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NOTES

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Sara O'Toole

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NOTES

CAMPUS SEXUAL ASSAULT ADJUDICATION, STUDENT DUE PROCESS, AND A BAR ON DIRECT CROSS-EXAMINATION

Sara O'Toole*

INTRODUCTION

In recent years, a debate about the prevalence of sexual assault and the responsibility of universities to protect students has raged in the media, on college campuses, and among politicians.[1] Student activists have increasingly spoken on their campuses and advocated for effective protection from assault and punishment for offenders.[2] Accused students have taken their grievances with the university adjudication process to federal courts, where they raise claims under Title IX and allege due process violations, such as their inability to personally cross-examine witnesses.[3] Under the Obama Administration, the Office for Civil Rights (the "OCR") updated its recommended procedures for handling campus sexual assault

* Candidate for J.D., 2018, University of Pittsburgh School of Law; B.A., 2015, *summa cum laude*, University of Pittsburgh.

[1] *See infra* notes 2–5.

[2] *See, e.g.*, THE HUNTING GROUND (Chain Camera Pictures 2015); KNOW YOUR IX, http://knowyourix.org (last visited Jan. 17, 2018); END RAPE ON CAMPUS, http://endrapeoncampus.org/ (last visited Jan. 17, 2018); Emma Sulkowicz, *My Rapist is Still on Campus*, TIME (May 15, 2014), http://time.com/99780/campus-sexual-assault-emma-sulkowicz/.

[3] *See, e.g.*, Yu v. Vassar Coll., 97 F. Supp. 3d 448 (S.D.N.Y. 2015); Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015); Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. 2015).

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and created new requirements for Title IX compliance.[4] The Trump Administration has since rescinded this OCR guidance and announced its intention to promulgate its own guidance.[5] Considering the likelihood that requirements will change, most universities that amended their policies to reflect the Obama Administration's prior recommendations must now question the future of their policies.[6] While these changes occur, the requirements of due process in a university setting should be thoroughly reviewed so that the government, students, and universities understand the extent and limits of students' due process rights.

A central focus in this debate is how to strike the appropriate balance of rights between a complainant student and an accused student. On the side of the complainant, there is federal legislation, Title IX of the Education Amendments, which bans discrimination based on sex in educational programs.[7] Such discrimination includes sexual harassment that creates a hostile environment.[8] For the accused student, the adjudication process often raises concerns about due process, although the extent of due process rights in a public university's

[4] Russlynn Ali, *Dear Colleague Letter: Sexual Violence*, U.S. DEPT. EDU. OFFICE FOR CIV. RIGHTS 2 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter *Dear Colleague Letter*].

[5] Kimberly Hefling & Caitlin Emma, *Obama-era School Sexual Assault Policy Rescinded*, POLITICO (Sept. 22, 2017), http://www.politico.com/story/2017/09/22/obama-era-school-sexual-assault-policy-rescinded-243016. However, a recent lawsuit is challenging the decision to rescind the OCR guidance. Nick Anderson, *Lawsuit Challenges Trump's Rollback of Guidance on Campus Sexual Violence*, WASH. POST (Jan. 25, 2018), http://wapo.st/2DMTsAP?tid=ss_tw&utm_term=.ddc0e8610508.

[6] *See* David G. Savage & Timothy M. Phelps, *How a Little-known Education Office has Forced Far-reaching Changes to Campus Sex Assault Investigation*, L.A. TIMES (Aug. 17, 2015), http://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html (discussing generally universities that have changed their policies). In response to the rollback of the OCR guidance, many universities have reaffirmed their commitment to take campus sexual assault seriously. *See, e.g.*, *Campus, UC Respond to Trump Administration's Title IX Changes*, BERKELEY NEWS (Sept. 7, 2017), http://news.berkeley.edu/2017/09/07/uc-responds-to-trump-administrations-troubling-title-ix-changes/ ("UC Berkeley, like the Office of the President of the University of California, stands firmly in support of the profoundly important policies enacted in recent years that seek to ensure a more efficient and fair system for all parties in cases of sexual harassment and sexual violence."); Katie Pope, *A Message from the Title IX Coordinator*, UNIVERSITY OF PITTSBURGH OFFICE OF DIVERSITY AND INCLUSION (Sept. 7, 2017), http://www.titleix.pitt.edu/ ("The Title IX Office at Pitt wants to remind the community that our commitment to the letter and the spirit of Title IX remains unchanged.").

[7] 20 U.S.C. §§ 1681–88 (2012) ("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 . . . .").

[8] Franklin v. Gwinnet Cty. Pub. Sch., 503 U.S. 60, 75–76 (1990).

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adjudication is not clear.[9] Finding the appropriate balance is essential to the goal of creating a more equal and safe educational environment, as moving too far in one direction may lead to a detrimental backlash and thus prevent effective solutions.

In line with this concern, Obama-era reform efforts faced a critical response from students and academics who responded to the OCR guidance with lawsuits and public critiques.[10] One of the criticisms is directed at the OCR's strong recommendation against allowing students to personally cross-examine each other during an adjudicatory hearing.[11] Although scholars have written to defend aspects of the guidance, such as the preponderance of the evidence standard, few have discussed whether the ban on direct cross-examination[12] comports with due process. An examination of the due process case law in educational settings and an application of the analysis from *Mathews v. Eldridge* supports the recommendation against personal cross-examination.[13] A balancing of the *Mathews* factors demonstrates that the limited additional value of personal cross-examination and a university's interest in maintaining an affordable and effective adjudication system weigh against the interest of the student, who is offered a variety of procedural protections aside from personal cross-examination.[14]

With the new presidential administration in office, the public debate of these issues holds even greater importance. President Trump will likely instruct the OCR to ease requirements on schools for campus sexual assault adjudications as the

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[9] U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ."). For students bringing claims of due process violations, *see, e.g.*, Yu v. Vassar Coll., 97 F. Supp. 3d 448 (S.D.N.Y. 2015); Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015).

[10] For lawsuits brought by accused students, *see, e.g.*, *Yu*, 97 F. Supp. 3d at 448; *Salisbury Univ.*, 123 F. Supp. 3d at 748; Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. 2015). For a response from academics, *see, e.g.*, David Rudovsky et al., *Open Letter from Members of the Penn Law School Faculty*, WASH. POST (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf.

[11] *See* Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html; Rudovsky et al., *supra* note 10; Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 520 (2012).

[12] In this Note, the terms "direct cross-examination" and "personal cross-examination" refer to students directly asking each other questions in person. These terms do not include the submission of questions by a student, which are then asked by a panel.

[13] *See infra* Part IV.

[14] *Id.*

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administration has signaled this move by lessening standards in temporary guidance.[15] President Trump has done so in the area of transgender student rights by rescinding protections that allowed them to use the bathroom corresponding with their gender identity.[16] Likewise, many people expect the administration to change the federal guidance in a way that makes it harder for schools to discipline students found responsible for sexual assault.[17] Advocates have begun a campaign for universities to hold the line and maintain the Obama-era policies that strictly enforced protections for students reporting sexual assault.[18] Politicians have advocated for such maintenance and may attempt to influence the creation of new guidance.[19] This continued advocacy may influence the notice-and-comment process that Secretary of Education Betsy DeVos plans to undergo during the creation of new guidance.[20] Therefore, more than ever, universities, the Department of Education, and the public must be convinced of the appropriateness and constitutionality of the adjudication procedures that schools have recently implemented. This Note will discuss one aspect of those procedures: the bar on personal cross-examination.

Part I of this Note describes Title IX, its requirements, and the Obama-era OCR guidance that required many universities to alter their adjudication procedures, including the bar on personal cross-examination. Part II provides an overview of the response to the OCR guidance with a focus on the response to its recommendation

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[15] The Department of Education has already weakened standards in a temporary question and answer document. *See* Hefling & Emma, *supra* note 5.

[16] Jeremy W. Peters, Jo Becker & Julie Hirschfeld Davis, *Trump Rescinds Rules on Bathrooms for Transgender Students*, N.Y. TIMES (Feb. 22, 2017), https://www.nytimes.com/2017/02/22/us/politics/devos-sessions-transgender-students-rights.html.

[17] Anemona Hartocollis, *Universities Face Pressure to Hold the Line on Title IX*, N.Y. TIMES (Feb. 18, 2017), https://nyti.ms/2luyP2X.

[18] *Id.*

[19] *See, e.g.*, Phil McCausland, *DeVos Rescinds Obama-Era Title IX Protections, Drawing Mixed Reactions From Advocates*, NBC NEWS (Sept. 22, 2017), https://www.nbcnews.com/news/us-news/devos-rescinds-obama-era-title-ix-protections-drawing-mixed-reactions-n803976; Bill Schackner, *Gov. Wolf urges Betsy DeVos and federal Education Department not to rewrite Title IX rules on campus assaults*, PITTSBURGH POST-GAZETTE (Sept. 8, 2017), http://www.post-gazette.com/news/education/2017/09/08/Governor-Tom-Wolf-Title-IX-Education-Department-sexual-assault-colleges-schools-Betsy-DeVos/stories/201709080161; Erik Oster, *Joe Biden responds to Betsy DeVos' Title IX stance in latest 'It's On Us' ad*, ADWEEK (Sept. 21, 2017), http://www.adweek.com/creativity/joe-biden-responds-to-betsy-devos-title-ix-stance-in-latest-its-on-us-ad/.

[20] *DeVos Says She'll Rescind Obama's Title IX Sexual Assault Guidelines*, CBS NEWS, Sept. 7, 2017, https://www.cbsnews.com/news/devos-to-rescind-obama-era-title-ix-order-on-withholding-school-funds-for-assault-inaction/.

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to prohibit personal cross-examination. Part III reviews the status of constitutional due process in educational settings through Supreme Court and federal case law. Finally, Part IV demonstrates that the OCR's recommendation against allowing personal cross-examination comports with due process in the university setting by applying the Supreme Court's balancing test from *Mathews*.

I. TITLE IX AND OCR GUIDANCE

Passed in 1972, Title IX of the Education Amendments to the Civil Rights Act prohibits discrimination based on sex in an educational program or activity that receives federal funding.[21] Nearly all higher education institutions fall within the jurisdiction of Title IX because they accept some form of financial assistance, the term "program or activity" is understood to mean all operations of a college or university,[22] and federal funding is defined broadly.[23] Since its enactment, the law has influenced various levels of education from elementary schools to universities by making academic and athletic opportunities available to men and women equally.[24] The success of Title IX is well documented throughout American society, and the law has been credited with transforming cultural norms.[25] For instance, many point to the success of the American women at the 2016 Olympics as a direct result of Title IX and the athletic opportunities made available by it.[26] It has facilitated a vast increase in female athletic participation at both the high school and college

[21] 20 U.S.C. §§ 1681–88 (2012) ("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 . . . .").

[22] Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, § 3(a), 102 Stat. 28, 28 (1988) (codified as amended at 20 U.S.C. § 1687 (2006)).

[23] 20 U.S.C. § 1681; 34 C.F.R. §§ 106.11–106.17; Litman v. George Mason Univ., 186 F.3d 544, 547 (4th Cir. 1999); Russo v. Diocese of Greensburg, 2010 U.S. Dist. LEXIS 96338 (W.D. Pa. Sept. 15, 2010).

[24] Barbara Winslow, *The Impact of Title IX*, GILDER LEHRMAN INST. AM. HIST., https://www.gilderlehrman.org/history-by-era/seventies/essays/impact-title-ix (last modified Nov. 12, 2017).

[25] Emma Chadband, *Nine Ways Title IX has Helped Girls and Women in Education*, NAT'L EDUC. ASS'N TODAY (June 21, 2012), http://neatoday.org/2012/06/21/nine-ways-title-ix-has-helped-girls-and-women-in-education-2/; DEBORAH L. BRAKE, GETTING IN THE GAME: TITLE IX AND THE WOMEN'S SPORTS REVOLUTION 5–8 (2010).

[26] Greg Myre, *U.S. Women Will Rule in Rio (You Can Thank Title IX)*, NPR (Aug. 4, 2016), http://www.npr.org/sections/thetorch/2016/08/04/487765827/u-s-women-will-rule-at-the-olympics-you-can-thank-title-ix.

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level.[27] Additionally, a rapid increase in women's educational attainment is often tied to Title IX.[28] Title IX continues to address gender inequality in a variety of areas and has made a lasting impact on societal views when it comes to athletics and education.

Although Title IX makes no specific mention of sexual assault or harassment, the Supreme Court first recognized sexual assault as prohibited sex discrimination under Title IX in 1990.[29] In 1999, the Supreme Court affirmed the position of many lower courts that students, as well as school employees, may create a sexually hostile environment in violation of Title IX.[30] The OCR has explained that a hostile environment "is created if conduct of a sexual nature 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."[31] Regulations require schools to adopt "prompt and equitable" grievance procedures for conduct that falls within the sex discrimination ban.[32] Therefore, since 1999, universities have been on notice of their requirement to promptly and equitably address student misconduct involving sexual assault. First in 1997 and revised in 2001, the OCR issued guidance for schools handling sexual assault grievances.[33] This guidance emphasized the importance of having "well-publicized and effective grievance procedures in place to handle complaints," discussed the definition of harassment, and clarified the implications of the Family Educational Rights and Privacy Act.[34]

In the Obama-era guidance, the 2011 Dear Colleague Letter (the "DCL"), the OCR provided a supplement to the 2001 guidance concerning the type of prompt and

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[27] Dep't of Just., *Equal Access to Education: Forty Years of Title IX 3*, U.S. DEP'T OF JUST., https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.

[28] *Id.* at 2.

[29] Franklin v. Gwinnet Cty. Pub. Sch., 503 U.S. 60, 75–76 (1990).

[30] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 653–54 (1999).

[31] *Sexual Harassment Guidance 1997*, U.S. DEP'T EDUC. OFF. CIV. RTS., https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html (last modified Oct. 16, 2015).

[32] 34 C.F.R. § 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.").

[33] *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, and Third Parties*, U.S. DEP'T EDUC. OFF. CIV. RTS. (Jan. 19, 2001), http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html.

[34] *Id.* The Family Educational Rights and Privacy Act is a federal law that protects the privacy of student records information. 20 U.S.C. § 1232(g).

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equitable response that it expected from schools and suggestions for proactive efforts to prevent sexual assault.[35] After reiterating a school's obligation to respond to sexual harassment, the DCL outlined procedural requirements including a notice of nondiscrimination, the designation of a Title IX coordinator, and the publication of a grievance procedure.[36] Additionally, the DCL identified elements that the OCR used to evaluate whether procedures met the prompt and equitable requirements.[37] These elements included: notice to students and others of the grievance procedures, adequate and impartial investigation of complaints, designated and reasonably prompt time frames, and notice of outcome.[38] Within its discussion of the requirement of an adequate, reliable, and impartial investigation of complaints, the DCL mentioned a number of mandates or suggestions that influence a school's sexual assault adjudication process.[39] For instance, the OCR advised schools to not wait for the conclusion of criminal proceedings to begin their own investigation.[40] Also, the DCL stated that the OCR would evaluate a school's process to see if it applied a preponderance of the evidence standard for complaints.[41] Under the DCL, students must be given an equal opportunity to present witnesses and evidence and access information that will be used at a hearing.[42]

In addition to the recommendations mentioned above and others not discussed here, the DCL spoke specifically about cross-examination of the parties. It stated:

> [The] OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.[43]

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[35] *Dear Colleague Letter*, *supra* note 4.

[36] *Id.* at 6.

[37] *Id.* at 9.

[38] *Id.* at 9–13.

[39] *Id.*

[40] *Id.* at 10.

[41] *Id.*

[42] *Id.* at 11.

[43] *Id.* at 12.

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This was the OCR's sole guidance regarding the availability of cross-examination by parties. This strong discouragement was often treated as a requirement for university sexual assault adjudication procedures as demonstrated by schools that changed their policies in accordance.[44] These policies usually do not permit personal cross-examination by the parties, and instead only allow questioning by an independent investigator or hearing panel.[45] Additionally, many policies allow students to submit questions that they would like the panel to ask the opposing party, but give the panel ultimate discretion in asking questions.[46] The Trump Administration has since rescinded the DCL, but many schools' policies continue to reflect its guidance.[47]

II. RESPONSE TO OCR GUIDANCE

Although many applauded the OCR's guidance as appropriately addressing the high rates of sexual assault on university campuses and taking proactive steps in

[44] *See, e.g.*, *Harvard Sexual and Gender-Based Harassment Policy*, HARV. U. TITLE IX RESOURCE GUIDE, http://titleix.harvard.edu/files/title-ix/files/harvard_sexual_harassment_policy.pdf?m=1461104544 (last modified May 4, 2017); *Procedures for Reports Against Students*, U. VA. OFF. EQUAL OPPORTUNITY & CIV. RTS., http://eocr.virginia.edu/appendixa (last modified Nov. 12, 2017); *Appendix D: Policy on Sex Discrimination, Sexual Harassment, Sexual Assault, Sexual Misconduct, Interpersonal Violence, and Stalking*, U. TEX. AUSTIN, http://catalog.utexas.edu/general-information/appendices/appendix-d/ (last modified Sept. 14, 2017); *University-Wide Committee on Sexual Misconduct Procedures*, YALE UWC PROCS., https://provost.yale.edu/sites/default/files/files/UWC%20Procedures.pdf (updating their policies for adjudication of sexual assault complaints to be in accordance with other DCL mandates).

[45] *Id.*

[46] *See, e.g.*, *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, DUKE U. STUDENT AFF., https://studentaffairs.duke.edu/conduct/z-policies/student-sexual-misconduct-policy-dukes-commitment-title-ix ("A complainant or respondent may not question each other or other witnesses directly, but may raise questions to be asked of that party through the hearing panel, which will determine whether to ask them.") (last modified Nov. 12, 2017); *Stanford Student Title IX Process*, STAN. U., https://stanford.app.box.com/v/student-title-ix-process ("[T]here will be a break so that a party listening to the hearing is able to submit written follow-up questions to the Hearing Coordinator by email. The Hearing Panel has ultimate authority as to what questions to ask.") (last modified Nov. 12, 2017); *University-Wide Committee on Sexual Misconduct Procedures*, *supra* note 44 ("The parties and any witnesses will be questioned by the panel only, but each party will be given an opportunity to submit questions for the panel to ask the other party or witnesses. The panel, at its sole discretion, may choose which, if any, questions to ask.").

[47] *See, e.g.*, *Campus, UC Respond to Trump Administration's Title IX Changes*, *supra* note 6. Universities may be awaiting new guidance before updating their policies. Some universities may desire to maintain their policies even following new guidance if they are convinced of its constitutionality.

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protecting students from sex-based harassment,[48] others found error in the OCR's recommendations, including the bar on direct cross-examination.[49] Critics argued that the guidance created unfair university adjudication procedures and insufficiently protected the due process rights of accused students.[50] For example, in response to a change in the University of Pennsylvania's procedures for adjudication of sexual assault complaints that brought its policy in line with the DCL, a group of University of Pennsylvania Law School professors wrote an open letter in opposition.[51] The letter claimed that the new procedure did not afford fundamental fairness or due process of law.[52] The letter took particular issue with the OCR discouraging direct cross-examination of the complainant and the university's decision to prohibit any direct cross-examination, even by an accused student's lawyer.[53] Specifically, the letter noted the importance of cross-examination as a procedure to reach fair and reliable determinations of facts.[54] A similar letter penned by Harvard Law School professors criticized Harvard's newly implemented policy and noted "[t]he absence of any adequate opportunity to discover the facts charged and to confront witnesses. . . ."[55] Additionally, much of the academic literature criticizing the DCL

[48] Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940 (2016) (arguing that the history of rape law reform suggests that society should support campus adjudication of sexual assault under an affirmative consent standard and oppose unique procedural protections); Katharine K. Baker, *Campus Sexual Misconduct as Sexual Harassment: A Defense of the DOE*, 64 KAN. L. REV. 861 (2016); Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 101 (2017).

[49] Larry Alexander et al., *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault*, INSIDE HIGHER EDUC. (May 16, 2016), https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf (responding to OCR letter with criticisms and recommendations, noting the preponderance of evidence standard); Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591 (2013); Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 KAN. L. REV. 913, 954–57 (2016); 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); Triplett, *supra* note 11.

[50] *Id.*

[51] Rudovsky et al., *supra* note 10.

[52] *Id.*

[53] *Id.* at 4.

[54] *Id.* ("Cross-examination has long been considered as perhaps the most important procedure in reaching a fair and reliable determination of disputed facts.").

[55] Bartholet et al., *supra* note 11.

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pointed to the bar on direct cross-examination as one of the multiple violations of due process rights.[56] One commentator criticized the OCR for strongly suggesting the prohibition of direct cross-examination without footnotes or citation of legal authority.[57] This response demonstrates the criticism directed generally at the DCL and specifically at its bar on personal cross-examination.

In addition to these academic claims of due process injustice, accused students brought lawsuits in the years following the issuance of the DCL. Some students who were found responsible for sexual assault through university adjudications have brought claims, sometimes referred to as reverse discrimination claims, against their universities.[58] These claims often include gender discrimination claims under Title IX, as well as breach of contract and due process violation claims.[59] Despite an uptick in these lawsuits, most of the claims do not survive a motion for summary judgment, making cases where judges offer a review of a university's adjudication procedures infrequent.[60] In the cases that offer judicial insight, some courts have commented on the ability or inability of the student to question the accuser and witnesses. For instance, the U.S. District Court for the District of Maryland noted that the plaintiff was told he would be able to ask questions of the investigator, complainant, and witnesses, but was denied the opportunity to ask many critical questions during the hearing.[61] However, this was one of a number of alleged procedural defects, which eventually led the court to permit the Title IX claim to proceed.[62] In contrast, a different federal district court held that "any claim of unfairness due to a requirement that questions be asked through the panel Chair fails as a matter of law," when

[56] *See* Bartholet et al., *supra* note 11; Rudovsky et al., *supra* note 10; Triplett, *supra* note 11.

[57] Triplett, *supra* note 11, at 520.

[58] *See, e.g.*, Yu v. Vassar Coll., 97 F. Supp. 3d 448 (S.D.N.Y. 2015) (bringing Title IX sex discrimination claim, due process claim, and breach of contract claim, among others); King v. Depauw Univ., 2014 U.S. Dist. LEXIS 117075 (S.D. Ind. Aug. 22, 2014) (bringing Title IX and breach of contract claim); Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015) (bringing Title IX claim along with other state law claims).

[59] *Yu*, 97 F. Supp. 3d at 448; *King*, 2014 U.S. Dist. LEXIS 117075; *Salisbury Univ.*, 123 F. Supp. 3d at 748.

[60] *Yu*, 97 F. Supp. 3d at 452 (granting Vassar's motion for summary judgment); Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. 2015) (granting motion to dismiss in part and denied in part, later vacated by settlement agreement); Doe v. Washington and Lee Univ., 2015 WL 4647996 (2015) (granting motion to dismiss claims for due process and breach of contract, but denying motion to dismiss for Title IX claim).

[61] *Salisbury Univ.*, 123 F. Supp. 3d at 766.

[62] *Id.*

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granting the university's motion for summary judgment.[63] The court found that the plaintiff failed to establish the chair's decision to cut short his submitted questions as a genuine issue.[64]

When courts have found issue with procedural elements, including the inability to cross-examine, they often do so in the context of pleading requirements, not substantive rulings on the conditions of due process.[65] Therefore, much of the criticism offered by courts comes in the form of a long list of plausible due process violations, without a definitive statement that any single error violates due process.[66] The judiciary's response, while often showing concern for protecting due process, has failed to match that of the critics who claim the existence of grievous due process violations.[67] This may be in part because the courts have not faced enough cases to find such error, or because, perhaps, the DCL and its discouragement of direct cross-examination does not violate due process.

In response to these due process and fairness criticisms, scholars and commentators came to the defense of the OCR guidance.[68] Many commentators considered it a necessary and effective response to an epidemic of sexual assault.[69] Other academics defended the DCL by arguing that the required preponderance of the evidence standard is appropriate.[70] After the Trump administration announced

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[63] *Yu*, 97 F. Supp. 3d at 465 (relying on Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) and Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987)).

[64] *Id.*

[65] *See* Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016).

[66] *Id.*

[67] *See, e.g.*, Some courts have rejected claims of violations of due process in campus sexual assault adjudications. *See, e.g.*, Plummer v. Univ. of Hous., 860 F.3d 767 (5th Cir. 2017) (affirming district court's summary judgment in favor of the university); Doe v. Washington and Lee Univ., 2015 WL 4647996 (Aug. 5, 2015) (dismissing due process claims); Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016) (dismissing all due process claims).

[68] *See* Anderson, *supra* note 48; Baker, *supra* note 48; Brake, *supra* note 48.

[69] Kristen Lombardi, *Biden Cites Progress on Campus Sexual Assault, But Says There's 'So Much Farther to Go,'* CTR. FOR PUB. INTEGRITY (Apr. 24, 2015), https://www.publicintegrity.org/2015/04/24/17232/biden-cites-progress-campus-sexual-assault-says-theres-so-much-farther-go.

[70] *See, e.g.*, Katherine K. Baker, Deborah L. Brake & Nancy Chi Cantalupo et al., *Title IX & the Preponderance of the Evidence: A White Paper*, http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf (where ninety law professors issued an open letter defending the burden of proof); Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, B.Y.U. EDUC. & L.J. 143 (2013); Lavinia M. Weizel, *The Process that is Due: Preponderance of the Evidence as the*

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coming changes to the DCL, a number of advocates defended its effectiveness and strong stance against sexual violence.[71] While the bar on direct cross-examination has faced similar criticism to that of the preponderance of the evidence standard, its constitutionality has not been as widely defended.[72] Although the OCR no longer advises universities to bar personal cross-examination, it is important for universities to recognize the constitutionality of such a prohibition, so that they independently maintain the policy. Since few commentators have specifically discussed the limitation on cross-examination or offered the legal support for the OCR's suggestion, this Note will demonstrate the feasibility of maintaining a bar on personal cross-examination.

III. CONSTITUTIONAL DUE PROCESS IN UNIVERSITY SETTINGS

To determine whether a bar on cross-examination in campus adjudications violates student due process rights, courts must determine what process is due. The Constitution demands that no one shall be "deprived of life, liberty or property without due process of law."[73] This protection applies to the federal government through the Fifth Amendment and was extended to the states through the Fourteenth Amendment.[74] With this extension, public schools are considered state actors, and thus, when school disciplinary proceedings threaten to deprive students of an interest, due process is required.[75] A court's analysis of school disciplinary processes is two-fold: first, it must find that a property or liberty interest exists, and second, it must determine the constitutionally required procedures.[76]

Standard of Proof for University Adjudication of Student-on-Student Sexual Assault Complaints, 53 B.C. L. REV. 1613 (2012); Jennifer James, Comment, *We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321 (2016) (arguing that the preponderance of the evidence standard should be federally codified).

[71] *Supra* note 19.

[72] Holly Hogan, *The Real Choice in a Perceived "Catch 22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277 (2009) (written prior to the DLC) (arguing that due process affords universities ample room to develop procedures like directing questions through a panel).

[73] U.S. CONST. amend. V.

[74] U.S. CONST. amend. XIV.

[75] *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 573 (1975).

[76] Bd. of Regents v. Roth, 408 U.S. 564, 569–71 (1972) ("The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of

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A. Protected Interests

The Supreme Court has stated that protected interests in property or liberty are not explicitly created by the Constitution, but "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."[77] The Court found this interest in public primary education for suspended students in *Goss v. Lopez* where state law directed authorities to provide a free education.[78] In *Goss*, multiple students were suspended for misconduct for up to 10 days without a hearing pursuant to an Ohio statute that permitted such suspensions.[79] In finding that the students had protectable interests, the Court relied on a state statute that required free education to support the existence of a property interest and the potential that misconduct charges would seriously damage their reputations to support the existence of a liberty interest.[80] The Court affirmed the district court's finding that the suspensions were invalid and held "the statute unconstitutional insofar as it permits such suspensions without notice or hearing."[81]

Goss is one of the four major cases in which the Supreme Court discussed students' due process rights.[82] Two of the cases, *Goss* and *Ingraham v. Wright*, involved disciplinary proceedings in public high schools.[83] In *Ingraham*, two students challenged the administration of corporal punishment by school officials.[84] The Court held that the corporal punishment did not violate their Eighth or Fourteenth Amendment rights.[85] In considering the students' Fourteenth Amendment due process rights, the Court held that due process was satisfied by Florida law, which recognized the common law right to be free from excessive

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liberty and property. When protected interests are implicated, the right to some kind of prior hearing is paramount. But the range of interests protected by procedural due process is not infinite.").

[77] *Id.* at 577.

[78] *Goss*, 419 U.S. at 573 (holding that students had claims of entitlement to public education on the basis of state law).

[79] *Id.* at 568.

[80] *Id.* at 574.

[81] *Id.* at 584.

[82] *Goss*, 419 U.S. at 565; Ingraham v. Wright, 430 U.S. 651 (1977); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

[83] *Goss*, 419 U.S. at 565; *Ingraham*, 430 U.S. at 651.

[84] *Ingraham*, 430 U.S. at 651.

[85] *Id.*

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corporal punishment in school.[86] The Florida law required teachers to exercise prudence and restraint in administering corporal punishment, which the Court found the teachers had done.[87] *Ingraham* did not appear to create any other due process requirements for school disciplinary proceedings.

The other two cases, *Missouri v. Horowitz* and *Regents of University of Michigan v. Ewing*, involved academic sanctions in graduate schools, in which the Court expressed more deference toward the universities.[88] Since the claim of sexual assault against a student is not academic, but disciplinary, the cases set in graduate school programs provide limited assistance in discerning due process requirements. There, the academic nature of the conduct led the Court to extend more deference to the universities. However, *Horowitz* and *Ewing* show how the Court may treat a claimed protectable interest in the university setting. In *Horowitz*, the Court heard a medical student's appeal after being dismissed from the program for academic reasons.[89] Finding that the school had informed the student of its dissatisfaction with her clinical progress and that it had made a deliberate and careful decision, the Court concluded that there was no violation of due process.[90] For that reason, the Court simply assumed that she had a liberty interest in pursuing a medical career and did not determine if this interest or any other constitutionally protected interest existed.[91] *Ewing* followed a similar path, as the Court assumed that a medical student had a property interest in his continued enrollment, but it found no violation of substantive due process when the university refused to allow him to retake an exam.[92] In each case, the Court assumed the existence of protectable interests for the students, although the Court has never officially recognized such a property or liberty right in a university education.[93] This assumption of a protectable interest casts some doubt on the requirement of due process in the university setting. Although the Supreme

[86] *Id.*

[87] *Id.*

[88] *Horowitz*, 435 U.S. at 78; *Ewing*, 474 U.S. at 214.

[89] *Horowitz*, 435 U.S. at 79.

[90] *Id.* at 84–85.

[91] *Id.*

[92] *Ewing*, 474 U.S. at 214–15.

[93] Weizel, *supra* note 70, at 1622 n.49.

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Court would likely find such an interest if presented with the question,[94] it is valuable to recognize that it has not done so yet. At a minimum, it demonstrates that the clear error claimed by numerous critics of the DCL is not an obvious conclusion based on Supreme Court precedent.

Goss and *Ingraham* are more relevant to sexual assault adjudication because they dealt with disciplinary violations and campus sexual assault is classified as a disciplinary violation. Although the *Goss* holding was limited to primary and secondary public education, numerous federal appeals and trial courts have extended it to find a protected interest in public university education.[95] For instance, in *Smyth v. Lubbers*, the district court recognized that a search of students' dormitories that led to the discovery of marijuana and the resulting suspensions implicated their property and liberty interests.[96] In finding the property interest, the court noted that a school evicting a suspended student from his dormitory was a significant deprivation of a property interest.[97] Additionally, the court found the liberty interest more strongly implicated because a suspension would appear on the student's disciplinary record and affect his potential admission to graduate school.[98] In *Gorman v. University of Rhode Island*, the appellee student faced charges of verbal abuse, harassment and threats that violated the student handbook.[99] He challenged the procedural protections the university had provided in its hearing.[100] The Court of Appeals for the First Circuit held that "a student facing expulsion or suspension from a public educational institution is entitled to the protections of due process" because the Fourteenth Amendment's protections of liberty and property include a student's interest in pursuing an education.[101] Similarly, when a student was dismissed from a vocational technical school, the Court of Appeals for the Tenth Circuit found that

[94] *Id.* at 1622 ("Although the Supreme Court's holding in *Goss* was limited to primary and secondary school students, lower federal courts have extended the Court's reasoning to students of public colleges and universities.").

[95] Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975); Smyth v. Lubbers, 398 F. Supp. 777, 796 (W.D. Mich. 1975); Gorman v. Univ. of R.I., 837 F.2d 7, 12 (1st Cir. 1988); Siblerud v. Colo. State Bd. of Agric., 896 F. Supp. 1506, 1512–13 (D. Colo. 1995).

[96] *Smyth*, 398 F. Supp. at 796.

[97] *Id.*

[98] *Id.* at 796–97.

[99] *Gorman*, 837 F.2d at 10.

[100] *Id.* at 14.

[101] *Id.* at 12.

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she had a protectable interest.[102] The court reasoned that "in light of *Goss* . . . where the Supreme Court recognized a property right in public school students . . . certainly such a right must be recognized to have vested with [the student], and the more prominently so in that she paid a specific, separate fee for enrollment and attendance at the [school]."[103] A district court judge later relied on *Gaspar* to find a protectable interest for a student at Colorado State University even though his claim was barred by the statute of limitations.[104] As demonstrated by the above cases, many courts have found that university students may have both a property and liberty interest in continuing their education that is protected by due process. Although the Supreme Court has never explicitly extended such protection to university disciplinary hearings, it is reasonable to assume such extension is proper and that accused students in sexual assault complaints have protected interests that require due process. However, due process is flexible and the existence of a protectable interest does not mandate the availability of direct cross-examination at a university hearing.

B. Mathews v. Eldridge *and Determining the Process that is Due*

In *Morrissey v. Brewer*, the Court explained that "[once] it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands."[105] Since the Supreme Court has not decided a case surrounding student due process complaints in a university disciplinary proceeding, there is little precedent that predicts the procedures that the Court would require in situations of campus sexual assault complaints.[106] To determine what process is due in such settings, the best guidance from the Court is *Mathews v. Eldridge*, which established

[102] Gaspar v. Bruton, 513 F.2d 843, 850 (10th Cir. 1975).

[103] *Id.*

[104] Siblerud v. Colo. State Bd. of Agric., 896 F. Supp. 1506, 1512 (D. Colo. 1995).

[105] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[106] None of the student due process cases decided by the court contemplated an adjudication for sexual assault. *See* Goss v. Lopez, 419 U.S. 565, 569–70 (1975) (describing students being suspended for demonstrating and physical attacks); Ingraham v. Wright, 430 U.S. 651, 657 (1977) (describing students being paddled for being slow to respond to his teacher's instructions and minor infractions); Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78, 79 (1978) (describing a student being dismissed for academic reasons); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 215 (describing a student who was dismissed after failing an important exam).

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three factors that the Court considers in determining sufficient procedure for due process.[107]

The Supreme Court has repeatedly held that notice and an opportunity to be heard are fundamental to due process protections.[108] Naturally, courts have also held these to be basic requirements for due process in educational settings, as these were required in *Goss*.[109] Beyond notice and an opportunity to be heard, *Mathews v. Eldridge* provides specific factors that the court balances to determine the requisite procedure.[110] In *Mathews*, the Supreme Court held that the Fifth Amendment Due Process Clause did not require that a recipient of Social Security disability payments be afforded an evidentiary hearing before termination of such payments.[111] Before considering the three factors, the Court emphasized that "due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[112] Then, the Court listed three factors that determine the dictates of due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[113]

In its analysis of the first factor, the private interest that will be affected by the action, the Court considered the degree of potential deprivation that would be caused

[107] Mathews v. Eldridge, 424 U.S. 319 (1976).

[108] Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915) (requiring notice and the right to a hearing); Palko v. Connecticut, 302 U.S. 319, 327 (1937) ("The hearing, moreover, must be a real one, not a sham or a pretense.") (since overruled for other reasons); Joint Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring) (recognizing the right to be heard); Armstrong v. Manzo, 380 U.S. 545, 552 (1965) (same); Grannis v. Ordean, 234 U.S. 385, 394 (1914) (same).

[109] *Goss*, 419 U.S. at 583–84 (1975). For courts holding this in the university setting, *see Gorman*, 837 F.2d at 13; *Siblerud*, 896 F. Supp. at 1515–16; Marin v. Univ. of P.R., 377 F. Supp. 613, 623 (D.P.R. 1974).

[110] *Mathews*, 424 U.S. at 335.

[111] *Id.* at 323.

[112] *Id.* at 334 (quoting Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961)).

[113] *Id.* at 335.

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by wrongfully depriving the respondent of benefits.[114] Also, it considered the possible length of wrongful deprivation before the respondent would receive a decision from an administrative law judge, which involved a timeframe that exceeded one year.[115] The Court found that the hardship imposed may be significant but likely less than a welfare recipient's hardship if deprived benefits.[116]

When the Court considered the second factor, the reliability of the existing procedures and the probable value of additional safeguards, it found that the benefits decision usually turns on unbiased medical reports.[117] When considering that there may be some credibility issues among physician reports, the Court clarified that "procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of cases, not the rare exceptions."[118] It also considered the policy of allowing the recipient to access the information that the agency used to make its decision as beneficial to the process's reliability.[119]

Finally, the Court analyzed the third factor of public interest, including administrative burdens and costs.[120] Here, it considered the interest in "conserving scarce fiscal and administrative resources," but noted that "financial cost alone was not a controlling weight."[121] In conclusion, the Court noted greater implications of this balancing, and considered that "[t]he judicial model of an evidentiary hearing is neither a required, nor even the most effective, method of decisionmaking in all circumstances."[122] Although applied in a different context, the factors and analysis used by the Court in *Mathews* provides an outline for considering the availability of direct cross-examination in the university setting.

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[114] *Id.* at 341.

[115] *Id.* at 341–42.

[116] *Id.* at 342.

[117] *Id.* at 344.

[118] *Id.*

[119] *Id.* at 345–46.

[120] *Id.* at 347.

[121] *Id.* at 348.

[122] *Id.*

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IV. THE *MATHEWS* BALANCING TEST SHOWS THAT A BAR ON DIRECT CROSS-EXAMINATION COMPORTS WITH DUE PROCESS

Critics of the DCL's ban on personal cross-examination argued that its availability is necessitated by procedural due process.[123] However, the Supreme Court has never held that direct cross-examination is required in postsecondary educational settings, and lower courts remain split about the specific requirements of due process for university students.[124] An analysis of the requirement of direct cross-examination under the *Mathews* balancing factors reveals that it is not mandated by due process in university disciplinary settings.[125] Federal courts have applied the *Mathews* analysis to determine appropriate due process in the university setting before, and it appears to be an appropriate approach in instances of campus sexual assault.[126] When applied to consider the OCR's ban on personal cross-examination, the analysis reveals that the bar does not implicate potential due process violations as some critics have suggested. This analysis assumes the existence of a protectable property or liberty interest, as discussed above. Each of the *Mathews* factors is applied to the circumstance of a student adjudication with a focus on the inability to cross-examine, and then, the factors are balanced. The balancing analysis reveals that the bar on direct cross-examination comports with due process.

[123] *See* Bartholet et al., *supra* note 11; Rudovsky et al., *supra* note 10; Triplett, *supra* note 11.

[124] *See* Triplett, *supra* note 11, at 500–02; Safko, *supra* note 49, at 2306–10.

[125] An article applying the *Mathews* analysis to the preponderance of the evidence standard mandated by the DCL revealed that the standard provided appropriate due process. Weizel, *supra* note 70. More recently, Alexandra Brodsky agreed that *Mathews* was the appropriate framework to analyze student disciplinary processes in the sexual assault context. Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 847 (2017). *But see* Tamara Rice Lave, *READY, FIRE, AIM: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637 (2016) (evaluating whether universities are adequately protecting students' due process rights under *Mathews* and stating that if the factors were applied as they were in *Mathews v. Eldridge* then courts are likely to uphold DCL influenced procedures, but suggesting they might be applied differently following *Hamdi v. Rumsfeld*).

[126] Plummer v. Univ. of Hous., 860 F.3d 767 (5th Cir. 2017) (affirming the district court's grant of summary judgment after applying the *Mathews* analysis to due process claims regarding the expulsion of two students for violating the sexual misconduct policy); Hill v. Bd. of Trs. of Mich. State Univ., 182 F. Supp. 2d 621 (W.D. Mich. 2001); Bradley v. Okla. *ex rel.* Bd. of Regents of Se. Okla. State Univ., 2014 U.S. Dist. LEXIS 58576 (E.D. Okla. Apr. 28, 2014).

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A. The Private Interest that Will Be Affected by the Official Action

To assert a due process claim, a student must first show that he has a protectable interest, as this Note discussed in Part III.[127] However, once this interest is established, in its *Mathews* analysis, a court first considers the weight of the accused's interest in the context of the potential adverse action.[128] If the action against the student is minimal, like a small fine, then his interest is weaker.[129] When the action threatened potentially eliminates the interest or severely harms it, then the interest is greater in contrast to the opposing interests.[130] When a student is threatened with suspension or expulsion from a university, his or her private interest in remaining at the school is undeniably high. Students invest thousands of dollars and years of their lives into their educations.[131] They develop connections and reputations within their university communities that will likely follow them throughout the rest of their lives.[132] If expulsion is an option for official action, the student may lose his interest in its entirety by being dismissed from school. The only context where the interest may be higher is if the university indicates the reason for expulsion on his transcript, but only a small number of schools do so.[133]

While the private interest may be at its highest when the university threatens expulsion, it is essential to remember the context. In a university disciplinary hearing,

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[127] *Supra* Part III.

[128] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[129] Goldberg v. Kelly, 397 U.S. 254, 262–63 (1970) (Frankfurter, J., concurring) (quoting Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 168 (1951) ("The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,' . . . and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication.")).

[130] *Id.* at 263 n.10.

[131] National Center for Education Statistics, *Tuition Costs of Colleges and Universities*, NAT'L CTR. FOR EDUC. STAT., https://nces.ed.gov/fastfacts/display.asp?id=76 (last visited Nov. 15, 2017) (reporting that the average price for undergraduate tuition, fees, room and board were estimated to be $16,188 at public institutions and $41,970 at private nonprofit institutions).

[132] *See* Goss v. Lopez, 419 U.S. 565, 574 (1975) (recognizing an interest in one's reputation); Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d at 16 (acknowledging the possibility that penalties will have a "major immediate and life-long impact on [the student's] personal life, education, employment, and public engagement").

[133] S.B. S5965 § 6444(6) (N.Y. 2015), http://legislation.nysenate.gov/pdf/bills/2015/S5965 (requiring institutions to make a notation of crimes of violence on the transcript of students found responsible after a conduct process that states they were "suspended after a finding of responsibility for a code of conduct

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the most severe action that a university may take is to prevent the student from returning to that singular university. There is no threat of incarceration, a criminal record, or registration as a sexual offender.[134] Additionally, there is no possibility for civil damages awarded to the complainant at the university hearing.[135] The potential harm to a student dismissed from school should not be minimized, but his or her interest is not the same as a criminal defendant or even a civil defendant.[136] After being disciplined, he or she has his or her freedom, does not have a stained criminal record, and has the option of applying to another university.[137] An accused student's interest is significant throughout an adjudicatory hearing, but it is not equivalent to a criminal defendant's interest.

B. The Risk of an Erroneous Deprivation of Such Interest Through the Procedures Used, and the Probable Value, If Any, of Additional or Substitute Procedural Safeguards

Next, a court would consider the risk of erroneous deprivation of the student's interest and the probable value of allowing direct cross-examination during the hearing. The student hearing process imitates traditional court proceedings in many ways that ensure the reliability of its findings. Disciplinary hearings often follow an

violation" or "expelled after a finding of responsibility for a Code of conduct violation"); S.B. 1193 § 23-9.2:15(A) (Va. 2015), https://lis.virginia.gov/cgi-bin/legp604.exe?151+ful+CHAP0771 (requiring universities to include a prominent notation on the academic transcript of each student who has been suspended for, has been permanently dismissed for, or withdraws from the institution while under investigation for a violation of the institution's code, rules, or set of standards governing student conduct stating that such student was suspended for, was permanently dismissed for, or withdrew from the institution while under investigation for a violation of the institution's code, rules, or set of standards).

[134] *See, e.g.*, Harvard University, *The Sanctioning Process*, TITLE IX RESOURCE GUIDE, http://resourceguide.titleix.harvard.edu/sanctioning-process (last visited Nov. 15, 2017) (stating that sanctions for misconduct range from warning to expulsion).

[135] *See* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 988 (2004) (noting the range of sanctions usually available under university disciplinary codes, including "fines [paid to the university], reprimands, negative notations on one's record, probation, suspension, or expulsion").

[136] *See* Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987) (citing Goss v. Lopez, 419 U.S. 565, 583 (1975)) ("Due process requires that appellants have the right to respond, but their rights in the academic disciplinary process are not coextensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial."); Jenkins v. La. State Bd. of Educ., 506 F.2d 992, 1000 (5th Cir. 1975); Schaer v. Brandies Univ., 735 N.E.2d 373, 381 (Mass. 2000) ("A university is not required to adhere to the standards of due process guaranteed to criminal defendants . . . .").

[137] Although the ability of the accused student to attend another university has been criticized. *See* Tyler Kingkade, *How Colleges Let Sexual Predators Slip Away to Other Schools*, HUFFINGTON POST (Oct. 23, 2014), http://www.huffingtonpost.com/2014/10/23/college-rape-transfer_n_6030770.html.

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investigation of the facts by an independent investigator or the school's Title IX officer.[138] At the hearing, both parties may present their statements and suggest witnesses for the committee to question.[139] Committee members are typically required to disclose "any real or perceived conflicts of interest between [them] and the parties," so the committee would be impartial.[140] Additionally, the DCL recommended that schools provide a guaranteed opportunity to appeal the decision.[141] All of these factors build a non-arbitrary process when schools properly follow the provisions in their student codes and policies. Oftentimes, when courts find erroneous deprivation, they point to the school not following its own university procedures properly.[142] This implies that erroneous deprivation issues may arise because the published procedures are not properly followed, not because policies do not provide sufficient due process protection. For this reason, many potential errors can likely be prevented by requiring schools to follow their written rules, rather than adding more, potentially burdensome, procedural safeguards.

The Court specifically discussed the risk of erroneous deprivation in *Goss*. There, the Court noted that "requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action."[143] It went on to comment about how the notice and hearing requirements permit administrators to become aware of potential factual disputes.[144] This awareness would allow the administrator to proceed using his discretion to determine the need for additional resources depending on the case.[145] The Court indicated that an administrator applying informed discretion will better avoid erroneous deprivation.[146] The fact that universities meet the requirements of

[138] *Dear Colleague Letter*, *supra* note 4, at 9, 12.

[139] *Id.* at 9.

[140] *Id.* at 12.

[141] *Id.*

[142] *See, e.g.*, Doe v. Columbia Univ., 831 F.3d 46, 56–57 (2d Cir. N.Y. 2016) ("The investigator and the panel failed to act in accordance with University procedures designed to protect accused students."); King v. DePauw Univ., 2:14-cv-70-WTL-DKL, 2014 WL 4197507, *11 (S.D. Ind. Aug. 22, 2014) ("Here King alleges that DePauw breached at least two of the 'Rights of the Respondent' that are contained in the 'Sexual Misconduct Policy' section of DePauw's Student Handbook.").

[143] Goss v. Lopez, 419 U.S. 565, 583 (1975).

[144] *Id.*

[145] *Id.* at 584.

[146] *Id.*

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notice and an opportunity to be heard shows that a court could similarly rely on an administrators informed discretion to make appropriate findings about the disciplinary process. The procedures suggested by the OCR and followed by most universities ensure a reliable, unbiased setting with low risk of erroneous deprivation to the student.

In conjunction with the risk of erroneous deprivation analysis, a court would evaluate the probable value of allowing direct cross-examination by accused students.[147] Confrontation of adverse witnesses is a constitutional right extended to criminal defendants, and the Supreme Court has extended this right to apply to adjudication in all states through the Fourteenth Amendment.[148] Courts have often celebrated the value of cross-examination in truth-seeking.[149] This value is not denied and is often essential in defending individuals from criminal prosecution, when the individual's liberty interest is most at risk. Also, the Court has extended this right to civil trials through the Due Process Clause.[150] However, it has not extended it to the educational setting and it has declined to do so for good reason. At least one court has specifically held that limitations to cross-examination are not due process violations.[151] The Court of Appeals for the Second Circuit found that "the right to cross examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings."[152] Another court recently declined to decide "whether confrontation and cross-examination would ever be constitutionally required in student disciplinary proceedings."[153] There, the court rejected the plaintiffs' claim of due process violations where the university denied them confrontation rights and limited cross-examination to written questions. Beyond the financial burdens this requirement places on universities,[154] due process

[147] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

[148] U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . and to have the Assistance of Counsel for his defense."); Pointer v. Texas, 380 U.S. 400, 403 (1965) (extending the confrontation clause to the states).

[149] *Pointer*, 380 U.S. at 404.

[150] Goldberg v. Kelly, 397 U.S. 254 (1970).

[151] Sterrett v. Cowan, 85 F. Supp. 3d 916, 929 (E.D. Mich. 2015) ("Confronting the complainant, let alone other witnesses, is not an absolute right and is generally not part of the due process requirement in a school disciplinary setting." (citations omitted)).

[152] Winnick v. Manning, 460 F.2d 545, 549 (2d Cir. 1972).

[153] Plummer v. Univ. of Houston, 860 F.3d 767, 775 (5th Cir. 2017).

[154] Discussed *infra* Part IV(C).

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does not require the extension of confrontation to the school setting because there are a number of reasonable alternatives.[155] Disciplinary proceedings typically include a hearing panel that questions all of the parties and relevant witnesses.[156] The respondent may submit a personal written statement and a list of questions that he or she would like the panel to ask.[157] The panel selects questions from that list, as well as additional questions, to ask the parties.[158] In this alternative, the primary difference is the person who asks the questions.

The difference in the questioner has a limited value in the university setting and numerous courts have found that having a panel question all parties is an appropriate alternative.[159] In *Dixon v. Alabama State Board of Education*, the court examined a student's expulsion and found that "a full-dress judicial hearing, with the right to cross-examine witnesses" was not required.[160] In another case, when applying *Mathews* to a university setting, the Court of Appeals for the First Circuit rejected the idea that students have an essential right to unlimited cross-examination in school disciplinary proceedings.[161] In *Nash v. Auburn University*, the Court of Appeals for the Tenth Circuit found that "[w]here basic fairness is preserved, we have not required the cross-examination of witnesses and a full adversary proceeding."[162] In that case, the students were told beforehand about the process and offered the opportunity to pose questions of the accusers through the presiding board chancellor, who would then ask the questions.[163] The court found this process sufficient.[164]

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[155] *Dear Colleague Letter*, *supra* note 4, at 10 (discussing generally schools' use of hearings and investigations).

[156] *See, e.g.*, *Student Sexual Misconduct Policy and Procedures: Duke's Commitment to Title IX*, *supra* note 46; *Stanford Student Title IX Process*, *supra* note 46; *University-Wide Committee on Sexual Misconduct Procedures*, *supra* note 44.

[157] *Id.*

[158] *Id.*

[159] *See* Gorman v. Univ. of R.I., 837 F.2d 7, 16 (1st Cir. 1988); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961); Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016).

[160] *Dixon*, 294 F.2d at 159.

[161] *Gorman*, 837 F.2d at 16. Although in that case the student had the opportunity to cross-examine witnesses as to the events in question, the court found no issue with a later limitation on the student's ability to question witnesses on another issue. *Id.*

[162] Nash v. Auburn Univ., 812 F.2d 655, 664 (11th Cir. 1987).

[163] *Id.*

[164] *Id.*

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Finding issue with limits on a respondent's opportunity to present information, a different court found that "in light of the disputed nature of the facts and the importance of witness credibility in [the] case, due process required that the panel permit the plaintiff to hear all evidence against him and to direct questions to his accuser through the panel."[165] Therefore, the court found that directing questions through a panel would have provided sufficient due process. Another federal district court found that this method of questioning was all that due process required in an adjudication concerning sexual assault.[166] There, the court held that where the plaintiffs "were able to submit written questions to witnesses in lieu of direct cross-examination . . . they received all the process that they were due."[167] The court clarified that despite the student's implicit belief that they were entitled to criminal due process protections, "universities are not required to conduct disciplinary proceedings in the same manner as criminal trials in order to satisfy the Due Process Clause."[168]

When considering judicial commentary on the requirements of due process in university settings, it is important to note that the opinions often come at the motion-to-dismiss stage.[169] As a result, the court's comments about due process requirements are considering the plausibility of a plaintiff's claim as opposed to the actual constitutional mandates and thus, the court errs on the side of the plaintiff's potential claim.[170] Moreover, many of the cases involving sexual assault allege a number of procedural deficits, so the availability of cross-examination is usually considered in the context of other violations, not as an independent necessity.[171] A Massachusetts District Court precisely explained this complication while reviewing an accused student's claim of due process violations: "It is not necessary for the Court to decide what the bare minimum might be—that is, how many procedural protections

[165] Donohue v. Baker, 976 F. Supp. 136, 147 (N.D.N.Y. 1997).

[166] Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 604 (S.D. Ohio 2016).

[167] *Id.*

[168] *Id.*

[169] *See, e.g.*, *id.* (granting University of Cincinnati's motion to dismiss); Yu v. Vassar Coll., 97 F. Supp. 3d 448, 452 (S.D.N.Y. 2015) (granting Vassar's motion for summary judgment); Sterrett v. Cowan, 85 F. Supp. 3d 916, 922 (E.D. Mich. 2015) (granting motion to dismiss in part and denied in part, later vacated by settlement agreement); Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *1 (W.D. Va. Aug. 5, 2015) (granting motion to dismiss claims for due process and breach of contract, but denying motion to dismiss for Title IX claim).

[170] *Univ. of Cincinnati*, 173 F. Supp. 3d at 604.

[171] *See, e.g.*, Doe v. Salisbury Univ., 123 F. Supp. 3d 748, 766 (D. Md. 2015).

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Brandeis could have removed and still provided 'basic fairness' to the accused—or whether any particular procedural protection was required under the circumstances of this case."[172]

Additionally, distinctive characteristics of sexual assault adjudication may decrease the effectiveness of personal cross-examination. Complaints of sexual assault involve instances of intimate attack that may traumatize survivors physically and emotionally. When survivors of sexual assault are personally cross-examined, it often adds to their trauma and may make it more difficult for them to share their stories.[173] Survivors may appear less credible, distracted, angry, or reactive in ways that prevent their account from being understood and reviewed impartially.[174] This re-traumatizing experience and the distracting reactions it inspires may not necessarily move the panel closer to the truth or to a correct determination. There is reason to doubt the value of permitting personal cross-examination in this context and the likelihood that it would produce a more accurate outcome.

Considering the alternative of directing questions through a panel, the added value of allowing personal cross-examination is limited in the university setting. Moreover, the risk of erroneous deprivation is low because universities have established protective processes that provide notice and a hearing to handle disciplinary matters.

C. The Government's Interest, Including the Function Involved and the Fiscal and Administrative Burdens that the Additional or Substitute Procedural Requirement Would Entail

The final factor considered in the *Mathews* analysis is the government's interest, or in this case, the university's interest, including the function and the additional burdens the process would place on the institution.[175] This part of the

[172] Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 607 (D. Mass. 2016).

[173] Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond The 1950s?*, 2016 BRIT. J. CRIMINOLOGY 1, 3 (2016) ("It is not uncommon for complainants to report that the suspicion and disbelief that they encounter during cross-examination feels like a repeat of the trauma of being raped—a phenomenon often referred to as 'secondary victimization'" (citations omitted).).

[174] H. Hunter Bruton, *Cross-Examination, College Sexual Assault Adjudications, and the Opportunity for Tuning Up the "Greatest Legal Engine Ever Invented,"* 27 CORNELL J.L. & PUB. POL'Y 145, 154–71 (2017).

[175] Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

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analysis considers both the interest of the university in utilizing an effective process and the financial and administrative burdens an additional procedure might place on the institution.[176]

As one district court described it, "ensuring allegations of sexual assault on college campuses are taken seriously is of critical importance, and there is no doubt that universities have an exceedingly difficult task in handling these issues."[177] Universities have a high interest in preventing sexual assault on their campuses. Not only is it mandated by Title IX,[178] but it is integral in creating a successful learning environment and a safe setting for current and potential students. Research has shown that suffering from sexual assault has detrimental impacts on student performance.[179] Additionally, universities face criticism from students and the public when they do not appropriately respond to high rates of sexual assault on campuses.[180] As an institution, the university has a strong interest in maintaining a safe and approachable environment for their students.

Beyond the institutional interest, the university also has the duty to represent the interests of the complainant student in the adjudication and to prevent the continuation of a hostile environment.[181] Victims of sexual assault make complaints

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[176] *Id.*

[177] Doe v. Brown Univ., 166 F. Supp. 3d 177, 183 (D.R.I. 2016).

[178] Franklin v. Gwinnet Cty. Pub. Sch., 503 U.S. 60, 75–76 (1992).

[179] Lilia M. Cortina, Suzanne Swan, Louise F. Fitzgerald & Craig Waldo, *Sexual Harassment and Assault: Chilling the Climate for Women in Academia*, 22 PSYCHOL. WOMEN Q. 437 (1998) ("Undergraduates reporting attempted or completed rape described diminished feelings of respect and acceptance on campus, and they perceived a more negative climate for women and gender issues at the university."); A number of female students who bring lawsuits against their universities leave the institution because their assailant remained, *see, e.g.*, Williams v. Bd. of Regents, 477 F.3d 1282, 1289 (11th Cir. 2007) (stating that plaintiff withdrew after filing her complaint with campus police); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949, 953 (4th Cir. 1997) (stating that appellant had sought and received a retroactive withdrawal from Virginia Tech for the academic year following her rape); Moore v. Regents of the Univ. of Cal., 2016 U.S. Dist. LEXIS 67548, at *8–9 (N.D. Cal. May 23, 2016) (stating that plaintiff withdrew from the university following her assault and an ineffective response by the university); Simpson v. Univ. of Colo., 372 F. Supp. 2d 1229, 1245 (D. Colo. 2005) (stating that one of the plaintiffs has withdrawn from the university following her complaint of sexual assault).

[180] Nick Anderson, *These colleges have the most reports of rape*, WASH. POST, June 7, 2016, https://www.washingtonpost.com/news/grade-point/wp/2016/06/07/these-colleges-have-the-most-reports-of-rape/?utm_term=.b3b293ae9c28.

[181] *Dear Colleague Letter*, *supra* note 4, at 4 ("If 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.").

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to the university, but it is the university's administrators who follow up on the complaint by investigating and bringing the claim to a hearing board.[182] In this regard, the universities represent the interests of the victim in obtaining protection from a hostile environment. This protection from a hostile environment may include a system of adjudication that prohibits personal confrontation by an alleged attacker.[183] This duty to Title IX complainants is a reflection of discrimination law, which is founded on different grounds than criminal law.[184] Unlike criminal law which emphasizes the vulnerable rights of the accused, discrimination law focuses on protecting a traditionally discriminated class.[185] In considering the government's interest in the adjudication, it is important to consider this foundation in protecting a discriminated class under Title IX, which reflects a policy objective within the law. The fact that complainants have sued universities through Title IX for failure to appropriately respond to reports of assault emphasizes the interest that the university has in providing protection.[186] They will and have been held responsible for their failure to do so.[187] It should be noted that a number of accused students have also sued their universities after being expelled.[188] This potential for liability on both sides may help the institution find the appropriate balance in its adjudication system.

For many institutions, creating a safe and just learning environment is essential to achieving their school missions and mantras.[189] Many university mission

[182] *Id.* at 12.

[183] *Id.* ("Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.").

[184] Baker, *supra* note 48, at 883.

[185] *Id.* at 863.

[186] *See, e.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); Samuelson v. Ore. State Univ., 162 F. Supp. 3d 1123 (D. Or. 2016); Doe v. Emerson Coll., 153 F. Supp. 3d 506 (D. Mass. 2015); Rouse v. Duke Univ., 869 F. Supp. 2d 674 (M.D.N.C. 2012); McGrath v. Dominican Coll. of Blauvelt, 672 F. Supp. 2d 477 (S.D.N.Y. 2009); Ross v. Corp. of Mercer Univ., 506 F. Supp. 2d 1325 (M.D. Ga. 2007).

[187] *See, e.g.*, Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170 (10th Cir. 2007); Rouse v. Duke Univ., 869 F. Supp. 2d 674 (M.D.N.C. 2012); McGrath v. Dominican Coll. of Blauvelt, 672 F. Supp. 2d 477 (S.D.N.Y. 2009).

[188] *See, e.g.*, Yu v. Vassar Coll. 97 F. Supp. 3d 448 (S.D.N.Y. 2015); Doe v. Salisbury Univ., 123 F. Supp. 3d 748 (D. Md. 2015); Sterrett v. Cowan, 85 F. Supp. 3d 916 (E.D. Mich. 2015).

[189] Weizel, *supra* note 70, at 1652 ("Substantively, schools have an interest in promoting their educational mission by embodying fundamental democratic values in their disciplinary proceedings and ensuring a safe learning environment for all students."). *See also* Brodsky, *supra* note 125, at 847 ("Government agencies and colleges alike, then, must ensure healthy protections in their decision-making, but also must

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statements speak to teaching responsibility and service, and seeking equality and justice in society.[190] To address cultural and societal issues that hamper these goals, universities need students to come forward about assault if they hope to create a safe campus environment and teach justice and responsibility. To achieve this goal, the schools have an interest in maintaining an alternative to the criminal justice system where victims can safely come forward to seek counseling and protections.[191] Allowing accused students to personally cross-examine those alleging sexual assault is a traumatic experience that many victims would not want, and therefore may avoid by not reporting the alleged assault.[192] Placing questioning power in the hands of a hearing panel as opposed to the opposing parties makes sense, as the university is attempting to create a more approachable system than the criminal justice system.

As for the additional burden of allowing personal cross-examination in university adjudications, its cost outweighs its limited value. Universities do not have the funds or resources to operate as a court of law and, society has no interest in creating a separate system of courts within the educational structure.[193] Courts have consistently been skeptical of turning university adjudications into full blown court proceedings.[194] *Goss* involved a high school suspension and the Court noted that

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avoid overly burdensome procedures that interfere with the entity's central purpose. All who develop campus disciplinary policies must constantly struggle to achieve a careful balance between the parties' competing interests and the core institutional interest in promoting education.").

[190] *See, e.g.*, *Mission Statement*, U. NOTRE DAME, https://www.nd.edu/about/mission-statement/ (last visited Nov. 9, 2017) ("The aim is to create a sense of human solidarity and concern for the common good that will bear fruit as learning becomes service to justice."); *Mission Statement*, GEO U., https://governance.georgetown.edu/mission-statement (last visited Nov. 9, 2017) ("Georgetown educates men and women to be reflective lifelong learners, to be responsible and active participants in civic life and to live generously in service to others.").

[191] Weizel, *supra* note 70, at 1652 ("Schools have a substantive interest in utilizing disciplinary procedures that promote fundamental fairness and teach students that misconduct will result in proportional sanctions.").

[192] Zydervelt et al., *supra* note 173, at 3 ("It is not uncommon for complainants to report that the suspicion and disbelief that they encounter during cross-examination feels like a repeat of the trauma of being raped—a phenomenon often referred to as 'secondary victimization'" (citations omitted).).

[193] *See* Michael Mitchell, Michael Leachman & Kathleen Masterson, *Funding Down, Tuition Up: State Cuts to Higher Education Threaten Quality and Affordability at Public Colleges*, CTR. ON BUDGET AND POL'Y PRIORITIES 1 (Aug. 15, 2016), http://www.cbpp.org/research/state-budget-and-tax/funding-down-tuition-up (discussing how funding for public colleges is nearly $10 billion below what it was prior to the recession).

[194] *See* Goss v. Lopez, 419 U.S. 565, 583 (1975); Dixon v. Alabama State Bd. of Ed., 294 F.2d 150, 159 (5th Cir. 1961).

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"further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."[195] In a case challenging expulsion from a college, the court stated:

> A hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required. Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out.[196]

In these cases, among others, courts have shown general concern about requiring universities to expend their resources on a full trial system of adjudication.[197]

In addition to the administrative costs associated with complicating university judicial systems, permitting personal cross-examination would place specific financial burdens on schools. The financial costs of additional procedures are increasingly relevant as university funding is slashed across the country.[198] For example, allowing students to cross-examine witnesses would likely alter the format of many hearings. Normally, hearing panels ask questions of all parties throughout the adjudication. If students could cross-examine witnesses themselves, then the structure of the hearing would change. Students with the opportunity to cross would likely expend more time on certain lines of questioning and create a less efficient hearing process. With adjudication processes being month-long endeavors, any extension would impose costs on the universities.[199] Additionally, students would not be well-versed in how to effectively and respectfully question witnesses, whereas unbiased panel members would likely show more control and respect to all

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[195] *Goss*, 419 U.S. at 583.

[196] *Dixon*, 294 F.2d at 159.

[197] *See, e.g.*, *Goss*, 419 U.S. at 583; *Dixon*, 294 F.2d at 159; Smyth v. Lubbers, 398 F. Supp. 777, 800 (W.D. Mich. 1975); Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 98 (1978); Murakowski v. Univ. of Del., 575 F. Supp. 2d 571, 585–86 (D. Del. 2008).

[198] Sarah Brown, *Bottom Line: How State Budget Cuts Affect Your Education*, N.Y. TIMES (Nov. 3, 2016), https://nyti.ms/2jIjHhh (discussing many states with nearly all experiencing budget cuts of 20% or higher).

[199] *Dear Colleague Letter*, *supra* note 4, at 12 ("Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint.").

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witnesses.[200] This deficiency in a student's effectiveness may lead to a stronger push for lawyers to actively participate in the process.[201] If lawyers become necessary to question witnesses, the entire hearing process begins to look more like a courtroom and the costs of this setting would fall on the schools. Schools may have to respond by bringing in effective arbitrators to oversee the proceedings and consider whether rules of evidence should be implemented.[202] Courts have held strongly against requiring schools to use formal rules of evidence.[203] While discussing the standard of proof required in university settings, one commentator noted that since "most disciplinary committees are made up of lay fact-finders who must serve as both judge and jury in a given proceeding, courts are extremely reluctant to require schools to utilize formal rules of evidence . . . the implementation of such complex rules could overwhelm the already limited resources of most public colleges and universities."[204] For many universities that have procedural safeguards for students in place, the added expense of personal cross-examination on their already tight budgets would be untenable.[205] In conjunction with their substantive interests in protecting students from unsafe environments and providing a just system that reflects their missions, the added financial and administrative burdens weigh strongly in favor of not requiring personal cross-examination by parties in university hearings.

When weighing the three *Mathews* factors against one another, the student's high interest in continuing at a particular university is outweighed by the low risk of erroneous deprivation, the limited additional value of allowing personal cross-examination, and the university's high interest in maintaining a fair adjudicatory system and eliminating hostile environments. Therefore, application of the *Mathews* analysis demonstrates that the OCR's bar on personal cross-examination is a defensible legal position that comports with due process in the university setting.

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[200] This concern about intimidation and distress through personal cross-examination was implicit in the DCL and its bar on cross-examination. *Id.* at 12.

[201] Lave, *supra* note 125, at 680 (showing that the majority of universities give students the right to retain counsel but only as a silent observer and arguing for a more active participation of attorneys in the university adjudication process).

[202] *Id.* (noting that university grievance procedures are not as complicated as jury trials because they do not use federal or state rules of evidence).

[203] *See* Smyth v. Lubbers, 398 F. Supp. 777, 800 (W.D. Mich. 1975); Walter Saurack, Note, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings*, 21 J.C. & U.L. 785, 798 (1995).

[204] Weizel, *supra* note 70, at 1654 (citations omitted).

[205] Mitchell et al., *supra* note 193.

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V. CONCLUSION

Universities face a number of challenges when adjudicating cases of campus sexual assault. The DCL offered guidance to help universities comply with Title IX requirements and address the problem of sexual assault on campuses. While the OCR guidance has been rescinded by the new administration, its advice remains legally defensible. Universities that have amended their adjudication processes to comply with the guidance may prefer to maintain their current policies. Whether or not the government insists on barring personal cross-examination, universities can legally maintain this position and prohibit personal cross-examination by student parties. Despite the changing political atmosphere, application of the *Mathews* analysis shows that this policy comports with the Due Process Clause. Although university students likely have protectable interests that require due process, the *Mathews* balancing test demonstrates that the process due in such settings does not require direct cross-examination of witnesses.

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