27, at 138.

301. In fact, the withdrawn OCR guidance indicated as much. 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at E-3 (describing obligations of pastoral and professional counselors and non-professional counselors or advocates); *id.* at J-1

Second, a school should have three categories of employees: (1) designated reporters, (2) confidential employees, and (3) student-directed employees. While designated reporters are obligated to report regardless of the student's wishes, *all* employees are obligated to ask the student if he or she would like the employee to report, and then do so if the student says yes. Even confidential employees should be required to ask. Schools sometimes assume confidential employees are completely free of reporting obligations,<sup>302</sup> but confidential employees should ask students if they want to report because students may erroneously think that confidential employees automatically report for them.<sup>303</sup>

Third, *all* employees should also be a source of information and support. Not only must employees who are not designated reporters explicitly ask the student if she wants the employee to call the Title IX office and/or to connect her with a confidential resource and then promptly follow the student's instruction, but the employee must give additional information to a student who is not ready to report, including the names and contact information of the Title IX coordinator and confidential support services, as well as information about Title IX protections against retaliation. The employee should make clear that without a formal report, the university typically will not take further action to address the incident because it will not know of it.<sup>304</sup>

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(describing training on a wide array of topics for "all employees likely to witness or receive reports of sexual violence").

302. See, e.g., UNIV. OF CALIFORNIA, POLICY OF SEXUAL VIOLENCE AND SEXUAL HARASSMENT § II.D.1, II.D.6, V.B.2, (last updated Nov. 6, 2016), <http://policy.ucop.edu/doc/4000385/SVSH>. However, some states require confidential resources to report to the police, although the AMA has proposed that survivors should be able to stop a report. See Laura G. Iavicoli, *Mandatory Reporting of Domestic Violence: The Law, Friend or Foe?*, 72 MT. SINAI J. MED. 228, 230–31 (2005). If such an obligation exists, schools and providers should try to inform survivors before treatment.

303. See, e.g., Michael Moore, *Rape Reporting Requirements at UM Not Well Understood*, MISSOULIAN (Jan. 14, 2012), [http://missoulian.com/news/state-and-regional/rape-reporting-requirements-at-um-not-well-understood/article\\_56d3dab6-3f3b-11e1-a86c-001871e3ce6c.html](http://missoulian.com/news/state-and-regional/rape-reporting-requirements-at-um-not-well-understood/article_56d3dab6-3f3b-11e1-a86c-001871e3ce6c.html) (describing the erroneously held belief of "a former freshman student who went to the Curry Health Center the morning after a sexual assault. The student decided later not to report the crime to police, but felt that because she had gone to Curry, the university was aware of the incident and would likely initiate its own investigation.").

304. The information should at least be equivalent to what OCR once advised for students who talk to confidential employees. See 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at E-3 ("Pastoral and professional counselors and non-professional counselors or advocates should be instructed to inform students of their right to file a Title IX complaint with the school and a separate complaint with campus

Institutions must tell all employees how to respond in a compassionate manner,<sup>305</sup> and inform them of their obligations. Written information about both topics should be readily accessible. Schools should also train, and then periodically retrain, their employees so that they respond appropriately to disclosures.<sup>306</sup>

*C. Listing the Designated Reporters and Obliging Everyone Else to be Responsible Too*

Schools with more nuanced policies must determine into which category each employee falls. A list of designated reporters informs students and employees who at the institution must report a disclosure to the Title IX office. A few schools already list a limited number of mandatory reporters, and these schools' policies are useful examples of a more tailored approach.<sup>307</sup>

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or local law enforcement. In addition to informing students about campus resources for counseling, medical, and academic support, these persons should also indicate that they are available to assist students in filing such complaints. They should also explain that Title IX includes protections against retaliation, and that school officials will not only take steps to prevent retaliation but also take strong responsive action if it occurs. This includes retaliatory actions taken by the school and school officials.”).

305. The UO policy has the following admonitions in its policy: “Respond with kindness and respect; Listen to what the student wants to tell you before handing out referrals and information; Be sensitive to the needs of the survivor, without being judgmental, paternalistic, discriminatory, or retaliatory.” See University Senate, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response*, UNIV. OF OREGON §§ III.A.1-3 (last updated May 12, 2017), [https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender%20based%20employee%20reporting%20responsibility%20policy%20effective%20Sept.%2015%2C%202017\\_0.pdf](https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender%20based%20employee%20reporting%20responsibility%20policy%20effective%20Sept.%2015%2C%202017_0.pdf).

306. Training has always been expected by OCR, although the 2001 revised guidance is not as onerous as the repealed 2014 guidance. Compare 2001 Revised Sexual Harassment Guidance, *supra* note 12, at 13 (“[S]chools need to ensure that employees are trained so that those with authority to address harassment know how to respond appropriately, and other responsible employees know that they are obligated to report harassment to appropriate school officials. Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.”), with 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at J-1 (“A school needs to ensure that responsible employees with the authority to address sexual violence know how to respond appropriately to reports of sexual violence, that other responsible employees know that they are obligated to report sexual violence to appropriate school officials, and that all other employees understand how to respond to reports of sexual violence.”).

307. See, e.g., CAL TECH INST., INST. POLICY: UNLAWFUL HARASSMENT 3-4, [http://hr.caltech.edu/documents/46-citpolicy\\_harassment.pdf](http://hr.caltech.edu/documents/46-citpolicy_harassment.pdf); CATHOLIC UNIV. OF AM., RESPONSIBLE EMPLOYEES FOR THE TITLE IX REPORTS OF SEXUAL OFFENSES 3-4, at <http://policies.cua.edu/res/docs/ResponsibleEmployees7-13-15.pdf>; CITY UNIVERSITY OF NEW YORK, POLICY ON SEXUAL MISCONDUCT 8-9, at <http://www.cuny.edu>

## 1. Numbers

Regardless of whom a university identifies as a designated reporter, the university should follow a few general rules. First, for reasons of student convenience and comfort, institutions should make more than just the Title IX coordinator a conduit for reports. Yet institutions should keep the number of designated reporters limited in order to maximize the number of employees who can be supportive resources for students. Because all employees would have an obligation to report to the Title IX coordinator when the student so requests, schools should reject the designation for any employee for whom there is a doubt about the appropriateness of the designation. This approach would minimize misalignments, i.e., situations in which a student would disclose inadvertently to someone who is a designated reporter.

## 2. Clarity

The list of designated reporters should be as clear as possible. Phrases like “Responsible Employees include the following”<sup>308</sup> will not

/about/administration/offices/la/Policy-on-Sexual-Misconduct-12-1-14- with-links.pdf; HOFSTRA UNIVERSITY, STUDENT POLICY PROHIBITING DISCRIMINATORY HARASSMENT, RELATIONSHIP VIOLENCE, AND SEXUAL MISCONDUCT 10, at <https://www.hofstra.edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards-policies-sexualassault.pdf>; STUDENT HEALTH SERVICES, *Sexual Assault Policy 13*, THE UNIVERSITY OF SOUTH CAROLINA, at <http://www.sc.edu/policies/ppm/staf108.pdf>; UNIVERSITY OF MICHIGAN, POLICY & PROCEDURES ON STUDENT SEXUAL & GENDER-BASED MISCONDUCT & OTHER FORMS OF INTERPERSONAL VIOLENCE 3, at <https://studentsexualmisconductpolicy.umich.edu/content/reporting-options>. For example, the University of Nebraska at Lincoln says on its website:

Not all University Employees are designated as Responsible Employees. Most UNL faculty and staff members are not Responsible Employees. Only those individuals identified by title on this webpage are *required* to take action or report incidents of sexual misconduct. The University encourages all other University employees and faculty members to: (1) assist a UNL community member with reporting to the Title IX Coordinator and/or local law enforcement; and/or (2) assist a Community member by directing the individual to resource and reporting options; (3) and/or report concerns to your supervisor or the Title IX Coordinator

*UNL Title IX Responsible Employees*, <http://www.unl.edu/equity/unl-title-ix-responsible-employees>. (last visited Oct. 24, 2017).

308. See, e.g., THE CATHOLIC UNIVERSITY OF AMERICA, RESPONSIBLE EMPLOYEES FOR TITLE IX REPORTS OF SEXUAL OFFENSES (last updated July 13, 2015), at <http://policies.cua.edu/res/docs/ResponsibleEmployees7-13-15.pdf> (defining responsible employees as, *inter alia*, “Officials with significant responsibility for student and campus activities and advising, including but not limited to . . .”).

do. The word “include” suggests that people off the list still have reporting obligations, but students and employees are not informed of those individuals’ identities. This makes surprises and institutional betrayal more likely. Also, schools should avoid putting a category of employees on the list if the category requires students to have additional information to determine an employee’s reporting status. For example, it is unhelpful to define a mandatory reporter as follows: “Supervisors who have hiring or firing power over at least three employees who are not student or post-doc employees.”<sup>309</sup> Students would have difficulty knowing if an employee is or is not a mandatory reporter with that description. Instead, the list should describe people by title and, ideally, by name too.

Once the policy categorizes people, designated reporters should be conspicuously identified. A university can achieve this objective by placing a sticker that identifies the person as a designated reporter on the person’s door,<sup>310</sup> by listing employees’ reporting statuses in the telephone directory and on the school’s website, and by encouraging faculty to describe their and their teaching assistants’ reporting statuses on their syllabi and at the end of their email signatures.

### 3. Who is on the List of Designated Reporters

OCR guidance and case law provide a starting place for determining who specifically should be a responsible employee and therefore listed as a designated reporter, although the guidance must be approached with caution. As already discussed, the OCR guidance lists three categories of employees who should be identified as responsible employees.<sup>311</sup> Part III criticized the second category—an employee “*who has the duty to report to school officials . . . any other misconduct by students or employees*”—as being much too wide to be

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309. THE UNIVERSITY OF MICHIGAN, POLICY AND PROCEDURES ON STUDENT SEXUAL AND GENDER-BASED MISCONDUCT AND OTHER FORMS OF INTERPERSONAL VIOLENCE 12 (last updated July 1, 2016), <https://publicaffairs.vpcomm.umich.edu/wp-content/uploads/sites/19/2016/04/SMP-Final-master-version-4.6.16.pdf>.

310. UNIVERSITY SENATE, *Student Sexual and Gender-Based Harassment and Violence Complaint and Response*, UNIV. OF OREGON §§ III.B.1, IX.E (last updated May 12, 2017), [https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender%20based%20employee%20reporting%20responsibility%20policy%20effective%20Sept.%2015%2C%202017\\_0.pdf](https://prevention.uoregon.edu/sites/prevention1.uoregon.edu/files/Gender%20based%20employee%20reporting%20responsibility%20policy%20effective%20Sept.%2015%2C%202017_0.pdf).

311. See *supra* text accompanying note 14. OCR says that its categories are not meant to capture the entire universe of responsible employees. See 2001 Revised Sexual Harassment Guidance, *supra* note 12, at 13 (“a responsible employee *includes* any employee [who falls into these categories]”).

helpful.<sup>312</sup> Rather, the “other misconduct” language is best read as informing the third category regarding students’ reasonable expectations.

However, the second category also has another component that deserves attention. A responsible employee includes an employee “*who has the duty to report . . . sexual harassment . . . by students to the Title IX coordinator.*”<sup>313</sup> Yet this language is also unhelpful because it produces circular reasoning. Who has a duty to report is the very question that a reporting policy is supposed to determine.

The first category—one “*who has the authority to take action to redress the harassment*”<sup>314</sup>—is a little more helpful, but only marginally. Few officials in the modern university have the unilateral authority to take corrective action to end the discrimination. Due process requirements, union-negotiated protections for employees, and contractual obligations typically require or necessitate that administrators invoke the university’s student conduct code process or its Affirmative Action and Equal Opportunity (AAEO) process, depending upon the accused perpetrator’s status, in order to trigger corrective action. Nonetheless, this category clearly includes the student conduct code officer, as that person typically determines whether sexual violence occurred and the repercussions. The category might also include employees who are allowed to respond to a finding of sexual violence, such as a coach who has the authority to kick a student perpetrator off of a team. Overall, this category is rather narrow and the identity of the relevant employees rests on an institution’s own policies regarding who has the authority to take action to redress sexual violence.

The third category is the most important. It is as follows: an employee “*who a student could reasonably believe has this authority or responsibility.*”<sup>315</sup> This category is very important because it stops designated reporter creep: responsible employees are arguably limited to those listed by the university. Once a policy defines those people who have the authority to take action or the duty to report to the Title IX office, and that policy is widely available, then no one else should be considered a responsible employee because a reasonable college student would understand that responsible employees are limited to those on the list.

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312. See *supra* text accompanying notes 170–74.

313. 2001 Revised Guidance, *supra* note 12, at 13 (emphasis added).

314. *Id.* (emphasis added).

315. *Id.* (emphasis added).



In addition, aligning mandatory reporters with student expectations can help avoid unwanted surprises, i.e., situations in which students think they are talking privately to an employee, but the employee has reporting obligations and will share their information.<sup>316</sup> Obviously, not all students have the same expectations. But when students would reasonably believe that an employee is not a designated reporter, then that person should not be made a designated reporter.<sup>317</sup> Schools can only guess about the identity of those individuals because no one has empirically assessed and documented students' beliefs. Nonetheless, some rough approximations are possible. The process of identifying designated reporters should be sensitive to the benefit of exempting employees who are critical sources of support for survivors.

Apart from the OCR guidance, case law also sheds light on who should be designated reporters. The cases do not themselves identify which employees are responsible employees, but they do identify who is an "appropriate person" for purposes of Title IX liability. Appropriate persons should be made designated reporters because schools can be liable for an appropriate person's failure to address student-on-student harassment.<sup>318</sup>

The Supreme Court's definition of an "appropriate person" is very close to the first category in OCR's guidance.<sup>319</sup> The Supreme Court defines an appropriate person as "an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures."<sup>320</sup> Case law can help identify the individuals who fall within this category, with two caveats. First, a court's analysis may turn on facts specific to the particular institution. Second, a court may find an employee is an appropriate person because the employee is a mandatory reporter.<sup>321</sup> If so, it may not be necessary to identify employees in that position as designated reporters. A closer analysis of the case would be required.

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316. *See supra* text accompanying notes 115–117.

317. While it is best to resolve ambiguities by not making someone a designated reporter, sometimes only a very small number of students would be surprised that someone was a mandatory reporter. A small number of students with different expectations should not preclude that employee from being labeled a mandatory reporter. Rather the students in the minority should be protected by notice, i.e., by the published list of mandatory reporters and by the mandatory reporters' disclosure at the beginning of the conversation about his or her obligation to report, although these mechanisms are imperfect.

318. *Davis*, 526 U.S. at 643–44.

319. *See Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998).

320. *Id.* at 290.

321. *See infra* text accompanying notes 436–53.

In light of the above, faculty should not be designated reporters. Absent a reporting policy making them mandated reporters, most students would not believe faculty have reporting obligations. Because faculty members are generally not Clery Act reporters, the AAUP concluded, “faculty members are thus usually not . . . expected to be mandated reporters of incidents about which they are told or happen to learn.”<sup>322</sup> In addition, faculty are often a critical source of support for survivors. The AAUP reported,

As advisers, teachers, and mentors, faculty members may be among the most trusted adults in a student’s life and often are the persons in whom students will confide after an assault. A faculty member may also be the first adult who detects changes in a student’s behavior that stem from a sexual assault and can encourage the student to talk about it. Faculty members may thus find themselves in the role of “first responders” to reports of sexual assault. . . .<sup>323</sup>

Consequently, faculty should not be designated reporters.

In contrast, high-level administrators should be designated reporters. Absent a reporting policy, most students would still expect high-level administrators to address sexual harassment. These expectations flow, in part, from the new consumerism that has infected academia as well as from the academic hierarchy and pomp that still exists. Students identify high-level administrators with authority and the ability to address issues like harassment. These administrators include, for example, the president, provost, vice presidents, vice provosts, athletic director, director of campus housing, director of campus operations, director of fraternity and sorority life, deans, associate deans, and department heads.

#### *D. Hard Cases*

There are several categories of employees that raise difficult classification issues, although for diverse reasons. Must resident assistants, police officers, coaches, campus security authorities, and employment supervisors be responsible employees? This brief discussion is meant to flag the major considerations.

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<sup>322.</sup> Am. Ass'n of Univ. Professors (AAUP), *Campus Sexual Assault: Suggested Policies and Faculty Responsibilities VI* (Nov. 2012), <https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures>.

<sup>323.</sup> *Id.*

### 1. Resident Assistants

OCR's 2014 *Questions and Answers* very clearly called out resident assistants (RAs) as employees who had to report sexual misconduct if they had to report other misconduct, such as drug and alcohol violations or physical assault.<sup>324</sup> However, OCR did not always enforce this requirement,<sup>325</sup> and the withdrawal of the 2014 guidance gives colleges and universities even more leeway.

An advantage of making RAs designated reporters is that this categorization immediately transfers the responsibility of responding to a disclosure away from a young, often inexperienced employee to the Title IX coordinator.

Yet making RAs designated reporters is arguably bad policy for two reasons. First, many students rely on their RAs for support and friendship. In fact, when researchers conducting a major study asked a focus group, "To whom do you think victims are most likely to report incidents of sexual assault?," all of the participants said that "victims are most likely to disclose sexual assaults to friends or resident assistants (RAs)."<sup>326</sup> Other studies confirm that RAs are the campus resource to whom students are most likely to turn for information and support.<sup>327</sup> Therefore, it makes sense to treat RAs like women's center or victim service employees, both of whom the withdrawn OCR guidance expressly exempted from mandatory reporting obligations because of their supportive role for students.<sup>328</sup>

Second, because of RAs' accessibility, some survivors will speak to RAs in an altered state, only to regret it later because the disclosure led to a report. In these instances, the survivor's impairment may mean that the RA cannot give an effective warning about the implications of making a disclosure. Consequently, some

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324. 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at D-5.

325. Wesley College did not make RAs mandatory reporters, although RAs had the obligation to report other misconduct. *See* WESLEY COLLEGE, WESLEY COLLEGE STUDENT HANDBOOK 2016–2017, pp. 24, 37, <http://wesley.edu/wp-content/uploads/2015/03/2016-2017-Student-Handbook-updated-Sept2016-2.pdf>. While OCR was "concerned" with Wesley College's policy, it did not require Wesley College to change this designation. Wesley College Letter, *supra* note 263, at 15.

326. KARJANE, FISHER, & CULLEN, *supra* note 27, at 49.

327. UNIV. OF NOTRE DAME, 2016 SEXUAL CONDUCT AND CAMPUS CLIMATE QUESTIONNAIRE REPORT 10 Table 21 (2016) (placing residence hall staff above, *inter alia*, employees at the campus police, the counseling center, and the health center), [https://titleix.nd.edu/assets/231426/2016\\_sexual\\_conduct\\_and\\_climate\\_questionnaire\\_report\\_final.pdf](https://titleix.nd.edu/assets/231426/2016_sexual_conduct_and_climate_questionnaire_report_final.pdf).

328. *See* 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at E-3.

survivors' autonomy will be undermined because their disclosure will be made without informed consent.

Even if RAs are not designated reporters under a nuanced policy, they would be student-directed employees. As such, an RA would be required to disseminate certain information to a survivor,<sup>329</sup> ask the survivor if she would like the RA to report the incident to the Title IX coordinator and/or connect her with a confidential supportive resource, and then follow the survivor's directions.

## 2. Campus Police

Campus police are another difficult case. On the one hand, good policy reasons exist to keep campus police off the list of designated reporters.<sup>330</sup> If police officers are designated reporters, students may be discouraged from contacting the police when they need police assistance, whether it is for a ride to the hospital for an examination by a sexual assault nurse examiner (SANE) or to remove a harasser from the student's residence. Also, police may be called to the scene by a neighbor or other third party, without a survivor's consent, and the student may not want a report to go to the Title IX coordinator. Finally, minority students, in particular, may have a complicated relationship with the campus police that impedes trust.<sup>331</sup>

On the other hand, many students probably expect campus police to report an incident to the Title IX office. Students' expectations may be influenced by the fact that police are campus security authorities and clearly have reporting obligations under the Clery Act.<sup>332</sup> They

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329. This was a requirement under the withdrawn OCR guidance. See 2014 Q & A on Title IX and Sexual Violence, *supra* note 4, at D-5 ("Regardless of whether a reporting obligation exists, all RAs should inform students of their right to file a Title IX complaint with the school and report a crime to campus or local law enforcement. . . . Additionally, all RAs should provide students with information regarding on-campus resources, including victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance. RAs should also be familiar with local rape crisis centers or other off-campus resources and provide this information to students.").

330. The withdrawn OCR guidance permitted keeping campus police off the list of responsible employees. See *supra* text accompanying note 212.

331. KARJANE, FISHER, & CULLEN, *supra* note 27, at 86; cf. Kimberly D. Bailey, *Criminal Law Lost in Translation: Domestic Violence, "The Personal is Political," and the Criminal Justice System*, 100 J. OF CRIM. L. & CRIMINOLOGY 1255, 1289-93 (2010) (discussing specific challenges women of color have with law enforcement).

332. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2 ("If your institution has a campus police or security department, all individuals who work for that department are campus security authorities.").

might also be influenced by the fact that people rarely have control over the police's response to a crime.

If campus police are made designated reporters, a school may want to ensure that community police, who would not have any reporting obligations within the school, can also respond to students' calls. Students should then be notified of this option in order to maximize their choices.

### 3. Coaches

Coaches are another difficult category. On the one hand, athletic coaches sometimes protect their players who are accused of sexual violence instead of forwarding the victims' reports to the Title IX office.<sup>333</sup> The fact that coaches may have their own reasons for disregarding the survivor's report suggests that coaches should be designated reporters. The designation would reduce their ability to claim, falsely, that the student did not want a report to be made.

However, athletes are not only perpetrators. They can be victims, too. If athletes who are victimized turn to their coaches for information and support, then their coaches should not be designated reporters.

A policy that treats the complainant's and accused student's coaches differently is a potential solution. A school might forego the designated reporter label only for coaches on the survivor's team. Alternatively, a school might exclude from mandatory reporting obligations only assistant coaches on the survivor's team if there are multiple levels of coaching and students typically are closest to those assistant coaches. Of course, if athletes are not typically close to any of their coaches, but rather would likely disclose to each other, the athletic counselors, or the team managers, then differentiating between survivors' and perpetrators' teams or between types of coaches on survivors' teams might be unnecessary.

A school's approach to coaches should reflect its sports culture, the number of coaches per team, and the disclosure practices of its athletes. The University of Oregon resolved this issue by labeling as "designated reporters" all of the coaches of any team on which the accused student is a member but only the head coaches of any team

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333. See, e.g., *Doe v. Univ. of Tennessee*, 186 F. Supp. 3d 788, 792 (M. D. Tenn. 2016) (denying motion to dismiss in case in which plaintiffs alleged the creation of an atmosphere that led to their assaults, including improper responses to athletes' sexual misconduct, a failure to report misconduct, attempts to cover-up, failing to implement disciplinary measures, and allowing perpetrators to continue to play for the school); see also *supra* note 46.

on which the complainant is a member.

#### 4. Campus Security Authorities

While all designated reporters will be campus security authorities (CSAs),<sup>334</sup> not all CSAs need to be designated reporters. A federal government handbook on this matter states, “[w]hile there may be some overlap, persons considered to be CSAs for Clery Act reporting are not necessarily the same as those defined as ‘responsible employees’ for Title IX.”<sup>335</sup>

If a school does not want its campus police to have mandatory reporting obligations for the reasons discussed previously,<sup>336</sup> then the school should not make all CSAs mandatory reporters for Title IX purposes. CSAs are defined to include police and others responsible for campus security.<sup>337</sup> Students would be justifiably confused if a school said all CSAs are designated reporters but police are not designated reporters.

Even if a school were to make its police officers designated reporters, it still might want to exempt other CSAs from mandatory Title IX reporting. The CSA category is very broad. Labeling all CSAs

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334. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2 (“If you direct the campus community to report criminal incidents to anyone or any organization in addition to police or security-related personnel, that individual or organization is a campus security authority.”).

335. *Id.* at 4-5. See also WHITE HOUSE TASK FORCE TO PROTECT STUDENTS OF SEXUAL ASSAULT, NOT ALONE 20 (Apr. 2014), <https://www.justice.gov/ovw/page/file/905942/download> (noting that a Department of Education chart shows that a school’s reporting obligation differs under Title IX and the Clery Act) (emphasis omitted). CSAs must report a wide variety of crimes to the institution, including rape, fondling, incest, and statutory rape along with dating violence, domestic violence, and stalking. See 34 C.F.R. § 668.46(c)(1)(i)(B) (2016); 34 C.F.R. § 668.46(c)(1)(iv) (2016). CSAs must only report “allegations of Clery Act crimes that are reported to them in their capacity as a CSA.” HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-5. Incidents they learn “about in an indirect manner” are not covered. *Id.* The information that must be reported is more limited than in the Title IX context. For “alleged criminal incidents” within the category of crime that the Clery Act identifies, CSAs must report the type of crime. See 34 C.F.R. § 668.46(c)(1)(i)(B); HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-1. The CSA must also specify if it was on campus, in or on a non-campus building or property, or on public property. See 34 C.F.R. § 668.46(c)(5) (2016). If it was on campus, it must be noted if it occurred in a dormitory or another residential facility and the general location of the crime. *Id.* The CSA need not, however, include the name of the person who is the victim or the alleged perpetrator. See 34 C.F.R. § 668.46(c)(7) (2016).

336. See *supra* text accompanying notes 330–31.

337. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2.

as designated Title IX reporters will dramatically reduce survivors' access to supportive campus personnel and create moments of unwelcome surprise for some survivors.

The CSA designation includes the following employees: "An official of an institution who has significant responsibility for student and campus activities, including, but not limited to, student housing, student discipline, and campus judicial proceedings."<sup>338</sup> The *Handbook for Campus Safety and Security Reporting* ("*Handbook*") provides examples of employees who fall within this category and emphasizes that the categorization depends upon function, not title.<sup>339</sup> The *Handbook* states, "Look for officials (i.e., not support staff) whose functions involve relationships with students."<sup>340</sup> The examples include "all athletic coaches (including part-time employees and graduate assistants)," "a faculty advisor to a student group," "a student resident advisor or assistant," "victim advocates or others who are responsible for providing victims with advocacy services, such as assisting with housing relocation, disciplinary action or court cases, etc.," and "members of a sexual assault response team (SART) or other sexual assault advocates."<sup>341</sup> Faculty are only excluded from the CSA designation if the faculty member does not have any responsibility for student and campus activity beyond the classroom.<sup>342</sup> As a faculty member's responsibilities can change over time, a faculty member's status is fluid.<sup>343</sup> Given the open-ended and broad definition of CSAs, a reporting policy will introduce considerable ambiguity if it makes all CSAs designated reporters.

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338. 34 C.F.R. § 668.46(a) (2016). It also includes,

- (i) A campus police department or a campus security department of an institution.
- (ii) Any individual or individuals who have responsibility for campus security but who do not constitute a campus police department or a campus security department under paragraph (i) of this definition, such as an individual who is responsible for monitoring entrance into institutional property.
- (iii) Any individual or organization specified in an institution's statement of campus security policy as an individual or organization to which students and employees should report criminal offenses. . . . Pastoral and professional counselors are specifically excluded.

*Id.*

339. HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, at 4-2 to 4-3.

340. *Id.* at 4-3.

341. *Id.* at 4-2 to 4-3.

342. *Id.* at 4-5.

343. *Id.* at 4-4.

## 5. Supervisors

Student employees may experience sexual violence in their workplaces. Title VII requires schools to have in place policies to address sexual harassment disclosed by employees.<sup>344</sup> If a student employee alleged that the school's response to the harassment was unreasonable,<sup>345</sup> a court would typically examine the institution's reporting policy,<sup>346</sup> although a particular reporting structure is not obligatory under Title VII. Employment supervisors should be on the list of designated reporters because their failure to report the abuse to the university could result in Title VII liability.<sup>347</sup>

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344. This discussion only applies to harassment disclosed by the victim, not witnessed by a supervisor.

345. Employers are strictly liable if a supervisor's sexual harassment involves tangible job action against an employee. Otherwise, the employer's liability for a supervisor's harassment is assessed using a negligence standard. Liability will exist unless the employer can show "(a) that [it] exercised reasonable care to prevent and correct promptly . . . harassing behavior, and (b) that the [employee] unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998). See generally Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755 (1999). If a co-worker harasses the student employee, liability is also governed by a negligence standard. See 29 C.F.R. § 1604.11(d) (2016); *Ortiz v. Hyatt Regency Cerromar Beach Hotel, Inc.*, 422 F. Supp. 2d 336, 342 (D.P.R. 2006). See generally Joanna L. Grossman, *Moving Forward, Looking Back: A Retrospective on Sexual Harassment Law*, 95 B.U. L. REV. 1029, 1041–42 (2015) (citing *Faragher*, 524 U.S. at 799; 29 C.F.R. § 1604.11(d) (2002)).

346. See generally D. Frank Vinik, Ellen M. Babbitt & David M. Friebus, *The "Quiet Revolution" in Employment Law & Its Implications for Colleges and Universities*, 33 J.C. & U.L. 33, 39 (2006) (noting that case law suggests the elements of an effective EEO compliance program include "development, implementation, and publication of effective complaint, investigation, and appeal procedures").

347. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2452 (2013); see also 29 C.F.R. § 1604.11(d) (2016) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."); EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE: VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), <https://www.eeoc.gov/policy/docs/harassment.html> [hereinafter EEOC guidance] (explaining that a supervisor cannot maintain confidentiality, but employees below management can confidentially counsel the victim so long as the victim knows that the employee is not able to remedy the situation). Liability is not a certainty, however. Some courts have recognized the importance of the victim's autonomy in assessing the reasonableness of the institution's response. See, e.g., *Milligan v. Bd. of Trustees of S. Ill. Univ.*, 686 F.3d 378, 383 (7th Cir. 2012) (holding that the university did not act unreasonably when a student reported a professor's sexual harassment to the



The Supreme Court defined “supervisor” in *Vance v. Ball State University* as someone the employer has empowered “to take tangible employment actions . . . , i.e., to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”<sup>348</sup> However, federal appellate courts differ by circuit in their views about which

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student’s supervisor, but the supervisor did not pursue the matter further because the student had refused the supervisor’s offer to talk together to other university officials about the incident); *Jackson v. Cty. of Racine*, 474 F.3d 493, 501–02 (7th Cir. 2007) (finding that an employer did not act unreasonably when it had notice of a supervisor’s sexual harassment but took no action for three months because no victim wished to lodge a formal complaint); *Torres v. Pisano*, 116 F.3d 625, 639 (2d Cir. 1997) (finding that a supervisor who kept an employee’s complaints confidential did not breach his duty to remedy sexual harassment because of the victim’s request for confidentiality). Sometimes courts find that the survivor’s request for confidentiality is relevant to whether the employer had notice, instead of the reasonableness of the employer’s response. *See Hardage v. CBS Broad. Inc.*, 427 F.3d 1177, 1186–88 (9th Cir. 2005), *amended on denial of reh’g*, 433 F.3d 672 (9th Cir. 2006), *amended on denial of reh’g*, 436 F.3d 1050 (9th Cir. 2006) (employer’s response was reasonable in light of the employee’s statement that he would handle the matter himself, his informed and sincere statement of his wishes, and his furnishing of only a vague account about the extent and nature of the supervisor’s advances); *Faragher v. City of Boca Raton*, 111 F.3d 1530, 1538 n.9 (11th Cir. 1997), *rev’d on other grounds*, 524 U.S. 775 (1998) (holding for vicarious-liability purposes that notice to a manager does not constitute notice to management when the complainant asks the manager, as a friend, to keep the information confidential); *Greenwood v. Delphi Auto. Sys., Inc.*, 257 F. Supp. 2d 1047, 1063–65 (S.D. Ohio 2003) (holding that the employer could not be held liable for its failure to take prompt corrective action for the period during which the employee made it clear that, despite having informed management about numerous alleged incidents of sexual harassment, he did not want to file a complaint and he wanted to resolve the situation himself, and the employer took prompt corrective action following the employee’s subsequent complaints); *Hooker v. Wentz*, 77 F. Supp. 2d 753, 757–59 (S.D. W. Va. 1999) (granting summary judgment when plaintiff confided in her immediate supervisor about sexual advances but asked that he not report it to others and the plaintiff did not use company’s complaint procedure); *Chambers v. Wal-Mart Stores, Inc.*, 70 F. Supp. 2d 1311, 1319–20 (N.D. Ga. 1998) (holding for vicarious-liability purposes that notice to a manager does not constitute notice to management when the complainant asks the manager, as a friend, to keep the information confidential); *Sims v. Med. Ctr. of Baton Rouge, Inc.*, No. CIV. A. 96-3371, 1997 WL 436258, at \*1–2, \*4 (E.D. La. Aug. 1, 1997) (granting summary judgment and finding that the company took prompt, remedial action as a matter of law by respecting the plaintiff’s requests for confidentiality; plaintiff refused to file a formal complaint after the Director of Human Resources asked her several times if she wanted to do so); *Elezovic v. Ford Motor Co.*, 697 N.W.2d 851, 862 (Mich. 2005) (“plaintiff’s telling two supervisors in confidence about one instance of Bennett’s improper conduct does not constitute notice, notwithstanding Ford’s policy that required the supervisors to report the information to human resources personnel”).

348. 133 S. Ct. 2434, 2443 (2013).

supervisors' knowledge is imputed to the employer: some say any supervisor, but others say only the victim's and perpetrator's supervisors.<sup>349</sup> A school should look at the case law in its jurisdiction to see whether its designated reporters should include all employment supervisors or just the victim's and perpetrator's supervisors. Even if the list of designated reporters only includes the latter, any other supervisor to whom the survivor discloses should be obligated to ask the survivor if he or she wants to report, and if the student says yes, then the supervisor should be required to report for the student.

### *E. Other Issues*

A school should consider a few additional issues when crafting its reporting policy. Four of the most important are briefly discussed here.

#### 1. Information Escrow Systems

An information escrow system is an online system that allows a survivor to report the incident to the university electronically and to store evidence related to the incident until she is ready to report.<sup>350</sup> Such a system often has a matching function that allows a survivor to specify that her report to the university should only be forwarded to the university when another survivor has identified the same perpetrator.<sup>351</sup> Proponents of these systems suggest that this matching feature increases reporting because survivors like it when another student's report can bolster their own credibility.<sup>352</sup>

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349. *Compare* Swinton v. Potomac Corp., 270 F.3d 794, 804–05 (9th Cir. 2001) (identifying management-level employees as the harasser's supervisor, the harassed employee's supervisor, and any supervisor who is a required reporter), *with* Hall v. Gus Constr. Co., 842 F.2d 1010, 1015 (8th Cir. 1998) (an employer is liable if management-level employees knew, or should have known, about the alleged harassment).

350. Ian Ayres & Cait Unkovic, *Information Escrows*, 111 MICH. L. REV. 145, 150 (2012).

351. *Id.*

352. *Id.* at 147–48, 160–61, 174 (articulating the benefits and disadvantages of such an “allegation escrow” system in both game theory and real-life terms, and suggesting that such a system may increase reporting).

Third-party vendors currently exist and offer these systems.<sup>353</sup> At least one vendor uses an open-source program that would allow a school to create its own information escrow system.<sup>354</sup>

A school should consider several issues, in addition to cost, before committing to an information escrow system. First, does the Title IX coordinator have the ability to input data into the system? Reports that go directly to the Title IX office (without first being processed through the information escrow system) should be entered into the information escrow system. Otherwise, reports in the escrow system may be erroneously orphaned.<sup>355</sup> A survivor who uses the information escrow system may want her information forwarded to the university when a match exists, but that will not occur if the other victim went directly to the Title IX office and her report was not added to the database. FERPA may prohibit a Title IX coordinator from entering a student's information into a third-party database without the survivor's consent.<sup>356</sup> Therefore, a reporting protocol should include securing the survivor's permission to enter her information into the third-party escrow system.<sup>357</sup> Since some escrow systems require that the information be transmitted from the survivor's own email account, the Title IX coordinator may need to ask the survivor to enter her information into the escrow system as part of the intake process.

Second, will an information escrow system effectively convey important information to the survivor? If not, will the existence of such a system funnel survivors away from more effective resources, such as a campus advocate or an attorney? Consider, for example, the importance of telling a survivor about methods of evidence collection. Evidence can be critical if the perpetrator is to be held accountable in the disciplinary, civil, or criminal systems. While an online resource can inform a survivor about the type of information that she should collect and save, and how to do so, some survivors may not read the information or may have unanswered questions. Valuable evidence may be lost.<sup>358</sup> On the other hand, perhaps the escrow system will

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353. See, e.g., PROJECT CALLISTO, <https://www.projectcallisto.org> (last visited July 6, 2017); LIGHTHOUSE, <http://lighthouse.vertiglolabs.com> (last visited July 6, 2017).

354. *Sexual Health Innovations Announces Callisto Code is Open Source*, DIGITAL JOURNAL (May 27, 2016), <http://www.digitaljournal.com/pr/2954484>.

355. See Ayres & Unkovic, *supra* note 350, at 148.

356. See 20 U.S.C. § 1232g (2013).

357. Ayres & Unkovic, *supra* note 350, at 174.

358. Ayres & Unkovic think that the computer can be programmed to take the survivor "through a series of questions that are more likely to address all the elements of a sexual harassment claim." *Id.* at 169. One has to wonder whether the computer

allow a survivor to get advice about evidence collection more quickly, and will facilitate preservation of evidence because it is convenient. Schools will want to consider carefully to whom survivors should be channeled and how best an online escrow system can deliver important information to survivors, if it is offered.

## 2. Anonymous Reporting

Anonymous reporting means different things to different people. In one study, for example, an “anonymous reporting option” was described as allowing a student to get assistance, information, and support referrals without formally entering a university process, although the crime would be documented in the campus crime statistics.<sup>359</sup> For others, anonymous reporting does not necessarily allow a student to access services, but rather is merely an online form that relays information about an assault without giving the survivor’s name.<sup>360</sup>

Many sources recommend an anonymous reporting option, including the American Law Institute<sup>361</sup> and the American Association of University Professors,<sup>362</sup> although the meaning of anonymous reporting is often not defined. Some states require universities to provide this option.<sup>363</sup> Unfortunately, too little analysis exists regarding whether this option should be offered, given its benefits and limitations.

The main benefit of anonymous reporting is that it may encourage some survivors to come forward who would not otherwise.<sup>364</sup> While

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will in fact be capable of navigating any nuances, whether a survivor will give up on answering the questions without an advocate there to support her, and whether answers memorialized during a traumatic experience might be incorrect in some details and whether the report will come back to undermine the survivor’s case. After all, there may not be a basis for refusing to turn over the report to the accused during proceedings.

359. KARJANE, FISHER & CULLEN, *supra* note 27, at 93 (“The anonymous reporting option allows student victims to come forward and talk to a trusted school official without the possibility of losing control of the process (e.g., mandated reporters at schools that do not offer anonymous reporting).”).

360. *See, e.g.*, UNIV. OF OREGON, ANONYMOUS REPORT FORM SEXUAL HARASSMENT, SEXUAL ASSAULT, PARTNER VIOLENCE & STALKING, [https://president.uoregon.edu/sites/president2.uoregon.edu/files/aaeo\\_anonymous\\_report\\_form.pdf](https://president.uoregon.edu/sites/president2.uoregon.edu/files/aaeo_anonymous_report_form.pdf) (last visited July 7, 2017).

361. *See* ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at §3.2.

362. AAUP, *supra* note 322, at § V.5.

363. *See, e.g.*, MINN. STAT. ANN. § 135A.15.5 (West 2015).

364. KARJANE, FISHER & CULLEN, *supra* note 27, at 93 (“There was strong agreement among field interviewees that an anonymous reporting option increases

an institution may not be able to take formal action against a perpetrator without a known complainant,<sup>365</sup> an anonymous report may allow the institution to identify patterns and problems that should be addressed. An anonymous report may also “bolster the credibility of a non-anonymous report.”<sup>366</sup>

On the other hand, survivors may have a false sense of what an anonymous report can do for them. Such reports usually cannot lead to discipline, unless the perpetrator admits the accusation.<sup>367</sup> In addition, these reports may be viewed with suspicion, in part because “the victim cannot be questioned further about the incident,”<sup>368</sup> and the victim is “unwilling to confront and face” the accused.<sup>369</sup> Other problems include the possibility that anonymous reports may not be truly anonymous, putting the survivor’s privacy at risk.<sup>370</sup> In addition, the accused may never receive repose if there has been an

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reporting of campus sexual assault.”); see ALI, COUNCIL DRAFT NO. 1, *supra* note 47, at § 3.2 cmt. (“While anonymous reporting may provide the basis for general education and safety efforts, it should not by itself provide the basis for enforcement efforts targeted at any individual, because it does not allow the school to assess either the credibility of the reporter or whether the report is made in good faith.”).

365. Compare SOUTHERN UTAH UNIV., SEXUAL ASSAULT ANONYMOUS REPORTING FORM, <https://www.suu.edu/titleix/pdf/titleix-anonymous-reporting-form.pdf> (“This form is designed to facilitate the anonymous report of a sexual assault to assist Southern Utah University in understanding current sexual violence trends at our campus. Filing this form will not result in an investigation unless the victim later decides to make a formal report to law enforcement. Completing this form does not constitute a police report nor a student conduct report. You will not be contacted by the university unless you indicate a desire to be contacted (you may request to be contacted at the end of this form).”), with REED COLLEGE, TITLE IX, CONFIDENTIAL AND ANONYMOUS REPORTING, <http://www.reed.edu/title-ix/> (“Any community member wishing to make an anonymous report of a violation of Title IX may do so by completing a secure online form. While it is inherently difficult to gather the full facts in response to anonymous reports, the college will nonetheless conduct an investigation. The investigation will be as thorough as is practicable and will be appropriate to the specific report.”).

366. Vanessa H. Eisemann, *Protecting the Kids in the Hall: Using Title IX to Stop Student-on-Student Anti-Gay Harassment*, 15 BERKELEY WOMEN’S L. J. 125, 150 n.155 (2000).

367. See *id.*

368. *Id.*

369. Norman D. Bishara, Elletta Sangrey Callahan & Terry Morehead Dworkin, *The Mouth of Truth*, 10 N.Y.U. J. L. & BUS. 37, 91 (2013).

370. Samantha Iannucci, “Due” the Process: *The Sufficiency of Due Process Protections Afforded by University Procedures in Handling Sexual Assault Allegations*, 95 OR. L. REV. 609, 637–38 (2017).

anonymous report. At one university, for example, “an informal complaint is never truly closed.”<sup>371</sup>

It is important to assess whether anonymous reporting should still exist when the institution’s reporting policy offers survivors student-directed and confidential reporting options, especially if there is an online information escrow system. Students might be queried about the need for this additional option, assuming a school has adopted these other reporting methods.

### 3. Third-party Information

How should a reporting policy address information that comes from third parties? Such information can come from many different sources, including from a friend of the survivor. Assuming that the event did not also create a hostile environment for the third party (so that the information disclosed could constitute a first-person disclosure) and the survivor does not report her own victimization to the institution, how should employees be told to respond to a third-party report?

If a designated reporter obtains information from a third party, the designated reporter should report the information to the Title IX coordinator. OCR does not differentiate between first-person and third-person reports.<sup>372</sup> Neither do the courts. An institution can be liable if an appropriate person has actual knowledge of a problem and acts with deliberate indifference, regardless of how that person obtained the information.<sup>373</sup>

However, if the third party conveys information to a confidential employee or to a student-directed employee, the situation differs. That employee should not have an obligation to make a formal report unless the victim indicates that she wants a report to be made. If the third party wants to make a report regardless of the survivor’s wishes, then the employee should direct the third party to a designated reporter or the Title IX office. However, if the third party

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371. Jose A. Cabranes, *For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 YALE L. & POL’Y REV. 345, 361 (2017).

372. 2001 Revised Guidance, *supra* note 12, at 13.

373. Julie Davies, *Assessing Institutional Responsibility for Sexual Harassment in Education*, 77 TUL. L. REV. 387, 423 (2002) (“Because the Court [in *Gebser*] did not frame this element as requiring a formal report, actual knowledge should be interpreted to mean that notice may be obtained through firsthand observation of particular events, reports from bystanders, and informal or formal reports from students.”).

would prefer the survivor make the reporting decision for herself, then the student-directed or confidential employee should encourage the third party to ask her friend to talk to a confidential or student-directed employee directly. The student-directed or confidential employee should provide the third party with information about resources and reporting options to share with the victim.

Alternatively, when a third party shares information with someone other than a designated reporter, the institution may want to reach out to the survivor to see if the student wants to report the incident or be connected with services. This outreach effort should be made by a trained, confidential advocate because the outreach, if done improperly, may put the survivor's safety in jeopardy (especially if the victim experienced domestic violence) or cause her embarrassment. Therefore, a policy might require student-directed and confidential employees to contact the university's trained, confidential advocate when in receipt of information from a third party.

#### 4. Exceptions

Schools will want to consider what exceptions should exist to a student-directed employee's obligation to keep a student's disclosure private.<sup>374</sup> State law may require some exceptions. For example, state law may require employees to report misconduct involving minors.<sup>375</sup>

In addition, a school may want to include a "*Tarasoff* exception": an exception that would require employees to report to the Title IX office if the student discloses that the alleged perpetrator poses an imminent risk of serious harm to another identifiable individual.<sup>376</sup> This exception is warranted because an institution may face liability under tort law or Title IX if it fails to act reasonably to protect the identified student.<sup>377</sup> Any resulting liability would not technically track the *Tarasoff* situation because *Tarasoff* involved a psychotherapist who interacted with the perpetrator.<sup>378</sup> Nonetheless, a court might extend *Tarasoff* and impose liability for a subsequent

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374. Confidential employees will generally be guided by their profession's ethical rules.

375. See, e.g., OR. REV. STAT. § 419B.010 (2015).

376. See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

377. A majority of states recognize a *Tarasoff* exception. See George C. Harris, *The Dangerous Patient Exception to the Psychotherapist-Patient Privilege: The Tarasoff Duty and the Jaffee Footnote*, 74 WASH. L. REV. 33, 47 (1999).

378. Melissa L. Gilbert, "*Time-Out*" for Student Threats?: *Imposing a Duty to Protect on School Officials*, 49 UCLA L. REV. 917, 919 (2002).

victim's attack in this context. The adoption of such an exception would often be consistent with other policies on campus that address threats,<sup>379</sup> as well as align with institutional values. If an institution incorporated such an exception into its reporting policy, it should inform its students about the exception.<sup>380</sup>

#### V. WIDE-NET POLICIES DO NOT REDUCE AN INSTITUTION'S OVERALL RISK OF LIABILITY

So far, this Article has argued that a more nuanced reporting policy has discernable benefits and is legally permissible. Yet, would such a policy expose the institution to liability? Reporting policies have historically been shaped by administrators' liability concerns.<sup>381</sup> Administrators may worry that a nuanced reporting policy would decrease institutional compliance with different laws; after all, no longer would all disclosures be funneled to someone who knows the institution's obligations under the Clery Act,<sup>382</sup> Title VII, and other relevant laws. Administrators may also worry that a narrower

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379. See, e.g., SOUTHERN ILLINOIS UNIV. EDWARDSVILLE, THREAT ASSESSMENT POLICY - 2C12 & 3C13, <http://www.siue.edu/policies/2c12.shtml> (describing one of five behaviors that will activate the threat assessment team: "The individual makes a threat of violence towards a specified person(s), including themselves or the community as a whole. The threat might be direct or indirect, implicit or explicit, veiled or outright, but leaves a reasonable observer in fear of his or her safety. The threat might take the form of verbal or written statements and/or might occur through various electronic media."); UNIV. OF CHICAGO, CAMPUS VIOLENCE PREVENTION POLICY & BEHAVIORAL INTERVENTION TEAM, <https://studentmanual.uchicago.edu/ViolencePreventionPolicy> ("When someone, whether a member of the University of Chicago community or not, jeopardizes that environment or threatens a person or people with violence, the University must call upon its full resources to promptly assess the situation, intervene as appropriate, and support those who raised concerns about the threat and others who may be involved.").

380. Cf. Elisia Klinka, *It's Been a Privilege: Advising Patients of the Tarasoff Duty and Its Legal Consequences for the Federal Psychotherapist-Patient Privilege*, 98 FORDHAM L. REV. 863, 888 n.203 (2009) (discussing how informed consent in the therapeutic context requires a psychotherapist to tell patients about the obligation to disclose this type of information).

381. All the participants of a focus group assembled for a National Institute of Justice funded study on campus sexual assault "agreed that liability concerns played a significant role in the development of their institutions' sexual assault policies." KARJANE, FISHER, & CULLEN, *supra* note 27, app. at 51

382. 20 U.S.C. § 1092(f) (2012). The Clery Act requires schools to gather and publish crime statistics so that people know what is happening on their campuses. The Act also requires that institutions of higher education provide information on their policies and services. See generally Higher Education Amendments of 1992, Pub. L. No. 102-325, 106 Stat. 448 (1992), amended by Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (2013).



reporting policy would increase risks to other students because known perpetrators would not be removed from campus.

This Part argues that wide-net reporting policies' purported benefits for the institution are overstated. The benefits are actually unquantifiable and potentially illusory. Moreover, wide-net reporting policies increase the risk of institutional liability in certain ways. There are risks to the institution when employees disregard their reporting obligations to honor students' requests not to report. Disregarding a survivor's desire for privacy raises its own potential claims.

This discussion will illustrate that a comparative assessment of potential liability is pure guesswork. Consequently, liability concerns are not a good reason for schools to maintain wide-net reporting policies. Rather, a school should select the reporting policy that best comports with the principles identified above and the school's aspirations for addressing survivors' needs and treating them with respect.

#### A. *Compliance with Other Laws*

Proponents of wide-net reporting policies claim that these policies funnel all disclosures to one person who is knowledgeable about the school's obligations under a variety of other laws,<sup>383</sup> and thereby minimize the opportunity for mistakes. While wide-net policies probably do offer such an advantage, it is likely that the size of this advantage is modest, at best. After all, the same funneling will occur under a more nuanced policy if a student discloses to a designated reporter or requests that a student-directed or confidential employee report to the Title IX coordinator. In addition, there is no problem at all if the student discloses to a student-directed or confidential employee who has no reporting obligations under other laws. An honest assessment should reveal that the funneling

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383. See W. Scott Lewis et al., *The Top 10 Things We Need to Know about Title IX (That the DCL Didn't Tell Us)*, NCHERM GROUP, LLC & AXITA 11 (2013) (recommending mandatory reporting because it would be "both impractical and a potential intellectual impossibility" to train employees accurately on the various laws); see also Flaherty, *supra* note 40 (reporting that an adviser to educational institutions said, "If everybody's a mandated reporter, it simplifies who's who, and it simplifies the training."); ATIXA, *supra* note 38, at 2 ("As with the other laws, the definition of 'responsible employee' under Title IX would allow the College to treat only some faculty and staff as mandated reporters but with the same possibility of confusion and risk of institutional exposure.").

benefits of a wide-net reporting policy would be lost in only a limited number of instances.

Moreover, campuses can reduce this risk by training employees who have multiple roles to meet their multiple legal obligations. If campuses tell employees their specific legal obligations, the information is not overwhelming or confusing.<sup>384</sup> Campuses can further reduce the risk by having information about employees' obligations available in writing and by encouraging employees with multiple roles to direct questions about their legal obligations to a confidential resource.<sup>385</sup>

Finally, any potential disadvantage associated with the loss of a wide-net reporting policy's funnel must be balanced against the gains that a narrower Title IX reporting policy offers for the application of the other laws. For example, employers are advantaged under Title VII when they have a system that increases reporting overall. Courts look at whether the employer's complaint system is effective when assessing the employer's reasonable care to prevent harassment from happening in the first place.<sup>386</sup> The Supreme Court has said that the employer's negligence can be proven with "[e]vidence that an employer . . . effectively discouraged complaints from being filed."<sup>387</sup>

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384. Employees typically fall into one of four categories: (1) Designated reporters or student-directed employees who are asked to report and can satisfy their obligations under Title IX, the Clery Act, and Title VII by reporting to the Title IX coordinator (who will forward the relevant information to the Clery coordinator or AAEO office); (2) Employees who are campus security authorities (CSAs) under Clery, but not designated reporters, will have obligations to report under Clery (typically de-identified information), but will not report to the Title IX coordinator without the student's request; (3) Employees who are neither CSAs nor designated reporters will only have obligations to report under Title IX and only if the student agrees; and (4) Employees who are designated reporters because they are employment supervisors will have an obligation to report to the Title IX coordinator when workplace harassment is disclosed (but possibly only when the employee is the perpetrator's or victim's supervisor, *see* text accompanying note 349 *supra*) or when it occurred in any context and the survivor asked them to report, and report to the Clery coordinator de-identified information only if they are a CSA. However, all employees might have an obligation to report to the Title IX coordinator, regardless of their categorization, if the disclosure reveals an imminent risk of serious harm to an identifiable individual or if the victim is a minor. *See generally* text accompanying notes 375–77.

385. Questions might also be directed to the Title IX coordinator if the employee is told to inquire solely about the employee's reporting obligation and not to disclose any private information that prompted the call. However, this approach poses the risk of inadvertent disclosures.

386. *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2451 (2013) (an employer is liable if "the employer was negligent in permitting . . . harassment to occur," and relevant evidence includes "the nature and degree of authority wielded by the harasser").

387. *Id.* at 2453.

Similarly, for administrative enforcement purposes, the Equal Employment Opportunity Commission describes an effective complaint system as one that is “designed to encourage victims to come forward.”<sup>388</sup> A more nuanced Title IX reporting policy may increase reporting overall, thereby benefiting an employer in the Title VII context.

### *B. Subsequent Victims and the Repeat Offender*

Administrators may be worried about repeat offenders. They can imagine the institution being sued by a student who was attacked by a perpetrator who never came to the school’s attention because the first victim asked a student-directed employee not to report. The second victim most likely would allege that the institution was negligent or violated Title IX.<sup>389</sup> These claims might fail for various reasons, but this Subpart focuses primarily on the difficulty a claimant would have proving that a more nuanced policy was unreasonable (as required for a negligence claim) or clearly unreasonable (as required for a Title IX claim). The Subpart will then illustrate that this repeat-offender scenario also produces liability risks for schools with wide-net policies, and the risks may actually be greater with a wide-net policy.

#### 1. Negligence

The victim of a serial perpetrator would face numerous obstacles bringing a successful negligence suit against an institution for its nuanced reporting policy. In fact, almost every element of the tort—

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388. EEOC guidance, *supra* note 347.

389. *See, e.g.,* Ross v. Univ. of Tulsa, 180 F. Supp. 3d 951, 954 (N.D. Okla. 2016). The litigant might also bring a claim against the employee on a negligence theory and against the employer on a respondeat superior theory. This claim would face many of the same doctrinal hurdles outlined in the text, especially with regard to duty. While a litigant might also assert a claim against a state university pursuant to 42 U.S.C. § 1983, that claim would likely fail because there is no constitutional right to be protected from private violence. *See* DeShaney v. Winnebago Cty. Dep’t of Soc. Servs., 489 U.S. 189, 195 (1989); *see also* Johnson v. City of Seattle, 474 F.3d 634, 641 (9th Cir. 2007) (stating that while the state can affirmatively create a danger and thereby be subject to liability, liability cannot arise from inaction); J.K. v. Ariz. Bd. of Regents, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at \*6 (D. Ariz. Sept. 30, 2008) (rejecting that a failure to report a perpetrator’s conduct to judicial affairs could constitute “affirmative conduct” giving rise to a state-created danger).

duty,<sup>390</sup> breach,<sup>391</sup> cause-in-fact,<sup>392</sup> and proximate cause<sup>393</sup>—might pose difficulty. Admittedly, making predictions about some of these elements is challenging because the relevant tort doctrine is often convoluted or in flux. Even assuming stable doctrine, it is impossible to predict accurately the likely success of the university's arguments about the effect of its nuanced reporting policy on each element. For example, assume a jurisdiction determines duty by foreseeability.<sup>394</sup> Would a court impute a student-directed employee's knowledge of risk to the university when the university's policy clearly says that a student-directed employee will not communicate to the Title IX coordinator those risks that do not pose an imminent threat of serious harm unless the disclosing student consents? Would the school be absolved of a duty because the second student assumed the risk by attending the university?<sup>395</sup> Would a court find that a university with

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390. See Brett A. Sokolow et al., *College and University Liability for Violent Campus Attacks*, 34 J.C. & U.L. 319, 321 (2008) ("Establishing that the school owed a duty to protect its students may be the most significant challenge faced by a plaintiff seeking to bring a negligence action against a college or university for injury caused by a violent student."); see also DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 418 (2d ed. 2015) ("[S]ome courts have been unwilling to require colleges to exercise reasonable care to protect one college student from another, even when the college knows it has admitted a dangerous student.") (citing cases).

391. *Thomas v. Board of Trustees*, 895 N.W.2d 692, 699 (2017).

392. A report to the Title IX coordinator does not necessarily result in a perpetrator being removed from campus, especially if the first survivor is not a willing participant in the Title IX process. In addition, it might be difficult to establish that the university would have removed the student from campus as opposed to impose some discipline that would have allowed the person to remain on campus.

393. Historically, and sometimes still, courts find proximate cause is lacking when the immediate cause of the plaintiff's harm is the act of a third party criminal. See generally DOBBS, *supra* note 390, § 209.

394. Tyler Brewer, *The Restatement (Third) of Torts: Combating Sexual Assaults on College Campuses by Recognizing the College-Student Relationship*, 44 J. L. & EDUC. 345, 352 (2015).

395. Arguably, the student assumes the risk of a student-directed or confidential employee not reporting another student's disclosure to the institution, and the institution is relieved of the duty to act for the student's benefit when there was no report. The Clery Act is based on the idea that the student is a consumer who will notice the level of security provided to students and select a college based upon her preferences. Cf. U.S. DEPARTMENT OF EDUCATION, *supra* note 172, at 1-1; *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336-37 ("[Prospective students and their parents] may inquire as to what other measures the college has taken. If the college's response is unsatisfactory, students may choose to enroll elsewhere. . . .") (imposing obligation to act with reasonable care when college voluntarily assumed duty to provide security). Admittedly, this approach to limiting the institution's duty reminds one of the victim blaming that historically hampered rape victim's recovery, and that feminists convincingly condemned. See Martha Chamallas, *Gaining Some Perspective*

a nuanced policy lacks a tort duty for reasons of public policy, e.g., to preserve the college's discretion to adopt the reporting policy it thinks best for its students overall or to respect the privacy of the first victim?<sup>396</sup>

Nonetheless, for purposes of analysis, this Article assumes that a plaintiff could establish duty, damages, cause-in-fact, and proximate cause. Even if this assumption is unrealistic in some states at present, the law might change: institutional liability for third-party criminal conduct has been expanding over time,<sup>397</sup> and the Restatement (Third) of Torts seems likely to continue that trend.<sup>398</sup>

Therefore, this Subpart only analyzes breach. Does a school breach the duty of reasonable care if its policy requires a student-directed employee to honor a student's request not to report an alleged perpetrator and another student is later attacked by the same perpetrator? Breach requires that the defendant failed to exercise the care that a reasonable person would have exercised under like circumstances. Breach rests upon both the foreseeability of the risk and the unreasonableness of the response in light of the risk. While a university's general counsel might feel uneasy that the institution's liability would turn on the jury's determination of breach, a judge could still decide the issue so long as reasonable people could not disagree.<sup>399</sup>

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*in Tort Law: A New Take on the Criminal Attack Cases*, 14 LEWIS & CLARK L. REV. 1351, 1381 (2010).

396. The Restatement (Third) allows a court to limit the duty of reasonable care for reasons of policy. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 7(b) (AM. LAW INST. 2011).

397. Brewer, *supra* note 394, at 388 ("the current trend is to impose a duty upon the college-student relationship"). Yet, today, often the duty still turns on something other than the university-student relationship. *Compare* *Nero v. Kansas State University*, 861 P.2d 768 (Kan. 1993) (finding the university owed the student staying in its dorm, who was allegedly sexually assaulted by a student the university knew was accused of sexually assaulting another student, a duty based on the obligation of landlord to tenant) *with* *Weckhorst v. Kansas State Univ.*, 241 F. Supp. 3d 1154, 1179–80 (D. Kan. 2017) (finding the university did not owe the student a duty when she was allegedly raped in a fraternity). *See generally* Eric A. Hoffman, *Taking A Bullet: Are Colleges Exposing Themselves to Tort Liability by Attempting to Save their Students?*, 29 GA. ST. U. L. REV. 539, 581 (2013) ("[C]ourts have found that colleges owe their students a duty when the institution has notice of possible harm and the present ability to intervene.").

398. RESTATEMENT (THIRD) OF TORTS, *supra* note 396, at § 40(b)(5) (identifying the school-student relationship as "special" for purposes of giving rise to a duty to act); *id.* cmt. g ("[I]t applies to risks created by the individual at risk as well as those created by a third party's conduct, whether innocent, negligent, or intentional."); *id.* § 3 cmt. g (discussing the foreseeable likelihood of harm).

399. Chamallas, *supra* note 395, at 1380 ("However, even under the

In terms of foreseeability, a reasonable person might not foresee that a student who is alleged to have attacked one student would attack another student. The disclosure by the first victim is unlikely to identify another specific person as a future target. Even an unknown future victim might not be reasonably foreseeable. While repeat offenders exist, most campus perpetrators are not repeat offenders.<sup>400</sup> Research by Lisak and Miller initially suggested that a small number of serial perpetrators committed most of the sexual violence,<sup>401</sup> but research published in 2015 by Kevin Swartout and colleagues challenged that conclusion.<sup>402</sup> Swartout's research found that men who perpetrate rape "across multiple college years" are "a small percentage of campus perpetrators."<sup>403</sup>

In designating a policy, a reasonable actor would also consider other factors that could minimize or eliminate any such risk.<sup>404</sup> These factors might include campus policies and programs that are aimed at preventing sexual assault, as well as campus support services that might lead the survivor to report at a later date. In fact, if a nuanced

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Restatement's approach, courts are still entitled to take a case away from the jury by, for example, determining that the specific precautions taken by defendants were adequate as a matter of law (i.e., no breach of duty) or for lack of causation. Additionally, courts are authorized to declare a policy exception from the duty to exercise reasonable care in "exceptional" cases."). *See, e.g.*, RESTATEMENT (THIRD) OF TORTS, *supra* note 396 at § 7 cmt. j (discussing foreseeability).

400. *See* Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1152 (2015).

401. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 80 (Feb. 2002) ("A majority of the undetected rapists in this sample were repeat offenders. . . . These repeat rapists each committed an average of six rapes and/or attempted rapes and an average of 14 interpersonally violent acts.").

402. Swartout, *supra* note 400 at 1152 ("Many researchers, policymakers, journalists, and campus administrators have assumed that 1 small subgroup of men accounts for most rapes committed on college campuses. Our findings are inconsistent with that perspective."); *see* Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2054 (2016) ("Reassuring as it is to think that a few bad apples commit most campus rapes, recent empirical work has found this conclusion to be seriously overstated numerically and flawed as a focus for policy.").

403. Swartout, *supra* note 400, at 1153. Nor do we know anything about the recidivism rates for behavior that is short of criminal, but would still be considered prohibited conduct under Title IX, such as "tak[ing] sex from another student" because of "coercion or intimidation or willful ignorance." Baker, *supra* note 143, at 777.

404. RESTATEMENT (THIRD) TORTS, *supra* note 396 at § 7(b) (a reasonable person would consider the likelihood of harm "between the time of the actor's alleged negligence and the time of the harm itself").

reporting policy has a *Tarasoff* exception<sup>405</sup>—so that employees have to make a report to the Title IX coordinator regardless of a student’s consent if there is an “imminent risk of serious harm”—then an employee’s decision not to report suggests that the foreseeability of what happened was, in fact, non-existent or minimal.<sup>406</sup>

Even if the risk to another individual is not so improbable that a reasonable person would ignore it, the employee’s action (as dictated by the institution’s policy) may still be reasonable. A reasonableness assessment is primarily a cost-benefit analysis. If the risk of repetition is low, a reasonable institution would not adopt costly precautions to prevent it. Cost here includes nonmonetary considerations, such as survivors’ loss of autonomy, survivors’ decreased wellbeing, and the overall level of safety on campus. As Part II suggested, wide-net reporting policies cause considerable harm.<sup>407</sup> In contrast, a more nuanced reporting policy respects survivors’ autonomy (which helps survivors heal), decreases survivors’ traumatic distress by eliminating unwanted or unanticipated reporting, and potentially increases the overall reporting of sexual violence. These are all “highly significant interests.”<sup>408</sup>

The fact that wide-net policies deter disclosures, whereas narrower policies may increase disclosures, makes nuanced policies arguably safer overall. Institutions need survivors to disclose in order to have any chance of removing serial perpetrators from their campuses or deterring first-time offenders. Institutions also need employees to comply with reporting policies and survivors to cooperate with the investigations if reporting policies are to have their desired effect.<sup>409</sup> A nuanced policy is designed to achieve these

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405. See *Tarasoff*, 551 P.2d at 347.

406. See *supra* text accompanying notes 376–77.

407. See *supra* Part II.

408. Cf. *The Florida Star v. B.J.F.*, 491 U.S. 524, 537 (1989) (noting the importance of “the privacy of victims of sexual offenses; the physical safety of such victims, who may be targeted for retaliation ...; and the goal of encouraging victims of such crimes to report these offenses without fear of exposure,” although noting these interests did not allow the state to impose tort liability on a newspaper that published the sexual assault survivor’s name in violation of a statute, primarily because the First Amendment required a different balance in the context of that case).

409. For a discussion of how employees disregard their reporting obligations under wide-net policies, see *infra* text accompanying note 432. For a case in which the first survivor did not want to participate, see *generally* *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951 (N.D. Okla. 2016). The survivor’s cooperation is especially important because survivors sometimes delay their reports, making successful disciplinary proceedings more difficult as evidence becomes compromised. See also Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A*

outcomes.

A nuanced reporting policy embodies a reasonable response by the institution and its employees when a student elects not to report. The employee must offer to connect the survivor with resources, provide the survivor with information about how to report, explain that the law prohibits retaliation, and tell the survivor about any third-party escrow system that allows her to preserve evidence.<sup>410</sup> The employee's response, coupled with the institution's acts to minimize risks of sexual violence (such as prevention education, services like safe ride, and/or restricting access to alcohol and fraternities),<sup>411</sup> contribute to the reasonableness of a school's nuanced reporting policy.

Apart from the fact that a nuanced policy is not an unreasonable policy, many institutions also will be protected by discretionary immunity.<sup>412</sup> This defense, which can protect public institutions in many situations,<sup>413</sup> works best when a school has a more nuanced reporting policy. Discretionary immunity exists when the state entity makes "a policy choice among alternatives" and the state entity has the authority to make that policy choice.<sup>414</sup> This type of immunity typically protects the institution, its officers, and its employees who are acting pursuant to it.<sup>415</sup> As a result, discretionary immunity should protect the institution and the employee when the employee (who is not a designated reporter) follows the policy, even if that means following the student's direction not to report after the

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*Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN. STATE L. REV. 977, 985 (2015) ("There is significant underreporting, both on college campuses and in society at large. When cases are reported, there is often a delay in reporting, which can result in the loss of whatever physical or other forensic evidence may have been available at the time of the incident.").

410. See *supra* text accompanying notes 301–06, 350–52.

411. See generally Oren R. Griffin, *A View of Campus Safety Law in Higher Education and the Merits of Enterprise Risk Management*, 61 WAYNE L. REV. 379, 398–401(2016) (discussing risk management strategies including risk avoidance by forgoing particular activities or programs).

412. Discretionary immunity is found in the Federal Torts Claims Act. DOBBS, *supra* note 390, § 336 at 335–37. Many states also recognize discretionary immunity under state law. *Id.* at § 344 at 369–70. See, e.g., OR. REV. STAT. § 30.265(6)(c) (2017).

413. DOBBS, *supra* note 390, § 336 at 335–37.

414. See *Westfall v. State ex. Rel. Oregon Dep't of Corrections*, 324 P.3d 440, 447 (Or. 2014). A university's choice is not preempted by federal law. Not only is OCR's guidance not binding law, but it gives the institution discretion with regard to the contours of its reporting policy. *Id.*

415. DOBBS, *supra* note 390, § 350 at 393–99. See, e.g., *Westfall*, 324 P.3d at 450 ("Once a discretionary choice has been made, the immunity follows the choice. It protects not only the officials who made the decision, but also the employees or agents who effectuate or implement that choice in particular cases.").



employee directly asks the survivor if she wants to report to the Title IX office. Immunity would exist for any harms resulting from the implementation of the policy. But as described below, an institution is not protected by discretionary immunity if an employee follows the student's request not to report and that response violates the school's policy.<sup>416</sup>

Finally, even if a school faces an increased risk of liability by foregoing its wide-net policy, the institution must assess its true exposure in light of the availability of insurance, the existence of damage caps, and the state's law about several liability. With respect to the latter, Ellen Bublick explained, "When jurisdictions do not retain joint and several liability for negligent tortfeasors, comparison of intentional and negligent torts can dramatically reduce rape victims' ability to recover damages from negligent defendants."<sup>417</sup> These considerations make less convincing an institution's concern about potential liability, although they admittedly do not address the human cost of a subsequent victimization.

## 2. Title IX: Deliberate Indifference "Before" an Assault

The repeat offender scenario could potentially result in a Title IX claim, too. While Title IX claims most frequently arise when an appropriate person at the institution responds to the survivor's report of sexual violence with deliberate indifference,<sup>418</sup> sometimes claims arise when the institution was deliberately indifferent to a survivor's safety *prior to* the assault happening.<sup>419</sup> This type of claim has two variations,<sup>420</sup> both of which might be raised.

One variation would focus on the student-directed employee's failure to report the specific information revealed by the first victim. This claim would face a variety of hurdles. For example, the first student's report must have gone to an "appropriate person."<sup>421</sup> Yet,

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416. See *infra* text accompanying note 457.

417. See Ellen M. Bublick, *Who is Responsible for Child Sexual Abuse? A View from the Penn State Scandal*, 17 J. GENDER, RACE & JUSTICE 297, 303–04 (2014) (citing her own testimony to the Pennsylvania House Judiciary Committee).

418. *Gebser*, 524 U.S. at 290; *Davis*, 526 U.S. at 642–43. The survivor's victimization must also be serious enough to rise to the level of sexual harassment. See, e.g., *Davis*, 526 U.S. at 650.

419. "Prior" claims are still relatively new. Not all courts accept that institutional acts "prior" to the plaintiff's attack can support Title IX liability. See generally Lucy B. Bednarek and Darcy L. Proctor, 56 No. 7 DRI For Def. 71 (2014).

420. See generally *Doe v. Univ. of Tennessee*, 186 F. Supp. 3d 788, 788 (M. D. Tenn. 2016).

421. See *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1153 (10th Cir. 2006).

as discussed below, an employee is less likely to be an “appropriate person” if the employee is not designated as a responsible employee.<sup>422</sup> In addition, to be deliberately indifferent, the appropriate person must have known of a “substantial risk” of harm to the plaintiff, meaning the prior complaint could not have been too dissimilar, too distant in time, or too vague.<sup>423</sup> If the reporting policy contains a *Tarasoff* exception,<sup>424</sup> then the chance that such facts would exist is rather low. In addition, successful “prior” claims typically rest upon many bad facts, not solely an employee’s failure to pass on an earlier report.<sup>425</sup>

The second type of “prior” claim would require that the school had an official policy that rendered the plaintiff more vulnerable to assault and reflected deliberate indifference.<sup>426</sup> The problem with this claim is the requirement of deliberate indifference. Deliberate indifference means the policy is “clearly unreasonable” in light of the known facts.<sup>427</sup> If a narrowly tailored policy is not unreasonable, as described above,<sup>428</sup> then it is not clearly unreasonable either.<sup>429</sup> Even if a nuanced policy were not in accordance with Title IX best practices or the OCR’s guidance, that fact alone would not make the institution deliberately indifferent.<sup>430</sup> Rather, in order for a policy to give rise to

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422. See *infra* text accompanying notes 433–53.

423. See *Escue*, 450 F.3d at 1154 (10th Cir. 2006); *Doe v. Bradshaw*, 203 F. Supp. 3d 168, 185 (D. Mass. 2016) (“the case law is clear that only reliable and unambiguous reports have been deemed sufficient to provide actual knowledge”); *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007).

424. See *supra* text accompanying notes 376–77.

425. See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184 (10th Cir. 2007); *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951, 971 (N.D. Okla. 2016); *Doe*, 186 F. Supp. 3d at 788; *Ariz. Bd. of Regents*, 2008 WL 4446712 at \*17.

426. See *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998). For a discussion of deliberate indifference in the context of an official policy, see *Simpson*, 500 F.3d at 1178 (stating that a violation of Title IX exists “when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient”). See also *Doe*, 186 F. Supp. 3d at 788.

427. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

428. See *supra* text accompanying notes 400–11.

429. Courts adjudicating prior claims have acknowledged the importance of honoring a student’s preferences in evaluating whether a school was deliberately indifferent. See, e.g., *Ross*, 180 F. Supp. 3d at 968–69.

430. Numerous cases now establish that an employee’s failure to report to the AAEO office, to follow Title IX regulations, or to comply with OCR guidance does not itself establish the institution’s deliberate indifference. See e.g., *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 752 (2d Cir. 2003); *Roe v. St. Louis Univ.*, 746 F.3d 874 (8th Cir. 2014); *Butters v. James Madison Univ.*, 208 F. Supp. 3d 745 (W.D. Va. 2016); *Karasek v. Regents of the Univ. of Cal.*, 2016 WL 4036104 at \*11 (N.D. Cal. July 28, 2016) (“Failure to adhere to the [2011 Dear Colleague Letter] may be bad policy, but

a successful claim of deliberate indifference, “the need for ...[a different policy must be] so obvious.”<sup>431</sup> The current national debate about reporting policies indicates no solution is “obvious.” Therefore, it would not be deliberately indifferent to adopt any of the policies described in this Article (or to implement that policy choice).

### 3. Liability Risks Under Wide-Net Policies

If anything, a wide-net policy makes a school *more likely* to be sued successfully when a subsequent victim is attacked. This scenario is possible because well-meaning responsible employees acquiesce to student requests not to file a report with the Title IX coordinator. In fact, anecdotal evidence gathered by this author suggests that many employees, particularly faculty members, disregard their reporting obligations under wide-net reporting policies, claiming that it is unethical to report without the student’s consent.<sup>432</sup>

When a responsible employee acts in contravention of the wide-net policy, the institution faces considerable Title IX exposure because the employee is more likely to be viewed as an “appropriate person.”<sup>433</sup> The Supreme Court defined an appropriate person as “an

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standing alone it does not constitute deliberate indifference.”); *Ross v. Univ. of Tulsa*, 2015 WL 4064754 \*4 (N.D. Okla. Apr. 15, 2015). *But see Doe 1 v. Baylor Univ.*, 240 F. Supp. 3d 646, 659–60 (W.D. Tex. 2017) (indicating that non-compliance with administrative guidance can be relevant to the assessment of deliberate indifference, although it generally will not be sufficient on its own). Nor does it establish negligence. As the Eastern District of Tennessee explained in *Doe v. University of the South*, “If the Court were to allow a regulation used in administering a federally-created right to create a state negligence per se claim, it would effectively eviscerate the *Gebser* rule.” 2011 WL 1258104 at \*14 (E.D. Tenn. Mar. 31, 2011). This reasoning has been followed by a number of courts. *See, e.g., Ross v. Univ. of Tulsa*, 2015 WL 4064754 at \*4 (N.D. Okla. Apr. 15, 2016) (“[a]llowing a Title IX regulatory violation to establish a negligence per se claim is inconsistent with the Supreme Court’s holding in *Gebser* that a defendant must act with ‘deliberate indifference’ in order to subject itself to money damages.”); *A.J. v. Victor Elementary Sch. Dist.*, 2011 WL 1005009 at \*7 (Cal. Ct. App. Mar. 22, 2011). *But see Leader v. Harvard Univ. Bd. of Overseers*, 2017 WL 1064160 at \*7 (D. Mass. Mar. 17, 2017) (noting that violation of regulation can be relevant evidence as to whether the school was negligent).

431. *Simpson*, 500 F.3d at 1178 (citing *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)).

432. *See* AM. ASS’N. OF UNIV. PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS 2 (2009); *see also*, Deamicis, *supra* note 288 (reporting that the campus newspaper included a staff editorial that encouraged RAs to maintain the anonymity of survivors even though the policy required otherwise because “[w]hen a policy doesn’t embody the values it’s supposed to protect, sometimes it’s worth breaking”).

433. A wide-net policy also makes it more likely a complaint would reach an appropriate person because the complaint is always supposed to be forwarded.

official . . . with authority to take corrective action to end the discrimination.”<sup>434</sup> While some courts have refused to equate a “responsible employee” with an “appropriate person,”<sup>435</sup> increasingly other courts have found that the “responsible employee” designation is a significant factor in assessing whether the employee is an “appropriate person.”

An illustrative case is *Wilborn v. Southern Union State Community College*.<sup>436</sup> In *Wilborn*, a woman filed suit against Southern Union State Community College and other defendants for sexual harassment allegedly perpetrated by two teachers.<sup>437</sup> She experienced the harassment when she was the only female in a summer session hosted by the Central Alabama Skills Training Consortium [CASTC].<sup>438</sup> She complained to Ron Brown, the program's case manager. He was not high up in the program's or college's administrative structure.<sup>439</sup> Rather, his job was to recruit participants into the program, determine their eligibility, complete paperwork, enroll them in the program, and “maintain those participants in the program until they complete the program.”<sup>440</sup> He did not have the power to select the students who were ultimately enrolled.

Brown was, however, a “responsible employee,” in the sense that he had reporting obligations once he learned of sexual harassment. Students were told that “if they felt uncomfortable reporting a problem to either instructor, they could report it directly to . . . Brown. If Brown received a serious complaint, including complaints about sexual harassment, he was obligated to inform [the Training

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434. See *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 290 (1998).

435. *Plamp v. Mitchell Sch. Dist. No. 17-2*, 565 F.3d 450, 458–59 (8th Cir. 2009) (holding guidance counselor was not an appropriate person for purposes of teacher-on-student harassment even though guidance counselor was “required by the sexual-harassment policy to report suspected instances of abuse or harassment to the administration,” but recognizing that guidance counselors and teachers might be appropriate persons in some instances); *Douglas v. Brookville Area Sch. Dist.*, 836 F. Supp. 2d 329, 346 (W.D. Penn. 2011) (holding that music teacher was not an appropriate person even though every school employee was required to report cases of suspected child abuse to the principal pursuant to school district policy); see also *Johnson v. N. Idaho Coll.*, 2009 WL 3303714, at \*1 (9th Cir. Oct. 13, 2009) (unpublished decision) (implying in *obiter* that a counselor at a college who had an obligation to report harassment to the AAEO office was not an appropriate person for purposes of Title IX).

436. 720 F. Supp. 2d 1274 (M.D. Ala. 2010).

437. *Id.*

438. *Id.* at 1283.

439. *Id.* at 1284.

440. *Id.*

Coordinator for CASTC].”<sup>441</sup> Consequently, the court concluded that Brown was an “appropriate person” for purposes of Title IX liability. The court explained:

To be sure, Brown lacked the power to fire or discipline the alleged perpetrators of the harassment. However, [plaintiff] has offered evidence that Southern Union granted him the power, and imposed the *obligation*, to collect complaints from program participants and report them to Southern Union officials endowed with the power to fire or discipline.<sup>442</sup>

Other courts have similarly relied on the employee’s reporting obligations to classify the person as an appropriate person for purposes of Title IX liability,<sup>443</sup> and some of these cases involve lower-level employees, as was the case in *Wilborn v. Southern Union State Community College*.<sup>444</sup> For example, the court denied the school district’s motion for summary judgment in *Jones v. Indiana Area School District*,<sup>445</sup> holding that teachers and guidance counselors were “appropriate persons” for purposes of Title IX liability because the school district policy directed complaints of sexual harassment to teachers and guidance counselors, among others.<sup>446</sup> Higher-level administrators have also been considered appropriate persons when they were conduits for reports, even though they themselves lacked

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441. *Id.*

442. *Id.* at 1306.

443. See *J.K. v. Ariz. Bd. of Regents*, No. CV 06-916-PHX-MHM, 2008 WL 4446712, at \*13 (D. Ariz. Sept. 30, 2008) (finding that the head football coach and the Executive Director of Academic Success (who was also the Director of the Summer Bridge program for high school students) were appropriate persons because they both “had the authority, and apparently the obligation, to report [the perpetrator’s] conduct to Judicial Affairs for possible Code of Conduct violations”); *Ross v. Univ. of Tulsa*, 180 F. Supp. 3d 951, 967 (N.D. Okla. 2016) (suggesting knowledge of campus police could trigger Title IX liability because, *inter alia*, campus police were designated in the school’s policy as proper recipients of a sexual violence report, but noting in *obiter* that the designation of “appropriate person” might not reach all of those who had reporting obligations, including “a low-level official university employee, . . . an unrelated off-campus entity, or even . . . a professor or counselor”); *Addison v. Clarke County Bd. of Educ.*, 2007 WL 2226053, at \*3 (M.D. Ga. Aug. 2, 2007) (assuming for purposes of motion to dismiss that school had knowledge of acts because bus driver and bus driver’s aide had notice of acts and they were responsible employees).

444. *Wilborn v. S. Union State Cmty. College*, 720 F. Supp. 2d 1274, 1276 (M.D. Ala. 2010).

445. See *Jones v. Indiana Area Sch. Dist.*, 397 F. Supp. 2d 628, 657 (W.D. Penn. 2005).

446. *Id.* at 643.

the power to institute corrective measures.<sup>447</sup>

Courts confronting the issue in the future will probably continue to find that the responsible employee designation is relevant to whether an employee is an appropriate person.<sup>448</sup> Courts discussing Title IX have noted that courts addressing Title VII have already reached this conclusion: “If the employer has structured its organization such that a given individual has the authority to accept notice of a harassment problem, then notice to that individual is sufficient to hold the employer liable.”<sup>449</sup> Otherwise the employer might establish an ineffective grievance mechanism and undermine the goal of preventing discrimination.<sup>450</sup>

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447. See *Jennings v. Univ. of N.C.*, 482 F.3d 686, 700–01 (4th Cir. 2007) (holding that the university’s legal counsel was an appropriate person because the university counsel was “an official responsible for fielding sexual harassment complaints” in case involving students who complained about the soccer coach’s sexual harassment of players); *Yog v. Tex. S. Univ.*, 2010 WL 4053706, at \*5 (S.D. Tex. Oct. 14, 2010) (holding that the university’s compliance officer was an appropriate person, even though the compliance officer simply played a role in the overall process of instituting corrective measures by investigating and reporting the investigation’s results to the provost); see also *id.* at \*4 (“Courts that have addressed this issue have held that notice given to any employee whom the defendant school has designated to respond to harassment complaints is sufficient to satisfy Title IX’s notice requirements.”).

448. See *MacKinnon*, *supra* note 402 at 2054.

449. *Yog*, 2010 WL 4053706, at \*5 (citing *Williamson v. City of Houston*, 148 F.3d 462 (5th Cir. 1998)). See also *Massey v. Akron City Bd. of Educ.*, 82 F. Supp. 2d 735, 744 n. 7 (N.D. Ohio 2000) (“A school also receives notice when notice is given to any employee whom the school has designated to respond to harassment complaints.”). For cases discussing this rule in the employment context, see *Distasio v. Perkin Elmer Corp.*, 157 F.3d 55 (2d Cir. 1998); *Williamson*, 148 F.3d at 466; *Bonenberger v. Plymouth Twp.*, 132 F.3d 20, 27 n. 7 (3d Cir. 1997).

450. *Yog*, 2010 WL 4053706, at \*5 (finding compliance officer, who did not have disciplinary power over harasser, was an appropriate person under Title IX); cf. *Janet Philibosian, Homework Assignment: The Proper Interpretation of the Standard for Institutional Liability if We are to Protect Students in Cases of Sexual Harassment by Teachers*, 33 SW. U. L. REV. 95, 112–13 (2003) (discussing the concept of appropriate person in the context of a teacher’s sexual abuse of a child) (“Too literal an interpretation of this requirement could easily insulate institutions from liability by allowing them to severely limit the powers of certain supervisory personnel. Many lower courts consider the principal of a school to be an appropriate person within the standard even if the principal lacks the ultimate authority to terminate a teacher’s employment.”). In fact, some courts have already said that reporting obligations are determinative for identifying “management-level employees” in the Title VII context. Management-level employees impute knowledge to the employer. As the Ninth Circuit explained, management-level employees include supervisors without supervisory authority over the harassed or the harasser if they have “an official . . . duty to act as a conduit to management for complaints about work conditions,” including the harassment. *Swinton v. Potomac Corp.*, 270 F.3d 794, 804–05 (9th Cir. 2001).

Using the employer's designation of responsible employees to determine "appropriate persons" also makes sense because the Supreme Court's test for an appropriate person simply does not work well in the context of a large public institution of higher education. As noted above, few officials have the unilateral "authority to take corrective action to end the discrimination."<sup>451</sup> In addition, at many institutions, everyone, whether the president or a faculty or staff member, can initiate the processes that may lead to corrective action (e.g., an expulsion through the student conduct code process) or interim measures (e.g., academic accommodations arranged by the appropriate office), thereby necessitating a better criteria for differentiating between employees who are, and are not, appropriate persons.<sup>452</sup> Consequently, a court should identify "appropriate persons" by using the university's own designation of "responsible employees" (i.e., those employees who must report prohibited conduct to the Title IX coordinator or AAEO officer). Such an approach aligns legal responsibility with the realities of a modern public university.

Relying on the university's own designation of a "responsible employee" also has the advantage of reinforcing the Supreme Court's pronouncement that Title IX liability should not rest on constructive notice or vicarious liability.<sup>453</sup> Because Congress and OCR have given institutions discretion to identify who are the "responsible employees," the institution has control over, and should have responsibility for, its choices. The institution can train and monitor

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451. See *supra* text accompanying note 314. The test for determining who is an appropriate person can be found in *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

452. That is the reality at the University of Oregon.

453. The rationale behind this formulation was summarized by the Ninth Circuit:

In *Gebser*, the Court held that principles of *respondeat superior* and constructive notice are inadequate to impose Title IX liability on a school district for a teacher's sexual abuse of a high school student. Noting that Title IX's express enforcement scheme, termination of federal funding, requires "an opportunity for voluntary compliance" before suspending or terminating funding, *Gebser* held that the judicially implied private right of action similarly should not impose liability "without regard to the recipient's knowledge or its corrective actions upon receiving notice." Monetary damages premised on constructive notice or *respondeat superior* for sexual harassment, the Court held in *Gebser*, would entail a risk that "the recipient of funds was unaware of the discrimination." Rather, in cases like this one *that do not involve official policy of the recipient entity*, . . . a damages remedy will not lie under Title IX unless an official who . . . has authority to address the alleged discrimination and to institute corrective measures . . . has actual knowledge of discrimination . . . and fails adequately to respond.

*Mansourian v. Regents of Univ. of Cal.*, 602 F.3d 957, 966–67 (9th Cir. 2010) (citing *Gebser*, 524 U.S. at 285, 287, 289) (internal citations omitted) (emphasis in original).

those persons whom it selects as responsible employees, and therefore “appropriate persons,” for purposes of Title IX.

While wide-net policies make it more likely that well-intentioned employees who do not report are appropriate persons,<sup>454</sup> these policies also make it more likely that the failure to report would be deemed “deliberately indifferent.” Although it should always be relevant that the employee was trying to respect the first victim’s privacy,<sup>455</sup> it would also be relevant that the employee was violating the institution’s reporting policy.<sup>456</sup> Moreover, the employee’s violation of the institution’s policy would mean that the institution probably could not successfully rely on discretionary immunity to defeat a negligence claim.<sup>457</sup> The violation also makes it more likely that there would be a finding of breach if a negligence claim were brought.<sup>458</sup>

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454. It is unclear how a court would treat a student-directed or confidential employee who only had a reporting obligation when the student wanted the employee to report. It is possible that a court would find the reporting obligation sufficient to also designate such a person an appropriate person. That conclusion, however, would require that the student asked the employee to report, something that would not have happened in the scenario being discussed. *See also* note 433 *supra*.

455. An employee’s effort to accommodate a student’s request for confidentiality can mean the employee’s response was not “clearly unreasonable.” *See* ); *Roe v. St. Louis Univ.*, 746 F.3d 874, 883 (8th Cir 2014) (citing *Gebser*, 524 U.S. at 291–92) (noting that the student’s “expressed desire for confidentiality” meant that the “alleged failure to comply with the [Title IX] regulations” and notify the Title IX coordinator “does not establish actual notice and deliberate indifference”); *Butters*, 208 F. Supp. 3d at 755 (granting summary judgment to the university when student complained about the university’s refusal to move forward with the process without the student’s involvement because the school wanted to give the student some control over the process).

456. *See* *Takla v. Regents of Univ. of California*, 2015 WL 6755190, \*6 (C.D. Cal. Nov. 2, 2015) (allowing claim alleging violation of university policy to survive a motion to dismiss). *But see* *Oden v. Northern Marianas College*, 440 F.3d 1085, 1089 (9th Cir. 2006) (school’s nine-month delay in convening a hearing on the plaintiff’s Title IX sexual harassment allegations, in violation of the school policy, was insufficient to create a triable issue of fact on deliberate indifference when no evidence suggested that delay was more than “negligent, lazy, or careless” and did not prejudice plaintiff); *Butters v. James Madison Univ.*, 208 F. Supp. 3d 745, 755 (W.D. Va. 2016) (affirming grant of summary judgment because, *inter alia*, the school’s failure to follow its own policy and have a more “victim-friendly” process was not dispositive of whether the school’s response was “clearly unreasonable”).

457. *See, e.g.*, *Westfall v. State ex. Rel. Oregon Dep’t of Corrections*, 324 P.3d 440, 449 (Or. 2014)

458. *See, e.g.*, *Cole v. Multnomah Cty.*, 592 P.2d 221, 224 (Or. Ct. App. 1979) (defendant’s own rule admissible on issue of negligence); *Jett v. Ford Motor Co.*, 183 Or. App. 260, 266–69 (2002), *rev’d on other grounds*, 335 Or. 493 (2003) (a company’s internal safety manual was “relevant to the reasonableness of plaintiff’s conduct in getting out of the delivery truck without first shifting into ‘park’ and shutting off the



*C. Original Victims and Reporting Failures*

As just discussed, wide-net reporting policies create liability risks for institutions when well-meaning employees follow a survivor's request and do not report to the Title IX office in violation of the institution's policy. The prior Subpart analyzed the institution's exposure when a perpetrator attacks a subsequent victim and that victim sues. Now this section considers, instead, a claim by a victim who alleges that the employee's failure to report her attack hindered her education or harmed her in some other way. While wide-net and nuanced reporting policies alike create liability risks for an institution when a survivor wants an employee to report and the employee does not do so, the risks are arguably greater with a wide-net policy.

Schools face obvious risks from three types of employees regardless of the type of reporting policy they have: those who are malfeasant, inept, or ignorant. Reporting obligations do not guarantee that employees will actually comply with their obligations and report, as both case law and news reports reveal.<sup>459</sup> Yet most of the problems arise because employees are malfeasant, not because they are inept or ignorant. Employees who are willing to comply with a reporting policy are just as able to comply with a nuanced policy as a wide-net policy. The actions required by a nuanced policy are not difficult and the persons who are subjected to it are not usually inept. Moreover, more nuanced reporting policies have the advantage of funneling students who know they want to report to designated reporters. The reduced number of responsible employees means that they can be exceptionally well-trained and monitored to reduce the possibility of malfeasance, ineptitude or ignorance. This benefit is important because these employees are most likely to be appropriate

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ignition"); RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM. § 13 cmt. f (AM. LAW INST. 2010) (“[E]ven if [evidence of internal standards] is admissible, it does not set a higher standard of care for the actor; rather, it merely bears on the ultimate question of whether the actor has exercised reasonable care.”).

459. See, e.g., *Statement to Dallas Morning News Regarding Sexual Assault Not Reported to Judicial Affairs*, BAYLOR UNIV. (Nov. 11, 2016), <http://www.baylor.edu/thefacts/news.php?action=story&story=174834>. Title IX itself does not deter employees from disregarding their obligations under wide-net reporting policies because employees face no liability under Title IX. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 257 (2009) (“Title IX reaches institutions and programs that receive federal funds . . . but it has consistently been interpreted as not authorizing suit against school officials, teachers, or other individuals . . .”).

persons.

Although a narrowly tailored policy would not protect an institution when a designated reporter does not report or when a student-directed or confidential employee fails to report after a student asks the employee to do so,<sup>460</sup> it should better protect the institution in one particular non-reporting situation: when the student asks the employee not to report, but the student later misremembers and asserts that she asked for a report to be made<sup>461</sup> and that the employee's failure to report harmed her. Under a narrower policy, the factual question—what did the student request—will determine liability. Under a wide-net policy, the resolution of the factual question in the school's favor would be

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460. In this context, an institution must avoid misfeasance and nonfeasance because of the duty undertaken regardless of the type of policy. *See, e.g.*, *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 755 (2d Cir. 2003) (noting in *dicta* that school may have been liable for duty undertaken when the plaintiff alleged that she was harmed by the defendants' failure to immediately notify the AAEO office of her sexual harassment complaint, expeditiously investigate it, and mitigate any harm from the harassment, but that the school did not voluntarily undertake that duty and Title IX regulations did "not impose a duty on each and every school official within that institution to report sexual harassment allegations to the designated AAO."); BARRY A. LINDAHL, 1 MODERN TORT LAW: LIABILITY AND LITIGATION § 3:81 (2d ed. June 2016 update) ("One who volunteers to act, although under no duty to do so, is thereafter charged with the duty to exercise due care and is liable for negligence in connection therewith . . . . The voluntary undertaking doctrine applies to governmental and nongovernmental entities."); *see also* *Peterson v. Multnomah Cty. Sch. Dist. No. 1*, 668 P.2d 385, 393 (Or. App. 1983); RESTATEMENT (SECOND) OF TORTS § 323, § 324A (AM. LAW INST. 1965) (describing negligent performance of undertaking to render services, and describing liability to third person for negligent performance of undertaking); *cf.* *Mullins v. Pine Manor College*, 449 N.E.2d 331, 336 (duty to provide security at college was voluntarily undertaken). For liability, the Restatement requires that the undertaking increased the risk of harm to the plaintiff or the plaintiff relied on it. RESTATEMENT (SECOND) OF TORTS §§ 323, 324A (AM. LAW INST. 1965). The latter might exist if the undertaking is part of a published policy and the plaintiff expected the university employee to comply with the policy. Without reliance, the increased risk generally must not be from simply failing to eliminate a preexisting risk. *See Regents of Univ. of Calif. v. Superior Court*, 193 Cal. Rptr. 3d 447, 466–67 (Cal. Ct. App. 2015).

461. A survivor's traumatic distress sometimes impairs a survivor's cognition and memory. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS ("DSM") 271–80 (5th ed. 2013) (recognizing threatened and actual sexual violence can cause posttraumatic stress disorder (PTSD), and symptoms of PTSD may include changes in cognition and mood as well as difficulties with concentration, emotional regulation, and sleep); *see also* THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014) ("Also, the trauma that often accompanies a sexual assault can leave a victim's memory and verbal skills impaired—and without trauma-sensitive interviewing techniques, a wom[a]n's initial account can sometimes seem fragmented.").

irrelevant. The employee would still have been obligated to report and the employee's violation of the employer's internal policy would typically constitute evidence of negligence.<sup>462</sup>

Although a narrowly tailored policy affords the advantages described in this section, administrators may still prefer a wide-net policy *because* it chills reporting, and thereby decreases the chance of a successful Title IX or negligence claim. An institution needs notice of a complaint through a responsible employee before a survivor can accuse it of responding negligently, acting with deliberate indifference, or violating OCR guidelines. Fewer complaints mean a school has to provide fewer services to remediate harm and employ fewer people to process Title IX complaints.<sup>463</sup> Fewer reports can also lead to the misimpression that a campus is safe,<sup>464</sup> another benefit for the institution. While fewer disclosures may benefit the school for these reasons, no school should be permitted to have as its objective the chilling of disclosures. That result is so contrary to the spirit of Title IX that OCR should make clear that a reporting system is unacceptable if it is designed to suppress disclosures and reporting.

#### *D. Reporting Against the Student's Wishes*

Wide-net reporting policies also give rise to a risk of liability when an employee reports against the survivor's wishes. That scenario is much more likely to occur when a school has a wide-net reporting policy. There are various claims a survivor might assert in her lawsuit against her college or university, including a Title IX official policy claim, a Title IX retaliation claim, and a privacy claim.

These claims would be novel in this context, but a zealous attorney might find all of them viable. Courts might agree that they have merit in light of the harm to survivors from mandatory reporting. Therefore, these claims should not be ignored when an institution is trying to assess what type of policy minimizes its

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462. See *supra* note 458.

463. See Jill Castellano, *Campus Sexual Assault Can Cost Universities Millions*, FORBES, June 18, 2015 (noting that those with positions subordinate to the Title IX coordinator are paid approximately \$83,000 a year and that Penn State's Title IX coordinator, an investigator, a prevention and education coordinator, and a deputy coordinator, will easily cost the school "a six figure value").

464. See Corey Raburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, in AM. PSYCHOLOGICAL ASS'N, A COLLECTION OF FORENSIC PSYCHOLOGY ARTICLES 16 (2015) ("[I]f a school stands out as having a high rate of sexual assault versus peer schools, it risks attracting fewer students and suffering long-term reputational damage.") (suggesting that schools have substantially undercounted campus sexual assault).

exposure to liability.

While these claims further complicate any overall assessment of the benefit of wide-net policies, they are also important to consider for reasons beyond their potential to result in a judgment against the institution. The fact that these claims involve violations of privacy and equality means that they should influence the contours of institutions' reporting policies regardless of whether the arguments are legally sufficient to result in legal liability. A policy that has a disproportionately negative impact on female students, for example, should not be maintained. In addition, the fact that the following arguments have policy implications as well as legal implications means that private institutions of higher education should take heed of them, even though private schools are not subject to constitutional prohibitions.

### 1. Title IX Official Policy

Survivors might argue that an institution's sweeping definition of "responsible employee" violates Title IX. If the institution's reporting policy takes away survivors' autonomy, exposes them to retaliation, causes them distress from a loss of control, and/or threatens their safety, each of which can undermine their ability to heal and partake in their education, then the policy arguably violates Title IX.<sup>465</sup> Moreover, a wide-net reporting policy may cause colleges and universities to treat survivors of sexual assault and domestic violence, most of whom are women,<sup>466</sup> differently from other campus victims of crime.<sup>467</sup> Males, who tend to be victimized outside of these particular crime categories, may obtain a level of privacy and autonomy denied to female victims of crime.<sup>468</sup>

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465. After all, Title IX says, "No person in the United States shall, on the basis of sex, be excluded from participation in, *be denied the benefits of*, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a) (2016) (emphasis added).

466. See *supra* note 45.

467. See *supra* text accompanying note 90.

468. This type of discrimination might be amenable to a civil rights claim for violation of the U.S. Constitution or a state constitution if the institution is a state entity. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009) (finding "Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for § 1983 suits as a means of enforcing constitutional rights"); see also, e.g., R.I. GEN. LAWS § 16-38-1.1 (2016). Admittedly, Title IX demands "gender salience" in a way that may not be constitutionally problematic, unlike with race-based distinctions. See Katharine K. Baker, *Sex Equality, Gender Injury, Title IX, and Women's Education in the United States* 32

Such a claim might be raised by a survivor who talks to a trusted employee on campus only to find out later that the employee had a reporting obligation. Even a survivor who has not yet disclosed her victimization to anyone on campus might bring a suit alleging that the school's policy violates Title IX. After all, the policy can eliminate her opportunity to talk to a campus confidant and get connected to institutional support and services. These two types of survivors, although situated differently, both find that the institution's wide-net reporting policy undermines their ability to reengage with their education.

Because these effects flow directly from the school's wide-net reporting policy, survivors could claim a Title IX violation based on the school's "official policy."<sup>469</sup> The Supreme Court has said that a school's "official policy" can give rise to Title IX liability,<sup>470</sup> and such a claim does not require prior notice to an "appropriate person" and an opportunity to cure.<sup>471</sup> Nancy Cantalupo, one of the foremost

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(draft on file) ("In both Title IX and constitutional sex equality jurisprudence, gender salience is not only consistent with, it may be necessary for, equality."). In addition, a plaintiff's claim of gender discrimination in violation of the U.S. Constitution would have to establish intentional discrimination, that is, that the institution's policy was motivated, at least in part, by a plaintiff's protected status. *Bator v. State of Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 2004); *Serrano v. Francis*, 345 F.3d 1071, 1082 (9th Cir. 2003) (citing *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998)); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1134 (9th Cir. 2003). While administrators may adopt wide-net reporting policies for reasons unrelated to gender (whether a misinformed belief that they are helping survivors or a desire to deter reporting), gender is arguably involved too because the institution is responding to a federal law that exists to remedy sex and gender-based discrimination. This argument would be similar to the argument that claimants use when they claim reverse gender discrimination, with mixed success, under Title IX for erroneous outcome claims. *See, e.g., Neal v. Colorado State Univ.—Pueblo*, NO. 16-cv-873-RM-CBS, 2017 WL 633045, \*9–13 (D. Colo. Feb. 16, 2017) (discussing such a claim and the courts' treatment of it). A civil rights claim would admittedly have many hurdles, including the need to convince a court that the Department of Education's view of equality as reflected in its Title IX guidance is unconstitutional. *See Sex Equality, Gender Injury, Title IX, and Women's Education in the United States, supra*, at 26–27 (discussing cases, including *Cohen v. Brown Univ. I*, 991 F.2d 888, 896–97 (1st Cir. 1993) and *Cohen v. Brown Univ. II*, 101 F.3d 155, 172–73 (1st Cir. 1996), where the court deferred to the agency in its analysis of equal protection). Yet, because a restrictive reading of the guidance arguably removes choice from victims, and courts reconciling Title IX and equal protection have been keen to increase victims' choice, there might be less judicial deference to the executive branch. *Sex Equality, Gender Injury, Title IX, and Women's Education in the United States, supra*, at 27–28.

469. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998).

470. *Id.*

471. *Mansourian v. Regents of Univ. of Calif.*, 594 F.3d 1095, 1099, 1103–06 (9th Cir. 2010).

academic experts on universities' Title IX obligations to address sexual violence, has advanced a similar argument in the context of school policies that require referrals to law enforcement.<sup>472</sup> Her argument applies with equal force to mandatory reporting within an institution. She said:

Mandatory referral undermines Title IX's equality principles and purposes both symbolically and practically. Symbolically, mandatory referral actually discriminates against survivors and is thus a direct violation of Title IX. Practically, it limits the number and diversity of reporting options that victims can use, which seriously impedes—and in an unknown but likely to be large number of cases may even eliminate—victims' access to a range of Title IX rights that the criminal system does not and *cannot* provide.

Mandatory referral discriminates on the basis of gender in clear violation of Title IX, because restricting survivors' options by turning all reports into a report to law enforcement perpetuates stereotypical attitudes that infantilize victims. Mandatory referral treats student victims of gender-based violence, most of whom are women and girls, differently from similarly situated adults. This differential treatment is in direct contrast to Title IX's prohibition on sex discrimination in federally funded educational activities. . . . Differential treatment without a reasonable justification falls under the definition of discrimination. That those infantilized in this manner are mainly women and girls makes mandatory referral proposals particularly contrary to Title IX's purposes.<sup>473</sup>

Schools expose survivors to harm when they turn a disclosure into either an involuntary report to law enforcement or an involuntary report to the Title IX office. Both scenarios can support a Title IX official policy claim.

## 2. Title IX Retaliation

A survivor may also have a retaliation claim when her private information is forwarded against her will to the Title IX coordinator.

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472. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L. J. F. 281, 291 (2016).

473. *Id.* at 291–92 (footnote omitted).

In *Jackson v. Birmingham Board of Education*, the Supreme Court explained that retaliation for speaking out against sex discrimination is a form of intentional sex discrimination, actionable under Title IX for damages.<sup>474</sup> As the Supreme Court said, “If recipients were permitted to retaliate freely, individuals who witness discrimination would be loath to report it, and all manner of Title IX violations might go unremedied as a result.”<sup>475</sup> The Court explained that the entire Title IX system depends upon reporting because the institution needs “actual notice” of the discrimination before it is obligated to address it.<sup>476</sup> The Court concluded, “If recipients were able to avoid such notice by retaliating against all those who dare complain, the state’s enforcement scheme would be subverted.”<sup>477</sup>

Under the Supreme Court’s reasoning, mandatory reporting should be seen as retaliation. It is punitive to tell a student that her disclosure to almost any employee on campus will be forwarded to the Title IX office for a potential investigation, even against her will. Such a policy discourages survivors from coming forward and exploring how to obtain support and resources from the school and how to formally report to the school when the survivor is ready.<sup>478</sup>

In fact, the way in which mandatory reporting policies play out for survivors satisfies the prima facie elements of a retaliation claim. The prima facie case of retaliation requires showing that the plaintiff “engaged in protected activity,” the plaintiff “suffered an adverse action,” and “that there was a causal link between the two.”<sup>479</sup> A protected activity includes acts falling short of a formal complaint

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474. 544 U.S. 167, 171 (2005).

475. *Id.* at 180 (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 237 (1969)).

476. *Id.* at 181 (citing *Gebser*, 524 U.S. at 288–90).

477. *Id.*

478. Scholars have argued that even the act of revealing the complainant’s name can constitute retaliation in the Title VII context. *See generally, e.g.*, Jamie Darin Prekert, Julie Manning Magid, Allison Fetter-Harrott, *Retaliatory Disclosure: When Identifying the Complainant is an Adverse Action*, 91 N.C. L. REV. 889 (2013).

479. *Emeldi v. Univ. of Or.*, 673 F.3d 1218, 1223 (9th Cir. 2012) (citing *Brown v. City of Tucson*, 336 F.3d 1181, 1192 (9th Cir. 2003) (following the Title VII approach to retaliation when determining Title IX retaliation claims)); *Doe v. Univ. of Tennessee*, 186 F. Supp. 3d 788, 809 (M. D. Tenn. 2016) (citations omitted) (“[I]n order to establish a prima facie case of Title IX retaliation, a plaintiff must show that 1) she engaged in protected activity under Title IX by complaining about Title IX discrimination; 2) this activity was known to the defendant; 3) the defendant, thereafter, took an adverse action against her; and 4) there was a causal connection between the protected activity and the adverse action.”).

about discrimination.<sup>480</sup> Revealing gender-based violence to a staff or faculty member, especially if the student is entitled to supportive measures regardless of a formal report,<sup>481</sup> should qualify as a protected activity.<sup>482</sup> Adverse action is defined as action that “well might have dissuaded a reasonable [person] from making or supporting a charge of discrimination.”<sup>483</sup> Consequently, mandating that an employee report to the Title IX coordinator without a victim’s consent should qualify as adverse action,<sup>484</sup> especially given the

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480. See *LeGoff v. Trustees of Boston Univ.*, 23 F. Supp. 2d 120, 128 (D. Mass. 1998) (citing authorities); see also 2013 Dear Colleague Letter, *supra* note 127, at 2. (“[O]nce a student, . . . complains formally or informally to a school . . . the recipient is prohibited from retaliating . . .”).

481. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, PREVENTING AND ADDRESSING CAMPUS SEXUAL MISCONDUCT: A GUIDE FOR UNIVERSITY AND COLLEGE PRESIDENTS, CHANCELLORS, AND SENIOR ADMINISTRATORS 12 (Jan. 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/images/Documents/1.4.17.VAW%20Event.Guide%20for%20College%20Presidents.PDF>; WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, SAMPLE LANGUAGE FOR INTERIM AND SUPPORTIVE MEASURES TO PROTECT STUDENTS FOLLOWING AN ALLEGATION OF SEXUAL MISCONDUCT 1 (Sept. 2014), <https://www.justice.gov/ovw/page/file/910296/download> (discussing supportive measures).

482. Admittedly, when a student talks to an employee at the institution about the student’s own victimization, with the intent to explore how to report or get resources and thereby take advantage of Title IX protections, the student’s action falls somewhere between the classic participation and opposition frameworks articulated by the courts. See generally Deborah L. Brake, *Retaliation in the EEO Office*, 50 TULSA L. REV. 1, 9–11 (2015) (describing the participation and opposition frameworks). Yet, a court might find that such a conversation is a protected activity, especially because “[c]ourts construe the ‘protected activity’ requirement broadly.” Gregory C. Keating et al., *Responding and Preventing Whistleblower and Retaliation Claims*, SU004 ALL-CLE 1191 (2012); see also *Pereda v. Brookdale Senior Living Communities, Inc.*, 666 F.3d 1269, 1275–76 (11th Cir. 2012) (finding a pre-eligibility request for post-eligibility maternity leave constituted protected activity under the FMLA because, *inter alia*, the finding would “honor the purpose for which FMLA was enacted”); *id.* at 1276 (“an employee need not be currently exercising her rights or currently eligible for FMLA leave in order to be protected from retaliation”); *Hutson v. Covidien, Inc.*, 654 F. Supp. 2d 1014, 1023–24 (D. Neb. 2009) (permitting an employee’s claim for retaliation to proceed when he sought accommodations although he did not have qualifying disabilities under the ADA).

483. *Emeldi*, 673 F.3d at 1225 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006)).

484. See Annaleigh E. Curtis, *Ignorance, Intent & Ideology: Retaliation in Title IX*, 40 HARV. J. L. & GENDER 333, 362 (2017) (“It is entirely possible, even likely, that significant portions of what victims of assault and harassment experience following reporting is experienced as retaliatory. Far from being an illusory experience, it probably *is* retaliatory, but to see it as retaliatory, we must abandon the singular focus on individual, simplistic ideas of causation and intent that currently dominate the legal landscape.”).



empirical evidence that suggests such policies dissuade some survivors from reporting.<sup>485</sup> In short, the protected activity (talking about the victimization, perhaps to access supportive measures or to learn of reporting options) causes the adverse action (the automatic report to the Title IX coordinator against the victim's will).<sup>486</sup>

The problem for a plaintiff, however, is that a defendant need only show that it had some non-retaliatory reason for the action.<sup>487</sup> The plaintiff must then prove that the defendant's reason is pretextual.<sup>488</sup> As Annaleigh Curtis pointed out, it is unclear what the plaintiff must establish to prove pretext in the Title IX context.<sup>489</sup> Curtis argues that if courts follow the Supreme Court's recent Title VII precedent,<sup>490</sup> Title IX plaintiffs will be disadvantaged because they will have to show that "the desire to retaliate (a strong version of intent) [was] the but-for cause of the adverse action."<sup>491</sup> Yet courts may instead follow the analysis for establishing pretext in "status-based" discrimination cases: "that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives for the decision."<sup>492</sup>

If mixed-motive intent suffices, or if courts adopt Curtis' proposed strict liability test,<sup>493</sup> then victims of mandatory reporting should have an easier time establishing a retaliation claim. Yet a survivor may succeed even if courts require a strong version of intent, e.g., the action was taken for the purpose of retaliation. After all, an institution may prefer its wide-net reporting policy *because* it discourages reporting.

Why would an institution want to discourage reporting? For the reasons mentioned above.<sup>494</sup> A survivor can bolster her theory that the wide-net reporting policy is meant to discourage reporting if campus employees are not required to report most other types of

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485. See *supra* text accompanying notes 133–34, 147–61.

486. *Emeldi*, 673 F.3d at 1223 (identifying causation as the third element of the prima facie case).

487. Curtis, *supra* note 484, at 340.

488. *Id.* at 339.

489. *Id.* at 340.

490. See *generally* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517 (2013).

491. Curtis, *supra* note 484, at 341 (citing *Nassar*, 133 S. Ct. at 2528).

492. *Id.* at 342 (quoting *Nassar*, 133 S. Ct. at 2523). Curtis argues that courts applying Title IX need not follow the approach adopted for Title VII because of differences in statutory language and statutory purpose.

493. Given that victims experience the institution's response as retaliation, Curtis suggests courts adopt a standard of strict liability and not let active ignorance and good motives shield the institution from liability. *Id.* at 359–60.

494. See *supra* text accompanying notes 463–64.

crime, wrongdoing, or student-disclosed victimization against the victim's wishes,<sup>495</sup> or if the institution lacks evidence to show that its wide-net reporting policy achieves any legitimate end.

3. Privacy/42 U.S.C. § 1983<sup>496</sup>

Wide-net reporting policies have serious privacy implications. Lord Hoffmann, of the United Kingdom's House of Lords, noted that human rights law protects the disclosure of private information because privacy is "an aspect of human autonomy and dignity."<sup>497</sup> The U.S. Supreme Court, too, has recognized "the individual interest in avoiding disclosure of personal matters, and . . . the interest in independence in making certain kinds of important decisions."<sup>498</sup> Of course, the two aspects of privacy mentioned by the Court are intertwined. As Khiara Bridges observed, "[W]hen an individual's

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495. See, e.g., UO ANNUAL CAMPUS SECURITY AND FIRE SAFETY REPORT 19 (2016) ("Required Reporters"). Clery reporters have an obligation to report Clery crimes, but employees who are not Clery reporters do not have the same obligation. See HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING, *supra* note 172, chap. 4. The Clery Act does not require all employees to notify the school even of an emergency, despite the fact that it requires the school to give an emergency notification upon confirmation of the threat. *Id.* at chap. 6.

496. Federal law allows a claim for damages when an individual is deprived of "any rights, privileges, or immunities" under the U.S. Constitution or federal law by a person acting under color of state law. 42 U.S.C. § 1983 (2016). The Eleventh Amendment protects state entities from suit, see U.S. CONST. amend. XI, and this extends to a state educational institution. See *Hagel v. Portland State Univ.*, 237 Fed. Appx. 146, 147–48 (9th Cir. 2007) (citing *Rounds v. Or. State Bd. of Higher Educ.*, 166 F.3d 1032, 1035 (9th Cir. 1999) ("[Portland State University] is an arm of the state of Oregon and, therefore, immune from suit under the Eleventh Amendment.")). However, the Eleventh Amendment "does not bar suits for prospective injunctive relief against individual state officials acting in their official capacity," *Pittman v. Or. Emp't Dep't*, 509 F.3d 1065, 1071 (9th Cir. 2007) (citing *Ex Parte Young*, 209 U.S. 123, 156–57 (1908)), or for damages against state officials in their *personal* capacity. See *Hydrick v. Hunter*, 500 F.3d 978, 987 (9th Cir. 2007) (citations omitted). Nonetheless, employees are protected by qualified immunity so long as their actions do not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." See *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted).

497. See *Campbell v. MGN Ltd.*, [2004] 2 AC 457, ¶50 (Lord Hoffmann).

498. *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983) (quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)) (finding privacy was implicated when defendant forced plaintiff to reveal facts about her sexual history to an investigator who was probing the validity of the plaintiff's claim that a fellow employee at a state prison had sexually assaulted and molested her); see also *Jennings v. Univ. of N.C.*, 482 F.3d 686, 702 (4th Cir. 2007) (dismissing privacy claims because coach did not require plaintiff to disclose private information related to her sex life nor did he invade school records to find out such information).

informational privacy is nonexistent or jeopardized, her ability to make autonomous decisions is similarly diminished.”<sup>499</sup>

Supreme Court precedent suggests the viability of a privacy claim for survivors subjected to a wide-net reporting policy. In *Whalen v. Roe*, the Supreme Court discussed both aspects of privacy in connection with the state’s requirement that a copy of a drug prescription for a Schedule II drug be automatically reported to the state health department when the prescription was filled.<sup>500</sup> In that case, the Court ultimately rejected the claim that a constitutional violation occurred, concluding that the state statute did not sufficiently infringe the plaintiffs’ liberty interests.<sup>501</sup> Although evidence showed that mandatory reporting deterred some people from getting their medication, the Court cited the remaining 100,000 prescriptions per month that suggested the regulation was not depriving the public of needed drugs.<sup>502</sup>

*Whalen* is relevant for survivors subjected to mandatory reporting policies at state institutions of higher education. Courts have already cited *Whalen* when evaluating the constitutionality of state actors’ inquiries into sexual matters. For example, when a police department probed the plaintiff about a prior affair and then refused to hire her based on the information she disclosed, the police department’s actions implicated both aspects of privacy.<sup>503</sup> Other courts have found that the constitutional right to privacy “is implicated when an individual is forced to disclose information regarding personal sexual matters.”<sup>504</sup> All of this suggests that a student might have a

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499. KHIARA M. BRIDGES, *THE POVERTY OF PRIVACY RIGHTS* 150 (2017). Some commentators have also identified an individual interest in preventing the collection of private information, regardless of the risk that the information will be divulged, because the mere collection can itself be invasive and demeaning, especially if the person subjected to collection is already marginalized. *See, e.g., id.* at 162–69.

500. *Whalen v. Roe*, 429 U.S. 589, 598–600 (1977). The form contained information about “the prescribing physician; the dispensing pharmacy; the drug and dosage; and the name, address, and age of the patient.” *Id.* at 593.

501. *Id.* at 600 (finding the legislation did not “pose a sufficiently grievous threat to either interest to establish a constitutional violation”).

502. *Id.* at 602–03.

503. *Thorne*, 726 F.2d at 468.

504. *Eastwood v. Dep’t of Corr. of State of Okla.*, 846 F.2d 627, 629–31 (10th Cir. 1988); *cf. United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (footnote omitted) (noting that “medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection”). One author states, “Although the Supreme Court has never announced definitively that a right to informational privacy exists, the circuits have trudged ahead and recognized the right.” BRIDGES, *supra* note 499, at 158.

Fourteenth Amendment Due Process claim,<sup>505</sup> although other types of privacy claims might also exist.<sup>506</sup>

Yet some obvious obstacles might inhibit a successful privacy claim. First, the right to privacy in this situation is unclear. One court has expressly rejected a privacy claim in the context of a school's effort to address sexual harassment. In *Nicole M. v. Martinez Unified School District*, the principal was protected by qualified immunity when she "encouraged plaintiff to disclose the incidents and perpetrators, promised to keep the conversation confidential, and then failed to do so."<sup>507</sup> Others at the school, including the harasser, learned about the disclosure.<sup>508</sup> The principal was protected by

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505. *Whalen* was a Fourteenth Amendment Due Process claim. *See Whalen*, 429 U.S. at 603–04.

506. Depending upon the facts, a student might be able to allege a privacy tort, *see* RESTATEMENT (SECOND) OF TORTS § 652B (AM. LAW INST. 1977) (intrusion into seclusion); *id.* at § 652D (publicity given to private facts), or a claim for intentional infliction of emotional distress. However, unlike England, many states in the U.S. do not recognize the claim of unauthorized disclosure of personal information. *See Campbell v. MGN Ltd*, [2004] 2 AC 457, ¶¶ 12–14, 21–22 (Lord Nicholls of Birkenhead).

It is unlikely that mandatory reporting violates FERPA, at least in the traditional sense. Individuals in the Title IX office would ordinarily be considered "school officials" under FERPA with the requisite need to know—i.e., "a legitimate educational interest." 34 C.F.R. § 99.31(a)(1)(i)(A) (2015). In addition, although FERPA broadly defines "education records" to include all records directly related to a student and maintained by the educational institution, 34 C.F.R. § 99.3 (2015), an oral communication by a student to an employee would not be an education record unless it merely repeats information contained in a record. Even if a staff or faculty member recorded a student's disclosure in writing as a memory aid, that information would fall within the exception for sole possession notes. *See* 34 C.F.R. § 99.3 (2015). *See also infra* note 516. However, a plaintiff might argue that a mandatory reporting policy violates the section of FERPA that says, "No student shall be required, as part of any applicable program, to submit to any analysis or evaluation that reveals information concerning . . . (3) sex behavior or attitudes; (4) illegal, anti-social, self-incriminating, or demeaning behavior; . . . without the prior consent of the student. . . ." 20 U.S.C. § 1232h(b) (2016). Apart from the issue of whether that statutory provision applies in this context, there would be a question whether the student is forced to submit to the evaluation. On the one hand, a Title IX coordinator might not force the student's participation in the Title IX process. On the other hand, the institution would have required a faculty or staff member to forward information without the student's consent and the Title IX office will investigate at times even without the student's consent and participation. In such an instance, the student is arguably being required "to submit" to an "evaluation that reveals information concerning . . . sex behavior." *Id.*

507. 964 F. Supp. 1369, 1385 (N.D. Cal. 1997).

508. *Id.* at 1372.

qualified immunity because there was no clear constitutional right to privacy in this situation.<sup>509</sup>

However, the court's analysis suggests that a privacy claim involving mandatory reporting might succeed.<sup>510</sup> Notably, the court mentioned that the plaintiff wanted the school to take action: "[T]he court finds it hard to imagine how [the principal] could take the action plaintiff desires—action reasonably calculated to end the harassment—without revealing the nature of the harassment, the identity of the harassers and even plaintiff's own identity."<sup>511</sup> Unlike *Nicole M.*, a privacy challenge to a mandatory reporting scheme is likely to be brought by a survivor who *does not want* the school to take action. In that context, a wide-net reporting policy implicates both aspects of constitutional privacy—first, a student's private information is passed on to others when the student does not want that to occur; second, to avoid that outcome, a student must forego her constitutionally protected rights of association with those trusted employees with whom she wants to privately discuss her victimization privately. Because evidence exists that wide-net reporting policies deter some victims from reporting, and maybe large numbers of students,<sup>512</sup> these policies have more profound privacy implications than the mandatory reporting regime in *Whalen*. Moreover, the university has very weak reasons for invading an adult student's privacy when she does not want a report to be made, especially because she is unlikely to cooperate in any investigation.

Second, under any legal theory, the plaintiff must have had a reasonable expectation of privacy,<sup>513</sup> and a school's mandatory reporting policy may eliminate that expectation. Yet a school may be unable to claim that the student has a lower expectation of privacy because of the very policy that the survivor is trying to impugn.<sup>514</sup> Moreover, the student still may have a reasonable expectation of privacy despite the wide-net policy if the reporting policy is not publicized, not known to the particular student, widely disregarded,

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509. *Id.* at 1385.

510. *See generally id.* at 1384–85.

511. *Id.* at 1385 (footnote omitted).

512. *See supra* text accompanying notes 133–134, 151.

513. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 179 (2005) (quoting *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105, 112 (3d Cir. 1987)) (asking whether the information is “within an individual's reasonable expectations of confidentiality”).

514. In the Fourth Amendment context, the government cannot lower the “reasonable expectation” of privacy by legislating it downward. In such situations, the legislation itself is unconstitutional. *See, e.g., Knisley v. Pike County Joint Vocational School Dist.*, 604 F.3d 977, 980 (6th Cir. 2010).

and/or negated by an employee's promise of privacy.<sup>515</sup> In addition, the wide-net reporting policy does not exist in a vacuum; other policies might give students a reasonable expectation of privacy. After all, professional organizations tell their members to treat student communications as confidential,<sup>516</sup> and federal law creates an expectation of privacy for many aspects of students' educational information.<sup>517</sup> Moreover, details about a rape are particularly sensitive and are widely viewed as "private."<sup>518</sup>

Third, in assessing the merits of both the constitutional and tort claims, courts consider to whom the information was disclosed and for what purpose. In the context of a constitutional claim, the Third Circuit has stated, "[t]he right to avoid disclosure of personal matters is not absolute," but entails the "delicate task of weighing competing interests."<sup>519</sup> Some courts have required that the defendant divulge

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515. See *Brown-Crisuolo v. Wolfe*, 601 F. Supp. 2d 441, 449–50 (D. Conn. 2009) (holding that plaintiff had a reasonable expectation of privacy in her work e-mail despite employer's policy permitting routine maintenance to find violations of the policy because, *inter alia*, the policy was widely disregarded).

516. See *Statement on Professional Ethics*, AAUP (2009), <https://www.aaup.org/report/statement-professional-ethics> (noting professors should "respect the confidential nature of the relationship between professor and student"); *Joint Statement on Rights and Freedoms of Students*, AAUP (1967), <https://www.aaup.org/AAUP/pubsres/policydocs/contents/stud-rights.htm#2> (stating that "[i]nformation about student views, beliefs, and political associations that professors acquire in the course of their work . . . should be considered confidential"). Universities themselves or their faculties sometimes "endorse" these statements. See Anahita, *supra* note 25 (discussing how faculty senate at University of Alaska, Fairbanks endorsed the AAUP's *Statement on Professional Ethics*).

517. The Family Educational Rights and Privacy Act (FERPA) protects the privacy of a student's "education records." 20 U.S.C. § 1232g (2016); 34 CFR Part 99 (2015). A record is any information "recorded in any way." 34 C.F.R. § 99.3 (2015). The statute broadly defines "education records" to include all records directly related to a student and maintained by the educational institution. 34 C.F.R. § 99.3(a) (2015). As suggested in note 505 *supra*, mandatory reporting policies do not violate the traditional interpretation of FERPA.

518. *Anderson v. Blake*, 469 F.3d 910, 914–16 (10th Cir. 2006) (suing police for violating plaintiff's constitutional right to privacy when officer released a video tape of alleged rape to news reporters); *Bloch v. Ribar*, 156 F.3d 673, 683–86 (6th Cir. 1998) (using qualified immunity to dismiss a claim for violation of constitutional right to privacy when sheriff released, during a press conference, highly personal details of rape, but acknowledging that the disclosure implicated plaintiff's privacy).

519. *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 179–80 (2005) (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)) (identifying the following as the competing interests: "the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated

the information to a wide audience,<sup>520</sup> although others have only required disclosure to an unauthorized third party.<sup>521</sup> It is unknown where the lines will be drawn in the context of mandatory reporting. Will transmission of information to the Title IX coordinator be seen as disclosure to an unauthorized third party? Will the Title IX coordinator's transmission of information to others, such as the police, constitute disclosure to a wide audience?<sup>522</sup> The fact that the information is transmitted for purposes of offering the survivor services or for apprehending the perpetrator will be relevant, although these purposes should have less significance if the victim is opposed to the transmission of her information or if less intrusive methods exist for accomplishing them.<sup>523</sup>

Without belaboring the point further, this discussion illustrates that the actual contours of such a claim have not yet been fully explored by any court and it is premature to rule out the possibility of a successful claim. In fact, the potential for liability is real. Survivors have started asserting privacy claims against their universities when they are dragged into disciplinary processes against their wishes, so the potential for liability is real.<sup>524</sup>

Overall, it is impossible to say that wide-net reporting policies protect institutions of higher education from liability better than

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public policy, or other recognizable public interest militating toward access"). This balancing sometimes occurs in the context of a qualified privilege to disclose, such as in the context of a common interest. *See, e.g.,* *Young v. Jackson*, 1572 So.2d 378, 383–85 (Miss. 1990) (affirming summary judgment based upon common interest when employer disclosed fact of employee's hysterectomy to other employees who feared the effects of radiation).

520. *See* *Flaskamp v. Dearborn Pub. Sch.*, 385 F.3d 935, 946–47 (6th Cir. 2004) (holding "the limited dissemination of the information about Flaskamp's relationship and the legitimacy of Smith's questions about the relationship establish that Flaskamp's informational-privacy rights were not violated").

521. *See* *E.N. v. Susquehanna Twp. Sch. Dist.*, NO. 1:09–CV–1727, 2010 WL 4853700, at \*2, \*12–13, n. 9 (M.D. Pa. Nov. 23, 2010) (refusing to dismiss claim of privacy invasion against Pensiero and noting that Pensiero allegedly divulged details of the assault to a third person—a parent—without E.N.'s consent).

522. *See* *Scheetz v. The Morning Call*, 946 F.2d 202, 205, 207 (3d Cir. 1991) (discussing how plaintiff could not expect information reported to police as part of potential crime to remain private).

523. The principal risk from the policy proposed *infra* in Part IV involves the possibility that a student-directed employee would disclose the student's victimization when that was not permissible. This risk can be minimized with training and by explaining to students that privacy can never be absolutely assured, although the institution has a commitment to it.

524. Complaint at 13, *Jane Doe v. Univ. of Notre Dame du Lac* (filed Aug. 17, 2017) (No. 71C01-1708-CT-000366), <https://www.scribd.com/document/358387376/20170817164842370#>.

more narrowly tailored policies. Both approaches expose institutions to some risk of liability and it is impossible to assess the difference in the amount of risk. Thus, there is no assurance that a wide-net reporting policy reduces an institution's potential liability more than a more nuanced policy.

#### CONCLUSION

Policies that make almost all employees mandatory reporters harm student survivors. Some survivors are deprived of the ability to disclose their victimization to the person on campus that they trust most to give them support and information. If they disclose anyway (sometimes without realizing the implications of a disclosure), or if someone contacts the school without their consent, they lose control over whether the institution will take action consistent with their wishes. This can expose them to psychological and physical harm. Because of these effects, the mandatory reporting regime can deter a student from disclosing to anyone on campus. This result reduces the likelihood that the survivor will be connected with supportive services that would allow her to continue her education; it also reduces the likelihood that the school will hold her perpetrator accountable. Consequently, a wide-net policy can contribute to a campus climate that does not effectively support survivors or deter sexual misconduct.

Fortunately, institutions of higher education can adopt more nuanced reporting policies. Nothing in the law prohibits it. The confusing language in OCR guidance that might lead an institution to conclude otherwise can be read in a way that is more permissive.

Yet, because OCR's guidance is not as clear as it should be, OCR should tell institutions of higher education that they need not make virtually all of their employees mandatory reporters. In fact, OCR should tell institutions that their wide-net reporting policies violate Title IX if they discourage survivors from reporting or accessing services.

Good reporting policies have certain features. All employees should have obligations when a survivor discloses sexual or gender-based violence to them. Even if an employee is not a designated reporter, the employee should be obligated to ask the student if she wants to report to the Title IX office and/or be connected with confidential supportive services. Employees should be required to follow the student's instructions. Institutions should clearly indicate who is a designated reporter and what obligations all employees have under their policy.



The classification of employees as designated reporters should include those who students expect to have the authority to redress the violence or the obligation to report it, and should exclude those who students turn to for support instead of for reporting. Faculty should not be designated reporters, but high-level administrators should be. Schools should carefully consider how to classify employees who are resident assistants, campus police, coaches, campus security authorities, and employment supervisors. A well-crafted policy will be the product of thoughtful conversations about online reporting, anonymous reporting, third-party reports, and necessary exceptions for situations involving minors and imminent risks of serious harm.

Administrators should not hide behind liability concerns as a justification for their institutions' wide-net reporting policies. A wide-net reporting policy does not necessarily decrease an institution's potential liability, and may, in fact, increase it. Instead, an institution's reporting policy should reflect the educational community's aspirations to respect adult students' autonomy and treating students with care. The adoption of a more nuanced reporting policy should, in turn, increase reporting and make the campus safer. So long as administrators, faculty, staff, and students keep Title IX's purpose in mind as they craft their institution's reporting policy, they should be able to design one that is both principled and legal.

## Appendix 2

# Legal Counsel for Survivors of Campus Sexual Violence

Merle H. Weiner<sup>†</sup>

**ABSTRACT:** This Article argues that survivors of campus sexual violence often need legal counsel before, during, and after campus disciplinary proceedings. Lawyers have been overlooked as a critical resource for survivors, and this omission means that most survivors do not receive essential services for addressing their victimization and furthering their recovery. This Article sets forth the reasons why institutions of higher education should make available free legal services to their students who are victimized, and addresses the reasons why institutions might be hesitant to do so. The Article then argues that potential institutional concerns do not relieve colleges and universities of their existing legal obligation to provide some survivors with free legal services. This Article suggests that schools would best meet their legal obligation by providing *all* survivors with free legal services. The Article then puts its theoretical discussion into perspective by describing the University of Oregon's unique on-campus program that provides free legal counsel to student survivors. The Article concludes by recommending that the Office for Civil Rights clarify campuses' legal obligation to provide free attorneys for some survivors and by suggesting that campuses offer *all* survivors this service. The result would be a better campus response to sexual violence, a decline in the overall rate of post-assault traumatic distress, a likely reduction in the rate of campus sexual violence, and greater progress toward the goal of gender equality.

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## INTRODUCTION

Since the U.S. Department of Education's Office for Civil Rights (OCR) issued its policy guidance about sexual violence in a 2011 *Dear Colleague Letter*,<sup>1</sup> college and university administrators have been scrambling to address campus sexual violence in a manner that complies with Title IX of the Education Amendments of 1972.<sup>2</sup> No institution wants to be known as the "rape school"<sup>3</sup> or to incur the financial costs of getting its response wrong.<sup>4</sup> Presumably, campus administrators also want to enable student survivors to complete their education.<sup>5</sup>

Despite the flurry of new activity, campuses rarely provide free legal counsel to students who claim to have been victimized. This is unfortunate because students face real barriers to obtaining lawyers, and lawyers can greatly advantage survivors. A student survivor encounters a wide variety of choices with legal implications, including whether to report the assault to the school, whether to use

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1. Office for Civil Rights, *Dear Colleague Letter from Assistant Sec'y for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

2. Mark Herring et al., *Report and Final Recommendations to the Governor*, GOV. TERRY McAULIFFE'S TASK FORCE ON COMBATING CAMPUS SEXUAL VIOLENCE 8 (May 28, 2015), [http://ag.virginia.gov/files/Final\\_Report-Task\\_Force\\_on\\_Combating\\_Campus\\_Sexual\\_Violence.pdf](http://ag.virginia.gov/files/Final_Report-Task_Force_on_Combating_Campus_Sexual_Violence.pdf) ("Across the U.S., colleges and universities have promulgated services, educational campaigns, policies, and adjudication processes in an effort to raise awareness and respond properly to reports of sexual violence."); Office for Civil Rights, *Title IX Enforcement Highlights*, U.S. DEP'T EDUC. 9 (June 2012), <https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf> ("Since the guidance's release, dozens of colleges and universities have made changes to their policies and procedures consistent with the guidance.")

3. See Complaint at 18-20, 59, *Eramo v. Rolling Stone LLC*, 314 F.R.D. 205 (W.D. Va. 2016) (No. 3:15-MC-00011), <https://www.documentcloud.org/documents/2077913-eramo-v-rolling-stone-complaint.html> (alleging that *Rolling Stone* magazine defamed a University of Virginia administrator when it reported that she allegedly said sexual assault statistics are "hard to find" at the University "because nobody wants to send their daughter to the rape school"). The administrator prevailed in her defamation suit. T. Rees Shapiro, *Jury Awards \$3 Million in Damages to U-Va. Dean for Rolling Stone Defamation*, WASH. POST (Nov. 7, 2016), [https://www.washingtonpost.com/local/education/jury-to-deliberate-damages-to-uva-dean-in-rolling-stone-defamation-lawsuit/2016/11/07/e2aa2eb0-a506-11e6-ba59-a7d93165c6d4\\_story.html?utm\\_term=.097446b26cf5](https://www.washingtonpost.com/local/education/jury-to-deliberate-damages-to-uva-dean-in-rolling-stone-defamation-lawsuit/2016/11/07/e2aa2eb0-a506-11e6-ba59-a7d93165c6d4_story.html?utm_term=.097446b26cf5). Even if the administrator never uttered that line, it illustrates what many university administrators may, in fact, think. One researcher opined that schools substantially undercount campus sexual assault because "if a school stands out as having a high rate of sexual assault versus peer schools, it risks attracting fewer students and suffering long-term reputational damage." See Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL'Y & L. 1, 6 (2015).

4. An institution can lose federal funding for violating Title IX. See 28 C.F.R. §§ 42.108, 54.605 (2016). In May 2016, OCR had 235 investigations at 185 institutions underway. *About The Chronicle's Title IX Investigation Tracker*, CHRON. HIGHER EDUC. (July 17, 2016, 5:28 PM), <http://projects.chronicle.com/titleix/about/>. In addition, survivors can sue for damages if a school violates Title IX. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992). Liability is predicated on the school being deliberately indifferent to a student's victimization. *Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999). There can also be liability pursuant to 42 U.S.C. § 1983 (2012). *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 258 (2009).

5. The terms "survivor" and "complainant" are used interchangeably throughout the Article to refer to the person who alleges to be a victim of sexual violence. The term survivor is not meant to imply that the allegations have been founded. Occasionally, the Article employs pronouns. The female pronoun is used to refer to the survivor and the male pronoun is used to refer to the alleged perpetrator. These pronouns reflect the generally gendered nature of campus sexual assault. However, the use of these pronouns is not meant to imply that same-sex sexual violence or female-on-male sexual violence does not exist.

the civil legal system to address the repercussions of the victimization, and whether to participate in a criminal process. Legal advice is very valuable because these complex systems overlap in complicated ways; involvement in any of them is not necessarily voluntarily; and information gathering and decision making can become more difficult because of a survivor's traumatic distress. In addition, a lawyer's presence shields the survivor from direct contact with the accused student's attorney and increases the chance that a survivor will obtain her desired outcomes in the three systems. In short, an attorney can militate against the factors that may impede a survivor's recovery and, relatedly, her education. A survivor who received a free attorney from an on-campus program at the University of Oregon summarized the value of such a service: "If it was not for [the attorney] . . . I would not have been able to graduate."<sup>6</sup> That comment captures the reason Title IX addresses campus sexual assault at all—and the reason free attorneys for survivors are so vital.

Because of the ways in which legal counsel can benefit survivors, institutions should make free legal services available to them. Part I of this Article demonstrates that very few campuses currently provide legal services to survivors. Neither the provision of information about the availability of legal services nor the provision of advocacy services is an adequate substitute. Part I then observes that this service gap has received scant attention from legislators and scholars, and that recognizing it is an important first step toward addressing it.

Part II provides more detail about why institutions of higher education should provide free legal services to student survivors. It discusses in concrete terms what legal counsel can do for survivors, and illustrates that attorneys' importance goes far beyond the advantages that they offer in disciplinary hearings. It reveals that attorneys have a critical role to play in helping students who may be in traumatic distress navigate three separate systems, obtain the needed relief in those systems, ward off the unsavory tactics of some defense lawyers, and ensure the institution's compliance with Title IX.

Part III considers some of the reasons why schools may push back against this proposal. In particular, a school might cite the juridification of disciplinary proceedings, the cost of providing free legal services, potential conflicts of interest for the lawyer involved, the university's increased exposure to legal liability, and the implications for the accused. This Part suggests that these reasons mostly lack merit or can be addressed satisfactorily, and that they fail to outweigh the benefit of providing survivors with free legal services.

Part IV argues that regardless of an institution's disposition toward this proposal as a matter of policy, all institutions of higher education have a legal obligation to provide free legal services to survivors in some instances. This Part

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6. Letter from Fatima Roohi Pervaiz, Dir., ASUO Women's Ctr., to Ellen Rosenblum, Or. Attorney Gen. (June 14, 2016) (on file with author) (quoting a letter from a student survivor who worked with the attorney in Student Survivor Legal Services).

briefly describes why institutions of higher education must address sexual violence between students at all, and then uses OCR Guidance to show that providing legal counsel to survivors is consistent with, and sometimes required by, Title IX.<sup>7</sup> The Article will show that an institution's obligation to provide legal counsel is tied to the institution's obligation to provide interim measures to students who report, to prevent sexual violence, to remedy the effects of sexual violence, and to take responsibility for remedying its own contributions to or shortcomings in responding to sexual violence.

Finally, Part V describes the program at the University of Oregon (UO) that provides free on-campus legal services exclusively to survivors. The program, Student Survivor Legal Services (SSLS), illustrates one possible approach to providing free legal services to survivors and affords one example of how an institution resolved the various legal and policy questions addressed in this Article.

Given the immense work still to be done to reduce the prevalence of campus sexual violence, the Article concludes by suggesting two steps the government and universities should take to further survivors' access to attorneys: OCR should tell universities that an effective campus response to sexual violence requires them to provide free legal services to some survivors, and universities should provide free legal assistance to all survivors because it is best practice.

## I. THE INADEQUACY OF THE STATUS QUO

### A. *The Gap in Legal Services for Campus Survivors*

Despite the recent campus efforts to address sexual assault (and now also domestic violence, stalking, and dating violence<sup>8</sup>), very few campuses provide

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7. This Article does not address whether high school students should also have easy access to legal counsel, in part because less sexual violence exists among that population. OCR reports that among public high school students, there were "nearly 3,600 incidents of sexual battery and over 600 rapes and attempted rapes in a recent year." Office for Civil Rights, *supra* note 2, at 8. Compare that to more than 402,500 rapes each year among college women, a figure obtained by assuming there are 35 rapes per year for every 1,000 women attending college, see Bonnie S. Fisher, Francis T. Cullen & Michael G. Turner, *The Sexual Victimization of College Women*, NAT'L INST. JUST. 11 (Dec. 2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>, and that there were approximately 11.7 million women attending college in 2016, see *Fast Facts: Back to School Statistics*, NAT'L CTR. FOR EDUC. STAT., <https://nces.ed.gov/fastfacts/display.asp?id=372>.

8. See generally Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89-92 (2013) (codified at 20 U.S.C.A. § 1092(f)(1)(F)(iii), § 1092(f)(8)(A)-(B) (West, Westlaw through Pub. L. No. 114-327)) (requiring campuses to issue public reports that detail the extent of this type of violence against students, their programs to prevent it, and their procedures to address it, and their educational activities aimed at prevention and response). Campuses probably have the same obligation to address domestic violence, dating violence, and stalking as they have to address sexual assault because these other types of violence are also gender-based, that is, they are "directed against a woman because she is a woman or . . . affect[] women disproportionately." Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, ¶ 6, U.N. Doc. CEDAW/C/1992/L.1/Add. 15 (1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; see also United

legal services to survivors of sexual violence. A national study of 440 four-year institutions of higher education found that only 13% of campuses offered “campus legal service counseling” to students who reported that they experienced a sexual assault.<sup>9</sup> Moreover, while 85% of campuses in the survey said that they used a team approach for responding to sexual violence on campus,<sup>10</sup> those teams had fewer representatives from legal services than from any other service mentioned. Campus legal services were part of the team at only 6% of the institutions, and community legal services (which 70% of the campuses claimed offered services to survivors<sup>11</sup>), were part of the team at only 22% of the institutions.<sup>12</sup> In contrast, the teams often included campus or community health services (60% and 46%, respectively), campus or community mental health services (78% and 45%, respectively), housing/residential services (69%), and campus or community victim assistance/advocacy services (44% and 51%, respectively).<sup>13</sup>

The problem is even more acute at two-year institutions. In general, community colleges have far fewer resources to address sexual violence than four-year colleges and universities.<sup>14</sup> Consequently, “[c]ommunity college students impacted by sexual assault are more likely [than students at four-year institutions] to withdraw or just stop attending class rather than pursue formal complaints or file lawsuits.”<sup>15</sup>

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States v. Morrison, 529 U.S. 598, 629 n.2, 631-32 (2000) (Souter, J., dissenting) (noting that Congress thought domestic violence was a crime motivated by gender when it enacted the civil rights remedy in the Violence Against Women Act). The Association of Title IX Administrators assumes campuses have an obligation under Title IX to address all of these types of violence. See Juliette Grimmer et al., *The Challenge of Title IX Responses to Campus Relationship and Intimate Partner Violence*, ASS’N TITLE IX ADMIN. (2015), <https://atixa.org/wordpress/wp-content/uploads/2012/01/Challenge-of-TIX-with-Author-Photos.pdf>.

9. SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER EDUCATION ARE FAILING TO PROTECT STUDENTS, U.S. SENATE SUBCOMMITTEE ON FINANCIAL & CONTRACTING OVERSIGHT app. § C2.5 (July 9, 2014), <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

10. *Id.* § C5.1.

11. *Id.* § C2.11. It is unclear from the report if community legal services included private attorneys. It is also unknown whether survey responders only included community resources that actually served student survivors given the legal service providers’ other priorities.

12. *Id.* § C5.6.

13. Law enforcement was also frequently part of the teams: campus law enforcement (80%), community law enforcement (59%), and local prosecutors (25%) were often involved. *Id.* §§ C5.2- C5.13; see also President’s Task Force on Preventing & Responding to Sexual Violence and Sexual Assault, *Initial Report to the President*, UNIV. CAL. 9, 14-15 (Sept. 2014), <http://ahed.assembly.ca.gov/sites/ahed.assembly.ca.gov/files/hearings/UC%20Task%20Force%20-%20Preventing%20and%20Responding%20to%20Sexual%20Assault.pdf> (recommending a “response team” model at all campuses sans an attorney for the complainant, and recommending an “independent confidential advocacy office” on all campuses sans an attorney); *id.* at 23-25 (including “sample best practices” for reporting and support options from other institutions, specifically the University Southern California, Yale University, and Frostburg State University, none of which indicate that they include legal services as a resource either within or outside of the institution).

14. *Community Colleges and Sexual Misconduct: Unique Challenges and Opportunities*, ASS’N STUDENT CONDUCT ADMIN. 4 (Apr. 18, 2015), <http://www.theasca.org/Files/2015%20Community%20Colleges%20%26%20Title%20IX.pdf> (“[M]any two-year institutions either do not have any or have very limited offerings for on-campus mental health resources, health services, and victims’ services programs.”).

15. *Id.* at 5.

Campuses today typically only inform students about the existence of legal services on campus and in the community, as they are legally required to under the Violence Against Women Reauthorization Act of 2013 (also known as the Campus SaVE Act)<sup>16</sup> and the regulations adopted pursuant to it.<sup>17</sup> Yet information about the identity and location of legal service providers is not always provided,<sup>18</sup> and even when provided it can be rather uninspiring if not meaningless: the information need not describe the legal remedies that are available or the value of legal representation.<sup>19</sup> The content and tone of the information about legal services contrasts sharply with the information about medical services, which is sometimes even mandated by state law. For example, an institution of higher education in Virginia must tell victims about “the importance of seeking appropriate medical attention,”<sup>20</sup> but neither federal nor Virginia law requires an institution to tell victims about the importance of seeking appropriate legal services. As a result, institutional materials do not inspire survivors to seek legal services.<sup>21</sup>

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16. Violence Against Women Act Reauthorization of 2013, § 304, 127 Stat. 54, 89-92 (2013) (codified at 20 U.S.C.A. § 1092(f)(1)(F)(iii), § 1092(f)(8)(A)-(B) (West, Westlaw through Pub. L. No. 114-327)) (requiring that the annual security report containing the institution’s current policies must include “[a] statement that the institution will provide written notification to students and employees about existing counseling, health, mental health, victim advocacy, legal assistance, visa and immigration assistance, student financial aid, and other services available for victims, both within the institution and in the community”).

17. Violence Against Women Act, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2016)).

18. For example, New York University has a Web page entitled “Resources for Student Complainants.” It is devoid of information about legal service providers. *Resources for Student Complainants*, N.Y.U., <https://www.nyu.edu/life/safety-health-wellness/sexual-respect/sexual-misconduct-resources-and-support-for-students/resources-for-student-complainants.html>. NYU’s “Know Your Rights” page simply says that students have “[t]he right to be referred to on- and off-campus counseling, mental health, or other student services for survivors,” but legal services are not mentioned. *Know Your Rights*, N.Y.U., <https://www.nyu.edu/life/safety-health-wellness/sexual-respect/sexual-misconduct-resources-and-support-for-students/know-your-rights.html>.

19. See, e.g., *Middlebury C.V. Starr Schools Abroad: Resources in the Event of Sexual Harassment, Sexual Assault, and/or Interpersonal Violence/Misconduct*, MIDDLEBURY C., <http://www.middlebury.edu/study-abroad/health/assault>; *Resources and Services: Sexual Harassment and Violence Resources and Information Index*, U. CHI., <https://csl.uchicago.edu/node/1190>; *Resources for Student Complainants*, *supra* note 18; *Sexual Assault: Pomona College Processes & Resources*, POMONA C., <https://www.pomona.edu/students/sexual-assault>; *Sexual Violence Resources & Information*, MIDDLEBURY C., <http://www.middlebury.edu/student-life/health-wellness-education-and-safety/campus-policies/sexual-violence-policies-resources/emergency>; *Violence Prevention and Advocacy*, CLAREMONT C., <http://7csexualmisconductresources.claremont.edu/support/support-resources/>.

20. See, e.g., VA. CODE ANN. § 23.1-806(L) (West, Westlaw through 2017 Reg. Sess.) (listing information the institution must provide to the alleged victim).

21. For example, the University of Michigan’s resource guide describes the benefit of having a sexual assault forensic exam, but not the benefit of consulting with an attorney. *Our Community Matters: Addressing Sexual Assault, Intimate Partner Violence, and Stalking*, U. MICH. 2 (Sept. 29, 2016), <http://dpss.umich.edu/docs/community-matters-brochure.pdf> (“Even if you are not sure that you want to file a police report, it can be helpful to have any available evidence collected in case you decide to file a report with law enforcement at a later date. The nurse can also provide emergency contraception, treatment for sexually transmitted infections (STIs), and other needed medical care.”). Rather, under “Legal Assistance,” the guide merely lists three resources. One of the resources will not represent students against other students and the other two require the student to be “low-income.” One of those two providers further requires a referral from the SafeHouse Center. *Id.* at 6.



It is unknown whether the information provided pursuant to the Campus SaVE Act has any positive effect on student survivors. Nor is it known if individuals on campus are providing verbal encouragement to students to seek legal assistance, although it is unlikely. The Office on Violence Against Women stated at the end of 2015, “Many students are unaware of their legal options and unfamiliar with the resources available for legal representation.”<sup>22</sup> Regardless, information about legal resources and civil legal remedies (to the extent that information is provided) may mean little to a student who does not know if she will qualify for legal services, if she is eligible for legal remedies, or why she might need legal services in the first place.

Even if directory-like information or encouragement by someone on campus does motivate survivors to seek legal counsel, often the existing on-campus and community legal services are inappropriate for or inaccessible to them. Numbers differ, but at best only 400 colleges and universities have Student Legal Service offices.<sup>23</sup> These offices handle a wide range of civil, criminal, and administrative matters for students, but they vary widely from place to place in terms of their staffing and sources of funding; they also vary in the breadth and depth of services offered. Some provide only advice and referral.<sup>24</sup> On-campus legal services are also sometimes inaccessible to survivors because their perpetrators are students or employees of the university. Julie Novkov reports that the on-campus offices that offer legal assistance “may rule out providing counsel if a potential case could have students structurally aligned against each other.”<sup>25</sup> One example of such an office is the Associated Students of the University of Oregon (ASUO) Legal Services. This legal services office is funded by student fees and provides free legal advice to students in a wide range of civil legal matters. However, it will not take a case if the opposing party is another student, a University of Oregon employee, or the University.<sup>26</sup> In addition, ASUO Legal Services generally

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22. Office on Violence Against Women, *OVW Fiscal Year 2016 Legal Assistance for Victims Grant Program Solicitation*, U.S. DEP’T JUST. 5 (Dec. 15, 2015), <https://www.justice.gov/ovw/file/798876/download>.

23. Donald C. Heilman, *Student Legal Services: An Emerging Provider of Legal Aid on Campus*, AM. B. ASS’N ACCESS TO JUST. (July 31, 2014), <http://apps.americanbar.org/litigation/committees/access/articles/summer2014-0714-student-legal-services-emerging-provider-legal-aid-campus.html>. *But see* Kelly A. Mroz, *Meeting the Legal Needs of College Students*, 58 RES GESTAE 32, 32-33 (2015) (noting that “[t]he National Legal Aid & Defender Association . . . lists 98 offices in 38 states that provide some form of direct legal services for students,” but “[t]welve states have no programs at all, and only five states boast four or more institutions with SLS offices”).

24. Mroz, *supra* note 23, at 32 (“While consistent in that they are legal offices designed to provide services for students at a college or university, these programs do not follow a single model. Some offices provide advice and referral only; others also offer representation. Services may be provided by contract attorneys, staff attorneys or law school clinics. The funding sources can be endowments, general funds, activity fees or organizational fees. Yet SLS offices retain a key shared characteristic in that services are either free or inexpensive (think health insurance co-pay) to qualifying students.”).

25. Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 605 (2016) (citing SUNY Albany and the University of Vermont’s Student Legal Services).

26. ASUO STUDENT LEGAL SERVICES, <http://asuolegal.org/>.

will only provide advice and consultation (for example, assistance with paperwork and maybe some letter writing), and will not provide full representation. Consequently, it would rarely if ever represent a survivor in a contested restraining order case, even if the perpetrator were not another student.

At least theoretically, students might access legal services in their communities, including private attorneys, legal aid organizations, and sexual assault organizations that have attorneys on staff.<sup>27</sup> Or they might reach out to a national organization that provides assistance to campus survivors.<sup>28</sup> While off-campus legal services often exist,<sup>29</sup> survivors have trouble accessing those services for various reasons.<sup>30</sup> It is a lot to ask a student who may be experiencing traumatic distress and who is busy with classes and campus activities to go to an off-campus service provider, especially when the benefit of seeing a lawyer may be unclear. As Lois Kanter observed, “while rape often has a ripple effect by creating many civil legal problems, it often disables its victim from seeking the legal services she needs.”<sup>31</sup> The survivor may also be unfamiliar with the agency and question whether her information will be kept confidential.<sup>32</sup> Most important, the survivor may not understand why she should speak with a lawyer unless and until she actually has an opportunity to do so.

Students also might not seek legal services off-campus because they lack the financial resources to hire an attorney. While free legal services may exist in a community, free off-campus providers are often legal aid providers with income restrictions. Most students don’t conceive of themselves as “poor,” even though

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27. In 2005, Lois Kanter found that “only a handful [of rape crisis centers] have been able to fund in-house lawyers to provide direct services to victims.” Lois H. Kanter, *Invisible Clients: Exploring Our Failure To Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253, 257 (2005). A search of the Legal Assistance Grants database of award recipients indicates that from 2010 to 2016, the Office on Violence Against Women gave out 485 Legal Assistance to Victims Grants (between 59 and 77 grants per year), but only 4 went to organizations that were obviously rape crisis centers. See Office on Violence Against Women, *Awards*, U.S. DEP’T JUST., <https://www.justice.gov/ovw/awards>.

28. SurvJustice is the only such national organization. See SURVJUSTICE, <http://www.survjustice.org/> (claiming “it is still the only national organization that provides legal assistance to survivors in campus hearings across the country”).

29. SEXUAL VIOLENCE ON CAMPUS, *supra* note 9, at app. § C2.11 (indicating that 70% of colleges say “community legal services” offer services to students who have reported that they have experienced sexual violence).

30. Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL’Y REV. 387, 391 (2015) (recognizing that “access to resources for students, staff, and faculty must be readily and easily available”); see also text accompanying notes 312-313, *infra*.

31. Kanter, *supra* note 27, at 278.

32. Some programs, such as the Victims Rights Law Center (VRLC) in Oregon, require the survivor to identify herself as a survivor of rape or sexual assault and leave contact information on an answering machine. An attorney will then call her back, but it can take up to two business days. Phone call by author to VRLC (July 20, 2016). SurvJustice asks the survivor to fill out an online form in which she describes the incident. See *Legal Assistance Intake Form*, SURVJUSTICE, [http://www.survjustice.org/uploads/9/2/9/6/92967220/form\\_-\\_survivor\\_inquiry.pdf](http://www.survjustice.org/uploads/9/2/9/6/92967220/form_-_survivor_inquiry.pdf).

they often are,<sup>33</sup> and so they don't investigate the legal aid option.<sup>34</sup> Even if a survivor were to contact the free off-campus service provider, she may be refused service. SurvJustice, the only national organization that provides legal assistance to survivors of campus sexual assault, is at capacity and cannot serve 50% of those who seek its assistance.<sup>35</sup> Legal aid providers regularly look at the resources of the student's family to see if the student qualifies for legal services.<sup>36</sup> Of course, even if a student's family has resources, they may still be unable or unwilling to provide funding for the student's legal services.<sup>37</sup> In addition, the survivor may be unable to access her family's resources if she feels uncomfortable telling her family about the rape. Even if a survivor's financial situation qualifies her for legal aid, she may be denied service because legal service organizations are oversubscribed,<sup>38</sup> and often prioritize clients with children who have family law matters.<sup>39</sup> Assuming a survivor manages to overcome all of these hurdles, the off-campus service provider may not be the best provider: the lawyer

33. Poverty is higher among pockets of college students than among the general population. "About 15.2 percent of the total United States population had income below the poverty level and more than half (51.8 percent) of students living off-campus and not living with relatives had income below the poverty level." ALEMAYEHU BISHAW, EXAMINING THE EFFECT OF OFF-CAMPUS COLLEGE STUDENTS ON POVERTY RATES, U.S. CENSUS BUREAU (May 1, 2013), [https://www.census.gov/library/working-papers/2013/acs/2013\\_Bishaw\\_01.html](https://www.census.gov/library/working-papers/2013/acs/2013_Bishaw_01.html).

34. For instance, Dana Woolbright, an attorney with Lane County Legal Aid's Survivors Justice Center, said that she had never been asked by a UO sexual assault complainant for representation. Diane Dietz, *Legal Aid Available to the Accused*, EUGENE REG.-GUARD (May 16, 2014), <http://www.thefreelibrary.com/Legal+aid+available+to+accused.-a0371718734>.

35. Email from ServJustice to author (May 3, 2017) (on file with author) ("Between 2014 to 2016, SurvJustice received over 600 requests for assistance regarding campus sexual assault cases from all 50 states and over 7 countries (regarding study abroad matters). Of these inquiries, SurvJustice provided direct assistance or consultation in approximately 30% of matters and referred out another 20% to qualified providers.").

36. Kanter, *supra* note 27, at 280. According to the Managing Attorney at Lane County Legal Aid:

Legal aid is funded to provide free civil legal services to low-income households, including households with college students. Legal aid does not count student scholarships, loans, or similar payments that go directly to the college, or otherwise must be used to pay tuition and similar college costs, because that is not revenue currently and actually available to cover household expenses. Regular or recurring payments from parents would count as income for a student applying for legal aid. Household means people who maintain a household and function as a single financial unit. . . . In addition to applying regular income eligibility criteria to applicants who happen to be students, legal aid could agree to also serve over-income students, or to give students a heightened priority, pursuant to a contract that paid for those legal services that would not otherwise be provided.

Email from Erika Hente to Merle H. Weiner (Apr. 14, 2017) (on file with author).

37. See *Civil Legal Aid 101*, U.S. DEP'T OF JUSTICE (Oct. 21, 2014), <https://www.justice.gov/atj/civil-legal-aid-101> (noting that "tens of millions of moderate income Americans . . . cannot afford legal help").

38. See *id.* ("According to the U.S. Census Bureau's 2011 statistics on poverty, 60 million Americans—one in five—qualified for free civil legal assistance. Unfortunately, more than 50 percent of those seeking help are turned away because of the limited resources available."); see also CRIMINAL JUSTICE SERVS. DIV., OR. DEP'T STATE POLICE, EDWARD BYRNE MEMORIAL STATE & LOCAL LAW ENFORCEMENT ASSISTANCE PROGRAM GRANT: STRATEGY FOR OREGON: FY 2004-2008, at 18 ("The availability of legal assistance for victims of domestic violence, sexual assault, and stalking remains critically short.").

39. Kanter, *supra* note 27, at 280.

may lack the necessary expertise about sexual assault or about the campus disciplinary process to serve the campus survivor of sexual assault well.<sup>40</sup>

For these reasons, student survivors rarely, if ever, have lawyers.<sup>41</sup> It is important to note that this is not necessarily true for accused students. Accused students frequently have legal counsel because the accused students and/or their parents realize the gravity of the accusations and are willing to pay for counsel. Web sites are dedicated to helping parents and students locate qualified attorneys.<sup>42</sup> Parents of accused students have organized conferences dedicated to developing the expertise of attorneys who represent accused students.<sup>43</sup> Even if parents of accused students cannot afford legal counsel, accused students sometimes receive free legal counsel. This can occur if there is a parallel criminal proceeding and the student is indigent. In addition, increasing numbers of institutions of higher education are providing free legal counsel for accused students.<sup>44</sup> Some schools provide accused students with legal counsel when there is a parallel criminal proceeding.<sup>45</sup> Other schools have on-campus organizations

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40. *Id.* at 254 (stating that “traditional legal services programs, law school clinics, and bar association pro bono projects have never served rape victims, particularly high school and college-age females who are most likely to be sexually assaulted”).

41. See Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2120 (2016) (quoting Colby Bruno of the Victim Rights Law Center as saying that campus sexual assault “victims don’t have lawyers”); Kanter, *supra* note 27, at 254 (“[T]he vast majority of rape victims never become involved in criminal or tort litigation, and they rarely have access to lawyers who can address their most pressing concerns, including: physical safety, education and employment disruption, housing relocation, economic consequences and financial stability, immigration problems, and the need for medical, mental health, and disability services.”).

42. See, e.g., *Call an Attorney*, SAVE OUR SONS, <http://helpsaveoursons.com/call-an-attorney/>; *Pro-Due Process Attorney List*, NAT’L COALITION FOR MEN CAROLINAS, <http://www.ncfincarolinas.com/#!attorneys/c9fw>.

43. *Third Annual Symposium on Representing Students Accused of Sexual Assault: Winning School Discipline Cases Beyond the Motion to Dismiss*, SAVE OUR SONS (Feb. 17, 2017), <http://helpsaveoursons.com/wp-content/uploads/2014/12/DC-Symposium-Brochure-2017-compressed-1.pdf>.

44. As recently as 1999, it was reported that “[n]o school offers to find students [in disciplinary proceedings] an attorney, or to pay for one if the student is unable to do so.” Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 339 (1999) (surveying 200 randomly chosen private and public universities). Today some institutions of higher education offer to provide counsel for those students who cannot afford their own. See AM. LAW INST., PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS: PRELIMINARY DRAFT NO. 2, at 26 § 7.7 cmt. (citing policies at Harvard Law School and Columbia University). The Harvard Law School Policy says Harvard Law School will “provide financial assistance to parties unable to afford an attorney who would like to do so, subject to reasonable fee structures and limits determined from time to time by the Title IX Committee.” *HLS Sexual Harassment Resources and Procedures for Students*, HARV. L. SCH. 6 (Dec. 18, 2014), <http://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>; see also *Gender-Based Misconduct Policy and Procedures for Students*, COLUM. U. 18 (Sept. 1, 2016), <http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf> (“University students may retain counsel independently or the University will arrange for an attorney-advisor upon request. The designated attorney-advisor will be provided at no cost to the University student. . . . If the University is requested to arrange for an attorney-advisor for either the Complainant or Respondent, it will notify the other party and upon request arrange for an attorney-advisor.”).

45. See, e.g., *Office of Affirmative Action and Equal Opportunity: FAQs*, U. VT., <http://www.uvm.edu/aaeo/faqs> (“In the event that you have criminal charges pending related to the incident for which AAEO has contacted you, the following may be helpful: Students: Student Legal Services (SLS) is a student-run organization, funded by the Student Government Association, which aids students

that offer legal assistance to students accused of violating the student conduct code even if a parallel criminal proceeding is not underway. The lawyers who represent students in conduct code proceedings justify this defense-focused legal work by conceptualizing the case as university versus student, not student versus student. That is how the ASUO's Office of Student Advocacy (OSA) justifies its representation of accused students. This legal services organization is funded by student fees and provides free legal advice and assistance to students who are having trouble with the University of Oregon. It provides advocacy for the student within the University of Oregon's administrative processes.<sup>46</sup> Consequently, although OSA will not work with the survivor to file a grievance against another student, it will represent the accused student in the student conduct code proceedings.<sup>47</sup>

### *B. The Inattention to Legal Services for Campus Survivors*

Remarkably little attention has focused on the gap in legal services for campus survivors or the importance of attorneys for this population. OCR did not discuss this topic in its two "significant guidance documents"<sup>48</sup> or in its "blueprint" resolution with the University of Montana-Missoula.<sup>49</sup> Other notable sources addressing campus sexual violence have also ignored the topic, including a White House task force report,<sup>50</sup> the American Law Institute's law reform project,<sup>51</sup> and trade publications that advise institutions of higher education about

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on campus with legal problems. Legal counsel is provided by two attorneys from a Burlington law firm, whose services SLS retains.").

46. See OFFICE OF STUDENT ADVOCACY, [officeofstudentadvocacy.org](http://officeofstudentadvocacy.org).

47. OSA will help a survivor file a grievance if the perpetrator is an UO faculty or staff member, but OSA will not represent the survivor in any litigation against the employee or UO.

48. The 2011 *Dear Colleague Letter* and the 2014 *Questions and Answers on Title IX and Sexual Violence* were both labeled as "significant guidance document[s]." See Office for Civil Rights, *supra* note 1, at 1 n.1; Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. 1 n.1 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; see also Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) (describing the significance of that designation).

49. See Resolution Agreement, University of Montana, OCR Case No. 10126001, DOJ DJ Number 169-44-9, at 9 (May 8, 2013), <https://www.justice.gov/sites/default/files/crt/legacy/2013/05/09/montanaagree.pdf>; see also Letter from Anurima Bhargava, Chief, & Gary Jackson, Reg'l Dir., Office for Civil Rights, to Royce Engstrom, President, & Lucy France, Univ. Counsel, Univ. of Mont., Re: DOJ Case No. DJ 169-44-9, OCR Case No. 10126001 (May 9, 2013), <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf> ("The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.").

50. See NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE'S TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 15 (Apr. 2014), [http://www.changingourcampus.org/resources/not-alone/WH\\_Task\\_Force\\_First\\_Report.pdf](http://www.changingourcampus.org/resources/not-alone/WH_Task_Force_First_Report.pdf) <https://www.notalone.gov/assets/report.pdf> (describing "Key Components of Sexual Assault Crisis Intervention/Victim Service Resources"). State task force reports are similarly incomplete. See, e.g., GOV. TERRY MCAULIFFE'S TASK FORCE, *supra* note 2, at 10, 48-49 (describing "best practices for protocols . . . to respond to sexual violence on campus").

51. The American Law Institute's project, which is ongoing and currently in draft form, has given almost no attention to the role of the complainant's attorney. See AM. LAW INST., PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS:

prevention and response.<sup>52</sup> The academic literature is also largely devoid of relevant analysis.<sup>53</sup> No one has formally suggested that institutions have a legal responsibility to provide free attorneys for campus survivors or identified such services as a best practice.

This virtual silence contrasts with the considerable attention legal commentators and professionals have given to the importance of legal counsel for the accused in disciplinary hearings.<sup>54</sup> The absence of counsel for the complainant in disciplinary hearings, however, can be as significant for the survivor as it is for the accused. After all, the outcome of campus proceedings can also determine whether a survivor is able to continue her education. In addition, while a few legal commentators have articulated the importance of legal counsel for survivors of sexual assault in criminal and civil legal proceedings,<sup>55</sup> this recognition

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PRELIMINARY DRAFT NO. 1 (Oct. 23, 2015); AM. LAW INST., *supra* note 44; AM. LAW INST., PROJECT ON SEXUAL AND GENDER-BASED MISCONDUCT ON CAMPUS: PROCEDURAL FRAMEWORKS AND ANALYSIS: PRELIMINARY DRAFT NO. 3 (OCT. 10, 2016).

52. W. Scott Lewis et al., *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes To Address Campus Sexual Violence*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT. (2011), <https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTFINAL.pdf>.

53. While this Article was in production, the author became aware of a then-forthcoming article by Kelly A. Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 Drake L. Rev. (forthcoming 2017). Behre's article effectively utilizes storytelling to illustrate the likely experience of a campus sexual assault victim and the benefit that legal counsel could afford her. Before Behre's article, the article that came closest to the topic was Lois H. Kanter's 2005 article, *Invisible Clients*. Professor Kanter's comment on the state of the academic scholarship is very telling. She notes: "The absence of civil legal services for rape victims is reflected in the lack of discussion regarding their civil legal need in legal literature. Among the thousands of articles that discuss rape, only a handful mention rape victims' need for legal counsel to address civil matters related to sexual assault." Kanter, *supra* note 27, at 254; see also Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 481-484 (2005) (briefly articulating why survivors need legal counsel in the criminal, civil, and disciplinary processes). While Behre's article contributes greatly to the literature, this Article goes beyond Behre's by arguing that the law requires schools to provide legal counsel to survivors in some instances, by documenting that this has not occurred in practice, and by analyzing the legal and practical obstacles to expanding legal representation for survivors.

54. See, e.g., Ellen L. Mossman, *Navigating a Legal Dilemma: A Student's Right to Legal Counsel in Disciplinary Hearings for Criminal Misbehavior*, 160 U. PA. L. REV. 585 (2012); William E. Thro, *No Clash of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 216-17 (2015); Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289 (2016); see also *Student Conduct Administration & Title IX: Gold Standard Practices for Resolution of Allegations of Sexual Misconduct on College Campuses*, ASS'N FOR STUDENT CONDUCT ADMIN. 11 (2014), <http://www.theasca.org/files/Publications/ASCA%202014%20Gold%20Standard.pdf> (noting "our field has often focused on protecting the rights of accused students"); cf. Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 2003 B.Y.U. EDUC. & L.J. 1, 25 (arguing that "accused students must be allowed to be fully represented by counsel at a disciplinary hearing"); Berger & Berger, *supra* note 44, at 338-44 (discussing the right to counsel in cases involving academic wrongdoing); Robert B. Groholski, *The Right to Representation by Counsel in University Disciplinary Proceedings: A Denial of Due Process of Law*, 19 N. ILL. U. L. REV. 739 (1999) (discussing the right to counsel in disciplinary proceedings generally).

55. See, e.g., Kanter, *supra* note 27, at 256; Tom Lininger, *Bearing the Cross*, 74 FORDHAM L. REV. 1353, 1398-1400 (2005).

is rarely imported into the scholarly discussion about the needs of campus sexual assault survivors.<sup>56</sup>

As a consequence of this silence, legislators attending to the needs of campus survivors tend to focus on increasing the amount of advocacy by non-lawyers instead of legal services. Approximately half of the campuses responding to the survey by the U.S. Senate Subcommittee on Financial and Contractual Oversight said they have “advocates” on campus who work with survivors.<sup>57</sup> While advocates are an essential component of campuses’ response to sexual violence,<sup>58</sup> advocates are usually not lawyers.<sup>59</sup> Despite the common terminology (lawyers are often called advocates), campus sexual assault advocates are typically social workers.

To see the focus of policy makers, consider the recent legislation proposed in the Senate by three champions of sexual assault survivors: Barbara Boxer (as sponsor), along with Kirsten Gillibrand and Tim Kaine (as original cosponsors). They introduced the Survivor Outreach and Support Campus Act (SOS Campus Act) in 2015.<sup>60</sup> If enacted, that legislation would require schools to create the role of “advocate,” who would, *inter alia*, give the survivor “[i]nformation on the victim’s rights and referrals to additional support services” and “[i]nformation on legal services.”<sup>61</sup> These advocacy services might be provided on campus, but they need not be provided in consultation with a legal organization. The advocacy services could also be provided off campus “at a rape crisis center, legal organization, *or* other community-based organization.”<sup>62</sup>

The description of the advocate’s role suggests that the advocate would either be engaged in the unauthorized practice of law or would be far less effective

56. *But see* Behre, *supra* note 53.

57. SEXUAL VIOLENCE ON CAMPUS, *supra* note 9, at app. § C2.2 (reporting that 43% of schools said “[c]ampus victim assistance/advocacy programs” offered services to students who report that they have experienced sexual violence); *id.* at app. § C2.8 (reporting that 92% of schools said “[c]ommunity victim assistance/advocacy programs” offered services to students who report that they have experienced sexual violence).

58. *See* NOT ALONE, *supra* note 50, at 11 (calling the provision of an advocate “a key ‘best practice’”). At the University of Oregon, these advocates respond to calls from survivors at any hour of the day or night. They perform a wide array of survivor-centered tasks, including accompanying the survivor to the hospital for an examination by a sexual assault nurse examiner (SANE), expediting services from campus mental health providers, contacting faculty to change examination dates, offering alternative dormitory housing, and providing emotional support. After a responsible employee reports an instance of domestic or sexual violence to their office, these advocates reach out to survivors to see if they need or want services or if they want to file a formal report.

59. For example, the University of Oregon has three advocates who work in the Crisis Intervention and Sexual Violence Support Services office and none is an attorney.

60. Survivor Outreach and Support Campus Act, S. 706, 114th Cong. (2015).

61. *Id.* at § 124(c)(1)(B)(ii),(iii); *see also* W. Scott Lewis, Sandra K. Schuster & Brett A. Sokolow, *Deliberately Indifferent: Crafting Equitable and Effective Remedial Processes To Address Campus Sexual Violence*, NAT’L CTR FOR HIGHER EDUC. RISK MGMT. 10 (2011), <https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENTFINAL.pdf> (recommending schools provide “a trained cadre of advocates (or advisors, but advocates are more appropriate for sexual misconduct cases) who are familiar with the campus process, so that the complainant can choose a knowledgeable supporter, if desired”).

62. S. 706 § 124(c)(1)(C)(i)-(ii).

than an attorney. The advocate is supposed to “[g]uide victims of sexual assault who request assistance through the . . . legal processes of the institution or local law enforcement”<sup>63</sup> and “[a]ttend, at the request of the victim of sexual assault, any administrative or institution-based adjudication proceeding related to such assault as an advocate for the victim.”<sup>64</sup>

Similarly, the Campus Accountability and Safety Act, or CASA,<sup>65</sup> introduced by Senator Claire McCaskill in 2015 with fifteen other original cosponsors, suffers from some of the same problems as the SOS Campus Act. This proposed legislation would require schools to designate “confidential advisors” to help students navigate the campus and criminal systems.<sup>66</sup> The advisor is required to do things that border on the unauthorized practice of law.<sup>67</sup> The word “advise” is even used at one point in the bill:

(I) The confidential advisor shall also advise the victim of, and provide written information regarding, both the victim’s rights and the institution’s responsibilities regarding orders of protection, no contact orders, restraining orders, or similar lawful orders issued by the institution or a criminal, civil, or tribal court.<sup>68</sup>

Without ever using the term “represent,” the bill would have the confidential advisor “as appropriate” do things that generally should be done by a lawyer, including:

(i) serve as a liaison between a victim and a higher education responsible employee or local law enforcement, when directed to do so by a victim who has been fully and accurately informed about what procedures shall occur if information is shared; and (ii) assist a victim in contacting and reporting to a higher education responsible employee or local law enforcement.<sup>69</sup>

Like the SOS Campus Act, CASA would have the confidential advisor accompany the victim “to interviews and other proceedings of a campus investigation and institutional disciplinary proceedings.”<sup>70</sup> Such accompaniment would

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63. *Id.* § 124(c)(2).

64. *Id.* § 124(c)(3).

65. Campus Accountability and Safety Act, S. 590, 114th Cong. (2015).

66. *Id.* § 4(a).

67. *Id.* (The advisor must “inform the victim— (i) of the victim’s rights, (ii) of the victim’s reporting options, including the option to notify a higher education responsible employee, the option to notify local law enforcement, and any other reporting options; (iii) if reasonably known, of the potential consequences of the reporting options described in clause (ii); and (iv) that the institutional student disciplinary proceeding has limited jurisdiction, scope, and available sanctions, and should not be considered a substitute for the criminal justice process”).

68. *Id.*

69. *Id.*

70. *Id.*



obviously be more effective if the person accompanying the survivor could act as a lawyer when necessary.

In 2017, CASA was reintroduced with eighteen cosponsors.<sup>71</sup> The bill would require schools to have a “sexual assault response coordinator” (SARC) instead of a “confidential advisor.”<sup>72</sup> The SARC is supposed to be someone with experience and the ability to provide effective victim services relating to domestic violence, stalking, dating violence, and sexual assault.<sup>73</sup> The person can be from the community, such as a community-based rape crisis center,<sup>74</sup> or an employee on campus, although the employee cannot be a responsible employee with reporting obligations. Although the bill permits the Secretary of Education to designate categories of employees that can serve in the role of SARC, and lists categories of professionals that may be included (such as health care staff, clergy, and staff at a women’s center), the bill does not mention attorneys. In fact, it is unlikely that the SARC would be an attorney since the SARC is expressly prohibited from serving as an advisor during the disciplinary proceedings.<sup>75</sup>

Among other things, the SARC is supposed to provide a wide range of information to the victim, including the following: rights under federal law and state law; rights and options pursuant to university policy; the range of reporting options; a description of the processes at the university and in the criminal justice system; a description of jurisdiction, scope and sanctions of the disciplinary process and the criminal justice system; and an explanation that the criminal justice system differs from the disciplinary process.<sup>76</sup> The SARC is also supposed to liaise with the higher education institution and law enforcement to assist with reporting and arranging necessary interim measures.<sup>77</sup>

Whether the SARC would be a confidential resource is ambiguous. On the one hand, the bill would require the institution to designate someone who has state law protection to provide privileged communications.<sup>78</sup> On the other hand, the bill also says the person shall provide confidential services “to the extent authorized under State law.”<sup>79</sup> In fact, while the SARC is generally excused from the obligation to report the crime to the institution or to law enforcement in a way that identifies a victim or accused individual, the SARC must do so if “required to do so by State law.” The SARC is also supposed to inform students of the limits of the coordinator’s ability to provide privacy or confidentiality.<sup>80</sup>

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71. *See* Campus Accountability and Safety Act, S. 856, 115th Cong. (2017).

72. *Id.* § 4 (a).

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

Neither version of CASA mentions the civil law system or the importance of having the confidential advisor or SARC be an attorney. There is no requirement that the school partner with a legal services organization when it allows an outside agency to provide the services of a confidential advisor or SARC, nor does either bill mention legal services organizations as a type of organization with which a school could partner.<sup>81</sup> Lawyers are disregarded as a critical resource for survivors, even though they are essential. In fact, while the most recent version of CASA would require the institution to have certain information on its Web site, such as hotline numbers and the name and location of the nearest medical facility that offers a sexual assault exam, neither the availability nor the importance of attorneys need be mentioned.<sup>82</sup>

The bottom line is that congressional initiatives are not addressing this issue effectively; instead, they are, at best, promoting mere “advocacy.” This is despite the fact that legislators appear to consider legal advice essential. After all, the bills envision that advisors or SARCs will engage in what amounts to the practice of law, but mistakenly assigns that task to the wrong group: advocates or other nonlawyers. The proponents of these proposals incorrectly assume that a non-lawyer is a sufficient alternative to an attorney. While an advocate or a SARC can provide survivors with legal information, tell survivors about the legal resources that exist on campus and in the community, and try to connect survivors with these resources, this arrangement is not as beneficial as providing the survivor with easy access to her very own attorney. In fact, the adoption of these proposals may make survivors less likely to move forward in any system or may expose them to harm if they do. The information to be provided can be overwhelming, no one is necessarily qualified to answer their legal questions (assuming they know what questions to ask), and no one can steer them away from pitfalls that exist with the overlapping systems.

Though advocates are vital to survivors’ wellbeing,<sup>83</sup> they simply are not a substitute for a lawyer. It is well recognized in the civil legal context that *both* advocates and lawyers play a critical role in meeting survivors’ needs.<sup>84</sup> How-

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81. Campus Accountability and Safety Act, S. 590, 114th Cong. § 4(a) (2015) (“The institution shall designate as a confidential advisor an individual who has protection under State law to provide privileged communication. The institution may partner with an outside victim services organization, such as a community-based rape crisis center or other community-based sexual assault service provider, to provide the services described in this paragraph.”).

82. S. 856 § 4(a). The most recent CASA bill would authorize grants for institutions that could cover legal services. See S. 856 § 8.

83. See generally Rebecca Campbell, *Rape Survivors’ Experiences with the Legal and Medical Systems: Do Rape Victim Advocates Make a Difference?*, 12 VIOLENCE AGAINST WOMEN 1 (2006).

84. See, e.g., ILL. COALITION AGAINST SEXUAL VIOLENCE, A GUIDE TO CIVIL LAWSUITS: PRACTICAL CONSIDERATIONS FOR SURVIVORS OF RAPE AND CHILDHOOD SEXUAL ABUSE 1 (2007) (“Consult your attorney, rape crisis counselor and *therapist* (if you are in counseling) when making this decision. These professionals can help you determine whether a civil suit meets your needs.”); see also AM. BAR ASS’N COMMISSION ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL

ever, people often assume that advocates can take the place of attorneys for campus survivors. Yet advocates cannot give legal advice because that would constitute an unauthorized practice of law.<sup>85</sup> Consider something as presumably straightforward as a restraining order. Lawyers give advice about whether getting a restraining order would be beneficial, given its potential impact on other legal proceedings; what type of restraining order to seek; and what relief should be sought within the order. Moreover, a lawyer can make a huge difference in the survivor's ability to obtain relief in court, especially when the accused student is represented, as he almost always is. The CourtWatch project in King County, Washington, found substantial differences between advocates and lawyers with regard to survivors' success in obtaining sexual assault protection orders (SAPO) in court:

When legal advocates were involved with a case, there was an 80% success rate in getting the order granted, compared with a 34% success rate for petitions without an advocate. . . . In cases where the respondent had an attorney, but the petitioner did not, even when the petitioner had an advocate, the SAPO was always dismissed. Similarly, if the petitioner had an attorney and the respondent did not, the order was granted in almost all the cases. This shows that a party without an attorney is at a huge disadvantage if the other side is represented.<sup>86</sup>

Advocates also lack the ability to identify survivors' legal needs outside the protection order context. In reference to non-lawyer advocates at community-based rape crisis centers, one commentator noted that "the civil legal needs of rape victims are [not] understood."<sup>87</sup>

Survivors also need attorneys because advocates are not always confidential resources, but attorneys are. Campus lawyers, unlike campus advocates, are exempt from reporting obligations under both the Clery Act and Title IX.<sup>88</sup> This grant of confidentiality, buttressed by the attorney-client privilege, can be extremely reassuring to survivors. For example, it eliminates the risk of harm from

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PROTECTION ORDER CASES 27 (2007) (explaining that coordination with advocates can be "critical" and necessary for holistic representation).

85. See generally Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 *FORDHAM L. REV.* 2581 (1999). Some campuses indicate that they do undertake legal tasks as interim and supportive measures, but it is unclear if a lawyer undertakes these tasks. See, e.g., *Policy on Sexual Misconduct*, CITY U. N.Y. 9-10 (2014), <http://www.cuny.edu/about/administration/offices/la/Policy-on-Sexual-Misconduct-12-1-14-with-links.pdf> (noting that "interim and supportive measures may include . . . providing the complainant assistance with filing a criminal complaint and seeking an order of protection" as well as "enforcing an order of protection").

86. Laura Jones, *Court Monitoring as Advocacy*, 26 *CONNECTIONS* 7, 8 (2012).

87. Kanter, *supra* note 27, at 265-66.

88. Office for Civil Rights, *supra* note 48, at 22 E-3 & n.26. While schools need not make victim advocates confidential resources, OCR "strongly encourages" them to do so. *Id.* at 23, E-3.

institutional betrayal,<sup>89</sup> the phenomenon that occurs when the survivor thinks she is speaking to a confidential resource, but then finds out the advocate cannot keep their conversation private. Not only do advocates lack the same privileges as attorneys in many states,<sup>90</sup> but some institutions of higher education designate their advocates as responsible employees with mandatory reporting obligations.<sup>91</sup>

### C. *The Detriment from the Gap and the Inattention*

The failure of universities to provide free attorneys for survivors, and the failure of others to talk about this gap, has pernicious implications. The absence of attorneys for complainants has watered down the effect of all the rights given to address sexual violence.<sup>92</sup> Professor Catharine MacKinnon, who is credited with framing sexual harassment and sexual violence as sex discrimination and thereby enabling Title IX to address it,<sup>93</sup> would remind us that rules about “procedure” have substantive implications.<sup>94</sup> Providing survivors with attorneys would improve survivors’ likelihood of obtaining relief in the civil, criminal, and campus contexts.

In addition, the absence of attorneys for survivors has contributed to the very violence campuses are trying to address. Nancy Cantalupo has argued that sexual assault survivors will not come forward without victim-centered best practices

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89. Carly Parnitzke Smith & Jennifer J. Freyd, *Dangerous Safe Havens: Institutional Betrayal Exacerbates Sexual Trauma*, 26 J. TRAUMATIC STRESS 119, 122-23 (2013). “Institutional betrayal” is when an important institution, or a segment of it, acts in a way that betrays its member’s trust. *Id.* at 120.

90. See Graceann Carimico, Thuy Huynh & Shallyn Wells, *Rape and Sexual Assault*, 17 GEO. J. GENDER & L. 359, 394-95 (2016) (noting that twenty-five states have an advocacy privilege and that the states vary in their laws’ strictness, with some allowing “balancing the weight of the defendant’s need to bring in the evidence against the victim’s need to keep the evidence out”).

91. See University Counseling Center, *Sexual Assault Victims’ Resources*, LOY. UNIV. NEW ORLEANS, <http://studentaffairs.loyno.edu/counseling/advocate-list> (“[T]he Advocacy Initiative is a network of students, faculty, and staff who are trained to work with individuals in the wake of sexual assault. Advocates are both compassionate and knowledgeable, and they can provide the vital link between persons in need and available resources. Advocates will ensure privacy for discussion of sensitive topics and will maintain heightened sensitivity to personal information disclosed. However, Advocates cannot guarantee strict confidentiality. Advocates are required by federal law to report if they have knowledge of a sexual assault.”).

92. Cf. Beverly Balos, *Domestic Violence Matters: The Case for Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & C.R. L. REV. 557, 574 (2006) (“The lack of appointed counsel for many victims of domestic violence who try to access the protection of the law by petitioning for a protective order means that an available remedy that has the potential to provide security and relief is in fact undermined.”).

93. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 2 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979)).

94. See CATHARINE A. MACKINNON, *WOMEN’S LIVES, MEN’S LAWS* 3-4 (2005) (noting that law “is substantive first,” and that “abstract legal questions” have substantive implications for the distribution and reification of power in society); *cf. id.* at 34 (discussing burdens of proof and evidentiary standards that “tacitly presuppose the male experience as normative and credible and relevant”). Analyzing questions of legal representation as a function of “neutral principles of constitutional law,” so that the issue takes on an aura of abstraction and neutrality, risks making “outcomes more manipulable by powerful substantive interests that can not be exposed or countered by the less powerful . . .” *Id.* at 5.

on campus.<sup>95</sup> The Department of Justice concurs. It has said that “any policy that compromises or restricts the victim’s ability to make informed choices about how to proceed may deter reporting.”<sup>96</sup> If survivors do not report, then their educational institutions cannot deal with their perpetrators or protect other victims who may be at risk from repeat offenders.<sup>97</sup> If survivors do not report, potential first-time perpetrators are not deterred by the prospect of getting caught. Consequently, campuses must provide the essential services that survivors need to come forward. Otherwise, institutions perpetuate, and perhaps facilitate, gender inequality.

Educational institutions also send a damaging message to students when they fail to provide student survivors with legal counsel. The ALI Reporters for the *Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis* observed that institutional responses send a message: “[I]n the way their disciplinary procedures are designed and applied, universities and colleges are modeling a way of thinking and behaving to its [sic] students.”<sup>98</sup> When universities and colleges fail to provide attorneys for survivors, or even fail to encourage survivors to consult with one, they are also modeling a way of thinking and behaving. They are suggesting that either (1) the law is unimportant for remedying survivors’ victimization and holding abusers accountable, or (2) their lack of information about the law is acceptable. Both messages seem inappropriate for an educational institution in a “constitutional democracy.”<sup>99</sup>

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95. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 J.C. & U.L. 613, 680 (2009) (“Most critically, we need to take victims’ needs as our starting point in crafting our responses to peer sexual violence, an approach which complies with the law and with best practices. The epidemic nature of peer sexual violence on campus, the overwhelming non-reporting of this violence, and the cycle of non-reporting and violence perpetuation lead to one overwhelming conclusion: we need victims to come forward and report. . . . The fact that 90% of campus sexual violence survivors are exercising their veto [not to report] demonstrates that we are not taking their needs into sufficient consideration when crafting our responses.”).

96. ALBERTO R. GONZALES ET AL., NAT’L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 8 (2005).

97. The prevalence of repeat offenders is contested. Compare David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80 (2002) (“A majority of the undetected rapists in this sample were repeat offenders. . . . These repeat rapists each committed an average of six rapes and/or attempted rapes and an average of 14 interpersonally violent acts.”), with Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 JAMA PEDIATRICS 1148, 1152 (2015) (“Many researchers, policymakers, journalists, and campus administrators have assumed that 1 small subgroup of men accounts for most rapes committed on college campuses. Our findings are inconsistent with that perspective.”), and Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2054 (2016) (“Reassuring as it is to think that a few bad apples commit most campus rapes, recent empirical work has found this conclusion to be seriously overstated numerically and flawed as a focus for policy.”).

98. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 7-8 § 1.2 (discussing procedures that are fair to student complainants and respondents); *id.* at 9 § 1.4 cmt. (“[T]he process for investigation and resolution has an educative function insofar as it conveys to participants and observers the university’s or college’s view about fair procedures.”).

99. *Id.* at 9 § 1.4 rptr.’s nn. (discussing “[t]he mission of universities in a constitutional democracy”).

The failure of campuses “to close the gap between legal promise and social reality”<sup>100</sup> affects more than just the educational context. Educational institutions are part of, and influence, our cultural understandings of violence and oppression.<sup>101</sup> If educational institutions are allowed to convey concern for survivors with a wink, then duplicity becomes normalized. It becomes harder to recognize and address similar duplicity in other contexts, such as the military, the criminal justice system, or the workplace.

Apart from these significant effects, the failure even to discuss the issue has meant that the prospect of providing legal counsel to campus survivors has been stymied. For example, absent are informed conversations about the sufficiency and proper allocation of federal funding for campus sexual assault. Members of Congress must learn about all potential services and responses to sexual violence that might benefit from more dollars.<sup>102</sup> Executive branch employees also need to have legal services in mind when they consider the optimal distribution of existing funding. Federal dollars fund rape crisis centers, including campus centers with advocacy positions,<sup>103</sup> and free legal services for victims of sexual assault, domestic violence, dating violence, and stalking (including for campus administrative proceedings),<sup>104</sup> but funding is not specifically earmarked for campus legal services. In fact, the meagerly funded Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program,<sup>105</sup> which permits the funding of legal services, only started awarding funds

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100. MACKINNON, *supra* note 94, at 57; *see also* MacKinnon, *supra* note 97, at 2085 (recommending assessing the appropriateness to Title IX of a “deliberate indifference test . . . by asking how different is the reality survivors face today from the time before sexual harassment in education was recognized as a legal equality claim”).

101. Novkov, *supra* note 25, at 608 (arguing that “activists” see university policies and Title IX as a way to “advance the pace of cultural change”).

102. *See, e.g.*, Napolitano, *supra* note 30, at 401 (calling upon the federal government to “direct additional efforts and resources toward the discovery and dissemination of evidence-based best practices for prevention, education, investigation, and adjudication”). The proposed Campus Accountability and Safety Act would provide additional funding for campus sexual assault support services, and legal assistance providers could be recipients. Campus Accountability and Safety Act, S. 590, 114th Cong. § 8 (2015) (amending Title VIII of the Higher Education Act of 1965 (20 U.S.C. § 1161a (2012)) with Part BB, § 899(b)(2)(C)); Campus Accountability and Safety Act, S. 856 § 8, 115th Cong. (2017).

103. The Sexual Assault Services Formula Grant Program was created by the Violence Against Women and Department of Justice Reauthorization Act of 2005 Technical Amendments, 42 U.S.C. § 14043g (Supp. II 2014). The Sexual Assault Services Formula Grant Program can be used to fund “rape crisis center[s]” on university campuses, and those centers can provide advocacy. *See* Office on Violence Against Women, *OVW Sexual Assault Services Formula Grant (SASP Formula) Program Frequently Asked Questions as of 10/6/2014*, U.S. DEP’T JUST. ¶¶ 10, 21, [https://www.justice.gov/sites/default/files/pages/attachments/2014/10/07/sasp-faq\\_final.pdf](https://www.justice.gov/sites/default/files/pages/attachments/2014/10/07/sasp-faq_final.pdf).

104. *See, e.g.*, Violence Against Women Act, 42 U.S.C. § 13925(a)(19) (Supp. II 2014); Victim Compensation and Assistance, 42 U.S.C. § 10603 (2012); Justice System Improvement Act, 42 U.S.C.A. § 3796gg-6 (Supp. I 2013-14); 42 U.S.C. § 14045b (Supp. II 2014).

105. *See* Office on Violence Against Women, *Protecting Students from Sexual Assault*, U.S. DEP’T JUST. (“In Fiscal Year 2016, the program funded 45 projects, totaling more than \$15 million.”); Office on Violence Against Women, *supra* note 22, at 2. This program is known as the OVW Campus Grant Program.

for this purpose in 2016,<sup>106</sup> and the 2017 solicitation already makes new awards for campus legal services appear unlikely.<sup>107</sup>

Once the importance of legal services for campus survivors is recognized, a conversation can also be had about the best way for colleges and universities to provide those services. With 5,300 institutions of higher education in the United States, ranging from “beauty schools to Harvard,”<sup>108</sup> logistical questions exist regarding the provision of legal services. These issues should be teed up now so that lawyers, academics, and administrators can start addressing them, informed by the experiences of pioneering campuses that are already offering these services.

## II. FIVE REASONS UNIVERSITIES SHOULD PROVIDE LEGAL COUNSEL TO SURVIVORS

Institutions should make legal counsel available to survivors who report their victimization to the institution, as well as to survivors who are trying to decide whether to report their victimization. For the first group, legal counsel assists the survivor as she journeys through the legal and administrative maze designed to address her victimization. An attorney allows the survivor to feel more in control as she engages with these systems, helps her actualize her rights, and protects her from being retraumatized by the various systems. For the second group, legal counsel facilitates an informed decision by the survivor.

### A. Navigating Three Systems

An important function of the survivor’s lawyer is to help the survivor navigate three separate systems: the civil law system, the criminal law system, and

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106. In 2016, \$25 million was awarded to 61 recipients to address sexual violence on campus. These funds came from both the OVW Campus Grant Program and the Legal Assistance to Victims program. However, only 16 grants were specifically made for organizations that will provide legal services on campuses. Press Release, Dep’t of Justice, Justice Department Awards \$25 Million to Address Sexual Violence on Campuses (Sept. 29, 2016), <https://www.justice.gov/opa/pr/justice-department-awards-25-million-address-sexual-violence-campus>. The last report to Congress on the activities of grantees published on the OVW Web site did not show that any grant recipient funded attorneys through the program. See REPORT TO CONGRESS ON THE 2011 ACTIVITIES OF GRANTEES RECEIVING FEDERAL FUNDS UNDER THE GRANTS TO REDUCE VIOLENT CRIMES AGAINST WOMEN ON CAMPUS PROGRAM 4 (2012), <https://www.justice.gov/sites/default/files/ovw/legacy/2014/04/25/2012-campus-rpt.pdf> (detailing most of the fulltime employees and not mentioning any attorneys).

107. Office on Violence Against Women, *OVW Fiscal Year 2017, Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence and Stalking on Campus Program Solicitation*, U.S. DEP’T JUST. 7-8, <https://www.justice.gov/ovw/page/file/923431/download> (detailing the requirement of hiring a full-time program coordinator and describing OVW priority areas).

108. Jeffrey J. Selingo, *How Many Colleges and Universities Do We Really Need?*, WASH. POST (July 20, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/20/how-many-colleges-and-universities-do-we-really-need/>.

the campus disciplinary system. All of these systems are implicated, or are potentially implicated, by the survivor's victimization. Sometimes the survivor herself invokes these systems, but sometimes others invoke one or more of them in contravention of the survivor's wishes.<sup>109</sup> Sometimes a survivor needs a lawyer in order to actualize her rights in any of these systems; otherwise, she may forego moving forward in any of them because she becomes demoralized by her own lack of knowledge or by the effort she must expend to engage with these systems confidently. Alternatively, she may inadvertently undermine her rights in one system by her action in another.

No one should underestimate the complexity of each of these three systems for a person without legal training. That complexity is multiplied one hundred-fold when a layperson has to navigate multiple systems simultaneously, even if the survivor has chosen to invoke them herself. Each system differs in its procedural and substantive rules, its emphasis on the survivor's autonomy, and its receptivity to remedying the type of victimization encountered by a survivor. Missouri Senator Claire McCaskill called the interaction of only two of the three systems (the criminal and campus processes) a "confusing" and "complicated thicket" and noted that the complexity discourages survivors from reporting.<sup>110</sup> This legal labyrinth compounds the complexity that already attends the factual and legal issues surrounding the acts of violence.<sup>111</sup>

Of course, student survivors who feel overwhelmed or confused by the overlapping systems are usually unaware of how much complexity truly exists and how it might affect them. Few students have ever heard of "collateral estoppel" or "discovery" and can't even begin to anticipate the ways in which the various types of proceedings could impact each other. For example, survivors will rarely consider, let alone know how to balance, the various factors that could influence

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109. "Responsible employee" reporting schemes may set both the campus disciplinary and criminal systems in motion. See *infra* note 192; see generally Colleen Flaherty, *Endangering a Trust*, INSIDE HIGHER ED (Feb. 4, 2015), <https://www.insidehighered.com/news/2015/02/04/faculty-members-object-new-policies-making-all-professors-mandatory-reporters-sexual> (noting concerns that mandatory faculty reporting will lead to reports in violation of students' wishes). As for the civil system, the accused may bring a civil suit against the survivor for defamation. See, e.g., Ashe Schow, *Brown University Student Sues His Accuser for Defamation*, WASH. EXAMINER (Oct. 19, 2015), <http://www.washingtonexaminer.com/brown-university-student-sues-his-accuser-for-defamation/article/2574442>; see also Defendant's Answer, Affirmative Defenses, Counterclaims, and Demand for Jury Trial at 55-61, *Kinsman v. Winston*, No. 6:15-cv-00696-ACC-GJK (M.D. Fla. May 8, 2015), <https://www.scribd.com/document/264695540/Winston-Answer> (detailing counterclaims for defamation per se, defamation, and tortious interference with prospective business advantage).

110. Zoë Carpenter, *Whom Should College Students Really Call When They Are Sexually Assaulted on Campus?*, NATION (Dec. 10, 2014), <https://www.thenation.com/article/who-should-college-students-really-call-when-they-are-sexually-assaulted-campus-0/>.

111. See, e.g., Napolitano, *supra* note 30, at 388 ("Even for law enforcement and criminal courts, investigating and adjudicating sexual violence and sexual assault cases often means grappling with the profound complexity inherent to these cases, and the difficulties that can arise are significant."); see also ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 8 ("These cases are complex. Many cases involve alcohol or other influences, partial or absent memories of what happened, few or no witnesses, and a student who has been harmed by someone whom he/she knows.").



a civil suit (such as a statute of limitations and a defendant's ability to invoke the Fifth Amendment), or know how to evaluate the potential impact of a civil suit on a criminal proceeding (such as the fact that "judges in criminal prosecutions permit scathing impeachment of accusers based on their parallel civil claims"<sup>112</sup>).

While it is usually not survivors' immediate concern, they also have rights that can be asserted against their educational institutions. For most survivors, this fourth area of law (which includes obligations under Title IX, Title VII, and the Clery Act, and may include obligations under Title II and Title VI too), is best viewed as a subset of the campus disciplinary process as it becomes relevant when a campus's response to the sexual violence fails to follow the law.<sup>113</sup> This area of the law is itself sufficiently complicated that an attorney who advises university lawyers about their institutions' obligations called it "The Tangled Web of Overlapping Legal Requirements and Enforcement Schemes."<sup>114</sup> Consequently, students will rarely know if their institutions are noncompliant, except perhaps in the most egregious cases. If a university told a survivor that federal law prevented the university from sharing the final disposition of the disciplinary proceedings with her, for example, the survivor might not know that the university's reading of the law was incorrect.<sup>115</sup>

Navigating multiple systems can be daunting, frustrating, time-consuming, and fraught with opportunities for survivors to make mistakes. The task itself can inhibit recovery. "Rape, sexual assault, and sexual harassment are traumatic in part because the victim loses control over his or her own body. A clearly established principle for recovery from these traumatic experiences is to rebuild trust and to reestablish a sense of control over one's own fate and future."<sup>116</sup> A trauma-informed, client-centered lawyer can help the survivor gain control over her fate and her future, or at least help her understand those parts of the various systems

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112. Tom Lininger, *Is It Wrong To Sue for Rape?*, 57 DUKE L.J. 1557, 1561 (2008). Lininger's article sets forth many of the competing considerations. See *id.* at 1579-83.

113. For some survivors, Title IX would be relevant if the school's deliberate indifference or its policies caused their victimization. See, e.g., *Ross v. Corp. of Mercer Univ.*, 506 F. Supp. 2d 1325, 1346 (M.D. Ga. 2007). For a discussion of deliberate indifference in the context of an official policy, see *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1184-85 (10th Cir. 2007) (stating that a violation of Title IX exists "when the violation is caused by official policy, which may be a policy of deliberate indifference to providing adequate training or guidance that is obviously necessary for implementation of a specific program or policy of the recipient").

114. See Jeffrey J. Nolan, *Addressing Intimate Partner Violence and Stalking on Campus: Going Beyond Legal Compliance To Enhance Campus Safety*, in EMERGING ISSUES IN COLLEGE AND UNIVERSITY SECURITY 21, 22 (2015), 2015 WL 4512292, at \*1; see also Napolitano, *supra* note 30, at 397 ("Standing alone, OCR's guidance regarding sexual violence is detailed and complex. That complexity is compounded when factoring in campuses' obligations under the Clery Act."); *id.* at 392 n.10 ("[S]tate laws add yet another layer of compliance complexity for universities.").

115. See Family Educational Rights and Privacy Act, 20 U.S.C.A. § 1232g(b)(6)(A) (Westlaw through Pub. L. No. 114-327).

116. Letter from Eileen Zurbruggen, Professor of Psychology, Univ. of Cal. Santa Cruz et al., to Daniel Hare, Chair, Acad. Senate of the Univ. of Cal. Sys. (Oct. 26, 2015), <http://ucscfa.org/wp-content/uploads/2015/10/UCSC-faculty-comments-on-SVSH-policy-10.26.15.pdf> (discussing reporting against the will of the survivor).

over which she may have little control. A lawyer knows what behavior can cause a client legal problems and can help navigate around the minefields. A lawyer's *raison d'être* is to help the client achieve the client's legal goals. This service helps with the survivor's recovery.

Lawyers' usefulness is magnified because complainants, who are expected to navigate the interplay of these three systems (and four sets of rules), may be cognitively impaired as a result of their victimization.<sup>117</sup> It is estimated that seventy-one percent of sexual violence survivors experience traumatic distress.<sup>118</sup> Traumatic distress has various effects. Everyday tasks can become difficult and understanding complex concepts can become very challenging.<sup>119</sup> Even describing the traumatic event itself can become difficult.<sup>120</sup> The ALI cautions that sexual assault survivors can have trouble understanding the campus disciplinary system, and "may find it difficult in the immediate aftermath to decide what to do."<sup>121</sup> That is not surprising; after all, even long-time faculty can find their campus's disciplinary system perplexing. The ALI focused its comments about complexity on the campus disciplinary system alone; yet, the multiple legal and quasi-legal regimes complicate matters even further for a student survivor. Other factors may also compound the survivor's challenge, and these other factors may be common in the student population at some institutions of higher education, especially at community colleges.<sup>122</sup> For example, the survivor may not be a native English speaker or may be unfamiliar with the U.S. legal system, or she might be a high school student who is taking classes at the college.<sup>123</sup>

Consider, for a moment, the irony that exists in the way that many campuses currently respond to reports of sexual violence by law students. A university is likely to provide the survivor with an academic accommodation if she requests it; an academic accommodation is a well-recognized interim and supportive

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117. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 12 § 2.2 cmt. ("Students subject to sexual harassment or other sexual misconduct, and especially to severe forms of assault, may not be able to participate in educational activities due to physical or emotional trauma . . .").

118. LYNN LANGTON & JENNIFER TRUMAN, U.S. DEP'T OF JUSTICE, SOCIO-EMOTIONAL IMPACT OF VIOLENT CRIME 3 (2014) (noting seventy-one percent of rape or sexual assault survivors experienced "moderate to severe distress resulting from their victimization").

119. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271-80 (5th ed. 2013) (recognizing that threatened and actual sexual violence can cause post-traumatic stress disorder (PTSD), and that symptoms of PTSD may include changes in cognition and mood as well as difficulties with concentration, emotional regulation, and sleep); WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE & SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014) ("Also, the trauma that often accompanies a sexual assault can leave a victim's memory and verbal skills impaired – and without trauma-sensitive interviewing techniques, a women's [sic] initial account can sometimes seem fragmented.").

120. M.J. Larrabee et al., "The Wordless Nothing": *Narratives of Trauma and Extremity*, 26 HUM. STUD. 353, 353 (2003).

121. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 11 § 2.

122. ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 8.

123. *Id.*

measure.<sup>124</sup> However, the school is unlikely to provide the survivor with a lawyer to help her understand and use those very same rights that she can't currently absorb in the context of her academic studies. The university's incomplete response ignores the real-life importance of those rights and insufficiently helps the survivor gain control over her future. Most survivors are not law students, of course, and therefore lack even the basic training that might reduce their need for a lawyer.

If campuses truly want to give victimized students equal access to education, then campuses need to help survivors make sense of the multiple systems that address their victimization. They need to provide student survivors with lawyers who can answer their legal questions and offer them legal advice. At a minimum, this service will make the entire process less overwhelming and thereby promote recovery. Depending upon the survivor's needs and willingness to invoke the various systems, legal counsel can also facilitate the survivor's ability to obtain the relief she seeks. The relief, in turn, can prevent the reoccurrence of gender-based violence, remedy its effects, and hold the perpetrator accountable.

### *B. Obtaining Needed Relief in Three Systems*

Consider what lawyers can do for student survivors in the civil legal system, criminal legal system, and campus disciplinary system. In the civil legal system, the lawyer helps the survivor consider all of the legal relief that might benefit her and then make good decisions about each potential remedy. In the criminal system, an attorney is vital to ensure that the survivor's rights as a crime victim are respected. Within the campus system, a lawyer has an important role to play before and after any investigation or fact-finding by the institution. This role includes helping the survivor decide whether to report, assisting her with filing the report, and protecting her from collateral consequences (such as invasion of privacy and retaliation).

#### *1. The Civil Legal System*

The survivor can use the civil legal system to address her immediate health and safety needs, which are essential prerequisites to her successfully partaking again in the educational program. Start by examining in detail the lawyer's role in securing a civil protection order. This type of relief is commonly identified as

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124. See White House Task Force to Protect Students from Sexual Assault, *Sample Language for Interim and Supportive Measures To Protect Students Following an Allegation of Sexual Misconduct*, U.S. DEP'T JUST. 6 (2014), <https://www.justice.gov/ovw/page/file/910296/download> (discussing interim measures, including academic accommodations for student survivors).

potentially appropriate for a student survivor.<sup>125</sup> Unpacking the decisions related to this one potential remedy illustrates the sheer number of decisions that are required for each legal remedy and the value of legal advice for making informed decisions. It also illustrates the difficulty of obtaining legal relief without a lawyer, even for a remedy that is commonly thought to be accessible by survivors themselves. A brief canvas of some of the other civil relief shows the range of legal remedies for which such detailed decisionmaking is required and why representation is beneficial.

With regard to the civil protection order, a lawyer can inform a survivor whether she is likely to qualify for the order. Not every survivor will qualify for relief in the civil law system, even though the behavior she experienced may violate the student conduct code.<sup>126</sup> There are disadvantages to pursuing an order when it is legally impossible to obtain, and an attorney can stop the survivor's improvident application for relief. Otherwise, the survivor wastes her time, experiences the disappointment of having the judge deny a request for relief, and unnecessarily exposes facts that may implicate her privacy or her ability to achieve other relief (if her statements in the restraining order proceeding are inconsistent with later statements, for example).

If the survivor is likely to qualify for a civil protection order, she will want to know whether it is necessary to obtain one. After all, many campuses have campus protection orders as a remedy.<sup>127</sup> However, at times, the campus protection order will not protect the survivor adequately. If the campus stay-away order requires the mutual consent of the parties when it is entered before the conclusion of campus disciplinary proceedings, the perpetrator may not agree to the order. If the accused is not a student from the same university, the university's order may do nothing to keep the accused away from the complainant when she is off campus. If the complainant is considering transferring to another educational institution, she may need a court-issued stay-away order so that it has an effect when she attends the other institution. If she is considering moving to another state, only a court-issued order would receive full faith and credit in the new

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125. The ALI Project, in an uncompleted part, says that "[c]olleges and universities should provide students who report having experienced sexual assault and related misconduct with information about obtaining orders of protection." AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at xx § 11.4.

126. For example, in Oregon, derogatory name calling, or repeatedly texting or messaging on social media, might not qualify as "abuse" for purposes of a Family Abuse Protection Act order or "stalking" for purposes of a stalking order, but it could constitute gender-based harassment or bullying under the University of Oregon student conduct code. *Compare* OR. REV. STAT. §107.705(1) (West, Westlaw through Ch. 21 of 2017) (defining abuse), *and* OR. REV. STAT. §30.866(1) (West, Westlaw through Ch. 21 of 2017), *with* UO Student Conduct Code, Policy No. III.01.01, § 1(II)(16) (2015), <https://policies.uoregon.edu/vol-3-administration-student-affairs/ch-1-conduct/student-conduct-code> (defining "harassment" under the student conduct code). In addition, sometimes eligibility for a protection order requires a "relationship" between the parties that may not exist.

127. GONZALES ET AL., *supra* note 96, at 10 ("Most reports of sexual assault on campus are dealt with through binding administrative actions, such as no-contact orders.").

state.<sup>128</sup> If the complainant and the accused have a child in common, she may need the ancillary relief that a civil protection order typically provides.

Even if a campus stay-away order can protect her, she may prefer a civil protection order for various reasons. The campus order may require that she also stay away from the perpetrator, and she may resent a restriction on her liberty since she has done nothing wrong. Also, the school controls the campus stay-away order, just as a prosecutor controls a criminal no-contact order, and the victim may want more control over her order.

Assuming the survivor wants a civil protection order, she will need to know what type of order (or orders) she is eligible for and what would best meet her needs.<sup>129</sup> Legal advice is often necessary to understand the range of possible relief and the importance of certain remedies. For example, some restraining orders will not trigger the federal gun ban because the parties have only a dating relationship.<sup>130</sup> A survivor who wants to ensure her perpetrator cannot have a gun must know to ask the state court to dispossess the respondent of his weapon. In addition, orders are often effective only for a period of time. The survivor needs to know if her order can be renewed and, if so, what evidence she should gather to make her request successful.

Once she decides to seek an order, an attorney can bring the action for relief. It is well documented that survivors obtain better outcomes if counsel represent them when they seek a civil protection order.<sup>131</sup> Studies have also found that survivors with attorneys are much more likely to obtain a wider range of available relief than survivors without attorneys.<sup>132</sup>

128. 18 U.S.C. § 2265(a) (2012).

129. In Oregon, for example, there are five types of restraining orders. *See* OR. REV. STAT. § 107.700 et seq. (West, Westlaw through Ch. 21 of 2017) (Family Abuse Protection Act order); OR. REV. STAT. § 30.866 (West, Westlaw through Ch. 21 of 2017) (Civil Stalking Protective Order); OR. REV. STAT. § 163.760 et seq. (West, Westlaw through Ch. 21 of 2017) (Sexual Assault Protective Order); OR. REV. STAT. § 124.005 et seq. (West, Westlaw through Ch. 21 of 2017) (Elderly Persons and Persons with Disabilities Abuse Prevention Act order); OR. REV. STAT. § 133.035 (West, Westlaw through Ch. 21 of 2017) (ex parte peace officer's emergency protective order).

130. *See* 18 U.S.C. § 921(a)(32) (2012) (excluding as "intimate partners" dating partners who have not resided together).

131. Recall the evidence from CourtWatch that looked at the success rates in cases in which the alleged perpetrator was represented and the survivor had an advocate or an attorney. *See supra* note 86 and accompanying text; *see also* Jane Murphy, *Engaging with the State: The Growing Reliance on Lawyers and Judges To Protect Battered Women*, 11 AM. U. J. GENDER SOC. POL'Y & L. 499, 511-12 (2003) (finding 83% of survivors with attorneys and 32% of survivors without attorneys had success in obtaining a civil protection order).

132. PETER FINN & SARAH COLSON, NAT'L INST. OF JUST., CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT 19 (1990) ("Most judges report that even with a simplified petitioning procedure and energetic lay assistance to victims, those victims who are not represented by counsel are less likely to get protection orders—and, if an order is issued, it is less likely to contain all appropriate provisions. . . . An attorney for the petitioner is especially important when the respondent appears with counsel."); Elizabeth L. MacDowell, *Domestic Violence and the Politics of Self-Help*, 22 WM & MARY J. WOMEN & L. 203 (2016) (reporting empirical research that demonstrated the real limitations of self-help courthouse programs for unrepresented domestic violence victims, including staff who have negative responses to survivors who seek legal help outside of narrow parameters or who are not the stereotypical victims, staff who ignore important economic remedies, and staff who fail to refer

Of course, restraining orders are not appropriate for all survivors. Sometimes advocates or law enforcement encourage survivors to get an order, and the student is surprised when the other side notices the survivor's deposition or the court sets the contested hearing for a date in the near future and the survivor is not prepared to put on a case. An attorney can help a client consider the benefits and drawbacks of obtaining a civil protection order and then prepare the client for the likely next steps.

The foregoing discussion illustrated an attorney's importance with respect to one remedy, but an attorney is also needed so that the survivor can consider the breadth of available legal relief. With respect to the perpetrator, a survivor might need to address issues of custody, separation, and divorce if the parties have a family relationship. Or a survivor might want to sue the alleged perpetrator in tort<sup>133</sup> or obtain relief made available by a civil rights statute.<sup>134</sup> The perpetrator has likely committed a tort, and the survivor needs information about these remedies because sexual violence has real economic and noneconomic costs for victims.<sup>135</sup> For some victims, a tort suit can "assist [a victim's] recovery and healing."<sup>136</sup> The survivor also needs information about the statute of limitations in order to preserve these options. A survivor "can get so bogged down in the criminal process that she misses the filing date."<sup>137</sup> Even if the scope of the

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survivors to other essential services); Lisa E. Martin, *Providing Equal Justice for the Domestic Violence Victim: Due Process and the Victim's Right to Counsel*, 34 GONZ. L. REV. 329, 334 (1998-99) (discussing the need for an attorney given a victim's emotional crisis and complex legal needs and noting how an attorney can "clearly be a tremendous asset").

133. Sarah L. Swan, *Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate*, 64 U. KAN. L. REV. 963, 965 (2016) (arguing that "tort law is also an important, though often ignored, means of redressing sexual assault"); see, e.g., *Weldon v. Rivera*, 301 A.D.2d 934 (N.Y. App. Div. 2003); *Blind-Doan v. Sanders*, 291 F.3d 1079 (9th Cir. 2002).

134. See Krista M. Anderson, *Twelve Years Post Morrison: State Civil Remedies and a Proposed Government Subsidy To Incentivize Claims by Rape Survivors*, 36 HARV. J.L. & GENDER 223, 240-41 (2013) (discussing jurisdictions that have civil causes of action modeled after the federal VAWA remedy or other "civil causes of action for 'gender' or 'sex' bias").

135. One estimate is that a rape costs a victim \$143,678 in 2015 dollars in "lost productivity, medical and mental health care, property loss, and lost quality of life." Bolger, *supra* note 41, at 2115; see also *infra* note 287; Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. F. 281, 295 (2016) ("Student survivors can lose financial aid, which may include valuable scholarships requiring a high level of academic performance that experiencing trauma makes challenging to achieve, at least in the short term. Survivors can lose valuable tuition dollars spent on classes that their health makes them unable to finish at all or finish on time."). Other costs include everything from "mental health services to medical treatment, lost tuition to lost income, transportation costs to housing expenses." Bolger, *supra* note 41, at 2116.

136. ILL. COALITION AGAINST SEXUAL VIOLENCE, *supra* note 84 at 4 (noting this as a "pro" of civil litigation); MACKINNON, *supra* note 94, at 248 ("Civil laws potentially offer accountability to survivors, a forum with dignity and control by them, the stigma of bigotry for perpetrators, a possibility of reparations, and the potential for social transformation by empowering survivors. This is not to say that perpetrators do not deserve incarceration, rather to say that jail has not tended to change their behavior, indeed has often entrenched and escalated it. Civil rights laws offer the prospect of redistributing power, altering the inequalities that give rise to the abuse."); LEE MADIGAN & NANCY C. GAMBLE, *THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM* 127 (1989) ("Civil suits are another means of survivor empowerment.").

137. MADIGAN & GAMBLE, *supra* note 136.

attorney's representation prevents the survivor's attorney from filing a tort suit on the client's behalf, the attorney can educate the client about her options and provide a referral to a tort lawyer. Currently, few survivors sue the accused student, in part because they are not in touch with lawyers who might discuss that option with them.<sup>138</sup>

For the survivor who wants to explore the possibility of a tort or civil rights suit, a lawyer can assess the likelihood that she would be able to collect on her judgment. The lawyer can investigate the perpetrator's assets, the availability of insurance, the length of time that a judgment is enforceable, and the potential for a third-party tort claim.<sup>139</sup> A lawyer can also advise the survivor about the implications of filing a civil claim. To make an informed decision about whether she wants to pursue that option, the survivor needs to hear about discovery and the potential for it to invade her privacy, including by permitting access in certain circumstances to her medical and therapeutic records, her journals, her computer records, and her past sexual history. She needs to think about how she will prove her harm and whether she will need to waive the privilege of confidentiality that she has with certain service providers. She must consider the defendant's ability to depose her friends and family. She also needs to consider the potential out-of-pocket costs that she could incur during civil litigation, and the possibility that the accused student would bring a counterclaim against her.

Survivors will not always want to avail themselves of all the rights the civil legal system offers to redress their victimization. That choice is fine. As a victim-services sexual assault agency once advised its clients, "A decision not to sue can be as empowering as a lawsuit, as long as you keep your needs in mind and are true to yourself."<sup>140</sup> The point is that the survivor is entitled to make an informed choice.

A campus survivor may also need legal information, advice, and assistance to deal effectively with third parties. For example, she may need to increase her financial aid or defer her education, in which case the attorney can review her loan documents or contact her lender. She may need help convincing her landlord to act in accordance with the law by changing her locks or by letting her out of a

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138. Swan, *supra* note 133, at 968 ("[F]ew students have actually used tort law as a means of addressing campus sexual assault [because] . . . individuals who experience campus sexual assault do not often access the civil courts and bring tort claims.").

139. See, e.g., Scheffel v. Oregon Beta Chapter of Phi Kappa Psi Fraternity, 359 F.3d 436 (Or. Ct. App. 2015) (reversing summary judgment in favor of local chapter of fraternity for negligence after plaintiff was raped by a chapter member); Ellen M. Bublick, *Tort Suits Filed By Rape and Sexual Assault Victims in Civil Courts: Lessons for Courts, Classrooms and Constituencies*, 59 S.M.U. L. REV. 55, 63 (2006) (noting the rise in the number of cases filed and that "today cases filed by victims include two types of viable claims—claims against assailants themselves and claims against third parties").

140. See, e.g., ILL. COALITION AGAINST SEXUAL VIOLENCE, *supra* note 84, at 28.

lease.<sup>141</sup> Similarly, she may need to invoke statutory protection to stop her landlord from evicting her because of her victimization.<sup>142</sup> The survivor is sometimes entitled to time off from work to attend the legal and disciplinary proceedings related to her assault, and her attorney can inform her of this fact.<sup>143</sup> The survivor may have injuries that require medical care, and she may need to utilize protections under the Family and Medical Leave Act or process an insurance claim. If her victimization occurred at her workplace, she may be entitled to unemployment compensation. If the campus newspaper or another publication wants to report on her victimization, she may need to use the law to stop them from publishing her name.<sup>144</sup> And when statutes do not contain legal protections and remedies, creative lawyering is essential to get the survivor what she needs.

In addition to the importance of legal advice for dealing with third parties, sometimes survivors need legal advice and assistance to deal effectively with the government. If the survivor suffered an injury or lost income, she may qualify for certain governmental benefits such as Temporary Assistance for Needy Families (TANF), the Supplemental Nutritional Assistance Program (SNAP), rental assistance, or social security disability benefits. An attorney can ensure a foreign student does not fall out of compliance with her visa if she needs to reduce her course load.<sup>145</sup> An attorney can also alert her if she may qualify for a U or T visa because of her victimization.<sup>146</sup>

A school is not adequately addressing the survivor's victimization if no one explores with her all of the civil legal implications of her assault. To the contrary, the institution is potentially allowing the student to miss an avenue of recovery, to flounder by herself trying to figure out answers, and to harbor resentment years later once she realizes that her decisionmaking was undermined because she lacked a lawyer. Handing her a pamphlet that tells her where to find a lawyer in the community hardly seems adequate, even if that pamphlet mentions some of her legal rights and even if she reads it. A survivor is unlikely to take initiative based on a piece of paper. She is unlikely to be able to make informed choices,

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141. OR. REV. STAT. § 90.453 (West, Westlaw through Ch. 21 of 2017) (permitting termination of lease); OR. REV. STAT. § 90.459 (West, Westlaw through Ch. 21 of 2017) (permitting changing of locks).

142. OR. REV. STAT. § 90.449(1)(a) (West, Westlaw through Ch. 21 of 2017).

143. OR. REV. STAT. § 659A.192 (West, Westlaw through Ch. 21 of 2017).

144. *Doe v. Bd. of Regents*, 452 S.E.2d 776, 781-82 (Ga. Ct. App. 1994) (enjoining release of incident report to campus newspaper because of rape shield statute).

145. Office for Civil Rights, *supra* note 48, at 7-8 B-4 (noting that prior approval of the designated school official is needed for the student on a student visa to drop below full-time).

146. *See id.*; *see also* 8 U.S.C.A. § 1101(a)(15)(T) (West 2014) (defining the category of visa for nonimmigrant victims of human trafficking); 8 U.S.C.A. § 1101(a)(15)(U) (West 2014) (defining the category of visa for victims of certain crimes, including rape and other sexual assaults, who assist in the investigation or prosecution).



either.<sup>147</sup> She is also unlikely to remember that piece of paper years later, although she probably would recall the kind attorney who patiently answered all of her legal questions.

## 2. *The Criminal Law System*

Campus law enforcement must inform survivors of their right to file a criminal complaint,<sup>148</sup> but fewer than five percent of survivors report their victimization to the police.<sup>149</sup> While survivors may not file a criminal complaint for a variety of reasons,<sup>150</sup> the absence of legal advice contributes to the low numbers. Most sexual assault survivors know very little about how the criminal system works, and their misinformation or lack of information can inhibit them from filing reports.<sup>151</sup>

Some universities encourage survivors to report to the police despite the fact that survivors may not know the implications of reporting.<sup>152</sup> Other institutions will report sexual violence to the police without the survivor's permission.<sup>153</sup> In both of these situations, universities can undermine a survivor's recovery. Survivors are likely to be both surprised and dismayed by the lack of compassion and even outright hostility sometimes exhibited in the criminal justice system toward victims.<sup>154</sup> The police report can trigger a range of secondary victimization as well as safety risks.<sup>155</sup>

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147. OCR has erroneously assumed that resource guides can contain "clear explanations of the criminal and non-criminal consequences that flow from complaining to particular entities," and thereby "ensure that any student who reports sexual harassment or assault will be given information needed to make informed decisions. . . ." See Letter from Anurima Bhargava et al. to Royce Engstrom et al., *supra* note 49, at 29.

148. Office for Civil Rights, *supra* note 1, at 7.

149. Fisher et al., *supra* note 7, at 23 (referring to completed or attempted rapes).

150. *Id.* at 23 ("[Reasons] included not wanting family or other people to know about the incident, lack of proof the incident happened, fear of reprisal by the assailant, fear of being treated with hostility by the police, and anticipation that the police would not believe the incident was serious enough and/or would not want to be bothered with the incident.").

151. Margaret Garvin & Douglas E. Beloof, *Crime Victim Agency: Independent Lawyers for Sexual Assault Victims*, 13 OHIO ST. J. CRIM. L. 67, 77 (2015) ("[T]he vast majority of sexual assault victims have never had advice from a private attorney about the process or their rights. As a result, many victims are inadequately or erroneously informed about what the system and what their participation can look like.").

152. See Nancy Chi Cantalupo, "Decriminalizing" Campus Institutional Responses to Peer Sexual Violence, 38 J.C. & U.L. 481, 487 n.28 (2012) (noting "many schools lead their list of reporting options with calling local or campus police and/or strongly encourage students to contact police").

153. See, e.g., Jeremy D. Heacox, *S-A: Clery Act Responsibilities for Reporting Allegations of Peer-on-Peer Sexual Assaults Committed by Student-Athletes*, 10 WILLAMETTE SPORTS L.J. 48, 61 (2012) (noting "[Marquette] university now reports any allegations of sexual assault to the sensitive crimes unit of the local police department").

154. See AM. LAW INST., *supra* note 44, at 34 n.31, § 7.8 ("The problem of non-investigation, non-prosecution and disbelief of sexual assault claims is long-standing and has been the subject of critique and reform efforts for decades."); see also Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1959-69 (2016); Anderson, *supra* note 134, at 230-34.

155. See *infra* note 194.

The best way to facilitate reporting without revictimizing the survivor is to provide the survivor with legal advice about the implications of filing a criminal complaint and then allow her to make an informed decision. Before a survivor files a criminal complaint, she needs to know whether she will be able to protect her medical and therapeutic records, control the elicitation of her sexual history on the stand, and say no to a medical exam. She needs information about the prosecutor's authority to make the decisions, and about the prosecutor's reputation for having a victim-centered approach. She needs to know her rights as a crime victim, as defined by state law<sup>156</sup> and federal law.<sup>157</sup>

If she enters the system, whether voluntarily or not, an attorney can help minimize the secondary victimization that can come from reporting to and being investigated by the police. Rebecca Campbell's work demonstrated that when an advocate accompanies the survivor to meetings with the police, police officers are less likely to discourage the survivor from filing a report, more likely to take her report, less likely to say her case is not serious enough to pursue further, less likely to ask the survivor about her prior sexual history, and less likely to ask if the survivor had an orgasm during the assault.<sup>158</sup> Significantly, 89% of women without an advocate said "they were reluctant to seek further help after their experiences with the legal system," but only 61% of women with an advocate said the same.<sup>159</sup> While non-attorney advocates fill this accompaniment role well, research is needed to see if the outcomes could be even better if the survivor had an attorney with her. Presumably, survivors' negative experiences might decline further if they received legal advice and support during their interactions with the police, if the police were more responsive and respectful because of an attorney's presence, and/or if survivors knew they had an attorney who was able to help them achieve their objectives in the legal system.

The survivor will also need a lawyer to help her realize her rights as a crime victim.<sup>160</sup> She may want to give a victim impact statement at sentencing but need help composing it. She may want crime victim compensation but not know how to get it or to notify law enforcement in a timely manner to qualify.<sup>161</sup> She may

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156. Robin Turner, *Examination of Victim Rights: Ensuring Safety and Participation in Court Process*, 40 MONT. LAW. 18, 19 (2015) ("Starting in the 1970s, a majority of U.S. states have enacted discrete constitutional amendments providing victims with rights in a criminal proceeding. Many of these amendments are modeled after CVRA [Crime Victims' Rights Act]. Other states do not enumerate all eight rights listed above, but typically grant the right to be heard, informed and present at all important stages of a criminal prosecution. As of the writing of this article, 32 states display a victim-rights amendment in their constitutions.").

157. Crime Victims' Rights Act, 18 U.S.C.A. § 3771 (West 2015) (applicable to federal crimes).

158. Campbell, *supra* note 83, at 8-9, 10 tbl.1.

159. *Id.* at 9, 10 tbl.1.

160. Garvin & Beloof, *supra* note 151, at 80-82.

161. *See, e.g.*, OR. REV. STAT. § 147.015 (West, Westlaw through Ch. 21 of 2017) (specifying that a person is only eligible for victim compensation if law enforcement was notified of the crime within 72 hours after the crime occurred "unless the Department of Justice finds good cause exists for the failure of the notification").

be eligible for an immigration benefit because she cooperated with law enforcement but be unaware of how to obtain it.<sup>162</sup> The attorney can advise the client about the benefits available to crime victims and help her obtain them.

The lawyer's job, however, often goes beyond accompanying the survivor to a police interview, conveying information, and obtaining crime victim benefits for her. Lawyers serve the important role of protecting their clients during the prosecution. Two experts in this area warn: "[V]ictims' rights and privacy protections that exist on paper can rarely be accessed without a lawyer by a victim standing alone. Sexual assault victims enter a system notorious for inflicting secondary victimization on them."<sup>163</sup> While some prosecutors are victim-focused and will take the time to provide information or to represent the victim's interest,<sup>164</sup> prosecutors cannot be relied upon to do so, especially if the victim's needs conflict with the prosecutor's effort to obtain a conviction.<sup>165</sup> Such conflicts can both hinder successful prosecutions<sup>166</sup> and traumatize victims,<sup>167</sup> but they may be avoidable if the survivor has an attorney.

Margaret Garvin and Douglas Beloof used the military to illustrate the benefits of providing a survivor with independent legal counsel.<sup>168</sup> The military, which is analogous to an institution of higher education in many ways, allows a survivor to decide whether to make a restricted or unrestricted report. The former does not trigger the involvement of law enforcement.<sup>169</sup> Regardless of the route chosen, the survivor receives services, including the services of a Special Victim Counsel (SVC).<sup>170</sup> For the survivor who chooses restricted reporting, the SVC educates her about the criminal process and helps her make an informed decision about whether to change her report to unrestricted. For all victims of sexual violence,

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162. See *supra* text accompanying note 146.

163. Garvin & Beloof, *supra* note 151, at 75; see also Myka Held, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445, 463-66 (2015).

164. For example, the Lane County prosecutor filed a motion to quash a deposition in a civil protective order case because the named victim in a criminal case has a right not to be deposed during the pendency of that criminal case. See OR. CONST. art. I § 42(1)(c); see also OR. REV. STAT. § 147.433 (West, Westlaw through Ch. 21 of 2017).

165. Garvin & Beloof, *supra* note 151, at 85-86 (noting the prosecutor's job is not to "facilitate agency").

166. *Id.* at 80-81.

167. See generally MADIGAN & GAMBLE, *supra* note 136, at 91-107 (discussing survivors' interactions with prosecutors and the revictimization resulting from prosecutors' handling of cases).

168. Garvin & Beloof, *supra* note 151, at 72-75. While the authors use the military's program as an example of the benefits that crime victims receive when they have legal counsel, the authors argue that all sexual assault victims should receive an independent lawyer so that they exercise their "crime victim agency" within the criminal law process; otherwise, they may become disempowered and stop participating in the process. *Id.* at 71. Their arguments are convincing, but their proposal is so sweeping that it seems politically infeasible, at least at present.

169. *Id.* at 72.

170. *Id.* at 73.

[t]he primary duty of an SVC is to zealously represent his or her clients' rights and interests, including during the criminal investigation, preliminary hearing, pretrial litigation, plea negotiations, court-martial proceedings, and post-trial phase of a court-martial . . . [The] SVCs educate clients on the military justice system, the roles of sexual assault response personnel, and the variety of medical and other non-legal assistance available to them.<sup>171</sup>

The description of the "significant legal support" that the SVC provides to the survivor "once the criminal process is engaged"<sup>172</sup> sounds almost identical to what the campus attorney's role is for her client. It includes such tasks as answering the client's questions, protecting the client's interests, and representing the client in communications with others in order to save the client from the burden of engaging in such communication herself.<sup>173</sup>

Survivors find legal services of this type very beneficial. Survivors in the military were overwhelmingly appreciative of this service and found that it was essential to "his or her ability to understand the process and participate effectively as witnesses against their accused."<sup>174</sup> An equivalent service for university students should have similar results. An attorney can make the criminal system more comprehensible to the survivor and more responsive to her needs. Those benefits are important for the survivor's healing and for encouraging her to participate in the criminal process.

Colleges themselves would be advantaged by helping the survivor become more successful in the civil and criminal systems. Some administrators complain that the campus adjudicatory system has become a "surrogate" for the civil and criminal justice systems.<sup>175</sup> Yet until survivors have attorneys who can help them navigate the civil and the criminal systems, survivors will rarely receive justice in those fora and will continue to find them intimidating and dissatisfying. While it is too idealistic to imagine that survivors' needs could be fully met in those systems by providing them with legal representation, and while universities and colleges will always have responsibilities to address campus sexual violence and ensure equal educational opportunity for their students, survivors might reduce their reliance on campuses to address their victimization if these other systems were more accessible and responsive.<sup>176</sup>

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171. *Id.*

172. *Id.* at 74.

173. *Id.* (describing, inter alia, extensive communications with and on behalf of clients; client accompaniment to interviews with defense counsel, law enforcement, and prosecutors; invocation of clients' privacy rights during discovery; representation of the client for "collateral misconduct" (that is, "improper conduct at the time of assault"); provision of advice about immunity; and assistance with filing, answering or responding to motions).

174. *Id.* at 75.

175. Napolitano, *supra* note 30, at 400-01.

176. This, in turn, may help reduce the Department of Education's extensive regulation of campuses. *Id.* at 392, 401.

### 3. *The University System*

Although the university disciplinary system is not a legal system per se, its rules and policies can be just as complicated. The Association for Student Conduct Administrators suggested the limited capacity of some complainants to navigate it: “Think back to your sophomore year of college. What kind of policy would you understand and how would you even know to look for it?”<sup>177</sup> The ALI Project recognized that some campuses’ policies contain complex terms and specialized vocabulary, and students “are at times besieged with information and policies” that can make information “a challenge to absorb.”<sup>178</sup>

A review of Columbia University’s *Gender-Based Misconduct Policy for Students* shows that the ALI’s characterization is, if anything, an understatement.<sup>179</sup> The procedural part of the manual is ten pages long, with two columns of information on each page. The policy’s timeline for the resolution of reports has eleven separate events with dates,<sup>180</sup> but it excludes the dates that require action by the complainant; instead, those dates are sprinkled throughout the document.<sup>181</sup> The policy lists thirteen potential notices the complainant will receive,<sup>182</sup> and eight protocols that will apply during the investigative process.<sup>183</sup> It contains legal terminology that some students may not comprehend completely, such as “potential or actual conflict of interest.”<sup>184</sup> The policy also imposes requirements on complainants that may be incompletely understood, such as a requirement “to preserve any relevant evidence” and to avoid “improperly influenc[ing] the testimony of a witness.”<sup>185</sup> Some rules have draconian outcomes if not followed.<sup>186</sup> Despite all of its detail, the policy leaves many questions unanswered. For example, the policy says that “[e]ach party has the right to request that evidence regarding his or her mental health diagnosis and/or treat-

177. ASS’N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 7.

178. AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 11 §§ 2-2.1 cmt.

179. *Gender-Based Misconduct Policy (Policy), Procedures for Responding to Student Gender-Based Misconduct (Procedures)*, COLUM. U. GENDER-BASED MISCONDUCT OFFICE (Sept. 1, 2015), [http://sexualrespect.columbia.edu/files/sexualrespect/content/007-02606%20Gender%20Based%20Misconduct\\_JL\\_F.pdf](http://sexualrespect.columbia.edu/files/sexualrespect/content/007-02606%20Gender%20Based%20Misconduct_JL_F.pdf).

180. *Id.* at 13-14. The dates include when the investigation begins, when it is completed, when the investigative report is completed, when the pre-determination conference is held, when the hearing is held, etc. *Id.*

181. *See, e.g., id.* at 21 (requiring a written objection to the panel’s membership for a conflict of interest within two days after notification of the panel’s membership); *id.* (requiring a response from the complainant and respondent, confirming receipt of the notice that a report with allegations has been filed and the meeting time, within two days of receiving this notice); *id.* at 27 (requiring the complainant’s written statement in response to the investigative report to be filed no less than two days prior to the scheduled hearing).

182. *Id.* at 20.

183. *Id.* at 23-24.

184. *Id.* at 21.

185. *Id.* at 23.

186. *See id.* at 19 (“Declining to schedule a meeting with investigators or refusal to respond to outreach by the Office . . . may preclude or limit participation in later stages of the process . . .”).

ment be excluded from consideration when responsibility is being determined,”<sup>187</sup> but the policy says nothing about the criteria for determining whether that request will be granted.

While a lot of care and attention obviously went into drafting Columbia’s policy and procedures, the written materials will undoubtedly frustrate and overwhelm many survivors. The information in the document is important, but an attorney should be the one absorbing it. The attorney is the one who should learn the procedures and keep track of relevant dates. An attorney should be available to help the survivor with the many tasks that the manual describes. OCR has found that for some complainants the campus disciplinary process is “more upsetting and traumatizing than the initial sexual harassment.”<sup>188</sup> Colleges should be making the survivor’s life easier, not more challenging, and the way to do so is to provide her with legal counsel.

The attorney plays a critical role in the campus system apart from helping the survivor understand, comply with, and manage the process without despair. For example, at some point, a survivor has to make a crucial decision: should she report the assault to the university or not? As she makes this decision, the survivor needs to know how long she has to report,<sup>189</sup> and how to identify and preserve relevant evidence in case she decides to report later.

To make an informed decision, the survivor needs to know what obligations the university has to keep her report confidential,<sup>190</sup> and what the implications of filing a report with the Title IX office are. If the student decides not to report or is unsure about reporting, she must know who on campus is a “responsible employee” with mandatory reporting obligations and who is a “confidential” or “private” resource and what the difference is between them. Because of the often draconian reporting policies on campuses these days (almost all employees are

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187. *Id.* at 23.

188. Letter from Shaheena Simons, Chief, Educ. Opportunities Section, & Damon Martinez, U.S. Attorney, U.S. Dep’t of Justice, to Robert G. Frank, President, Univ. of N.M., Re: Title IX and Title IV Investigation of University of New Mexico 14 (April 22, 2016), <https://www.justice.gov/opa/file/843901/download> (noting length of investigations, lack of communication, misinformation, and delays).

189. At the University of Oregon, there is no statute of limitations for complaints against students. *See, e.g.*, UO Student Conduct Code, *supra* note 126, § 1(IV)(6) (“Allegations of sexual misconduct . . . may be considered at any time regardless when the alleged misconduct occurred.”). Complaints against faculty or staff must be brought within 365 days, although the University will reach back to assess whether the aggregation of activity creates a hostile environment. *See* UO Discrimination Policy 580.015, § R(3), <https://policies.uoregon.edu/discrimination-0>; Oregon Bureau of Labor and Industries, OAR 839-003-0025(5) (noting that if the unlawful practice is of a continuing nature, the complaint is timely if filed within one year of the most recent unlawful act); *cf. Time Limits for Filing a Charge*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <https://www.eeoc.gov/employees/timeliness.cfm> (discussing “ongoing harassment”).

190. Office for Civil Rights, *supra* note 48, at 20 E-1 (explaining that the school “will need to determine whether or not it can honor such a request while still providing a safe and nondiscriminatory environment for all students”); *id.* at 21-22 E-2 (listing factors that a school considers in determining whether it can keep information confidential); 34 C.F.R. § 99.12(a) (2016) (discussing the accused student’s right to see information in the educational record).

deemed responsible reporters),<sup>191</sup> the survivor should have access to a lawyer early in the process. Certainly, any confidential resource with whom the student connects (such as a confidential medical or mental health professional) should be encouraging the student to talk to a lawyer before talking to others.

In deciding whether to report to the university, a survivor needs to know if the university will inform law enforcement of the assault even without the survivor's consent. Some universities do so.<sup>192</sup> Domestic violence survivors especially need to know this information because disclosure to law enforcement can at times pose a direct threat to their lives. While Title IX coordinators are supposed to try to respect a complainant's wishes regarding confidentiality, the coordinator can override the complainant's wishes when ongoing safety concerns exist,<sup>193</sup> even if the safety risk relates only to the student herself. Yet involving the criminal system can be dangerous for a domestic violence victim,<sup>194</sup> and she may not be ready to assume that risk. If the survivor had an attorney, the attorney could alert her to the risks of reporting to the university and work with the university and law enforcement to address the client's safety concerns.

Apart from learning about the institution's position on privacy and confidentiality, the survivor may want to know whether she will face repercussions when she reports. She may have been in violation of the student conduct code herself at the time of her assault. For example, she may wonder whether being a minor in possession of alcohol will get her in trouble. The answer is not always clear. At the University of Oregon, the Conduct Code is ambiguous,<sup>195</sup> and the University of Oregon's Standard Operating Procedures contain exceptions to its general

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191. See *infra* note 393 and accompanying text.

192. See, e.g., VA. CODE ANN. § 23.1-806 (West 2016) (defining "responsible employee" broadly; requiring that person to report to the Title IX coordinator; requiring the Title IX coordinator to share the report, including personally identifiable information, with a review committee that includes a student and a member of law enforcement; and then requiring the committee, or the law enforcement representative if the committee cannot reach consensus, to disclose the information to a law enforcement agency if necessary "to protect the health or safety of the student or other individuals" and to a prosecutor if the act would constitute a felony").

193. Office for Civil Rights, *supra* note 1, at 5; AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 19 § 3.4. (recommending that "in exceptional circumstances" universities can overcome the "presumption in favor of complainant control" and report directly to local law enforcement).

194. Brief for the Domestic Violence Legal Empowerment & Appeals Project (DV LEAP) et al. as Amici Curiae in Support of Respondent at 4, *Lozano v. Montoya*, 134 S. Ct. 1224 (2014) (No. 12-820) ("Extensive research demonstrates that risks of violence against women and children are greatest at and after separation from the abuser."); *id.* at 20 ("This dynamic of control manifests in abusive behavior that often escalates if a victim leaves her abuser or seeks assistance from the legal system."). The ALI Project is quite paternalistic in stating that it strongly recommends reporting in the cases of "egregious or violent behavior . . . except where, in the institution's educational discretion, it concludes that this encouragement might be harmful to the student." AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 19 § 3.4 cmt. The student, with the advice of legal counsel, can make this decision for herself.

195. The UO Student Conduct Code states that "a violation of provisions of the alcohol or drug policy in the Student Conduct Code does not affect a person's ability to file a complaint regarding another person's Sexual Misconduct on the same occasion." UO Student Conduct Code, *supra* note 126, § 1(V)(3)(h)(B).

willingness to grant amnesty.<sup>196</sup> A lawyer could discuss the Code's ambiguity, the exceptions in the Standard Operating Procedures, and the university's standard practice. Such a conversation would allow the survivor to make an informed decision.

In making her decision, the complainant also needs to know that any information disclosed in disciplinary proceedings may be discoverable and used in a civil or criminal proceeding.<sup>197</sup> She needs to know that a lawyer can help protect the survivor's privacy if the accused student or his attorney requests counseling records, school records, and other private records. While the document custodian (for example, the counselor or educational institution) might fight the accused student's subpoena,<sup>198</sup> the survivor can assert any privileges directly.

The survivor needs to understand that she may lack the ability to stop the disciplinary process once it begins, even if she doesn't like how it is unfolding.<sup>199</sup> She needs to know that if she names her friends as witnesses and they fail to participate in the process, they may be in violation of the school's conduct code.<sup>200</sup> She needs information about the advantages of reporting, including how the school will make available interim measures that would not otherwise be

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196. Office of the Dean of Students, *Student Conduct Standard Operating Procedures Regarding Sexual Misconduct, Sexual Harassment, and Unwanted Sexual Contact*, UNIV. OR. § 5 (Oct. 13, 2016), <http://dos.uoregon.edu/sexual-misconduct> ("To encourage reporting, neither a Complainant nor a witness in an investigation of sexual misconduct will be subject to disciplinary sanctions for a violation of university policy at or near the time of the sexual misconduct, unless the Complainant's or witness(es)' conduct placed the health or safety of another person at risk, or was otherwise egregious." (emphasis added)).

197. See, e.g., Order Granting, in Part, Plaintiffs' Motion to Compel Production of Disciplinary Records and Denying Deponent-Intervenor's Motion for Protective Order, *Simpson v. Univ. of Colo.*, 2004 WL 4187649 (D. Colo. May 26, 2004) (permitting disclosure of some disciplinary records after in camera review); see also *Ellis v. Cleveland Mun. Sch. Dist.*, 309 F. Supp. 2d 1019, 1023 (N.D. Ohio 2004) (noting in dicta that FERPA "does not, by its express terms, prevent discovery of relevant school records under the Federal Rules of Civil Procedure," but that there is a "higher burden" to access them than other records). See generally *In re Smith*, 921 N.E.2d 731, 734 (Oh. Ct. Common Pleas 2009) (explaining that FERPA permits the production of student records pursuant to a judicial order or subpoena, and sometimes without notice to the student, if in response to a federal grand jury subpoena or other subpoena for law enforcement purposes); 20 U.S.C. § 1232g(b) (2012); 34 C.F.R. § 99.31 (2016). In addition, campus police records are specifically excluded from the definition of protected education records in FERPA. 20 U.S.C. § 1232g(a)(4)(B)(ii).

198. *Confidentiality of Client/Patient Health Care and Survivors' Services Information: Policy No. III.05.02*, UNIV. OR. (Apr. 29, 2016), <https://policies.uoregon.edu/III.05.02> (indicating that UO, as a non-party, will resist a subpoena for "confidential health care and/or survivors' services information . . . if there is a good faith basis under applicable law," "inform the client/patient of their right to seek independent legal advice, and release privileged information only in response to an order from a court or tribunal, a stipulated protective order that the client/patient has signed, or a written authorization from the client/patient").

199. AM. LAW INST., *supra* note 44, at 5 § 6.7 (recommending that the complainant and respondent should be able to end or suspend the proceedings "on mutual agreement," "except where the school has strong reasons to insist on a formal resolution").

200. Office of the Dean of Students, *supra* note 196, § 8 ("Witnesses named by the parties are expected to participate in interviews with the Decision-maker upon request of the Decision-maker, and are expected to be forthcoming with requested information. Witnesses are also expected to attend the administrative conference when requested by the Decision-maker. If a witness chooses not to participate and therefore denies the Decision-maker and the parties the opportunity to understand the information that they may have relevant to the allegations, the witness may be subject to disciplinary action for a failure to comply.").



available and, at the conclusion of the proceedings, various remedies. She also needs to know that the school might provide her supportive measures even if she doesn't formally report.<sup>201</sup>

Most survivors are likely to be concerned about retaliation, as it can have a devastating effect on them.<sup>202</sup> The lawyer can inform the survivor that retaliation is prohibited and that the institution must take action against it.<sup>203</sup> The lawyer can also identify retaliatory conduct for the survivor, and, with the client's consent, inform the institution about the conduct in order to ensure that it is addressed swiftly and appropriately.<sup>204</sup> Finally, the lawyer can reassure the survivor that throughout the process she will have someone at her side with as much professional stature as the accused student's attorney and the institution's general counsel; she will have her own lawyer who will advocate on her behalf.

OCR recognizes the importance of providing the survivor with a confidential person from whom she can obtain information. OCR once called it an "exemplary procedure" when the university provides "a variety of sources of initial, confidential and informal consultation concerning the incident(s), without committing the individual to the formal act of filing a complaint."<sup>205</sup> An attorney fills this role perfectly.

Once the student decides to report the sexual violence to the institution, a lawyer can help her determine which venue or venues are the most appropriate for reporting. Julie Novkov explained that there are often "too many" units charged with investigating and resolving the dispute.<sup>206</sup> According to Novkov, at some schools, a student assaulted in a dorm could proceed by reporting the assault to any of the following: Residential Life's peer-to-peer student mediation group; the disciplinary body (which might be lodged in Academic Affairs or the Office for Student Success); Diversity/Inclusion; or the university police and/or

201. "Interim measures" are those that are required once a victim gives notice of the alleged sexual violence but before the matter is formally resolved. "Supportive measures" are similar but they are discretionary; they usually are an option when the survivor has disclosed the violence to a confidential source such as a counselor, but has not formally reported the violence to the institution. White House Task Force, *supra* note 124, at 1. The difference tends to be whether the measure would involve action against the perpetrator. Such measures typically can only be taken after a formal report is filed.

202. Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 368 (2015) (discussing the case of Lizzy Seeberg, who committed suicide after Notre Dame football players threatened her with retaliation in response to her accusation that a player raped her, and the case of Trey Malone, who committed suicide in part because of Amherst's "callous reaction" to his reported assault).

203. See Office for Civil Rights, *supra* note 48, at 42-43 K-1; see also *id.* at 18-20 E-1.

204. Office of the Dean of Students, *supra* note 196, § 18 ("Any act of retaliation against any individual participating in any part of this process may subject the party of [sic] participant engaging in retaliation to further disciplinary procedures.").

205. U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 4 (1988); U.S. DEP'T EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT: IT'S NOT ACADEMIC 3 (1995). The 1997 and 2008 versions of this pamphlet do not contain this language.

206. Novkov, *supra* note 25, at 605.

the local police.<sup>207</sup> The “complexity” associated with the different fora increases if the accused student also brings charges against the complainant.<sup>208</sup>

The survivor’s lawyer can also help the survivor draft the formal complaint alleging the conduct code violation. Because the other party’s behavior will be measured against the student conduct code, an attorney can identify for the survivor elements of the offense for which relevant information should be provided to campus authorities. For instance, one type of “sexual misconduct” at the University of Oregon is “nonconsensual personal contact” short of unwanted penetration. It is defined as occurring when a

student subjects another person to contact of a sexual nature when a reasonable person would know that such contact would cause emotional distress: A. Without having first obtained Explicit Consent; or B. When he or she knows or should have known the person was incapable of explicit consent by reason of Mental Disorder, Mental Incapacitation, or Physical Helplessness.<sup>209</sup>

The complainant should explain why the contact caused her emotional distress and why a reasonable person would experience emotional distress too. Depending upon the facts, it might be necessary for the student to suggest that the “reasonable person” is a person with the same characteristics as the complainant (for example, of the same gender or gender identity).<sup>210</sup>

Similarly, lawyering may be necessary to convince the university that it should assume jurisdiction over an off-campus assault, if that is the complainant’s preference.<sup>211</sup> Factors that can influence the University of Oregon’s decision to extend jurisdiction include if the conduct “produced a reasonable fear of physical harm,” or “involved academic work or any records, documents, or identifications of the University.”<sup>212</sup> A lawyer can remind the complainant to mention the fact that the assault occurred while the complainant and accused were working on an academic assignment, for example.

So far, almost everything described are acts that an attorney performs outside of the disciplinary proceedings. As will be described next in Section II.C, the attorney also undertakes many additional tasks that relate directly to the disciplinary hearing or that occur during the disciplinary hearing itself.

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207. *Id.* at 605-06.

208. *Id.* at 606.

209. UO Student Conduct Code, *supra* note 126, § 1(II)(29)(b).

210. *See* Bryant v. Walker, 78 P.3d 148, 151 n.1 (Or. Ct. App. 2003).

211. Office of the Dean of Students, *supra* note 196, § 7.

212. UO Student Conduct Code, *supra* note 126, § IV(2)(b).

### C. *Managing the Disciplinary Proceedings*

Now the focus shifts to the advantage legal counsel offers survivors during disciplinary proceedings. To be clear, not all schools allow legal counsel to participate in or even to be present during the disciplinary hearings,<sup>213</sup> and OCR has never required otherwise.<sup>214</sup> Nor do all schools follow an adjudicatory model as opposed to an investigatory model,<sup>215</sup> and this discussion is not meant to endorse one approach over the other. Similarly, this discussion is not meant to suggest that the process must involve fact-finding, as opposed to a process like restorative justice.<sup>216</sup> Rather, this section explores the function of the complainant's attorney during disciplinary proceedings, while acknowledging that the attorney often, but not always, engages in similar activities regardless of the model employed and typically plays a role within alternative dispute resolution processes too.<sup>217</sup>

Both the accused student and the complainant can have an "advisor" in the disciplinary proceeding.<sup>218</sup> If an institution permits one party to have an attorney,

213. Berger & Berger, *supra* note 44, at 339 ("Fewer than 60% of our sample respondents permit the student to hire an outside lawyer, and of the schools that do give students this option, many require that the lawyer remain silent during the hearing except to advise his client."); Mossman, *supra* note 54, at 598 ("The ability of a student to retain an advisor or attorney varies greatly between universities . . .").

214. Office for Civil Rights, *supra* note 48, at 26 F-1 ("If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.")

215. See Mary P. Koss, Jay K. Wilgus & Kaaren M. Williamsen, *Campus Sexual Misconduct: Restorative Justice Approaches To Enhance Compliance with Title IX Guidance*, 15 TRAUMA, VIOLENCE & ABUSE 242, 252 (2014) ("Under the investigative model, the student conduct professional considers all available information and retains decision-making authority for the factual determination regarding the responsibility of the accused student. In a hearing-based model, the student conduct professional organizes and administers an adversarial process to weigh the information in a manner that often resembles a quasi-judicial trial, hearing, or arbitration. Hybrid models employ components of each by, for example, utilizing an investigator to gather and present the underlying facts to a hearing board that is ultimately responsible for making a factual determination.")

216. See generally *id.*; *infra* note 217.

217. Among other things, restorative justice (RJ) is supposed to be designed to meet the victim's needs. See Koss et al., *supra* note 215, at 254. Consequently, an attorney could be essential at various stages of RJ in a campus setting, see *id.* at 250 (diagramming how RJ might be integrated into the campus processes), including for any, or all, of the following purposes: helping the victim report the sexual violence to the institution to ensure that it is viewed as actionable in the university process; counseling a student about the RJ process and its benefits and limitations so that she can make an informed choice when invited to participate; helping the victim during the repair stage request sanctions and remedies that will validate and provide reparation for the harm; reviewing the confidentiality agreement and explaining its meaning; exploring alternatives to RJ generally and as a resolution process; counseling on who should attend the various stages; helping craft the victim impact statement; developing the redress plan; advising on who should be involved in any sanctioning process; counseling on remedies if the plan is violated; reviewing any memorandum of understanding between local prosecutors, judges, and law enforcement personnel; and, proposing a memorandum of understanding that will be important for the victim's participation.

218. The Department has interpreted section 485(f)(8)(B)(iv)(II) of the Clery Act, as amended by VAWA, to include an attorney. See VAWA Final Rule, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014).

it must allow both sides to have an attorney.<sup>219</sup> Survivors have sued schools when they have been denied this right.<sup>220</sup> According to OCR, a proceeding is not unfair if only one student has an attorney and the other student has a non-attorney advisor, even though the disciplinary procedures must be “equitable,”<sup>221</sup> and there is an emphasis on “balance.” All that is required is that the rules treat both parties and their advisors equally.<sup>222</sup>

As a result of these rules, it is legally permissible for the alleged perpetrator and his defense attorney to be pitted against the survivor and her lay advisor, although such a situation raises serious questions about balance and fairness in fact. A survivor is undoubtedly benefited when she has an attorney to match the accused student’s attorney. As Tom Lininger observed, “there is a marked disparity between a lawyer’s representation and a layperson’s companionship.”<sup>223</sup> Many of the reasons why a complainant needs a lawyer have been articulated before, but in the context of why the accused student should have a lawyer.<sup>224</sup> Berger and Berger, for example, explained why having a lawyer as an advisor, as opposed to a professor (if not a law professor), would benefit an accused student. The same explanation applies to the complainant.

Presentation of the student’s case often begins with fact-finding: Documents may need to be procured and examined, witnesses identified and interviewed, statements or affidavits drafted and signed. The seasoned lawyer has learned to become a good fact-finder. In addition, he under-

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219. The regulations do not preclude the involvement of attorneys, *see* 34 C.F.R. § 668.46(k)(2)(iii)-(iv) (2015). Their involvement was the result of the “advisor of choice” amendment to the Clery Act in the 2013 VAWA Reauthorization, informed by the Department of Education’s response to comments about the proposed regulations. VAWA Final Rule, 79 Fed. Reg. at 62774 (stating that during the proceedings, the accused and the accuser will have the opportunity to be accompanied by the advisors of their choice); *see also* Office for Civil Rights, *supra* note 48, at 26 F-1. *See generally* AM. LAW INST., *supra* note 44, at 25 § 7.7 (“Although schools vary considerably in whether they allow students to bring advisers with them to disciplinary proceedings, both complainants and respondents should be allowed the opportunity to be ‘accompanied . . . by an adviser of their choice.’”).

220. *See* Motion for Temporary Restraining Order Preliminary Injunction and Permanent Injunction, *Murray v. Univ. of North Carolina at Chapel Hill*, No. 14CVS001200 (N.C. Super. Ct. Aug. 20, 2014), 2014 WL 8764256, at \*4.

221. Office for Civil Rights, *supra* note 1, at 8 (“Any procedures used to adjudicate complaints of sexual harassment or sexual violence, including disciplinary procedures, however, must meet the Title IX requirement of affording a complainant a prompt and equitable resolution.”); *id.* at 9; Office for Civil Rights, *supra* note 48, at 12-14 C-5.

222. Office for Civil Rights, *supra* note 48, at 26 F-1 (discussing the restrictions on the advisors’ ability to participate); *id.* at 30 F-5 (discussing the presence of a party for the entirety of the hearing); *id.* at 31 F-6 (discussing the cross-examination of witnesses).

223. Lininger, *supra* note 55, at 1393.

224. *See* Berger & Berger, *supra* note 44, at 341 (“[F]ew students, even if innocent, have the sangfroid not to feel great emotional tension before their accusers and in front of the person or panel who will determine their education future . . . . This is hardly the environment in which we should expect anyone, let alone a young person (sometimes hardly past adolescence) to exercise cool judgment, to think clearly, to question effectively, or to testify helpfully.”); Groholski, *supra* note 54, at 789 (discussing how a student’s emotional response to the charges can interfere with his effective advocacy on his own behalf).

stands the requirements of fair process and is likely to make timely application for access to potential witnesses, for a reasonable interval in which to assemble his client's defense, for a transcript or tape recording of the hearing, and for a written statement of the panel's findings and conclusions. He will compel the school to adhere to its own procedures that benefit his client and challenge those procedures that are prejudicial.

If a full-blown hearing does ensue, a law-trained advisor, provided she is sensitive to the setting (it is not a courtroom, and the panel members are not judges or jurors) brings skills that lay advisors are far less apt to possess. The lawyer knows that written submissions, whether or not required, can often be useful in presenting a client's case before, during, and after the hearing. . . . Good lawyers have learned to draft such advocacy documents effectively.

The right to cross-examine hostile witnesses, one of the pillars of due process, becomes far less sturdy when an untrained person . . . is questioning the witness. If the student himself testifies . . . his testimony should be rehearsed . . . . Also, a lawyer is better able than a lay person to make the initial assessment whether or not the client should speak at all.<sup>225</sup>

While no one has studied whether the accused student will be found responsible more frequently, or receive a more serious penalty, when the complainant has a lawyer as her advisor, those results seem probable. And when only the accused student has a lawyer, that lawyer is likely to dominate and "distort" the process, "particularly when adjudicators are not legally trained."<sup>226</sup>

A survivor may be comfortable with a lay advisor, such as an advocate, professor, or student, even though the accused student has a lawyer. However, she may instead recognize intuitively what the experts quoted in the prior paragraphs revealed: she is probably disadvantaged and therefore less likely to prevail. If she is uncomfortable without an attorney, then it disserves her not to provide her one. Otherwise the disciplinary proceeding will likely be less successful *and* more stressful than it should be for her. William E. Thro, the General Counsel at the University of Kentucky, stated,

Regardless of the standard of proof used, a disciplinary proceeding is going to be an extraordinary stressful and traumatic event for the victim/survivor. At a minimum, the victim/survivor will have to recount the events of a sexual encounter that, at least in the victim's/survivor's

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225. Berger & Berger, *supra* note 44, at 341-42.

226. AM. LAW INST., *supra* note 44, at 25 § 7.7 cmt.

view, was nonconsensual. . . . To the extent a public institution can minimize the stress of the ordeal, it should do so.<sup>227</sup>

Campuses differ dramatically with respect to what the lawyer is allowed to do during the disciplinary proceedings. Institutions can limit the attorneys' participation.<sup>228</sup> The only constraint on the type of institutional rules is that a school must give to "the complainant any rights that it gives to the alleged perpetrator."<sup>229</sup> Using the University of Oregon as an example, the following description demonstrates that the complainant's attorney undertakes valuable tasks even when the attorney is not a full participant.<sup>230</sup>

First, the attorney ensures that the administrative conference, and the related steps such as the fact-gathering investigation, occur within sixty days, that delays are for good cause, and that the school follows OCR Guidance.<sup>231</sup>

Second, the attorney identifies relevant evidence, such as texts, photos, and medical information, and ensures it all gets to the decision-maker during the fact-gathering investigation. The lawyer also helps the client identify relevant witnesses within the tight timeframe.<sup>232</sup> The lawyer informs the client that the decision-maker can draw adverse inferences if the complainant selectively answers the investigator's questions,<sup>233</sup> and advises the client how best to answer if the investigator asks about topics the student wants to keep private. The attorney listens as her client practices telling her story, accompanies her client to the initial interview, and coordinates the presence of the District Attorney or police in order to reduce the number of times that the survivor has to explain what occurred. The attorney will also make requests for any interim measures.

Third, the attorney reduces the distress that the survivor may experience from the administrative conference itself. The attorney can invoke the survivor's right not to attend the hearing,<sup>234</sup> and then serve as the client's proxy to observe

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227. Thro, *supra* note 54, at 210.

228. 34 C.F.R. § 668.46(k)(2) (2015).

229. Office for Civil Rights, *supra* note 48, at 24-26 F-1. The ALI Project concurs and repeatedly recommends that hearings, in fact, be "evenhanded."; *see, e.g.*, AM. LAW INST., *supra* note 44, at 15 § 7.4.

230. *See also* AM. LAW INST., *supra* note 44, at 26 § 7.7 cmt. ("Having lawyers present but limiting their role does not mean that their presence has no function. They may provide guidance to their client student; they may draft questions for witnesses for their client to ask or to provide to panel members; they may help muster arguments using lawyerly skills that students can present, or that can be presented in written form."). At the University of Oregon, an accused student can have an "adviser of their choice present at the [administrative] conference," UO Student Conduct Code, *supra* note 126, § 2(5)(i). The complainant has the same right. *Id.* § 2(6)(g). An attorney is explicitly listed as someone who can assist the student. *Id.* at § 3(II)(2)(c); Office of the Dean of Students, *supra* note 196, § 15.

231. Office of the Dean of Students, *supra* note 196, § 10(2).

232. *Id.* § 8 (providing that any witness names or information that a student wants considered must be provided within ten days of receiving the Notice of Allegations).

233. *Id.*

234. Office for Civil Rights, *supra* note 48, at 31 F-7 (indicating that the hearing should not cause the complainant distress); *id.* at 30 F-5 (indicating that a school cannot "require a complainant to be present at the hearing as a prerequisite to proceed with the hearing").

and report to the client on what transpired. The attorney can seek special protections for her client if her client wants to attend the conference but is scared to do so. For example, the University of Oregon Student Conduct Code explicitly entitles a complainant, upon request, to be in a separate room from the accused.<sup>235</sup> If there is a need for a bifurcated hearing or special accommodations due to disability, the attorney can make a request.<sup>236</sup> If the complainant believes the decision-maker is biased, the attorney can file a petition for a new decision-maker.<sup>237</sup>

Fourth, the complainant's attorney prepares her client for what will occur at the conference and takes steps to ensure her client's participation is effective. For example, she tracks down her client's witnesses and asks them to attend. While the Student Conduct Code gives the complainant an "opportunity to offer a relevant response to any assertions made; [and] to propose relevant witnesses and submit suggested questions to the Director,"<sup>238</sup> the Standard Operating Procedures make parties responsible for contacting their own witnesses and ensuring they appear, although a party can request the decisionmaker's help to secure the attendance of opposing or difficult witnesses.<sup>239</sup>

In preparation for the conference, the attorney also works with the student to plan her response to the factual record.<sup>240</sup> This requires crafting responses to the accused student's assertions. The attorney prepares her client for the decisionmaker's or accused student's potential questions, helping the survivor organize her answers in a coherent way. Based upon what they read in the record, the attorney and client will formulate additional questions for the witnesses or the accused student and submit them in a timely fashion.<sup>241</sup> If the survivor needs to submit new evidence, the lawyer can craft the petition that explains why there is good cause for the evidence to be admitted.<sup>242</sup> The attorney and client also prepare the student's closing statement, which the survivor is allowed to give and which will generally suggest how the decision-maker should resolve conflicting evidence.

Fifth, at the conference, the attorney is allowed to advocate on her client's behalf by presenting a five-minute summary of the student's information.<sup>243</sup> Even though this is the only time the attorney can speak, the attorney plays a valuable role at other times by listening, taking notes, and capturing any errors that may give rise to an appeal. For example, the attorney watches to see if the director screened out questions that were "appropriate and relevant to the

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235. UO Student Conduct Code, *supra* note 126, § 2(6)(h); *see* Office of the Dean of Students, *supra* note 196, § 10(5).

236. Office of the Dean of Students, *supra* note 196, §§ 10(3), 10(6).

237. *Id.* § 16.

238. UO Student Conduct Code, *supra* note 126, §2(6)(b)-(c); *see also* Office of the Dean of Students, *supra* note 196, § 10(8).

239. Office of the Dean of Students, *supra* note 196, § 10(4).

240. *Id.* § 9.

241. *Id.* § 10(9).

242. *Id.*

243. *Id.*

case.”<sup>244</sup> The attorney also passes notes to her client, reminding her to submit additional questions, make certain arguments, or emphasize certain evidence.

Sixth, the complainant’s lawyer responds to arguments and objections made by the accused student’s lawyer and advances her own. This task can arise prior to, or at, the administrative conference. For example, the University of Oregon has its own evidentiary rules regarding admissibility that address relevancy, competency, prior conduct, sexual history, and more.<sup>245</sup> Parties can file a petition for exceptions to these rules.<sup>246</sup> Similarly, the complainant’s lawyer would oppose efforts by the accused student’s attorney to submit the results of a polygraph,<sup>247</sup> arguing that such evidence is unreliable.<sup>248</sup> Sometimes the accused student’s attorney may attack the procedures themselves, such as by arguing that the “preponderance of the evidence” standard that OCR mandates<sup>249</sup> violates due process.<sup>250</sup> The complainant’s attorney would reply.<sup>251</sup>

Seventh, the complainant’s lawyer ensures her client receives notice of the investigation’s findings and the disciplinary sanctions.<sup>252</sup> If the accused was found not to have violated the conduct code, or if the sanction was insufficient, the lawyer helps the complainant appeal if an appeal is allowed.<sup>253</sup> A party typically has to appeal within a narrow timeframe<sup>254</sup> and must articulate the basis for the appeal.<sup>255</sup> The grounds for appeal often require legal argument because they

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244. Office for Civil Rights, *supra* note 48, at 31 F-6.

245. Office of the Dean of Students, *supra* note 196, § 11.

246. *Id.* § 11(h).

247. *Id.* § 11(f).

248. See *United States v. Scheffer*, 523 U.S. 303, 309 (1998) (“[T]here is simply no consensus that polygraph evidence is reliable.”); *The Truth About Lie Detectors (aka Polygraph Tests)*, AM. PSYCHOL. ASS’N (Aug. 5, 2004), <http://www.apa.org/research/action/polygraph.aspx>.

249. Office for Civil Rights, *supra* note 48, at 24–26 F-1.

250. The accused student’s attorney might assert that OCR’s guidance on this point is invalid because OCR “did not engage in the public notice and comment process that is part of federal administrative rulemaking” when it adopted this “substantial change in procedures.” *The History, Uses, and Abuses of Title IX*, AM. ASS’N U. PROFESSORS 10 (2016), <https://www.aaup.org/file/TitleIXreport.pdf>; see also Open Letter from Members of the Penn Law School Faculty at 2 (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> (expressing concern about the use of guidance to impose the preponderance-of-the-evidence standard). Certainly the shift has been critiqued. See, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (finding that “[t]he lower standard may thus be seen, in context, as part of an effort to tilt the playing field against accused students, which is particularly troublesome in light of the elimination of other basic rights of the accused”).

251. The complainant’s attorney could reply by demonstrating that OCR’s guidance was not new and did not need to go through the formal rulemaking process. Katharine K. Baker, Deborah L. Brake & Nancy Chi Cantalupo, *Title IX and the Preponderance of the Evidence: A White Paper*, FEMINIST L. PROFESSORS 9-10 (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf>.

252. 20 U.S.C. § 1092(f)(8)(B)(iv)(III)(aa) (2012); 20 U.S.C. § 1232g(b)(6)(A) (2013); Office of the Dean of Students, *supra* note 196, § 13(a).

253. Whatever right of appeal the school affords, complainants and accused students must have an equal right to appeal. Office for Civil Rights, *supra* note 1, at 12.

254. See, e.g., UO Student Conduct Code, *supra* note 126, § 3., IV Appeals (1) (allowing fourteen days for appeal); Office of the Dean of Students, *supra* note 196, § 14 (same).

255. UO Student Conduct Code, *supra* note 126, § 3., IV Appeals (1), (2).



include the following typical provisions:<sup>256</sup> the complainant did not have a “reasonable opportunity to present information”; the hearing was not administered “in conformity with the procedures required in this Code”; the sanctions were not “commensurate with violations”; or there was “new information sufficient to alter a decision” and the information was “not known to the person appealing at the time of the hearing.”<sup>257</sup>

Eighth, if the accused is found to have violated the conduct code, the complainant’s lawyer gives the survivor legal advice about whether she can disclose the outcome and the sanction.<sup>258</sup> The answer will turn on the type of sexual violence experienced by the survivor and the confusing interplay of FERPA and the Clery Act.<sup>259</sup> The attorney also ensures that the institution provides the survivor with resources to remedy the effects of the victimization. In addition, the attorney helps the complainant assess whether she has a tort claim, a civil rights claim, or a crime victim’s compensation claim. A lawyer might pursue some of these remedies directly for the survivor or help the survivor find an attorney who can pursue these remedies for her.

Overall, the complainant’s lawyer is an essential resource for the complainant during the disciplinary process and after the process concludes. The attorney is valuable whether or not the accused student has a lawyer, but becomes particularly important when the accused student is represented.

256. ASS’N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 14 (identifying “typical criteria” for an appeal).

257. UO Student Conduct Code, *supra* note 126, § 3., IV Appeals (1), (2).

258. Office for Civil Rights, *supra* note 1, at 13-14 (explaining the interplay of Title IX, FERPA, and the Clery Act).

259. The Clery Act now states that institutions must notify both parties of “the result of any institutional disciplinary proceeding that arises from an allegation of dating violence, domestic violence, sexual assault, or stalking.” 34 C.F.R. §668.46(k)(2)(v)(A) (2016). The Act specifically says that doing so “does not constitute a violation of FERPA.” *Id.* at 668.46(l). Yet the definitions in the Clery Act of sexual assault and dating violence are quite specific and do not necessarily cover all forms of sexual violence. For example, sexual assault is only “rape, fondling, incest, or statutory rape.” *Id.* at 668.46(a). Dating violence requires “[v]iolence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.” *Id.* Consequently, the outcome of a disciplinary hearing of someone who has never been in a dating relationship with the victim and engages in behavior that is not sexual assault may fall outside of the categories for which the Clery Act permits disclosure. Whether the behavior falls within FERPA’s definition of a “crime of violence” or a “non-forcible sex offense,” which would allow the postsecondary institution to disclose the final results of the disciplinary proceedings, requires analysis. 20 U.S.C. §1232g(b)(6) (2012). The offenses that constitute a crime of violence or a non-forcible sex offense include arson, assault offenses, burglary, criminal homicide (manslaughter by negligence), criminal homicide (murder and nonnegligent manslaughter), destruction/damage/vandalism of property, kidnapping/abduction, robbery, forcible sex offenses, statutory rape, and incest. 34 C.F.R. § 99.39 (2016). While a survivor would not be liable for repeating anything that a school is required to disclose to her, see 34 C.F.R. § 99.33(c), she could be liable for repeating something that the institution was not required to release to her, and in fact was prohibited from releasing to her.

*D. Protecting Against Defense Attorney Tactics*

Another important function of the survivor's attorney is to shield the survivor from the defense attorney. Interacting with a defense attorney can be extremely upsetting for a complainant.<sup>260</sup> When the defense attorney is dealing with an unrepresented party, the defense attorney is supposed to let the opposing party know that the attorney represents the other side,<sup>261</sup> but that will not eliminate the complainant's distress from the contact itself and from any questions asked by the defendant's attorney. This distress can increase exponentially if the defense attorney's tone and questions are meant to agitate as much as to obtain information. At the University of Oregon, some accused students have had three attorneys representing them simultaneously. The sheer number of people working for the accused student can demoralize the survivor, especially if she has no attorney working for her.

Some defense attorneys engage in tactics that can inflict harm, and the complainant's attorney can sometimes curb this behavior. What motivates defense attorneys to act in these ways is uncertain. Perhaps it is frustration over the disciplinary system's lack of discovery and the absence of a *Brady*-type obligation to hand over exculpatory evidence, or perhaps it is the inability to subpoena witnesses, or perhaps it is their desire to have the complainant recant. Regardless, defense lawyers have engaged in their own "fact finding" that sometimes crosses the line of propriety. This has included hiring private investigators who, as part of their investigation, revealed the sexual assault allegations to others who were not privy to that information, including the complainant's relatives. Defense attorneys have also posted the complainant's name and picture on Facebook, asking people to contact them with information about her past. Defense attorneys have filed requests under the Oregon public records law with the university to obtain information about the complainant that was not contained in an educational record.

The complainant's attorney may be able to stop some of these practices. If the behavior can be characterized as retaliatory, the tactics can be brought to the attention of the university.<sup>262</sup> A school must protect the complainant when it "knows or reasonably should know of possible retaliation by other students or

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260. See MADIGAN & GAMBLE, *supra* note 136, at 101-02.

261. MODEL RULES OF PROF'L CONDUCT r. 4.3 (AM. BAR ASS'N 1983).

262. See Office of the Dean of Students, *supra* note 196, § 15 ("If the Decision-maker determines that a student's advisor has engaged in unreasonable, disruptive, harassing or retaliatory behavior, the Decision-maker may require the student to proceed without an advisor or require the student to identify a new advisor."); *id.* § 18 ("Any act of retaliation against any individual participating in any part of this process may subject the party of [sic] participant engaging in retaliation to further disciplinary procedures. Examples of retaliation include, but are not limited to, contacting a witness or the other party in order to dissuade that person from participating in this process . . .").

third parties, including threats, intimidation, coercion, or discrimination (including harassment).”<sup>263</sup> If the practices of the attorney or the attorney’s investigator approach unprofessional conduct,<sup>264</sup> the survivor’s attorney can advise the defense attorney of that fact. If lines are crossed, bar complaints can be filed. Where the attorney or investigator for the accused student commits a tort such as invasion of privacy, a tort suit may be appropriate.<sup>265</sup>

When the defense attorney’s practices cannot be stopped, an attorney can discuss the tactics with the client and explain why the behavior is permissible. Victims should be advised about these possibilities at the outset of the process, remote though they may be in most cases. While a survivor would undoubtedly prefer that the practices stop instead of merely being told why they cannot be stopped, at least the survivor’s attorney can provide relevant information and be a source of support.

### *E. Serving as OCR’s Tentacles*

A side benefit of providing survivors with legal services is that the attorneys who represent survivors often have an interest in shaping the disciplinary process so that it is fair and effective for their clients. With respect to a particular client’s case, the survivor’s lawyer can act like a private attorney general. If the institution isn’t complying with Title IX in its handling of her client’s case, the lawyer can help the institution become Title IX-compliant by articulating the problem. The Title IX coordinator—a position required by Title IX regulations—oversees the university’s compliance with Title IX.<sup>266</sup> Yet Title IX coordinators are not infallible, and universities are not always in compliance. Almost all of the institutions currently under investigation by OCR have Title IX coordinators. If a survivor’s attorney has a good working relationship with the Title IX coordinator, and the Title IX coordinator is receptive to concerns expressed by the survivor’s attorney, then problems can be solved. If the institution ultimately does not comply with its Title IX obligations, then the survivor’s attorney can inform the client of the institution’s noncompliance. If the survivor wants to file a lawsuit

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263. Office for Civil Rights, *supra* note 48, at 18-20 E-1. *See, e.g.,* Doe v. Univ. of Tenn., 186 F. Supp. 3d 788, 800, 809 (M.D. Tenn. 2016); Doe *ex rel.* A.N. v. E. Haven Bd. of Educ., 430 F. Supp. 2d 54 (D. Conn. 2006).

264. *See* MODEL RULES OF PROF’L CONDUCT r. 5.3(b) (AM. BAR ASS’N 2002) (explaining that “a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person’s conduct is compatible with the professional obligations of the lawyer”); *In re* Taylor, 23 Or. Disciplinary Bd. Rptr. 151 (2009) (finding a violation of disciplinary rules when an attorney’s investigator in a rape case issued a subpoena and obtained victim’s educational records in violation of the statute and the accused’s lawyer used them); *see also* MODEL RULES OF PROF’L CONDUCT r. 4.4 (prohibiting methods of obtaining evidence that violate the rights of a third party); *id.* r. 8.4(d) (defining professional misconduct as conduct that is prejudicial to the administration of justice).

265. *Cf.* Clayton v. Richards, 47 S.W.3d 149, 154 (Tex. App. 2001) (“Even if the detective may have furnished only technical services in connection with acts constituting invasion of privacy, the private investigator may still be liable in tort if an actual invasion of privacy has been committed.”).

266. 34 C.F.R. 106.8 (2016).

or an administrative complaint against the institution and this action is beyond the scope of the attorney's representation, the attorney should inform the client how to file an OCR complaint herself and offer the names of attorneys who can institute a lawsuit.

Independent of any particular case on which the attorney is working, the attorney can help formulate institutional policy that is responsive to survivors' needs. This does not require the lawyer to sue the institution for a violation of Title IX, but rather to advocate within the institution for policies and practices that make a lawsuit unnecessary. The attorney can do this on a solicited or unsolicited basis. This participation can benefit an institution by heading off future litigation for violations of Title IX. Because the attorney is on the ground doing the work—immersed in the law as well as the institutional policies, practices, and procedures—the attorney has the ability to spot problems and suggest solutions. For example, the attorney might provide feedback to improve the student conduct code procedures.

Having a lawyer available to serve this function is important because there are constant pressures to deviate from OCR recommendations. For example, OCR has advised that “questioning about the complainant's sexual history with anyone other than the alleged perpetrator” should not be allowed.<sup>267</sup> Yet the National Center for Higher Education Risk Management and others have suggested that schools could enact different rules.<sup>268</sup> A school might be tempted to emulate the exceptions to the rape shield law that exist in the Federal Rules of Evidence or state law.<sup>269</sup> The lawyer for survivors can educate the institution about why such exceptions are not required by law, are contrary to the spirit of Title IX, and/or are bad policy.

Overall, the attorney for the survivor serves a very important role for both her client and the institution. The attorney helps her client navigate three systems without despair and use the laws that were adopted for her benefit. The lawyer makes it less likely that the survivor will become overwhelmed by the complexity, prejudiced by missteps, traumatized by defense attorneys, or denied remedies

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267. Office for Civil Rights, *supra* note 48, at 31 F-7.

268. See W. Scott Lewis et al., *Deliberately Indifferent: Crafting Equitable and Effective Remedial Process To Address Campus Sexual Violence*, NAT'L CTR. FOR HIGHER EDUC. RISK MGMT. 11 (2011), [https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENT\\_FINAL.pdf](https://www.ncherm.org/documents/2011NCHERMWHITEPAPERDELIBERATELYINDIFFERENT_FINAL.pdf) (suggesting that schools may want to adopt an evidentiary rule that does not bar sexual history evidence, but that instead says “normally this kind of evidence is not permitted, unless it meets a high relevance threshold (that it would be ‘manifestly unfair’ not to consider the information)”). If there is a question about the applicable law, the lawyer can make the necessary arguments. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 63 (2013) (implying that it might violate an accused student's constitutional rights not to have certain exceptions found in federal law).

269. See FED. R. EVID. 412; see also Lininger, *supra* note 55, at 1390 (explaining that the rules tend to recognize “the following permissible purposes for introducing the accuser's prior sexual conduct: (1) to show prior consensual sex between the accuser and the defendant; (2) to show that someone other than the defendant was the source of the bodily fluid and cause of the injury at issue in the prosecution; and (3) to introduce any evidence that the defendant has a constitutional right to introduce”).

or rights in the civil, criminal, or campus systems. The attorney also helps the institution achieve Title IX compliance. Given these tremendous benefits, it is inexcusable that attorneys have been excised from the institutional response to sexual violence.

### III. POSSIBLE CONCERNS ABOUT THIS PROPOSAL

Critics will no doubt raise objections to this proposal. Five of the most likely objections are addressed here: juridification of disciplinary proceedings; cost; conflicts of interest; legal risks to the institution; and implications for the accused. These policy concerns are addressed in turn, but none of them is sufficient to reject this proposal. As will be explained, providing counsel for survivors will not juridify the proceedings because the presence of lawyers says nothing about the procedural rules. However, if the institution does reform its rules, then involving survivors' legal counsel should enhance the rulemaking process tremendously. Nor is the cost of providing an attorney to survivors a reason to shy away from this proposal. The cost is not prohibitive, and the institution should bear it regardless. A legitimate concern is how to avoid conflicts of interest for the attorney, but fortunately various options exist. Nor does providing attorneys to survivors pose a large or unwarranted litigation risk for the institution; rather, survivors' attorneys can reduce the institution's liability exposure. Finally, this proposal may require a school to provide legal counsel for the accused student in some instances, but this is an advantage, not a disadvantage, of the proposal. In such instances, the school's process will be seen as more legitimate and caring overall.

#### *A. Juridification of the Proceedings*

Will providing a lawyer to the complainant cause the student conduct process to become unduly legalistic? Numerous courts have cautioned that “[a] university is not a court of law, and it is neither practical nor desirable it be one.”<sup>270</sup> Judge Posner, in rejecting a due process challenge to proceedings in which a student's attorney could not participate, said he was “reluctant to encourage further bureaucratization by judicializing university disciplinary proceedings.”<sup>271</sup> The increased cost of a more formalized system is often cited as a concern, as

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270. *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005); see also *Osteen v. Henley*, 13 F.3d 221, 225-26 (7th Cir. 1993) (“To recognize such a right [of a lawyer who would function as a trial lawyer] would force student disciplinary proceedings into the mold of adversary litigation. The university would have to hire its own lawyer to prosecute these cases and no doubt lawyers would also be dragged in—from the law faculty or elsewhere—to serve as judges. The cost and complexity of such proceedings would be increased, to the detriment of discipline as well of the university's fisc.”).

271. *Osteen*, 13 F.3d at 225.

well as the likelihood that a more trial-like process would undermine the disciplinary proceeding's "effectiveness as part of the teaching process."<sup>272</sup> Perhaps the most problematic repercussion, however, is that a courtroom-like process might discourage survivors from reporting.<sup>273</sup>

Many of these concerns are contested,<sup>274</sup> but fortunately this Article need not resolve where the line should be drawn. Nor need this Article weigh in on whether non-adversarial processes are better than adversarial processes, at least some of the time.<sup>275</sup> The provision of free attorneys and the juridification of disciplinary hearings are two separate issues. This Article's point is simple: a complainant should have an attorney participate in the proceedings if and to the extent that the school permits attorneys to participate. This position is not altered or affected by the fact that there is "an almost bewildering diversity in the details" regarding the processes campuses use to resolve these cases.<sup>276</sup> Whatever those processes are now or will become, complainants should have an attorney if the school permits attorneys to participate. Even if a school restricts attorneys' participation completely or significantly, attorneys can still play a valuable role for the survivor in the civil and criminal processes and in the campus process before and after the disciplinary hearing.

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272. *Gomes*, 365 F. Supp. 2d at 16 (citing *Goss v. Lopez*, 419 U.S. 565, 583 (1975)); Berger & Berger, *supra* note 44, at 340.

273. *Cf.* Berger & Berger, *supra* note 44, at 340 (discussing the effect of a more adversarial process on faculty members or fellow students who might report academic dishonesty); Cantalupo, *supra* note 135, at 284 (arguing that efforts to make Title IX proceedings more like criminal proceedings would undermine the goals of Title IX, which is to give equal educational opportunity to victims and to help establish equality); Anderson, *supra* note 154, at 1998 (arguing "procedural exceptionalism" for campus sexual assault would "harm the learning environment, deprive victims of equal educational opportunities, and violate students' civil rights under Title IX").

274. Berger & Berger, *supra* note 44, at 344 (noting that allowing lawyers to play an active role at the hearing did not appear to undermine "any school's education mission," and they could not imagine that it would do so). Sometimes commentators question the value of the lawyer's participation in the hearing itself. *Cf.* William E. Thro, *No Class of Constitutional Values: Respecting Freedom and Equality in Public University Sexual Assault Cases*, 28 REGENT U. L. REV. 197, 217 (2016) ("In most instances, being able to seek legal counsel prior to the hearing and having the lawyer present at the hearing will suffice. Legal cases rarely turn on a devastating cross-examination at trial or a brilliant answer in appellate oral argument; legal cases generally turn on comprehensive preparation for trial and lucid persuasive briefing on appeal. A lawyer can thoroughly prepare his client for a student disciplinary hearing and can script opening and closing statements as well as direct examination. Moreover, cross-examination often can be anticipated and counsel can provide on-the-spot advice."). For example, the ALI has questioned the value of cross-examination by lawyers in disciplinary proceedings. *See* AM. LAW INST., *supra* note 44, at 17 § 7.5 cmt. (noting cross-examination by lawyers may "be more combative and adversarial than truth-seeking or truth-revealing in character"). However, sixteen University of Pennsylvania law professors thought it had much value. *See* Open Letter from Members of the Penn Law School Faculty, *supra* note 250, at 4 ("[N]o one should think that questioning by panel members is an adequate substitute for the far more informative and effective cross-examination by a student's representative."). Often each side raises some valid points. *See* AM. LAW INST., *supra* note 44, at 25 § 7.7 cmt. (noting there are both "advantages and disadvantages of having lawyers involved").

275. Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189, 274, 276-77 (1991); *see also* Novkov, *supra* note 25, at 616 (advocating a restorative justice model as one possibility).

276. Novkov, *supra* note 25, at 602.

As mentioned in the preceding section, an attorney for the survivor can help an institution think through its procedures for student conduct code proceedings, including its rules about attorney participation. Certain procedures can harm victims of sexual violence. That is why, for example, OCR “strongly discourages” schools from letting the students personally question each other at the hearing. That practice “may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”<sup>277</sup> Lawyers too can be harsh when they interrogate survivors.<sup>278</sup> In contrast, prohibiting statements by lawyers during the proceeding may negatively impact survivors. Women (who disproportionately comprise the population of survivors), more than men, may lack a “legal voice.”<sup>279</sup> Similarly, barring attorneys altogether might disproportionately disadvantage survivors and undermine society’s efforts to end gender-based discrimination. After all, disciplinary hearings are a “private place,” not subject to the checks and balances that come with public proceedings,<sup>280</sup> and women’s victimization in private places, including the rapist’s bedroom, is longstanding.<sup>281</sup> Survivors’ attorneys can help colleges and universities consider whether various neutral rules have disproportionately negative effects on survivors.

But before definitive conclusions are drawn about the involvement or role of attorneys in disciplinary proceedings, much more information is needed, especially about outcomes. Survivors probably do better when they are represented by attorneys, but we really do not know that for sure, nor do we know what sort of attorney participation makes a difference. For the survivor, it is not inconsequential if her attorney’s participation makes it more likely that her perpetrator will be held responsible in the disciplinary proceeding. Rather, a finding of responsibility can be an important part of the remediation. As MacKinnon has said,

Law names authoritatively . . . Remember the crumpled blankness on the faces of raped women when their violators are exonerated, the look of hope vanquishing disbelief when they are convicted. This—not closure, not incarceration, not money—is what law can mean. It can give people back the humanity that the violation took away.<sup>282</sup>

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277. Office for Civil Rights, *supra* note 1, at 12.

278. Lininger, *supra* note 55, at 1362 (noting the “heavy-handed tactics used by lawyers”).

279. *Cf.* MACKINNON, *supra* note 94, at 107.

280. Zoe Ridolfi-Starr, *Transformation Requires Transparency: Critical Policy Reforms To Advance Campus Sexual Violence Response*, 125 YALE L.J. 2156, 2159 (2016) (arguing that the “opacity creates a culture of impunity for campus officials entrusted with ensuring the safety of students”); *see generally id.*

281. *Cf.* MACKINNON, *supra* note 94, at 106-07.

282. *Id.* at 108.

*B. Cost to the Institution*

Lawyers cost money. The Association for Student Conduct Administrators, an organization with some hostility toward attorneys' involvement in the disciplinary process,<sup>283</sup> said what many readers may be thinking: "One can only imagine the costs associated with a scenario involving so many attorneys being paid to debate whether or not a student violated the rules set forth by a college."<sup>284</sup> Costs, of course, are a concern, and are probably a large concern for smaller colleges or institutions far from legal resources.<sup>285</sup>

However, trite as it might sound, there is also a price to pay for not having counsel for students. One hidden cost is that the school will see more survivors leaving school.<sup>286</sup> Moreover, the school will lose the alumni loyalty and student and parent satisfaction that come from providing counsel for survivors. Stories of good, supportive programs get around and can make the school more attractive to applicants. In addition, to the extent that legal counsel for survivors increases survivors' reporting, schools will deter more sexual assault and catch more perpetrators who might otherwise reoffend. When schools ignore the importance of attorneys for survivors, they contribute to the enormous social costs of the victimization<sup>287</sup> and increase demand on their own campuses for services to address survivors' needs.<sup>288</sup>

To the extent that OCR starts holding institutions responsible for their failure to provide necessary legal services to survivors, as it should, financial repercussions might follow administrative enforcement. The cost of an attorney is already

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283. Tamara King & Benjamin White, *An Attorney's Role in the Conduct Process*, ASS'N FOR STUDENT CONDUCT ADMIN. 4, <http://www.theasca.org/files/Best%20Practices/Attorney%20role%20in%20conduct%20process%20%202.pdf> ("When attorneys are introduced into the equation, the focus shifts from taking responsibility for one's actions to 'getting the student off'. [sic] The attorney is not to blame for this mindset as that is how they have been trained.").

284. D. Matthew Gregory & Laura Bennett, *Courts or Campuses? Different Questions and Different Answers*, ASS'N FOR STUDENT CONDUCT ADMIN. L. & POL'Y REP. 6 (May 1, 2014), <http://www.theasca.org/Files/Publications/LPR487May12014.pdf>; see also *Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (noting the cost to the university of hiring its own lawyer to counteract the student's lawyer as a reason to say that students are not entitled to lawyers).

285. See also AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 9 § 1.3 cmt. (noting some campuses are "in rural areas remote from legal resources").

286. See *supra* text accompanying note 6; see also Carol E. Jordan, Jessica L. Combs & Gregory T. Smith, *An Exploration of Sexual Victimization and Academic Performance Among College Women*, 15 TRAUMA, VIOLENCE, & ABUSE 191, 191 (2014) (finding that sexual assault negatively impacts students' grades).

287. See Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (June 24, 2016), <http://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html> (detailing one family's approximately \$245,000 in out-of-pocket costs and lost wages to date from daughter's sexual assault); see also WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *supra* note 119 ("Each [of the studies] . . . found the costs to be significant: ranging from \$87,000 to \$240,776 per rape.").

288. In the short term, providing legal counsel for survivors may cause increased demand for on-campus services, such as mental health counseling. This outcome would result in a real cost if present personnel could not absorb the increased demand. Yet a policy that gave survivors counsel and thereby increased reporting should eventually cause demand for all services to decline as assaults are deterred.



an obligation of the institution in some cases,<sup>289</sup> and survivors have a claim against the institution if these costs are not paid.<sup>290</sup> Survivors who find private counsel might start asking for reimbursement after this Article is published. Lawsuits are also possible for “deliberate indifference,”<sup>291</sup> and the settlements can be large.<sup>292</sup> If the institution knows that a survivor needs an attorney in order to navigate the institution’s process for eliminating the harassment and remedying its effects and the institution fails to provide her one, then the institution’s response is arguably “clearly unreasonable”<sup>293</sup> and should be considered deliberately indifferent.<sup>294</sup> The institution should be held liable for the harm that could have been avoided had it responded appropriately to the survivor’s victimization.

How can schools pay for legal counsel for survivors? Are there ways to contain the costs? Depending upon the size of the school, it may make sense to employ an attorney instead of paying lawyers in the community to do this work. To put two lawyers on staff, one for the survivors and one for the accused students, would not break the bank of any of those schools who compete in Division I sports.<sup>295</sup> Schools that spend millions of dollars on their sports programs, with

289. See *infra* notes 375, 380-382, 383-386, 388-389, 397 and accompanying text (describing the legal obligation to provide services for complainants in various contexts).

290. See Bolger, *supra* note 41, at 2112-13 (noting that OCR has required schools to reimburse “a variety of expenses, including . . . counseling treatment” when the school failed to remedy the hostile environment promptly and treatment was necessary to “ensure equal access to education programs”).

291. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998).

292. There have been many well-publicized settlements lately. See, e.g., Settlement Agreement and Release, Doe v. Univ. of Or., No. 6:15-cv-0042 (D. Or. Aug. 3, 2015) (agreeing to pay the plaintiff \$800,000 plus a full waiver of tuition, housing, and student fees for four years of further education at the University), [http://media.oregonlive.com/education\\_impact/other/Doe%20v%20UO%20Settlement%20Agreement%20%28fully-executed%29%20080315\\_Redacted%5B1%5D.pdf](http://media.oregonlive.com/education_impact/other/Doe%20v%20UO%20Settlement%20Agreement%20%28fully-executed%29%20080315_Redacted%5B1%5D.pdf); Settlement Agreement and Release, Doe v. Univ. of Tenn., No. 3:16-cv-00199 (M.D. Tenn. July 5, 2016) (paying \$2,480,000 to eight plaintiffs to settle all claims), <https://assets.documentcloud.org/documents/2942750/Settlement-Agreement-University-Of-Tennessee.txt>; Settlement Agreement and Mutual Release, Kinsman v. Fla. State Univ. Bd. of Trs., No. 4:25-cv-00235-MW-CAS (N.D. Fla. Jan. 25, 2016), <http://www.gannett-cdn.com/experiments/usatoday/Sports/1-25-2016-FSU-Signed-Settlement-Agreement.pdf> (agreeing to pay \$950,000 to settle all claims).

293. See, e.g., Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 648 (1999).

294. See Hernandez v. Baylor Univ., No. 6:16-CV-69-RP, 2017 WL 1322262, at \*2, \*6 (W.D. Tex. Apr. 7, 2017) (denying defendant’s motion to dismiss student’s Title IX claim when, *inter alia*, staff at counseling center and staff at health center were too busy to help victim); Kelly v. Yale Univ., No. Civ.A. 3:01-CV-1591, 2003 WL 1563424, at \*4 (D. Conn. Mar. 26, 2003) (denying Yale summary judgment on plaintiff’s Title IX claim because “Yale’s failure to provide Kelly with accommodations, either academic or residential, immediately following Nolan’s assault of her, was clearly unreasonable given all the circumstances of which it was aware”); *supra* note 113 and accompanying text; cf. United States v. Terrell Cty., 457 F. Supp. 2d 1359, 1367 (M.D. Ga. 2006) (granting plaintiff’s motion for summary judgment pursuant to the Civil Rights of Institutionalized Persons Act in light of gross deficiencies in a jail because “the failure to implement interim measures to alleviate these conditions demonstrates deliberate indifference”).

295. To avoid conflicts of interest, the lawyers should ensure that they are not in the same “firm.” MODEL RULES OF PROF’L CONDUCT r. 1.10 & cmt. 1 (AM. BAR ASS’N 1983); see also *id.* r. 1.0(c) (defining “firm”). The determination depends upon the facts. *Id.* at cmt. 2. It seems wise for the attorney for complainants and the attorney for accused students to operate as two independent law offices that also are not part of the university’s legal department. Funding the attorneys from the same source, such as the university’s general revenue, should not make them part of the same firm. Consider that both prosecutors and defense attorneys can be funded by the government, but they are not part of the same firm.

many schools spending upwards of \$100 million a year, should not claim they lack resources for legal services for survivors.<sup>296</sup>

If the institution has a law school that can offer a post-graduate fellowship to a new member of the bar, the cost of a lawyer need not be high. Yet if the institution does not have a law school or if this amount of money is still too much, then schools can form a consortium and share a lawyer who will represent students alleging gender-based victimization. ALI recommended a consortium for “schools with smaller resources” with respect to investigators and decisionmakers,<sup>297</sup> and this recommendation makes sense with respect to attorneys too. The University of Oregon, Lane Community College, and Northwest Christian University will soon share the services of an attorney for survivors, and funders are currently considering a proposal that would expand the consortium to include four additional institutions of higher education in the area. Schools might also consider entering a memorandum of understanding with a legal service provider in the community and thereby negotiating a better rate. Or, as Harvard Law School does, a school can set a fee structure to contain the costs of providing legal assistance.<sup>298</sup>

There is also the possibility of outside funding. Existing grant programs are one possible resource.<sup>299</sup> “Campus Sexual Assault” was highlighted as a target area in the 2016 solicitation for the Legal Assistance to Victims program administered by the Office of Violence Against Women.<sup>300</sup> In addition, several authors have suggested that schools should create a list of local attorneys who are willing to provide pro bono representation to students.<sup>301</sup> The list might expand to include parents of students and former students when those parents are retired lawyers.<sup>302</sup> Sometimes law students might be able to provide the representation.<sup>303</sup>

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296. *NCAA Finances*, USA TODAY, <http://sports.usatoday.com/ncaa/finances/>.

297. AM. LAW INST., *supra* note 44, at 9-10 § 7.1 cmt.

298. *See supra* note 44.

299. *See* Office on Violence Against Women, *OVW Fiscal Year 2015 Grants to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program Solicitation*, U.S. DEP'T JUST. 7 (2015), [https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/02/09/campus\\_program\\_solicitation2.pdf](https://www.justice.gov/sites/default/files/ovw/pages/attachments/2015/02/09/campus_program_solicitation2.pdf). *See generally supra* notes 103-107 and accompanying text. Some states' Victims of Crime Act programs also are highlighting campus sexual assault, and their funding can cover campus legal services. *See 2016-2019 Victims of Crime Act Competitive Project Grant Application*, OR. DEP'T JUST. 10-11 (2016), [http://www.doj.state.or.us/victims/pdf/2016\\_voca\\_competitive\\_rfa.pdf](http://www.doj.state.or.us/victims/pdf/2016_voca_competitive_rfa.pdf) (describing as a “priority area” programs that provide advocacy services to campus sexual assault or stalking survivors). UO's Student Survivor Legal Services receives VOCA funding for its program.

300. Office on Violence Against Women, *supra* note 22, at 5 (“OVW recognizes the need for comprehensive approaches to legal services for college and university students who are victims of sexual assault, domestic violence, dating violence, and stalking on and off campus”).

301. Berger & Berger, *supra* note 44, at 344; Mossman, *supra* note 54, at 627.

302. Comment of Diane Rosenfeld, Title IX Advocacy in the Trump Era: A Coordinated Response, Stanford Law School, May 2, 2017.

303. *See* GOV. TERRY MCAULIFFE'S TASK FORCE, *supra* note 2, at 79 (recommending that “Virginia's public and private law schools should determine ways in which law students could participate in these programs through an academic clinic or a non-credit volunteer program”); Mossman, *supra* note 54, at 626 (suggesting a “network of law school students and professors” who would “provide pro bono advice or representation”).

Because the competent representation of survivors requires an attorney trained to understand sexual and domestic violence, a school should educate its pool of pro bono and student attorneys about this topic specifically, which should not be a great expense.

Other possibilities exist, too. A school might limit free legal assistance to those students who are financially needy, although some flexibility seems warranted since complainants may be reluctant to ask parents for help to pay for legal counsel and parents may refuse even if asked. Alumni might set up a fund to assist complainants. Student government might allocate student fees to support an attorney position. Schools should explore all these possibilities.

Schools can obviously only afford what they can afford. But many colleges and universities can afford what this proposal requires. Even if only large or rich universities and colleges offered free legal services to survivors, a lot of students would benefit. In addition, Congress might consider requiring schools to disclose what free legal services they offer to survivors as part of their Clery Act obligations.<sup>304</sup> Schools would then have a financial incentive to provide survivors with attorneys. Consumers of higher education would be able to evaluate which institutions really care about helping survivors and ending sexual violence on campus.

### *C. Potential Conflicts of Interest*

Campus administrators might wonder whether they can provide attorneys to survivors without creating conflicts of interest for the lawyers. Of course, a conflict of this type only becomes a concern if the university employs the survivor's attorney. There is nothing to stop a school from structuring the arrangement in another way. For example, the university could reimburse the student for the cost of her legal services or arrange free services for survivors from an outside organization, such as a local law firm.

However, the university could employ the survivor's attorney. The attorney need not have her loyalty torn between her client and her employer in a way that poses an ethical problem. In most instances, the institution and the survivor have similar interests and so no conflict exists. Both want to mitigate the effects of the victimization on the survivor. This is true even if the institution has contributed in some way to the victimization or the hostile environment; the institution is still legally obligated to remedy the effects.<sup>305</sup> In fact, student survivors' needs are typically best met by a largely collaborative relationship between the survivor's attorney and the college's administration.

The most obvious potential or actual conflict exists when the student has or might have a claim against the college. However, lawyers are allowed to limit

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304. 20 U.S.C. § 1092 (f)(8)(b)(vi) (2012); 34 C.F.R. § 668.46 (b)(11)(iv) (2016).

305. See *infra* text accompanying note 391.

the scope of their representation,<sup>306</sup> and clients are allowed to waive conflicts.<sup>307</sup> Therefore, the college could employ the attorney so long as the student was informed that the attorney was an employee of the college and that the attorney would not sue the college. The client would need to waive any potential conflict before representation began.

Yet there still may be concerns that the attorney would not fight as hard for her client if she fears the university could fire her for doing so.<sup>308</sup> The risk of a conflict seems low given the way in which the university's and the survivor's interests are generally aligned and given the consented-to limits of the attorney's representation. Nonetheless, the attorney should not be part of the general counsel's office and the general counsel should have no control over the attorney's employment, compensation, or client files. In addition, the source of the attorney's funding should be structured so as to minimize potential conflicts. To the extent possible, the attorney should have a multi-year contract, and decisions about refunding the position should be allocated to an entity with interests that align with survivors, like a law school's domestic violence clinic. It is also good practice for the attorney to have a policy, approved by the university at the outset of the project, that he or she will inform the client if the client has a potential legal claim against the university and will provide the client with the names of lawyers in the community who might represent her.

The fact that the U.S. military uses a similar model suggests its acceptability. The U.S. military employs the attorneys who represent survivors of sexual and gender-based violence in the military.<sup>309</sup> Federal legislation makes clear that the attorney and client have an attorney-client relationship,<sup>310</sup> and the attorney performs a wide-range of tasks for the survivor. However, the attorney cannot sue the United States.<sup>311</sup>

Despite the fact that it is a bit messier to have the university employ the survivor's attorney than to have the university hire outside counsel for the survivor, on-campus legal services have several advantages over the alternatives. First, on-campus legal services are the most convenient for survivors and their availability increases the likelihood that students will access the service, even if

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306. MODEL RULES OF PROF'L CONDUCT r. 1.2(c) (AM. BAR ASS'N 1983).

307. *Id.* r. 1.7(b)(4).

308. Joe Drape, *Stanford Drops Lawyer Who Advised Students in Sexual Assault Cases*, N.Y. TIMES (Feb. 9, 2017), <https://www.nytimes.com/2017/02/09/sports/stanford-lawyer-sexual-assault-accusations.html>. *But see* Fernanda Zamudio-Suaréz, *Stanford U Says Lawyer Was Not Dismissed Over Criticism*, CHRON. HIGHER ED.: THE TICKER (Feb. 14, 2017), <http://www.chronicle.com/blogs/ticker/stanford-u-says-lawyer-was-not-dismissed-over-criticism/116898>.

309. *See supra* text accompanying notes 168-174 (describing special military program to address service members' victimization).

310. *See* 10 U.S.C.A. § 1044e(c) (West 2016).

311. *Id.* § 1044e(b)(4).

only to figure out how it might benefit them.<sup>312</sup> As the Director of Student Legal Services at Penn State said, “For college students, there are enormous barriers to legal services. Money and transportation are common problems.”<sup>313</sup> While an outside lawyer could be given office space at the university and perhaps achieve a similar on-campus presence, the provision of the office space and the preferential treatment among outside lawyers creates the same potential conflicts as employment by the institution.<sup>314</sup> Second, on-campus services may be the least costly option for some universities, depending upon the number of students on campus who might want to access the service. Overall, campuses should strive to have the legal services accessible on campus and work to eliminate or reduce any potential conflicts of interest that such an arrangement might pose.

#### *D. Litigation Risks to the Institution*

Campuses may not want to provide attorneys for survivors or encourage survivors to consult with attorneys because administrators may believe this service is not in institutions’ own best interest. General counsel may perceive that “law-yeering up” survivors would expose his or her campus to liability, especially when it is still adjusting to a complex regulatory environment.

No empirical evidence exists that suggests this proposal would cause more survivors to file complaints with OCR or to sue their institutions. In fact, the survivor might have *less* reason to complain when the institution provides her with an attorney because that attorney can help her obtain the remedies she needs, both within the university and in the civil and criminal systems. A student might also be less likely to sue the university because she would be more likely to feel that its process made sense.

Admittedly, a certain risk might exist because the lawyer could identify the institution’s shortcomings to the survivor. The likelihood that the survivor would act on this information, however, is probably slight. Even if the university makes egregious errors, most survivors have a lot to worry about in the aftermath of their victimization. Complaining about their universities is not typically high on their list of priorities. If it were otherwise, institutions would have seen far more

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312. Cf. Aarti Nasta et al., *Sexual Victimization: Incidence, Knowledge and Resource Use Among a Population of College Women*, 18 J. PEDIATRIC & ADOLESCENT GYNECOLOGY 91, 95 tbl.5 (2005) (reporting that 22% of participants who reported being sexually assaulted utilized on-campus resources but only 6% utilized off-campus resources); *Making the Grade? Findings from the Campus Accountability Project on Sexual Assault Policies*, STUDENTS ACTIVE FOR ENDING RAPE & V-DAY 9 (2013), <http://www.vday.org/~assets/downloads/2013-Campus-Accountability-Project-Full-Report.pdf> (noting that “[o]n-campus counseling centers may be more accessible to survivors as compared to off-campus therapeutic resources” and “on-campus counseling centers could facilitate survivors’ access to mental health services”).

313. Mroz, *supra* note 23, at 32.

314. See *supra* note 308 and accompanying text.

suits than they have so far. If the survivor's lawyer limits the scope of her representation to exclude suing the institution, then the survivor would have to take initiative either to find another attorney or to file an OCR complainant, and that is a significant barrier.

Most important, it seems wrong to allow an institution to claim that these sorts of risks are a reason to defeat this proposal. A suit would arguably serve the useful purpose of giving the institution notice of problems within the institution so that they could be remedied. Moreover, the survivor would simply be enforcing her legal rights, and the institution should bear the cost of its own non-compliance. In addition, the university can insure against the risk of a suit.<sup>315</sup>

#### *E. Obligations to the Accused Student*

Does the provision of free legal counsel to survivors then require a school also to give free legal counsel to accused students? If the law requires this, or if a school would want to do this to avoid accusations that it treats some of its students unfairly, then the school might again be concerned about cost. Yet, the concern about cost has already been addressed above, and it is not a sufficient reason to reject this proposal.

As it turns out, OCR Guidance gives a school some flexibility with regard to whether it must provide accused students and survivors with legal counsel to the same extent. While the school must treat the students equally during the disciplinary proceedings, the school need not treat the students similarly after a finding of responsibility. In addition, it is debatable whether counsel is required for accused students in the period before the disciplinary proceedings (when interim measures are provided to the survivor). Nonetheless, it is good policy to treat both students similarly before a determination of responsibility because, as described below, providing the accused student with counsel produces its own benefits. A brief discussion of these three time periods illustrates that schools have some flexibility regarding whether to treat the survivor and the accused student identically.

First, nothing prohibits a school from treating the students differently *after* a finding of responsibility. In fact, institutions have the *obligation* to offer the survivor legal services during this period if they are needed "to remedy the hostile environment."<sup>316</sup> Also, at this point in time, offering only the complainant an attorney raises no constitutional concerns because the proceedings have ended and the students are not similarly situated.

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315. See Robb Jones, *Title IX Sexual Violence Claims and Insurance Coverage: The Basics*, UNITED EDUCATORS: EDUC. MATTERS BLOG (July 15, 2016), <https://www.ue.org/about-ue/education-matters/?id=2147485465>.

316. Office for Civil Rights, *supra* note 48, at 34 H-1 ("[A]ll services needed to remedy the hostile environment should be offered to complainant." (emphasis added)); see also Office for Civil Rights, *supra* note 1, at 15-17; *infra text* accompanying notes 383-387.

Second, and in contrast, OCR Guidance makes it likely that a school must offer an attorney to both students for the disciplinary proceedings if it offers free counsel to either student. OCR has emphasized the importance of “[a] balanced and fair process that provides the same opportunities to both parties.”<sup>317</sup> OCR has recognized that a balanced process does not require that both sides actually have legal counsel,<sup>318</sup> but a school must treat both students the same way if it allows the participation of legal counsel.<sup>319</sup> While OCR has never addressed whether a school could provide a free attorney only to the complainant if the accused student could bring an attorney or other advisor to the proceedings, this scenario seems unbalanced and that is enough to prohibit it. It is beyond the scope of this Article to analyze whether it would be constitutional for a state institution of higher education to treat the students asymmetrically during the disciplinary proceedings, assuming OCR were to change its guidance to permit it.<sup>320</sup>

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317. Office for Civil Rights, *supra* note 48, at 25-26 F-1 (stating that “a school’s Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence”).

318. Violence Against Women Act, 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014) (codified at 34 C.F.R. § 668.46 (2016)).

319. Office for Civil Rights, *supra* note 48, at 26 F-1.

320. While an asymmetrical approach would obviously raise concerns under both the Due Process and Equal Protection Clauses, at first glance it does not appear that either provision would necessarily be violated. Any Due Process Clause claim would be analyzed under *Mathews v. Eldridge*, 424 U.S. 319 (1976), and would turn on case-specific information. *See, e.g., Gabrilowitz v. Newman*, 582 F.2d 100, 105 (1st Cir. 1978); *see also Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6 (D. Me. 2005) (citing *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988)). In some instances, the private interest at stake would be small and in some cases it would be large, depending upon the nature of the accusation. *See Gomes*, 365 F. Supp. at 16 (noting that the private interest was “compelling” when the charges of sexual assault could have caused the accused to be expelled, did cause the student to be suspended for one year, and had a potential impact beyond the university on the student’s future opportunities for employment or higher education). The risk of error would also vary dramatically from case to case and place to place. It would require an assessment of the entire process, including the type of participation allowed for lawyers. *See AM. LAW INST. (DRAFT NO. 1)*, *supra* note 51, at 24 § 4.4 (“Universities and colleges should recognize the interrelationship between different aspects of procedure in achieving overall fairness.”); *AM. LAW INST.*, *supra* note 44, at 42 § 7.8 rptr.’s nn. The government’s interest would also vary from case to case and institution to institution. For example, while a school might be concerned about the fiscal burden of providing attorneys for accused students, *see Mathews*, 424 U.S. at 348, that concern might have much less weight if the school already has an attorney on staff who could provide the representation. Notably, a court in 2015 found that the provision of legal counsel only to the complainant did *not* violate the accused student’s due process rights. *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at \*1 (W.D.N.C. July 22, 2015).

The Equal Protection Clause might not prohibit asymmetrical treatment either. Heightened scrutiny should not be triggered because there is no fundamental right to legal counsel outside the criminal context, *see WAYNE R. LAFAYE ET AL.*, 3 CRIM. PROC. § 11.2(a) (4th ed. Dec. 2016 update), and the proposal draws distinctions between sexual assault complainants and accused students, not between men and women, *see Doe v. Univ. of Mass.-Amherst*, No. 14-30143-MGM, 2015 WL 4306521, at \*8-9 (D. Mass. July 14, 2015); *cf. Doe I v. Univ. of Cincinnati*, 173 F.Supp.3d 586, 606-07 (S.D. Ohio 2016) (holding that alleged unfair procedures, such as not permitting cross-examination of witnesses and denying students’ request for an advisor, were not motivated by gender bias, but perhaps by bias in favor of alleged victims of sexual assault and against students accused of sexual assault). So long as it is rational to offer legal services during disciplinary hearings to sexual assault complainants and not to the respondents, then, arguably, no violation of equal protection exists. The rationality of asymmetry is perhaps reflected in the fact that Congress provides funds for civil legal assistance for low-income victims of domestic violence, sexual assault, and stalking, and no one argues that Congress must give equal funding for legal services

Third and finally, it is unclear whether a school could provide free legal counsel as an interim measure only to complainants. Title IX guidance certainly allows asymmetry in the provision of free services that are required as interim measures.<sup>321</sup> But legal services pose a unique problem not raised by other services like counseling. At some point, the complainant's attorney is likely to start preparing for the disciplinary proceedings or engaging in tasks that will affect the disciplinary proceedings, and these acts could arguably undermine the balance required during the disciplinary process itself if the accused student lacks an attorney from the outset.<sup>322</sup>

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to the alleged perpetrators. In the context of campus disciplinary proceedings, asymmetry is rational because of the epidemic of sexual violence on campus, with one in five college-aged women reporting that they have been the victim of a completed or attempted rape. See Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study: Final Report*, NAT'L INST. JUST. § 5-3 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>. Courts should also consider the ability of sexual violence to rob victimized students of their educational opportunities, the role attorneys can play in averting this outcome, and the need to have students report sexual violence so that colleges and universities can get the problem under control.

321. OCR Guidance expressly permits asymmetry outside the disciplinary process itself as the institution responds to the allegations of sexual violence. For example, the regulations adopted to implement the Campus SaVE Act specifically require colleges and universities to tell complainants about their rights and options, including available legal services, 34 C.F.R. § 668.46 (b)(11)(vii) (2016), but the regulations do not require the same for the accused student, Violence Against Women Act, 79 Fed. Reg. at 62763-64 ("Although we encourage institutions to provide written notification of this sort to an accused student or employee, the statute does not refer to or support requiring it."). The Department of Education acknowledged that the accused student may need similar services, and that the provision of relevant information is probably desirable, but not required. *Id.* at 62763 ("[W]e note that responding to these sorts of allegations, whether in the criminal justice system or in an institution's disciplinary procedures will likely be very stressful for the accused as well as the accuser. Therefore, institutions should consider providing the accused with information about existing counseling, health, mental health, legal assistance, and financial aid services both within the institution and in the community."). The permissible asymmetry extends beyond the provision of information about resources to the formalization of arrangements that would make certain services more available. See Office for Civil Rights, *supra* note 48, at 32 G-1 (noting that schools should enter a memorandum of understanding with local victim service providers if possible when the university lacks services that the complainant might need). The permissible asymmetry also extends to the actual provision of the services themselves because interim measures are only required for students who report sexual violence. See *supra* note 201; *infra* note 372; see also Henrick, *supra* note 268, at 68 n.83 (citing Indiana Univ., OCR Complaint No. 05-06-2138 (Mar. 6, 2007) (finding no violation of Title IX when the complainant received advocacy assistance about the disciplinary process and during the hearing but the accused student was refused an advocate)). It also extends to the fact that interim services must be provided for free. OCR Guidance on counseling services is illustrative. Consider Office for Civil Rights, *supra* note 48, at 33 G-3:

If a school provides all students with access to counseling on a fee basis, does that suffice for providing counseling as an interim measure? Answer: No. Interim measures are determined by a school on a case-by-case basis. If a school determines that it needs to offer counseling to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.

Consequently, a university must provide free counseling services to a complainant even though all other students, including the accused student, are required to pay for this service. This asymmetry is permitted even though the accused student might suffer trauma after learning that he has been identified as a perpetrator of sexual assault.

322. The fact that attorneys start their work for the disciplinary proceeding before the proceeding begins was recognized recently in the Fair Campus Act, a bill that was introduced in 2015 to require campuses to permit students to have attorneys during the disciplinary process (at the student's own expense). The bill would also require that students have access to the lawyer in time for the lawyer to engage



While schools may have some flexibility prior to the disciplinary hearing with respect to the allocation of free legal assistance, they should provide access to free legal counsel to both students before the finding of responsibility for at least three reasons. First, if the accused student has an attorney, then the result will seem more legitimate to the accused student, and arguably to others as well. Drawing upon social science research, Deborah Epstein has argued that procedural justice is important for achieving compliance with orders by batterers.<sup>323</sup> In fact, she cites research suggesting that processes that undermine a person's dignity may "result in an increase in future offending."<sup>324</sup> While Epstein's observations may not translate perfectly into the context of campus sexual assault,<sup>325</sup> they provide food for thought. Moreover, Epstein's work leads to a broader conclusion that is definitely applicable here: If the university is trying to inculcate a message that sexual assault and gender discrimination are wrong, then it should insulate the results of disciplinary hearings from the attack that the process was unfair and gender discriminatory.<sup>326</sup>

Second, the accused student's attorney can actually improve the survivor's situation. Some survivors will be more willing to come forward and report when they feel the process is fair to the accused. Also, the availability of attorneys for both students may minimize any due process concerns about other parts of the procedure,<sup>327</sup> some of which may be designed to protect the complainant. Moreover, defense attorneys can help educate clients so that they are less likely to reoffend. Epstein reminds us that defense attorneys don't always have to affirm a client's view that the system is operating unfairly. Rather, "it is at least as important to let clients know when they believe a judge has acted fairly, a prosecutor is being reasonable, or a sentence is not overly harsh."<sup>328</sup> The defense attorney, who typically is trusted, can share with the accused student information about counseling programs, alcohol and drug treatment, and the importance of gender equality.<sup>329</sup> Unfortunately, not all defense attorneys care about gender equality and ending campus sexual violence. Consequently, schools that provide

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in an investigation and other preliminary matters related to the hearing. Fair Campus Act of 2015, H.R. 3408, 114th Cong. § 163(a)(4) (2015).

323. Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1845-46, 1874-84 (2002).

324. *Id.* at 1877.

325. Among other things, the college sexual assault perpetrator (who commits sexual assault outside an intimate relationship) probably has a different profile than the domestic violence perpetrator captured in the studies Epstein relies upon (even assuming the domestic violence perpetrator also commits sexual assault against his partner). In addition, there may be differences between the likely compliance with a campus restraining order and a legal restraining order.

326. Lewis et al., *supra* note 52, at 10 ("[G]iven the imperative for gender equity, what is offered to complainants in terms of advisor/advocate must also be afforded to the accused student.").

327. See AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 24 § 4.4 cmt. ("[T]he presence of counsel or trained advisors for both complainants and respondents may enhance overall fairness even if other formal procedural safeguards are more limited. There is thus, in a sense, a hydraulic relation between the different components of procedure in formal contested proceedings.").

328. Epstein, *supra* note 323, at 1893.

329. *Id.*

free counsel for accused students should ensure that the attorneys they fund respect the values of the institution. While an accused student can always spend his own dime to hire the attorney of his choice, the institution does not have to pay for representation by a misogynist or someone who lacks concern for survivors.<sup>330</sup>

Third, and most important, providing attorneys to both students will help model the type of care and concern for others that the institution wants all of its students, and especially students accused of sexual assault, to exhibit. Cynthia Farina's thought-provoking article, *Conceiving Due Process*,<sup>331</sup> proposed an alternative to the *Mathews v. Eldridge* test by drawing upon feminist principles. In doing so, Farina argued that to further the ethic of care and responsibility, "a citizen's interaction with the state [including when it acts as "educator" or "discipliner" may not] become[] an experience of frustration, self-loathing or despair."<sup>332</sup> Rather, institutions must "enshrine and nurture" "compassion, responsibility and respect," without losing sight of the fact that these institutions "have also been the sites of the most terrible violence to personhood."<sup>333</sup> Farina convincingly argued that it matters "how government treats its people"<sup>334</sup> and that there exists an "interplay of substance and procedure."<sup>335</sup> Consistent with Farina's vision, the institution should make available an attorney for the accused student at the same time the survivor is offered one because that indicates that the institution cares about the accused student, wants to listen to his position, and does not want to wield power in a way that makes him feel devalued. By providing him an attorney, the institution recognizes his humanity and sees his vulnerabilities, even while acknowledging that patriarchy has given him power over his alleged victim. It says that regardless of whether accused students are "masculine norm-hyper-conformists, group culture-followers, reckless unconscious misogynists, insecure strivers for male bonding, narcissistic egotists, aggressively oblivious nonempathetic advantage-takers, [or] . . . conscious[ly] predatory,"<sup>336</sup> the institution will treat them with "compassion, responsibility and respect" because that is how all members of the community should treat each other.<sup>337</sup> The

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330. See *supra* text accompanying notes 260-265 (describing tactics of attorneys that should perhaps disqualify them from employment by the university).

331. Farina, *supra* note 275.

332. *Id.* at 266.

333. *Id.* at 268.

334. *Id.* at 270.

335. *Id.*

336. MacKinnon, *supra* note 97, at 2055.

337. Farina, *supra* note 275 at 268. This approach is consistent with new institutionalism. See Kristy L. McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE & ABUSE 438, 441 (2015) ("[N]ew institutionalism posits that individuals 'reflect the values of institutions with which they are associated' and "[i]nstitutions may be defined as 'webs of interrelated rules and norms that govern social relationships, comprise the formal and informal social constraints that shape' the choices of individuals within an institution." (citations omitted)). See generally Meryl Kenny, *Gender, Institutions, and Power: A Critical Review*, 27 POLITICS 91 (2007).

institution teaches by example. This approach seems especially appropriate for a university that strives to educate its students about appropriate behavior.

For these reasons, schools should offer the accused student a free attorney on the same terms as the complainant. The recommendation to make free legal services accessible to both students at the same time is in accord with the ALI Project's recommendation of "evenhandedness in extending appropriate support services."<sup>338</sup> The recommendation is also already reflected in the current practice of some schools.<sup>339</sup>

Regardless of the merit of the five aforementioned policy concerns (and frankly, they are neither individually nor collectively compelling enough to reject this proposal), schools must still provide some survivors with free legal counsel in some instances. As described next, the law already imposes an obligation on institutions of higher education to provide survivors with legal counsel in some situations, and this legal obligation cannot be avoided by the policy considerations just mentioned.

#### IV. THE LEGAL OBLIGATION TO PROVIDE FREE LEGAL SERVICES TO SURVIVORS

At present, schools are sometimes legally obligated to provide free legal counsel to students who allege they are victims of campus sexual assault. This Part demonstrates that the obligation to provide free legal counsel to campus survivors exists because: A) Title IX requires campuses to address student-on-student sexual violence; and B) OCR Guidance requires institutions of higher education to eliminate the violence, prevent its reoccurrence, and, if appropriate, remedy its effects. While OCR Guidance has never addressed directly the institutional obligation to provide free legal services to survivors, its open-ended language suggests that such a legal obligation sometimes exists.

##### *A. The Connections Among Title IX, Sexual Violence, and Student-on-Student Conduct*

It is not obvious why Title IX, which prohibits sex discrimination in educational institutions,<sup>340</sup> obligates institutions of higher education to address sexual violence between students at all. When Title IX was first proposed, legislators

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338. See AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 14 §2.3 cmt.

339. See *id.* at 14 n. 11, § 2.3 cmt. (discussing respondents' services in the UC campus system).

340. See 20 U.S.C. § 1681 et seq. See *id.* § 1681(a) ("No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."). The implementing regulations are found at 34 C.F.R. pt. 106. The law applies to any educational program or activity that receives federal financial assistance, and its protection extends to the entire institution. Civil Rights Restoration Act of 1987, 102 Stat. 28 (1988).

were primarily interested in addressing gender discrimination in faculty and administrative hiring, student admissions, and vocational programs.<sup>341</sup> However in 1981, after compelling arguments by Catharine MacKinnon,<sup>342</sup> OCR issued a policy memorandum that said sexual harassment was a form of gender discrimination covered by Title IX.<sup>343</sup> While the definition of sexual harassment in that memorandum encompassed sexual violence,<sup>344</sup> and while courts acknowledged that sexual violence was a form of sexual harassment,<sup>345</sup> OCR really only emphasized the connection between sexual harassment and sexual violence in 2011: sexual violence was sexual harassment because sexual violence was “unwelcome conduct of a sexual nature.”<sup>346</sup>

A school’s responsibility to address sexual violence perpetrated against a student arises when the “conduct is sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program.”<sup>347</sup> The 2011 *Dear Colleague Letter* noted that very severe conduct might create a hostile environment even if it occurred only one time.<sup>348</sup> However, since “sexual violence” covers a range of behavior,<sup>349</sup> including “sexual battery” and “sexual coercion” as well as “rape” and “sexual assault,”<sup>350</sup> a school’s legal obligations (and a survivor’s legal redress in the civil and criminal systems) will vary depending upon the particulars of the student’s experience.<sup>351</sup>

341. *The History, Uses, and Abuses of Title IX*, *supra* note 250, at 2-3.

342. *See supra* note 93 and accompanying text; *Alexander v. Yale*, 631 F.2d 178 (2d Cir. 1980) (accepting the theory that sex harassment constituted sex discrimination in violation of Title IX).

343. Memorandum from Antonio J. Califa, Dir. of Litig., Enf’t & Policy Serv., to Reg’l Civil Rights Dirs. (Aug. 31, 1981) (cited in U.S. DEP’T EDUC., *supra* note 205, at 2).

344. *Id.* (“Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.” (emphasis added)). A similar understanding of sexual harassment appeared in later guidance too. *See, e.g.*, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, U.S. DEP’T EDUC. vi (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> (defining sexual harassment as “conduct of a sexual nature [that] is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program or to create a hostile or abusive educational environment”). Official notice of the 2001 guidance’s release can be found at 66 Fed. Reg. 5512 (Jan. 19, 2001).

345. *Soper ex rel. Soper v. Hoben*, 195 F.3d 845, 854-55 (6th Cir. 1999); *Doe ex rel. Pahssen v. Merrill Cmty. Sch. District*, 610 F. Supp. 2d 789, 808 (E.D. Mich. 2009).

346. Office for Civil Rights, *supra* note 1, at 3.

347. *Id.*

348. *Id.*

349. OCR 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.” *See* Office for Civil Rights, *supra* note 1, at 1. Consequently, sexual violence includes everything from using a firearm to rape someone to using guilt to pressure someone to consent to a kiss. *See* Lisa Fedina et al., *Campus Sexual Assault: A Systematic Review of Prevalence Research from 2000-2015*, TRAUMA, VIOLENCE & ABUSE 1, 11 (2016). The most prevalent sexual violence is “unwanted sexual contact and sexual coercion . . . followed by incapacitated rape and attempted or completed forcible rape.” *Id.* at 13.

350. Office for Civil Rights, *supra* note 1, at 1-2.

351. OCR attaches responsibility to an institution when “the harassment rises to a level that it denies or limits a student’s ability to participate in or benefit from the school’s program based on sex.” Office for Civil Rights, *supra* note 344, at 5; *see* Fedina, *supra* note 349, at 15 (noting the diversity in experience

Early cases against schools tended to involve allegations against people who had authority over the student, such as coaches or teachers,<sup>352</sup> but by the mid-1990s courts were holding schools liable for their responses to student-on-student sexual harassment.<sup>353</sup> In 1999, the Supreme Court decided *Davis v. Monroe County Board of Education*,<sup>354</sup> and eliminated any remaining doubt about whether Title IX imposed obligations on institutions to address such behavior.<sup>355</sup> OCR had already recognized that Title IX reached this behavior two years before *Davis* was decided. OCR had issued guidelines entitled, "Sexual Harassment Guidance: Harassment of Student by School Employees, Other Students, or Third Parties."<sup>356</sup> OCR's Revised Guidance in 2001 kept the same title and the same interpretation of Title IX.<sup>357</sup>

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"has substantial implications for victim services, including the provision of . . . legal services"). For example, to the extent that interim measures are supposed to be "proportional," then legal services might not be required for a student who suffers the most minimal type of sexual violence, like an unwanted kiss, although determinations should be made on a case-by-case basis, not categorically. See AM. LAW INST. (DRAFT NO. 1), *supra* note 51, at 13 § 2.2 cmt. ("misconduct that is relatively minor, for example, would ordinarily not warrant temporary measures as intrusive as those imposed for the most egregious reported misconduct"); AM. LAW INST., *supra* note 44, at 2 § 6.2 rptr.'s mn. (noting that conduct "that is relatively minor in scope" may be "more appropriately addressed through an informal educational process than a disciplinary process").

352. See, e.g., *Alexander v. Yale Univ.*, 631 F.2d 178 (2d Cir. 1980) (former female student and male music professor); *Lipsett v. Rive-Mora*, 669 F. Supp. 1188 (D.P.R. 1987) (female resident and male staff surgeon), *rev'd sub nom.* *Lipsett v. Univ. of P.R.*, 864 F.2d 881 (1st Cir. 1888); *Bougher v. Univ. of Pittsburgh*, 713 F. Supp. 139 (W.D. Pa.) (female student and male professor), *aff'd on other grounds*, 882 F.2d 74 (3d Cir. 1989).

353. See *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995) (noting that a counselor might not be entitled to qualified immunity in 1995, but at the time of the peer-on-peer harassment in 1992, it was not clearly established that a school had a responsibility to deal with peer-on-peer harassment). *But see* *Seamons v. Snow*, 84 F.3d 1226, 1232 n.7 (10th Cir. 1996) (reflecting that a school's liability for the actions of students is unclear).

354. 526 U.S. 629 (1999). That case involved a fifth-grader who for months was subjected to sexual harassment by a classmate. The school did virtually nothing to stop the abuse, leading the victim to suffer in her studies and contemplate suicide. *Id.* at 634. The perpetrator's actions deprived the victim of an educational opportunity because the violence was "severe, pervasive, and objectively offensive." *Id.* at 651.

355. In finding that a claim existed against the school board, the Supreme Court explained that the school board was not directly responsible under Title IX for the perpetrator's acts. Rather, the school board was responsible for "its own decision to remain idle in the face of known student-on-student harassment in its school[]." *Id.* at 641. The school had the "authority to take remedial action," *id.* at 644, and "control over the harasser and the environment," *id.* at 644, but the school did almost nothing to stop the abuse. The school did not "respond to known peer harassment in a manner that [was] not clearly unreasonable," *id.* at 648-49, and this "deliberate indifference" subjected the school district to liability, *id.* at 647. In *Davis*, the standard that the Supreme Court articulated for liability (deliberate indifference) applies to a private lawsuit and not to an administrative enforcement proceeding. See *id.* at 639; *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998); see also Office for Civil Rights, *supra* note 344, at iv.

356. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12034, 12039 (Mar. 13, 1997) (emphasis added).

357. Office for Civil Rights, *supra* note 344.

*B. OCR's Guidance on Institutional Obligations Under Title IX**1. An Undiscussed Issue*

OCR Guidance details the ways in which colleges and universities must address student-on-student sexual violence. Generally, “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”<sup>358</sup> The institutional response has to be prompt and effective. It must include providing survivors with interim measures pending the resolution of any disciplinary hearings. In addition, a school must remedy any effects caused by its own failure to respond appropriately to the sexual violence and any effects caused by sexual violence for which it is responsible, most notably when its employee was the perpetrator.<sup>359</sup>

These general obligations, which are described in more detail below, trigger an obligation to provide free legal services to some survivors in some instances. While OCR Guidance does not expressly say that schools must provide free legal services, its language is broad enough to require the provision of free legal services. The goals of Title IX are also advanced by this interpretation. Nor has OCR ever excused schools from this obligation when it would otherwise arise under its guidance.

Admittedly, opponents of such an idea can point to language that might support the opposite conclusion. For example, the 2011 *Dear Colleague Letter* merely “recommends” that schools “make victim resources, including comprehensive victim services, available.”<sup>360</sup> OCR’s 2014 *Questions and Answers* spell out a “school’s basic responsibilities to address student-on-student sexual violence,” and suggests that schools only need to make survivors “aware” of any available legal resources. It says,

Title IX requires a school to protect the complainant and ensure his or her safety as necessary, including taking interim steps before the final outcome of any investigation. . . . If the school determines that the sexual violence occurred, the school must continue to take these steps to protect the complainant and ensure his or her safety, as necessary. *The school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and*

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358. Office for Civil Rights, *supra* note 1, at 4; *see also* Office for Civil Rights, *supra* note 344, at 12.

359. *See infra* text accompanying notes 372-402.

360. Office for Civil Rights, *supra* note 1, at 14.

*legal assistance*, and the right to report a crime to campus or local law enforcement.<sup>361</sup>

OCR's Letters of Findings and Resolutions, issued after an investigation, sometimes suggest that schools need to provide information about legal resources,<sup>362</sup> including by developing resource guides,<sup>363</sup> but they do not chastise schools for their failure to provide legal services to complainants.

Yet statements like those in the prior paragraph do not say that schools *only* need to make survivors aware of available legal resources instead of provide them. Rather those statements merely indicate that schools must provide information about legal resources, not that such information is *sufficient* for a school to meet its Title IX obligations. Nor does OCR's failure to hold schools accountable for their failure to provide legal services mean that the obligation does not exist; it may simply indicate that OCR has not focused on the importance of this service for survivors. Because other language in OCR's Letters of Findings and Resolutions indicates that colleges sometimes must provide resources to survivors, like academic support, housing assistance, or counseling,<sup>364</sup> there is good

361. Office for Civil Rights, *supra* note 48, at 3 A-5 (emphasis added); *see also id.* at 13 C-5 (stating that "Title IX grievance procedures should also explicitly include . . . in writing . . . sources of counseling, advocacy, and support"); *id.* at 32 G-1 ("The school should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as . . . legal assistance . . .").

362. *See* Letter from Shaheena Simons & Damon Martinez to Robert G. Frank, *supra* note 188, at 5-6 (discussing an appropriate response and noting that "[t]he school should also ensure that the complainant is aware of any available resources, such as victim advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance"); Letter from Alice B. Wender, Reg'l Dir., Office for Civil Rights, to Teresa A. Sullivan, President, Univ. of Va., Re: OCR Review No. 11-11-6001, at 7 (Sept. 21, 2015), <https://www2.ed.gov/documents/press-releases/university-virginia-letter.pdf> ("Recipients should also ensure that the complainant is aware of his or her Title IX rights and any available resources, such as advocacy, housing assistance, academic support, counseling, disability services, health and mental health services, and legal assistance, and the right to report a crime to campus or local law enforcement.").

363. Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom & Lucy France, *supra* note 49, at 28-29 ("With respect to students, the Agreement requires the University to . . . develop a resource guide on sexual harassment, including sexual assault, to be posted on the University's website and distributed to students in hard copy and/or electronically upon receipt of complaints of sexual harassment and sexual assault. The guide will contain information on . . . *contact information for all on and off-campus resources for victims of sexual assault*; . . . [and] where complaints can be directed, with clear explanations of the criminal and non-criminal consequences that flow from complaining to particular entities. . . . The guide will ensure that any student who reports sexual harassment or assault will be given information needed to make informed decisions in writing and all in one place that can be referenced easily in the future." (emphasis added)).

364. *See, e.g.*, Voluntary Resolution Agreement, Lyon College, OCR Docket No. 06-12-2184, at 2 (2013), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122184-b.pdf> (stating that the College's grievance procedures must include a statement regarding remedial actions, including "counseling for the individual(s) alleged to be harassed as well as witnesses and the broader student body"); Letter from Taylor D. August, Reg'l Dir., Office for Civil Rights, to David L. Beckley, President, Rust College 9, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122139-a.pdf> (mentioning counseling and academic support as remedies for the effects of sexual harassment); Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom & Lucy France, *supra* note 49, at 16 (identifying the failure to provide a student with an escort while on campus and to provide another student with counseling services as examples of insufficient interim measures); Letter from Taylor D. August, Reg'l Dir., Office for Civil Rights, to Donald V. Weatherman, President, Lyon College, OCR Reference No. 06-12-

reason to think that legal services would also be included if OCR were to focus on this service.

The Department of Education's specific statement about legal counsel within the context of the Campus SaVE Act rulemaking process might seem like more damning evidence against the idea of a legal obligation, at least initially. The 2013 Violence Against Women Reauthorization Act states that schools must give students and employees "written notification . . . about existing counseling, health, mental health, victim advocacy, legal assistance, and other services available for victims both on-campus and in the community."<sup>365</sup> After the Department of Education solicited comments about potential regulations to implement the law, it expressly rejected the idea that schools must provide attorneys for students in disciplinary proceedings if one side was represented. It rejected the suggestion because Congress did not adopt "clear and unambiguous statutory authority" to that effect and it would be a "burden" on schools.<sup>366</sup>

This one statement in the Federal Register certainly doesn't resolve the issue and deserves little weight. First, the comment addresses the general obligation to provide free legal services. It is not focused on the specific scenarios identified by this Article below that trigger the obligation. Second, at best, the statement only addresses the general obligation to provide counsel in "a meeting or disciplinary proceeding." As Part II discussed, attorneys serve many functions outside of the disciplinary process and the Department of Education's language here does not rule them out. Third, although the statement appeared in the Federal Register, it was made in response to a commenter's question and the topic of the question was not itself being considered for a rule. The Department of Education's rationale is so conclusory that its conclusion itself is suspect.<sup>367</sup> For example, it did not articulate the nature of the institutional "burden" or explain why a university shouldn't have this "burden" if it is necessary to remedy its own violation of Title IX. Nor was there any thought about the "burden" on survivors who need but lack legal counsel. Certainly, this statement deserves far less weight than OCR's

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2184, at 10-11, <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122184-a.pdf> (finding that Lyon College took appropriate steps to remedy the effects of sexual harassment, including but not limited to: allowing the student to finish degree requirements elsewhere at Lyon College's expense and receive course credit toward his degree and reimbursement for services received related to the harasser's conduct).

365. 20 U.S.C.A. § 1092 (f)(8)(B)(vi) (West, Westlaw through Pub. L. No. 114-327).

366. 79 Fed. Reg. 62752, 62774 (Oct. 20, 2014) ("We do not believe that the statute permits us to require institutions to provide legal representation in any meeting or disciplinary proceeding in which the accused or the accuser has legal representation but the other party does not. Absent clear and unambiguous statutory authority, we would not impose such a burden on institutions. We would note, however, that the statute does require institutions to provide written notification to students and employees about legal assistance available for victims, both on-campus and in the community. We encourage institutions to also provide information about available legal assistance to the accused.").

367. See *S. Utah Wilderness All. v. Dabney*, 222 F.3d 819, 828-29 (10th Cir. 2000) (noting that informal agency decisions are not entitled to *Chevron* deference; they may be interpretative rules if the agency's interpretation is "well reasoned" and "has the power to persuade").



guidance in two “significant guidance documents,”<sup>368</sup> although admittedly they are not legally binding either.<sup>369</sup> Most important, the comment was made with respect to the requirement that schools provide students and employees with information about legal resources, as mandated by the 2013 Violence Against Women Reauthorization Act. Yet OCR has stated very clearly that the VAWA Reauthorization Act did not alter a school’s Title IX obligations, including as set forth in OCR’s guidance.<sup>370</sup> Consequently, the key question is whether an obligation to provide free legal services to some survivors existed prior to the Department of Education’s comment. An argument can be made that it did.

## 2. *The Language that Supports the Obligation*

This section now discusses OCR Guidance in more detail and identifies four situations in which schools have an obligation to provide free legal services to survivors as part of their responsibility to address student-on-student sexual violence. The situations are the following: when legal counsel is a necessary interim measure;<sup>371</sup> when the school’s response would not be prompt and effective without the provision of legal counsel; when the school has failed to respond promptly and effectively to the violence; and, when the school is directly responsible for the student-on-student violence.

### i. Interim Measures

Schools must sometimes provide free services to the complainant as “interim measures” in order to mitigate the effects of the victimization. These measures allow the survivor to continue with her education pending the outcome of the disciplinary process.<sup>372</sup> Necessary interim measures are assessed on a case-by-

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368. See Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007) (describing the significance of that designation); see also Office for Civil Rights, *supra* note 1, at 1 n.1 (noting that the letter “does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations”).

369. 72 Fed. Reg. at 3436 (mentioning the non-legally binding nature of a significant guidance document).

370. Office for Civil Rights, *supra* note 48, at 44 M-2.

371. See also Office for Civil Rights, *supra* note 1, at 15 (“Title IX requires a school to take steps to protect the complainant as necessary, including taking interim steps before the final outcome of the investigation.”); Office for Civil Rights, *supra* note 48, at 3 A-5; Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12043 (Mar. 13, 1997) (“It may be appropriate for a school to take interim measures during the investigation of a complaint. . . . In cases involving potential criminal conduct, school personnel should determine whether appropriate law enforcement authorities should be notified.”).

372. An “interim measure” is a service or accommodation provided to the student after she files a report but before the matter is formally resolved. See White House Task Force, *supra* note 124, at 1. “Interim measures” are sometimes divided into “supportive measures” and “protective measures.” The former typically is an option even before the filing of a formal report and includes resources or accommodations for the complainant. The latter category involves restrictions against the respondent, such as moving the respondent from housing, and typically requires a formal report.

case basis by looking at, *inter alia*, the “specific need expressed by the complainant” and “any continuing effects on the complainant.”<sup>373</sup> While administrators themselves can provide many of the necessary interim measures, such as changing the complainant’s residence hall or class schedule, OCR has never limited interim measures to these types of responses. For example, providing “[m]edical and mental health services, including counseling” are well-recognized as necessary interim measures.<sup>374</sup>

Interim measures must be provided for free: “If a school determines that it needs to offer [a service] to the complainant as part of its Title IX obligation to take steps to protect the complainant while the investigation is ongoing, it must not require the complainant to pay for this service.”<sup>375</sup> OCR suggests that a school “enter into an MOU [Memorandum of Understanding] with a local victim services provider if possible” if the school itself does not offer the particular service.<sup>376</sup> Consequently, while schools must ensure that complainants are aware of available legal resources on and off campus,<sup>377</sup> sometimes they will need to provide that service free of charge if it is needed as an interim measure.

For all of the reasons that Part II discussed, schools should recognize that legal services are often a necessary interim measure. Legal services are frequently needed to ensure the victim’s safety and her equal access to an education. In fact, asking a survivor to navigate multiple legal and quasi-legal systems without legal assistance is almost certain to impede her recovery and her education.

## ii. A Prompt and Effective Response

OCR Guidance makes clear that an institution must have a prompt and effective system for addressing sexual harassment.<sup>378</sup> This responsibility requires a school to take various steps, including having an appropriate grievance process, taking action that will prevent the recurrence of the violence, and remedying its

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373. Office for Civil Rights, *supra* note 48, at 33 G-2 (“A school should consider a number of factors in determining what interim measures to take, including, for example, the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation, or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).”).

374. White House Task Force, *supra* note 124, at 5; *see, e.g.*, Letter from Anurima Bhargava & Gary Jackson to Royce Engstrom & Lucy France, *supra* note 49, at 16 (criticizing the University of Montana for failure to “consider or discuss with the complainant any options for her to avoid contact with the other student” and for failure to offer another student “interim measures” to “ensure her safety” once she “began expressing suicidal ideation”).

375. Office for Civil Rights, *supra* note 48, at 33 G-3 (discussing counseling); *see also* NOT ALONE, *supra* note 50, at 5 (identifying a “cab voucher” as one potential interim measure).

376. Office for Civil Rights, *supra* note 48, at 32 G-1.

377. *Id.*

378. Office for Civil Rights, *supra* note 1, at 16 (“When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population.”).

effects. Sometimes the institution needs to provide survivors with legal counsel in order to meet each of these obligations.

First, institutions must have in place a prompt and equitable grievance procedure. This goes beyond merely publishing a sexual violence policy and letting students know how to report the harassment.<sup>379</sup> OCR has explained: “A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, *how it works*, and how to file a complainant.”<sup>380</sup> Some students need legal services to understand how the campus system works. When the university’s system for reporting or addressing sexual violence is sufficiently complicated that a lawyer would be useful, or when even a well-written description of the system overwhelms a survivor, then the failure to provide the survivor with an attorney renders the institution’s process inadequate. Without a lawyer, student survivors can find themselves confused, exhausted, and demoralized. They can be deterred from reporting.

Second, when schools know of the violence, they must act to “eliminate the hostile environment and prevent its recurrence.”<sup>381</sup> If a lawyer would make the prevention of future violence more likely, such as by helping remove the perpetrator from campus, obtaining a civil protection order, or securing the perpetrator’s incarceration, then the school’s failure to provide the survivor with one is an insufficient response.<sup>382</sup>

Third, a prompt and effective response requires that the institution address the effects of the victimization after the perpetrator is found responsible.<sup>383</sup> The 2014 guidance qualified the institutional obligation to “remedy its effects” by including the phrase “as appropriate.”<sup>384</sup> That phrase harkens back to earlier guidance that limited the school’s obligations to redress the effects of sexual harassment to situations when it was responsible in some way for the attack or for not addressing the attack promptly and effectively.<sup>385</sup> Nonetheless, the 2014 guidance also says, without limitation, that “[a]ll services needed to remedy the hostile environment should be offered to the complainant.”<sup>386</sup> OCR’s list mentions, among other things, “[p]roviding comprehensive, holistic victim services

379. See, e.g., Office for Civil Rights, *supra* note 344, at 14.

380. *Id.* at 20 (emphasis added).

381. Office for Civil Rights, *supra* note 1, at 4 n.32.

382. Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12043 (Mar. 13, 1997) (“Finally, a school should take steps to prevent any further harassment . . .”).

383. Office for Civil Rights, *supra* note 1, at 15.

384. Office for Civil Rights, *supra* note 48, at 2-3 A-5.

385. Office for Civil Rights, *supra* note 344, at 10, 12 (discussing situations in which a school’s employee perpetrated the victimization or the school fails to respond promptly and effectively upon notice).

386. Office for Civil Rights, *supra* note 48, at 34 H-1; see also Office for Civil Rights, *supra* note 1, at 15 (noting that “effective corrective action may require remedies for the complainant”); *id.* at 16 (“[R]emedies for the complainant might include, but are not limited to: . . . providing counseling services; providing medical services; providing academic support services, such as tutoring . . .”).

including medical, counseling and academic support services, such as tutoring.”<sup>387</sup> While legal services are not specifically called out, OCR says that its list is not exclusive. To the extent that an institution must remedy the effects of the violence even when the institution has no responsibility for the violence itself or for making the survivor’s situation worse, then legal services should be provided because they are often needed by the survivor.

### iii. A Remedy for the Institution’s Inadequate Response

It has always been clear that if the institution’s response falls short of being “prompt and effective” for ending the harassment and preventing its reoccurrence,<sup>388</sup> then it must remedy “the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.”<sup>389</sup> The appropriateness of the institution’s response “will differ depending upon the circumstances.”<sup>390</sup> However, if the school contributes to the hostile environment in any way after the attack, then the school must remedy the effects of its own post-attack actions or inactions.<sup>391</sup>

There are two ways a school can have an inadequate response. As just suggested, in some cases, the inadequacy will be the school’s failure to provide a lawyer, such as when a lawyer is critical for the student’s ability to decide whether to report to the institution or when the survivor needs a legal remedy to end the violence. In other cases, the inadequacy will exist for a reason unrelated to the provision of legal services, but the inadequacy itself will trigger the institution’s obligation to provide legal services as a remedy.<sup>392</sup> For example, if a

387. Office for Civil Rights, *supra* note 48, at 35 H-1.

388. *See, e.g.*, Office for Civil Rights, *supra* note 344, at 12.

389. *Id.* at 13; *see also* Office for Civil Rights, *supra* note 1, at 16.

390. Letter from Shaheena Simons & Damon Martinez to Robert G. Frank, *supra* note 188, at 6.

391. Office for Civil Rights, *supra* note 48, at 3 A-5; *see also* Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12037 (Mar. 13, 1997) (“[I]f a school’s liability depends on its failure to take appropriate action after it receives notice of the harassment, e.g., in cases of peer harassment, the extent of a school’s liability for remedying the effects of harassment will depend on the speed and efficacy of the school’s response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have prevented if it had responded appropriately to the student’s complaints, including, if appropriate, the provision of counseling services.”); Office for Civil Rights, *supra* note 344, at 12 (noting that if “upon notice, the school fails to take prompt, effective action . . . the school is responsible for taking effective corrective actions to stop the harassment, prevent its recurrence, and remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively”).

392. Office for Civil Rights, *supra* note 1, at 16-17 (recommending that “[s]chools should proactively consider the following remedies when determining how to respond to sexual harassment or violence. These are the same types of remedies that OCR would seek in its cases”; specifically mentioning offering, to both survivors and to the broader student population, “counseling, health, mental health, or other holistic and comprehensive victim services to all students affected by sexual harassment or sexual violence, and notifying students of campus and community counseling, health, mental health, and other student services”).

school has a broad mandatory reporting policy, whereby virtually every employee must report sexual violence to the Title IX office, and if the school inadequately or ineffectively warns students about the policy, then its reporting policy can cause a student to experience institutional betrayal and related harm when she discloses to a trusted ally.<sup>393</sup> When that student must then decide whether she wants the disciplinary process to move forward (and perhaps also a criminal investigation that was triggered by the university report), the institution must provide her with a lawyer because it has placed her in a situation that has made her situation worse. Similarly, if the institution encourages survivors to file police reports without giving them legal counsel so that they can make informed decisions, then the institution must provide survivors with lawyers to help them navigate the criminal system. After all, involvement in the criminal justice system is an “emotionally draining experience that, more often than not, re-victimizes the rape survivor and increases her need for an array of legal services.”<sup>394</sup>

#### iv. A Remedy for the School’s Responsibility for the Sexual Violence

Finally, if the school itself was responsible for the sexual violence then a school has an obligation to remedy the effects. The examples of responsibility provided in OCR Guidance involve an employee of the school,<sup>395</sup> such as a professor who victimizes the student.<sup>396</sup> Schools often employ students, such as resident assistants or teaching assistants, and institutional responsibility arises when these students victimize other students. OCR has indicated that when the school bears responsibility because its employee committed the sexual violence, the school may have to provide free services to the survivor to address the effects of the abuse.<sup>397</sup> Of course, one of the effects of a sexual assault is that the survivor needs to navigate various legal and quasi-legal systems and doing so without a competent attorney can enhance, as opposed to reduce, the effects of the abuse. Consequently, if the school’s agent created the hostile educational environment, then the school would be directly responsible for remedying the survivor’s harm and free legal services would need to be provided to the survivor.

A school’s responsibility for remedying the effects of the abuse exist so long as the school has culpability for the perpetrator’s attack. Culpability can exist even apart from a school employing the perpetrator. For example, culpability

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393. See Merle H. Weiner, *A Principled Approach to Responsible Reporting* (2017) (unpublished manuscript) (on file with author). See generally Smith & Freyd, *supra* note 89.

394. Kanter, *supra* note 27, at 260.

395. See, e.g., Office for Civil Rights, *supra* note 344.

396. *Id.*

397. See, e.g., Sexual Harassment Guidance, 62 Fed. Reg. 12034, 12043 (Mar. 13, 1997) (“In some situations, a school may be required to provide other services to the student who was harassed if necessary to address the effects of the harassment on that student. For example, if an instructor gives a student a low grade because the student failed to respond to his sexual advances . . . the school may be required to . . . offer reimbursement for professional counseling; or take other measures that are appropriate to the circumstances.”).

may exist when the university knew of an obvious risk and failed to address it, thereby exposing the survivor to the sexual violence. Courts have already recognized this type of responsibility. In *Williams v. Board of Regents of the University System of Georgia*,<sup>398</sup> for instance, the appellate court remanded the case, recognizing that the school could be responsible when the coach recruited a student athlete with a history of sexual assault, allowed the student to live in the dorm, and failed to educate the student about the campus sexual assault policy. In another well-known case, *Simpson v. University of Colorado Boulder*,<sup>399</sup> the court held the institution responsible for a violation of Title IX when the university ran a recruiting program for student athletes that posed a risk of sexual violence, the university knew of the risk, and the university inadequately addressed it. Recently, in *Doe v. University of Tennessee*,<sup>400</sup> the court recognized the potential for institutional responsibility based upon the school's "failure to acknowledge and address the acute risks to female students by a certain segment of its student body [i.e., male athletes] that are well above and beyond the general risks of student-on-student harassment."<sup>401</sup>

An institution needs to remedy the effects of the sexual violence when the institution's prevention efforts were insufficient in light of the known risks. Because certain populations of students on campus pose a high risk of offending (most notably athletes and fraternity members),<sup>402</sup> a school's failure to institute effective prevention efforts will make a school responsible for addressing the effects of the sexual violence. Addressing the effects includes addressing the legal effects, and that requires a lawyer. To be clear, the lawyer would not be provided to the student for the purpose of suing the institution. Rather, the lawyer is needed to address the immediate effects of the assault itself, that is to help the survivor navigate and participate in the three systems that are meant to redress the abuse.

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398. 477 F.3d 1282 (11th Cir. 2007).

399. 500 F.3d 1170 (10th Cir. 2007).

400. 186 F. Supp. 3d 788 (M.D. Tenn. 2016).

401. *Id.* at 807.

402. See Kristy McCray, *Intercollegiate Athletes and Sexual Violence: A Review of Literature and Recommendations for Future Study*, 16 TRAUMA, VIOLENCE & ABUSE 438, 440 (2015) (citing studies that link athletic participation and sexual violence, but noting "a significant gap in the research"); Sarah K. Murnen & Marla H. Kohnman, *Athletic Participation, Fraternity Membership, and Sexual Aggression Among College Men: A Meta-Analytic Review*, 57 SEX ROLES 145, 153 (2007) (describing a statistically significant association between participation in athletics and/or fraternity life and attitudes related to sexual aggression and self-reports of sexual aggression); Robin G. Sawyer et al., *Rape Myth Acceptance Among Intercollegiate Student Athletes: A Preliminary Examination*, 18 AM. J. HEALTH STUD. 19, 23 (2002) (finding male athletes participating in team-based sports had higher rape-myth acceptance than male athletes participating in non-team sports); Belinda-Rose Young et al., *Sexual Coercion Practices Among Undergraduate Male Recreational Athletes, Intercollegiate Athletes, and Non-Athletes*, VIOLENCE AGAINST WOMEN 1, 11 (2016) (finding student athletes engage in higher rates of sexual coercion than non-athletes, but that self-reported rates of sexual coercion among club, intercollegiate, and recreational athletes were similar).

### 3. *The Benefit of Further Guidance*

Because free legal services are arguably required in all of the above scenarios (i.e., when legal services would be appropriate as an interim measure, when a prompt and effective response requires it, when the institution failed to respond appropriately to the survivor's injury, or when the institution caused the survivor's injury), institutions should consider providing free legal counsel to all survivors. A uniform policy is sensible because of the breadth of situations that may trigger an institutional obligation to provide free legal services to a survivor.<sup>403</sup> A uniform response reduces the chance that an institution would get its response wrong by misjudging whether, in fact, it was obligated to provide an attorney in a particular instance. Also, by providing all survivors with free legal counsel, the institution eliminates the burden of case-by-case determinations.

Despite the logic of this argument, some institutions will predictably fail to provide legal counsel to any survivors and will cite the lack of clear language from OCR about the obligation to do so. The possibility of resistance is evident from the recent past: Congress had to pass federal legislation with very explicit obligations to ensure colleges and universities would even tell survivors about the existence of legal services.<sup>404</sup>

Therefore, OCR should clarify its guidance and state that Title IX sometimes requires institutions to provide free legal services to students who have experienced sexual or gender-based violence. If an institution does not provide free legal counsel automatically to all campus survivors, OCR should require the school to assess each situation on a case-by-case basis to determine if the institution must offer the survivor legal counsel. Moreover, OCR should explain that regardless of the school's legal obligation, it is a best practice to make comprehensive services available to all survivors, including free legal services. A Virginia Task Force on Combatting Campus Sexual Violence summed up the proper orientation in 2015: "From the moment a victim of campus sexual violence discloses an assault to campus personnel or other allied professionals (law enforcement, forensic nurses, etc.), it is vital that they receive immediate support, have access to comprehensive services, and understand available options."<sup>405</sup> It notes that "a multidisciplinary, victim-centered approach . . . can help mitigate the trauma that victims experience."<sup>406</sup> Providing the survivor with a lawyer is necessary if the institution wants a victim-centered, comprehensive approach to service delivery. If OCR is reluctant to make these statements to clarify its guidance, then Congress must adopt a law with such language.

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403. *Cf.* ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 54, at 8 (advising that "[t]he same standards should apply to any act of sexual harassment, whether by a student, employee, or campus visitor").

404. *See supra* text accompanying note 16.

405. *Cf.* Herring et al., *supra* note 2, at 14.

406. *Cf. id.* at 11.

## V. THE UNIVERSITY OF OREGON'S STUDENT SURVIVOR LEGAL SERVICES

It is now time to give a concrete example of how the foregoing analysis can actually be implemented at an institution of higher education. The University of Oregon is perhaps the first university in the United States to have an on-campus service that offers legal counsel exclusively to survivors of campus sexual assault, domestic violence, dating violence, and stalking, including in campus disciplinary proceedings. This author started the program because the need for this service was obvious. Accused students often hired private attorneys, and sometimes teams of attorneys, to defend themselves when an allegation of sexual assault was leveled against them, but complainants typically lacked legal counsel. Few student survivors had the resources to hire an attorney and free legal services are limited in our community. Survivors were sometimes reluctant to ask a parent for financial help to hire an attorney, in part because this would require the student to tell her parents what had happened and in part because the student (and often the parents) did not realize the importance of an attorney for the survivor's protection and wellbeing. To make matters worse, accused students received free on-campus legal services if they wanted them because a legal organization funded by student fees provided representation to students facing student conduct code proceedings.<sup>407</sup> The accused student might even have two free lawyers if he had received a public defender in the criminal system. Complainants lacked similar services.

Although the project began in response to complainants' need for representation in disciplinary proceedings, it soon became clear that the disciplinary proceedings were only one aspect of why survivors needed an attorney. Survivors often needed legal assistance to address the repercussions of their assault and to help them navigate the three systems that were simultaneously implicated by their victimization: campus, civil, and criminal. Survivors also often needed an attorney at the conclusion of the disciplinary proceedings, when they were trying to figure out questions like, "Can I tell people that X is suspended?" or "What other legal remedies exist?" As the attorney at Student Survivor Legal Services (SSLS) worked with complainants, we also noticed that the lawyer could advocate for survivors' interests as the campus administration formulated policies and funded services.

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407. The Associated Students of the University of Oregon (ASUO) funds the Office of Student Advocacy, which provides attorneys to represent students accused of student conduct code violations. See *supra* text accompanying notes 46-47.



### A. *The Structure*

The University of Oregon houses the attorney for complainants in its Domestic Violence Clinic. The Domestic Violence Clinic is located on the University of Oregon campus. It is a law school program that provides free legal services to low-income survivors of domestic violence, sexual assault, and stalking, and almost none of its clients are University of Oregon students. Clinic services are provided by law students under the supervision of two law faculty who are members of the Bar. The Clinic is an educational program and students receive credit for their work.

The program that serves University of Oregon student survivors is called Student Survivor Legal Services (SSLS). Although University of Oregon law students provide most of the services offered by the Domestic Violence Clinic, law students *do not* provide legal services to campus survivors. Student attorneys do not participate in these cases in order to assure survivors that their privacy and confidentiality will be respected, even though, of course, student attorneys must learn the ethical rules that bind attorneys and must practice under the supervision of an attorney who is bound by those rules.<sup>408</sup> Instead, an attorney with no formal teaching responsibilities serves student survivors.

When SSLS began, its attorney was a recent graduate of the University of Oregon Law School. Because the Domestic Violence Clinic's primary mission is education, the attorney position in SSLS was created as a two-year post-graduate fellowship with a starting salary of \$37,000. The more senior supervising attorneys in the Domestic Violence Clinic mentored the attorney. In this way, the University of Oregon law school could fulfill its educational mission while also providing a badly needed service for survivors on campus.

As a testament to the importance of the service, the SSLS attorney is staying on in the same position even though the attorney's post-graduate fellowship has now ended. Her salary is being covered primarily by a grant and by funds from the Domestic Violence Clinic, although the Dean of Students and the Title IX office have contributed some funding. The Domestic Violence Clinic will continue to control the hiring, firing, and supervision of the attorney and the position will remain totally independent of the General Counsel's office.

Because the post-graduate fellowship was such a good mechanism for educating a new lawyer to do this important work, the Domestic Violence Clinic has created another post-graduate fellowship. The new attorney will serve student survivors at a nearby community college and at a private college, and if a new grant comes through, the attorney will also serve survivors at four other smaller

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408. OR. RULES FOR ADMISSION OF ATTORNEYS § 13.20(1)(d) (2017) (requiring students who are to appear before a court to have taken a class on legal professionalism or to have passed the Multistate Professional Responsibility Examination); *id.* § 13.10(2) (requiring that an Oregon Bar Member supervise the student attorneys); OR. RULES OF PROF'L CONDUCT r. 1.6 (2015) (describing the obligation of confidentiality).

colleges in Lane County. The attorneys in the Domestic Violence Clinic, including the SSLS attorney who serves University of Oregon students, will mentor the new attorney.

### *B. The Limits of the Representation*

Lawyers can define the scope of their representation.<sup>409</sup> Before the SSLS attorney takes on the representation of a student, the attorney makes two points very clear. First, SSLS can't represent the student in a suit against the University of Oregon, although SSLS can represent a survivor in the campus disciplinary proceedings. Second, SSLS can't represent the student in tort litigation, even against the perpetrator.

For various pragmatic reasons, SSLS will not represent a complainant in a suit against the University of Oregon. After all, the University of Oregon employs the SSLS attorney. This restriction has not proven problematic because the needs of SSLS clients are typically best met with a largely collaborative relationship with the administration. Nonetheless, because there is a potential or actual conflict of interest due to the fact that the attorney is employed by the University of Oregon and will not sue the University,<sup>410</sup> clients are asked to waive the conflict expressly.<sup>411</sup> The attorney tells the client that if the client ever has a legal claim against the University, the attorney will tell her and will provide her with the names of lawyers in the community who can represent her, but that the SSLS attorney cannot sue the University of Oregon.

The second limitation is imposed on SSLS by a funding source. Many federal grants prohibit attorneys from bringing tort suits, including the Legal Assistance to Victims program, the Grants to Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program (Campus Program), and the Victims of Crime Act program.<sup>412</sup> Again, the SSLS attorney explains the limits of her representation and offers to provide clients with the names of tort attorneys in the community if the clients want this information. The SSLS attorney is available, however, to answer survivors' questions about potential tort remedies.

Despite these limitations, the SSLS attorney is able to provide a variety of important services for her clients. The scope of the representation varies depending upon the client's needs. Sometimes the client merely wants brief services, such as someone to answer her questions. Sometimes the client wants full representation and the attorney helps her at the various stages of the different processes.

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409. OR. RULES OF PROF'L CONDUCT r. 1.2(b) (2015) ("A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.").

410. *Id.* r. 1.7(a)(2).

411. *Id.* r. 1.7(b)(4).

412. *See, e.g.*, 42 U.S.C. § 10603d(b) (2012) (describing limits of the Crime Victim Fund); Office on Violence Against Women, *supra* note 22, at 6.

### C. Counsel for the Accused Student

The University of Oregon provides free legal representation to complainants and accused students if the other side is receiving free legal representation from an entity at the University of Oregon. Its student conduct code explicitly states, "To the extent the University provides free legal representation to students who are party to student conduct proceedings, it will ensure that free legal representation is equally available to student respondents and student complainants."<sup>413</sup> This policy ensures "procedural fairness" and advances "general principles of equal treatment," both of which are express objectives in the conduct code.<sup>414</sup>

This provision was adopted at a time when accused students received representation from ASUO's Office of Student Advocacy and SSLS was just beginning. The faculty who proposed the language wanted to ensure that a survivor always had access to legal representation when the accused student had a lawyer. So long as the Office of Student Advocacy and SSLS continue to exist, all University of Oregon students, both the accused and the complainant, have access to legal counsel.

### D. An Example

To see why a lawyer is so helpful, examine briefly the actions of the attorney in one of the cases handled by Student Survivor Legal Services. During the nine-month representation of a student rape survivor, the attorney took on the full representation of all aspects of the survivor's case. At the time the survivor sought help, she was trying to navigate a criminal and campus investigation, while also still fearing for her safety despite the existence of a campus protective order. The attorney helped the student obtain a Sexual Abuse Protective Order (SAPO), which prevented the perpetrator from having any contact with her. The attorney and client discussed how to manage the SAPO hearing to prevent the defense from using the hearing as an opportunity for discovery. They also discussed timing of the proceedings: a criminal no-contact order would have precluded the client's ability to obtain a SAPO.

The perpetrator had hired numerous lawyers to represent him on the civil protective order case, the criminal case, and the campus student conduct code case. The defense team was very aggressive, but the survivor's attorney successfully coordinated with the local district attorney to prevent a deposition of the survivor. The SSLS attorney also advocated for her client's position during the criminal process. She attended all meetings with the survivor and the District Attorney, and worked with the District Attorney in reaching a plea deal

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413. UO Student Conduct Code, *supra* note 126, at Policy No. III.01.01 § 3(II)(2)(e) (addressing student conduct procedures).

414. *Id.* at Policy No. III.01.01 § 2 (addressing student rights).

that was acceptable to the survivor. She also worked with the survivor on her victim impact statement that was given before sentencing. The criminal case eventually concluded with the perpetrator pleading guilty to a felony that required him to undergo a sex offender evaluation and any recommended treatment. The attorney also successfully represented the complainant during the campus administrative process, which ultimately led to the perpetrator being permanently expelled from campus with a notation on his transcript that he violated the student conduct code.

### CONCLUSION

Survivors of campus sexual violence benefit tremendously when they are afforded free legal counsel to help address their victimization. A lawyer can help a survivor complete her education because the lawyer provides invaluable assistance as the survivor navigates the complicated interplay of the civil legal system, the criminal legal system, and the college disciplinary system. Instead of the survivor foregoing legal remedies (including reporting to the university) because she is demoralized by the complexity, overwhelmed by the required steps to access legal remedies, or frightened by the prospect of encountering the accused student's lawyer, the survivor is empowered by an attorney and given the means to take advantage of the laws that were enacted for her benefit. The lawyer is critical to the survivor's ability to gain and maintain control over her situation.

Government officials and campus administrators who believe that lawyers don't matter (or don't matter much) are complicit in perpetuating the gender discrimination that is endemic on higher education campuses. OCR should be more explicit about universities' obligations under Title IX to provide free legal counsel to survivors of sexual violence in some instances. In addition, the Secretary of Education should disseminate to institutions of higher education information that identifies on-campus legal services as one of the "best practices" for responding to incidents of domestic violence, dating violence, sexual assault and stalking.<sup>415</sup> Universities should provide these services to all sexual violence survivors regardless of their legal obligation to do so because doing so is a best practice. If these things don't occur, Congress should pass legislation to make sure they occur.<sup>416</sup>

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415. 20 U.S.C. § 1092(f)(16)(B)(2012) ("The Secretary shall seek the advice and counsel of the Attorney General of the United States and the Secretary of Health and Human Services concerning the development, and dissemination to institutions of higher education, of best practices information about preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking, including elements of institutional policies that have proven successful based on evidence-based outcome measurements.").

416. If Congress were to enact legislation, it might consider providing institutions with a safe harbor from survivors' suits if the institution provided all survivors with free attorneys. Institutions shouldn't be totally shielded from liability, but some sort of additional protection might be warranted.

The decisions of OCR and campus administrators to follow this Article's recommendations will "deeply shape women's realities, but from high up and a long way off."<sup>417</sup> Those decisions will be grounded in survivors' experiences, however. Survivors greatly appreciate and value receiving the help of an attorney who can provide them with trauma-informed, client-centered, confidential legal services. Survivors find the attorney's services essential for successfully navigating the confusing campus, civil, and criminal systems that are so important to their safety and recovery. Survivors are grateful for how they can focus more on their studies instead of addressing their victimization, because their attorneys can assist them. By listening to survivors, society can close the gap in services and more effectively address gender discrimination on campuses.

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417. MACKINNON, *supra* note 94, at 35.