

SPECIAL REPORT

**Six-Year Experiment in Campus Jurisprudence
Fails to Make the Grade**



Stop Abusive and Violent Environments

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April 4, 2011 marked the beginning of a new era in campus jurisprudence. On that date, the federal Department of Education’s Office for Civil Rights (OCR) – without explicit Congressional authority or prior public input -- issued its Dear Colleague Letter (DCL) on sexual violence.¹

The directive, along with other OCR sexual violence policies that followed, mandated the establishment of a campus-based system for investigating and adjudicating felony-level crimes. This quasi-judicial system is characterized by its own investigative methods, evidentiary standards, adjudication processes, appeal procedures, and limited range of possible sanctions that can be imposed on persons found “responsible” of committing the offense.

Although Department of Education officials claimed the directive only represented “guidance,” a cursory review of the document reveals abundant use of words such as “requirement” and “obligation.” The subsequent enforcement measures by the OCR further revealed the binding nature of the DCL’s provisions. As such, the DCL represented an unprecedented experiment in our societal response to the problem of sexual assault.

This Special Report documents how this experiment in campus jurisprudence has been found to be harmful to both identified victims and accused students, and has enormously complicated the work of university administrators.

Identified Victims

Within months after the issuance of the Dear Colleague Letter, accounts began to emerge of the alleged mistreatment of identified victims² of sexual assault. Every year after that, the complaints mounted.

In the Spring of 2012 – one year after the OCR issued its new sexual violence policy -- Amherst College student Angie Epifano found herself increasingly distraught over a rape that had occurred a year previously and contacted college representatives. In her subsequent complaint, Epifano claimed that a school official brushed off her report by saying:

We can report your rape as a statistic, you know for records, but I don’t recommend that you go through a disciplinary hearing. It would be you, a faculty advisor of your choice, him, and a faculty advisor of his choice in a room where

¹ United States Department of Education. *Dear Colleague Letter*, April 4, 2011, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>. The present Special Report is being issued on the six-year anniversary of the DCL’s original release.

² This report uses the term “identified victims” to refer to accusers or complainants of sexual violence. In this context, the word “victim” is improper and prejudicial. As District Judge Dennis Saylor noted, “Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.” See *John Doe v. Brandeis University*, available at <https://www.scribd.com/doc/306658508/Saylor-Decision>.

you would be trying to prove that he raped you. You have no physical evidence, it wouldn't get you very far to do this.³

A year later, Jessica Howell, a student at Eastern Michigan University, was repeatedly sexually abused during a months-long relationship. But she declined to disclose the name of the abuser to authorities. Her refusal arose in large part from the experience of a friend of hers the year before, in 2012. Howell later wrote a scathing letter to university administrators:

Your condolences are empty; the assault prevention efforts on campus are thin. We will not take you seriously until the violation of our bodies and minds is treated as more than a late library book. No fine returns our dignity, no reflective essay returns our sense of security.⁴

Complaints from identified victims continue to the present time.

In early 2017 an Old Dominion University student filed a federal lawsuit against the university. The lawsuit alleged campus police interrogated her for nearly eight hours before allowing her to get a medical exam to preserve evidence of her reported rape. She also said the officers released her alleged attacker while she was still being interrogated and before she could provide forensic evidence that would have given them probable cause to arrest him.⁵

Twenty other examples of complaints by identified victims around the country are presented in Appendix A of this Special Report. Shortcomings were reported at every stage of the process: incident reporting, investigations, adjudications, and sanctioning. At three institutions -- the University of Alabama at Birmingham, University of New Mexico, and University of Wisconsin–Whitewater -- the identified victims emphatically stated that universities' flawed procedures had a more traumatic effect than the original sexual assault.

The common denominator of all these cases is the inherent conflict of interest of college administrators, whose first loyalty is to maintain and promote a positive reputation of the institution. In addition, college investigators lack adequate training in the collection, analysis, and preservation of forensic evidence; nor do campus adjudicators possess

³ Angie Epifano, *An Account of Sexual Assault at Amherst College*, The Amherst Student (October 17, 2012), available at <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

⁴ David Jesse, *Victim Opts Out of Process, Calls Campus Efforts Thin*, Detroit Free Press (June 6, 2015), available at <http://www.freep.com/story/news/local/michigan/2015/06/06/sexual-assault-victim-opts/28627323/>.

⁵ Alanna Durkin Richer, *Woman Sues Old Dominion Over Rape Response*, Associated Press (January 6, 2017), available at http://bigstory.ap.org/article/c8636439bf694b4bb5a530ad89c63fce/apnewsbreak-woman-sues-old-dominion-over-rape-response?utm_content=buffer5604b&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

expertise in how to resolve complex “he-said, she-said” cases. Finally, the strongest punishment that schools can deliver is expulsion.

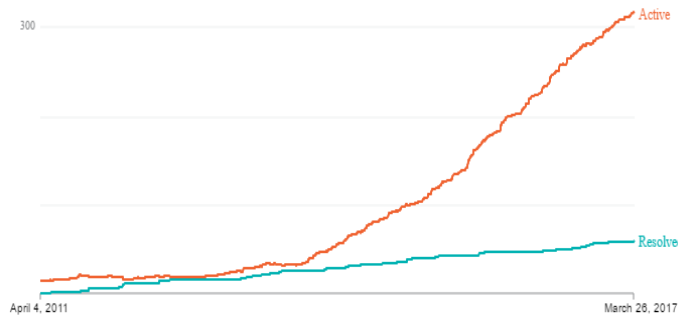
OCR Complaints and Investigations

Dissatisfied with how universities handled their allegations, identified victims began to file complaints with the federal Office for Civil Rights. Advocacy groups such as End Rape on Campus⁶ and Know Your IX⁷ launched campaigns to further encourage the filing of complaints. Over a five-year period, the number of sex-related (Title IX) complaints increased from 391 cases in FY2010 to 2,354 cases in FY2014, representing a dramatic six-fold increase.⁸

**Complaint Caseload by Jurisdiction
(Fiscal Years 2007 – 2014)**

Jurisdiction	FY2007	FY2008	FY2009	FY2010	FY2011	FY2012	FY2013	FY2014
Race	934	993	1,103	1,056	1,104	1,267	1,192	1,203
Sex	327	328	336	391	1,096	686	2,242	2,354
Disability	3,013	3,165	2,997	3,405	3,507	3,683	4,272	3,909
Age	97	96	132	131	146	134	125	122
Multiple	848	917	944	1,037	1,145	1,192	1,333	1,588
Other	675	695	852	913	843	871	786	813
TOTAL	5,894	6,194	6,364	6,933	7,841	7,833	9,950	9,989

Not all complaints resulted in investigations, of course. One analysis revealed that 39% of Title IX complaints submitted to OCR led to the opening of a formal investigation.⁹ This in turn gave rise to a growing backlog of open investigations, as shown in Figure 3:



⁶ End Rape on Campus, *Annual Report*, (April 2015 – April 2016), page 8, available at <https://static1.squarespace.com/static/51f82234e4b097de73d1a373/t/5787d0c5ff7c500d764ec354/1468518614188/EROOC+Annual+Report+PAGES.pdf>.

⁷ Know Your IX. Available at <https://www.knowyourix.org/our-wins/>

⁸ Office for Civil Rights. Fiscal Year 2016 Budget Request, page AA-23, available at <https://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf>

⁹ Chronicle of Higher Education, *How a Title IX Complaint is Processed*, April 30, 2014, available at <http://www.chronicle.com/article/How-a-Title-IX-Complaint-Is/146297/>.

Of the 314 currently active investigations, 184 involve multiple investigations at the same institution; 199 alleged incidents occurred at private colleges and 176 happened at public universities.¹⁰

If the existing system of campus rape tribunals was working as promised, one would expect to see a *decreasing* number of OCR complaints and investigations, compared to the pre-2011 period, as identified victims found their cases were more likely to be resolved in a prompt and fair manner.

But the data reveal the opposite. The burgeoning number of complaints and investigations points to a system of campus-based investigations and adjudications that are increasingly viewed as ineffective, even antithetical, to the national effort to end campus rape.

Accused Students

Students accused of sexual assault have encountered problems in their dealings with campus disciplinary committees, as well. Some of these students filed lawsuits against the university, and more often than not obtained some measure of judicial relief.

Within days after the release of the Dear Colleague Letter, constitutional lawyer Hans Bader charged the Department of Education with ignoring Supreme Court precedent, sidestepping review-and-comment requirements, and shredding the presumption of innocence.¹¹ Eventually, numerous organizations and respected authorities issued letters and reports sharply criticizing the due process shortcomings embodied in the Dear Colleague Letter:¹²

- Open letters by law school professors:
 - Harvard University¹³
 - University of Pennsylvania¹⁴
 - 26 individual law professors¹⁵

¹⁰ Title IX: The Chronicle of Higher Education, available at <http://projects.chronicle.com/titleix/#overview>. (Last Visited March 29, 2017).

¹¹ Hans Bader, *Education Department "Dear Colleague" Letter Shreds Presumption of Innocence in Harassment Cases, Ignoring Supreme Court* (April 8, 2011), available at <https://cei.org/blog/education-department-dear-colleague-letter-shreds-presumption-innocence-harassment-cases>.

¹² Stop Abusive and Violent Environments, *OCR is Harming Free Speech and Due Process*, available at <http://www.saveservices.org/sexual-assault/ocr/>. (Last Visited March 29, 2017).

¹³ Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, The Boston Globe (October 15, 2014), available at <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

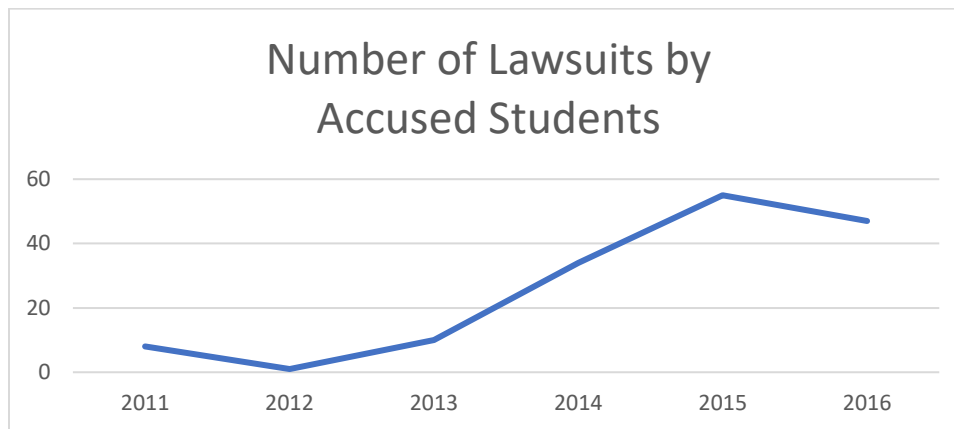
¹⁴ Eugene Volokh, *Open letter from 16 Penn Law School professors about Title IX and sexual assault complaints*, The Washington Post (February 19, 2015), available at <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/>.

¹⁵ Larry Alexander et al., *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault*, May 16, 2016, available at <http://www.saveservices.org/wp-content/uploads/Law-Professor-Open-Letter-May-16-2016.pdf>. (Letter last updated June 1, 2016).

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- Open letter from the Foundation for Individual Rights in Education¹⁶
- American Association of University Professors: *The History, Uses, and Abuses of Title IX*¹⁷
- National Association of Scholars: *OCR's New Sexual Harassment Guidelines Threaten Academic Freedom, Due Process*¹⁸

Before long, these due process concerns were manifested in legal actions. During the period from 1992 to 2009, a total of 10 lawsuits were filed by accused students, an average of less than one lawsuit per year.¹⁹ Beginning in 2013, the number of lawsuits began to rise dramatically, as shown in Figure 2:



A previous SAVE report analyzed 51 lawsuits filed after January 1, 2012 for which a judicial decision had been issued by July 15, 2016. Of those 51 lawsuits, 30 were decided at least partly in favor the accused student, most commonly during the course of a pre-trial motion-to-dismiss hearing. Among the most common causes of action, an allegation of lack of due process was successful in eight out of 11 cases (73%), followed by breach of contract (62%), Title IX violation (54%), and negligence (33%).²⁰

¹⁶ Foundation for Individual Rights in Education, *FIRE Letter to Office for Civil Rights Assistant Secretary for Civil Rights Russlynn Ali, May 5, 2011*, available at <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/>.

¹⁷ American Association of University Professors, *The History, Uses, and Abuses of Title IX* (June 2016), available at <https://www.aaup.org/report/history-uses-and-abuses-title-ix>.

¹⁸ Glenn Ricketts, *OCR's New Sexual Harassment Guidelines Threaten Academic Freedom, Due Process*, National Association of Scholars (September 28, 2011), available at <https://www.nas.org/articles/OCRs-New-Sexual-Harassment-Guidelines-Threaten-Academic-Freedom-Due-Process>.

¹⁹ Title IX for All, available at https://titleixforall.knack.com/databases#due-process-lawsuits3/due-process-lawsuits/?view_142_page=1. (Last Accessed March 27, 2017).

²⁰ Stop Abusive and Violent Environments, *Lawsuits Against Universities For Alleged Mishandling of Sexual Misconduct Cases*, Special Report (2016), Table 9, available at <http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf>.

A second SAVE report reviewed lawsuits in which the university was accused of conducting a biased investigation.²¹ The widely used “victim-centered” model, which instructs university investigators to assume the allegation is true from the outset, worsens confirmation bias and undermines impartiality. The report examined 18 lawsuits by accused students and concluded, “Collectively, the allegations represented egregious violations of OCR requirements to conduct investigations that are equitable, and represent a departure from the most rudimentary notions of fairness.”²²

These judicial decisions often featured strongly worded commentaries:

- *John Doe v. Brandeis University*: “Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning.”²³
- *John Doe v. San Diego State University*: Judge Joel Wohlfeil declared San Diego State University violated “procedural fairness” and that the disparities in the proceedings were “enough to shock the Court’s conscience.”²⁴
- *John Doe v. University of California, Davis*: “due process has been completely obliterated by the University’s failure to get this case adjudicated...if anyone has failed the alleged victim in this case, [it] is the University.”²⁵

On September 30, 2016, the Office for Civil Rights issued the only Determination Letter issued to date that focused on alleged due process improprieties against an accused student. Wesley College in Delaware was found in violation when it expelled an accused male student without an interview or meaningful hearing.²⁶ “What makes the case so unusual, compared to others that have come before the courts and are public, is the sheer number of important procedural protections denied to the accused,” explained the *Washington Post*.²⁷

A listing of 20 lawsuits filed by accused students against their universities is presented in Appendix B. A perusal of these cases suggests that colleges often approach sexual assault allegations with a predetermined notion of guilt, unfettered by even the most basic

²¹ Stop Abusive and Violent Environments, *Victim-Centered Investigations: New Liability Risk for Colleges and Universities*, Special Report (October 2016), available at <http://www.saveservices.org/wp-content/uploads/Victim-Centered-Investigations-and-Liability-Risk.pdf>

²² *Id.* at 11.

²³ *John Doe v. Brandeis University*, Memorandum and Order on Defendant’s Motion to Dismiss, March 31, 2016, at page 12, available at <https://kcjohnson.files.wordpress.com/2013/08/brandeis-decision.pdf>.

²⁴ David French, *Yet Another College Loses a Due Process Case*, National Review (March 3, 2017), available at <http://www.nationalreview.com/corner/445476/yet-another-college-loses-due-process-case>.

²⁵ Dorian Hargrave, *University of California’s skewed take on Title IX*, San Diego Reader (October 13, 2015), available at <http://www.sandiegoreader.com/news/2015/oct/13/ticker-university-californias-skewed-take-title-ix/>.

²⁶ Office for Civil Rights Resolution Agreement with Wesley College, September 30, 2016, available at <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-b.pdf>.

²⁷ Fred Barbash, *College Expels Student for Sex Misconduct without Bothering to Interview Him, Draws Sharp Government Rebuke*, Washington Post (October 13, 2016), available at <https://www.washingtonpost.com/news/morning-mix/wp/2016/10/13/egregious-unfairness-to-student-insexual-misconduct-case-brings-unusual-government-rebuke/>.

considerations of fairness or due process. This pattern of rampant bias invites comparisons with the discredited justice of a by-gone era: “Blacks were found guilty upon mere accusation, with no substantive evidence offered, no adequate counsel granted, and no real attempt on the part of the courts to provide evenhanded justice.”²⁸

College Administrators

College administrators have expressed deep reservations about the OCR sexual violence directives, as well. These concerns have revolved around the capability of universities to assume functions traditionally handled by law enforcement agencies; lengthy OCR investigations; basic unfairness of many campus adjudications; financial impacts; and liability exposure.

A *Chronicle of Higher Education* report revealed that many members of the National Association of College and University Attorneys were experiencing frustration over the “increasingly complex rules that sometimes go beyond their capacity.”²⁹ The article concluded, “Beyond the issues of meeting the expanded federal requirements, college lawyers are asking if it’s appropriate, or even practical, for academic institutions to take on the role normally played by law enforcement agencies.”

The *CHE* article highlighted the concerns of Leslie Gomez, a partner with Pepper Hamilton and former Philadelphia special victim prosecutor. Gomez pointed out that law enforcement agencies have dedicated investigators, subpoena power, ability to analyze forensic evidence, and can decline prosecution without repercussions. Conversely, universities lack all these tools yet are mandated to review all complaints.

John McCardell, Vice Chancellor of the University of the South at Sewanee, Tennessee, has reflected on the irony of the OCR’s Dear Colleague Letter that has “imposed on entities ill-trained or equipped for the task, a quasi-judicial role, with the implication that ‘justice,’ however defined, can be satisfactorily rendered through processes that cannot possibly replicate a genuine legal proceeding.”³⁰

One of the strongest critics of the OCR-mandated regime is Janet Napolitano, president of the University of California system. In a lengthy analysis of her university’s experience with the OCR’s enforcement of the Dear Colleague Letter, she noted: “OCR investigations often take years to complete, leaving institutions under a cloud of suspicion and in limbo regarding the legal sufficiency of their policies and practices.”³¹

²⁸ Jerrold Packard, *American Nightmare: The History of Jim Crow*. Macmillan, 2003. Page 133.

²⁹ Eric Kelderman, *College Lawyers Confront a Thicket of Rules on Sexual Assault*, *The Chronicle of Higher Education* (June 25, 2014), available at <http://chronicle.com/article/College-Lawyers-Confront-a/147349>.

³⁰ John McCardell, *Threat of Litigation as a Constraint*, Personal communication, 2017.

³¹ Janet Napolitano. “*Only Yes Means Yes: An Essay on University Policies Regarding Sexual Violence and Sexual Assault*.” *Yale Law and Policy Review*. Pages 396-397. Available at <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1684&context=ylpr>

One student affairs administrator characterized sexual assault cases as “enormously complex, full of truths, lies, reversals, angry parents, hungry lawyers and empowered supporters.” Evidencing clear frustration, the administrator announced, “All students are traumatized to some degree or another. Families are devastated. And the professionals who must coordinate this process are expected to operate with constraints on our judgment and strategies imposed by a group of people who don’t understand what we deal with every day.”³²

Another student affairs employee was even more critical of the process:

A Title IX investigation is anything but equitable. A complainant is hand-held throughout the process -- called a "victim" or "survivor" from the get-go, given on- and off-campus resources, academic accommodations, counseling, advocacy, etc.

On the other hand, the accused student has everything at stake from loss of educational opportunity, ruined reputation, compromised future, and sometimes criminal charges, and is in dire need of help. But that student does not have an advocacy center on campus, and does not receive any information about resources or academic accommodations. And the consequences, of course, are not the same. There are no sanctions for a wrongful accusation.³³

Financial Impact

As a result of the myriad of OCR sexual violence requirements, colleges are spending millions of dollars for a growing cadre of Title IX workers including lawyers, investigators, case workers, survivor advocates, peer counselors, workshop leaders, and consultants.³⁴ At the University of California, Berkeley, Title IX spending has increased at least \$2 million since 2013.³⁵ Nearly 30 faculty and staff work in support of Title IX at Yale, while Harvard University employs 50 Title IX coordinators across its 13 schools.³⁶

The federal Campus SaVE Act mandated additional reporting requirements and recommended that each school hire a Clery Compliance officer. Compliance with these policies is projected to cost the University of North Carolina system approximately \$1.52 million.³⁷ UNC has created six new full-time positions solely for Title IX compliance,

³² Anonymous, *An Open Letter to OCR*, Inside Higher Education (October 28, 2011), available at <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>.

³³ Communication with anonymous student affairs employee. April 2, 2017.

³⁴ Hartocollis, Anemona, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, New York Times (March 29, 2016), available at https://www.nytimes.com/2016/03/30/us/colleges-beef-up-bureaucracies-to-deal-with-sexual-misconduct.html?_r=0.

³⁵ Id.

³⁶ Id.

³⁷ Danielle Chemtob, *Title IX Programs Increase Cost*, dailytarheel.com (November 8, 2015), available at <http://www.dailytarheel.com/article/2015/11/title-ix-programs-increase-costs>.

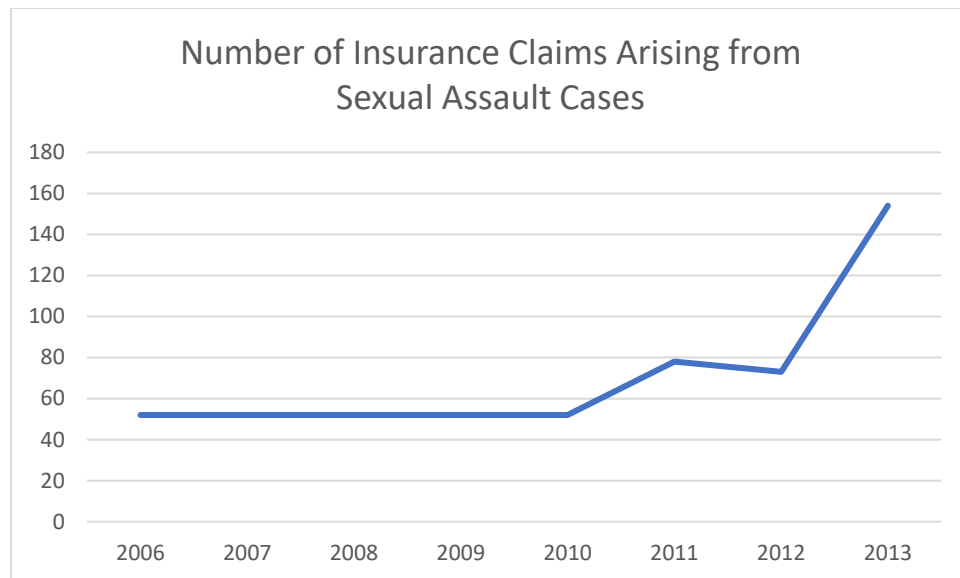
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consisting of investigators, coordinators, and survivor advocates, which will cost the university upwards of \$479,000 per year.³⁸

Reflecting on the aftermath of three burdensome investigations conducted within a period of two years, University of California president Janet Napolitano rued the fact that “Much of the time and effort looking backwards at years of data and information is time and effort lost to serving the ongoing needs of student survivors.”³⁹

Liability Exposure

United Educators insures approximately 1,000 universities across the nation. The company periodically releases reports on its sexual assault-related claims. Figure 1 reveals how the number of claims increased exponentially in 2013, compared to previous years:⁴⁰



United Educators’ most recent report analyzes 305 claims reported from 104 universities during the period 2011-2013.⁴¹ The document reveals that 68% of the claims were filed by identified sexual assault victims, and the remaining 32% by accused students. The claims arose from:

³⁸ Harry Painter, *Title IX Compliance and Then Some*, The James G. Marin Center for Academic Renewal (April 4, 2014), available at <https://www.jamesgmartin.center/2014/04/title-ix-compliance-and-then-some/>.

³⁹ Janet Napolitano, *supra* at note 31.

⁴⁰ The numbers displayed for 2006-2010 represent the mean for those years.

⁴¹ Alyssa Keehan, JD, et. al., *Confronting Campus Sexual Assault: An Examination of Higher Education Claims*, at Figure 14, EduRiskSolutions.org (2015), available at <https://www.ue.org/uploadedfiles/confronting%20campus%20sexual%20assault.pdf>.

- Demand letter to the university: 44%
- Office for Civil Rights investigation: 28%
- Lawsuits:
 - By accused students: 17%
 - By alleged victim: 11%

Litigation costs represent a growing concern for administrators. The costs of responding to a lawsuit “can run into the high six or even seven figures, not counting a settlement or verdict,” according to Brett Sokolow, executive director of the Association of Title IX Administrators.⁴²

University of the South Vice Chancellor John McCardell explains:

One might argue that setting forth such elaborate procedures for internal resolution of complaints might in fact reduce the constraint imposed by formal litigation. One would be wrong. The cost in time and effort required to comply with meeting these exacting standards in the case of every complaint brought forward is a genuine constraint. Nor does the search for internal resolution reduce either the threat or the eventual reality of litigation. Indeed, it often heightens both: the possibility that some internal procedural error might occur or some perceived unfairness in the conduct or tone of a hearing (which is of course recorded in its entirety) might be discerned at once creates the mistaken impression that what is taking place is in some sense a legal proceeding.⁴³

‘Under the current system, everyone loses.’

The American College of Trial Lawyers recently issued a White Paper that highlights how the current system of campus rape tribunals shortchanges both identified victims and accused students, thereby undermining the goal of curbing campus rape.⁴⁴

The report represents a robust indictment of the current federally mandated regime, concluding, “Under the current system, everyone loses.” The ACTL document makes recommendations regarding the need for procedural due process; impartial investigations; the rights to counsel, access to evidence, and notice of allegations; cross-examination; and the inadequacy of the preponderance of evidence standard.

Implementing such reforms will entail the removal of the OCR’s 2011 Dear Colleague Letter on sexual violence and subsequently issued policy documents on this topic.

In its place, SAVE’s model legislation, the Campus Equality, Fairness, and Transparency Act encourages, but does not mandate, the referral of felony-level allegations to the criminal justice system; calls for objective and fair investigations; and delineates a series

⁴² Id.

⁴³ John McCardle, *supra* at note 30.

⁴⁴ American College of Trial Lawyers, *White Paper on Campus Sexual Assault Investigations* (2017), available at <https://www.actl.com/library/white-paper-campus-sexual-assault-investigations>.

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of due process protections.⁴⁵ Such modifications will improve the reliability of adjudicatory determinations, restore credibility to the campus disciplinary system, help to reverse the ongoing surge of complaints from students, and allay the concerns expressed by administrators.

In the past, debates on campus sexual assault have tended to assume that identified victims and accused students represent divergent interests: the accuser expected the school to reach a finding of “responsibility,” and the accused hoped for a determination of “not responsible.”

This Special Report suggests otherwise – that identified victims and accused students share a common, over-riding interest in assuring the investigative and adjudicatory process is conducted in a respectful, prompt, and fair manner in order to reach reliable outcomes. This needs to be the guiding principle for future debates and deliberations on campus sexual assault.

⁴⁵ Stop Abusive and Violent Environments. *Campus Equality, Fairness, and Transparency Act*, available at <http://www.saveservices.org/sexual-assault/cefta/>.

APPENDIX A

Complaints by Identified Victims

ALABAMA

University of Alabama at Birmingham: A female student named Shannon reported an incident to her school in October of 2015. She claims that a school representative told her that it may be best if she would “drop out for the semester.” A no-contact order was put in place, but she was the one who had to avoid the accused student. After three months, the investigator (a divorce lawyer) concluded the accused not responsible without ever looking at Shannon’s rape kit, speaking with her psychiatrist, or reviewing the photos that corroborated the bruising she reported. “The assault was bad,” Shannon concluded, “but the way my school has treated me has created more trauma than the original assault did.”⁴⁶

ALASKA

University of Alaska, Anchorage: In February 2017, the Department of Education issued its Title IX investigation findings detailing “very serious failures” by the university when investigating campus sexual assaults, including failing to investigate reports of student sexual assaults. Based on the OCR settlement agreement, the UA system must reexamine two dozen cases filed from 2011 through 2015.⁴⁷

ARKANSAS

University of Arkansas, Fayetteville: The University of Arkansas was named in a Title IX lawsuit by a former student, Elizabeth Fryberger. She alleged the University of Arkansas violated Title IX after she reported that Raymond Higgs, a fellow student, sexually assaulted her in October 2014. The university found Higgs responsible for sexual assault and ordered him expelled in December 2014. Higgs appealed, arguing that the sanction was too severe and would impede his athletic career. As a result, the university told Fryberger that his expulsion wouldn’t take effect until the day after his graduation.⁴⁸

⁴⁶ Tyler Kingkade, *She Was Barred From the Library to Avoid Him*, The Huffington Post (March 8, 2016), available at http://www.huffingtonpost.com/entry/college-sexual-assault-gag-orders_us_56ddd17ae4b0ffe6f8ea278c.

⁴⁷ Tyler Kingkade, *Advocates Worry About New Era Of Secrecy On Campus Rape*, Buzz Feed News (February 23, 2017), available at https://www.buzzfeed.com/tylerkingkade/advocates-worry-about-new-era-of-secrecy-on-campus-rape?utm_term=.pbvLAJEkW&utm_content=bufferacc2a&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

⁴⁸ Tyler Kingkade, *A University Says It Shouldn’t Have To Pay Money To Campus Rape Victims*, Buzz Feed News (March 21, 2017), available at https://www.buzzfeed.com/tylerkingkade/university-of-arkansas-title-ix-lawsuit?utm_term=.kmrXXzbGk&utm_content=buffer63619&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer#.bppjiYO8q.

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COLORADO

University of Colorado at Boulder, Boulder: The university settled with a woman who claimed that it took the university four weeks to remove a student after he was found responsible for non-consensual sexual intercourse.⁴⁹

INDIANA

Indiana University, Bloomington: The Department of Education's Office for Civil Rights opened an investigation after a student filed a complaint in 2016 saying the university violated gender equality laws by mishandling her report of sexual assault. The complaint states that the assigned Title IX investigator was under his own unrelated investigation for sexual assault. The alleged perpetrator was found not guilty of sexual misconduct after the university's investigation.⁵⁰

IOWA

Drake University, Des Moines: Student John Doe filed a federal lawsuit alleging gender discrimination after the school refused to investigate his sexual assault claim against a female student. According to both parties, Doe was incapacitated due to intoxication when he and Jane Roe engaged in sexual activity. The following day, Roe filed a complaint of sexual assault. Doe filed his own complaint against Roe, which the school refused to accept, claiming it was retaliation.⁵¹

KANSAS

Kansas State University, Manhattan: Sara Weckhorst reported to KSU officials that she was raped at a fraternity house by two male students. Weckhorst claimed that KSU officials refused to investigate because the alleged incident occurred off-campus. Weckhorst filed a federal lawsuit against KSU alleging Title IX violations.⁵²

Kansas University, Lawrence: A male student was found responsible for assaulting two female students, and transferred to another school after being allowed to withdraw for

⁴⁹ Diana Moskovitz, *Why Title IX Has Failed Everyone On Campus Rape*, Deadspin (July 7, 2017), available at http://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925?utm_content=bufferb0b24&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

⁵⁰ Mary Ann Georgantopoulos, *Feds Investigating Indiana University's Handling of Sexual Assaults*, Buzz Feed News (June 2, 2016), available at https://www.buzzfeed.com/maryanngeorgantopoulos/departement-of-education-opens-third-investigation-into-iu-bl?utm_term=.ix2ddoZNA#.dwzeev53d.

⁵¹ Ashe Schow, *Lawsuit: Father Fired After Defending Disabled Son From Campus Kangaroo Court*, Watchdog.com (March 20, 2017), available at <http://watchdog.org/291268/father-fired-defending-disabled-son-campus-kangaroo-court/>.

⁵² Tyler Kingkade, *Lawsuit Says University Policy Let Repeat Rapist Prey On Women*, Buzz Feed News (November 28, 2016), available at https://www.buzzfeed.com/tylerkingkade/kansas-state-lawsuit-accused-student-rape-again?utm_content=bufferfdd37&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

“non-academic misconduct in lieu of expulsion.” Former student Daisy Tackett filed a Title IX lawsuit against KU alleging that the six-month long investigation allowed a hostile educational environment to persist, the rowing coaching staff ignored her struggles with anxiety, and punished her for missing practice to meet with investigators.⁵³

KENTUCKY

Northern Kentucky University, Highland Heights: Allegations of an effort to protect members of the basketball team, who were accused of sexual assault, cast doubt on the objectivity of the school’s disciplinary system. The players involved in the incident were permitted to finish the season and conference tournament, but suspended for an undetermined length of time during the off-season. The NKU athletic director, who was aware of the allegations, never called the police.⁵⁴

MARYLAND

University of Maryland, College Park: Two identified victims of sexual assault filed a complaint with the Department of Education alleging that the university mishandled their investigations.⁵⁵

MASSACHUSETTS

Harvard University, Cambridge: Alyssa Leader filed a Title IX lawsuit against the University for “deliberate indifference” to her sexual assault claim against a fellow student, John Doe. Leader’s claim focused not only on the school’s initial response, but also on the University’s failure to respond “to her multiple reports that she was subjected to continuous, retaliatory harassment by Doe and his friends.”⁵⁶

NEW YORK

Columbia University, New York: Amelia Roskin-Fraze reported an incident of sexual assault to the school a few weeks after it allegedly occurred. Roskin-Fraze states that school representatives told her to go to police and failed to investigate her claim. A few

⁵³ Ashley Scoby, *A Woman Says She Was Raped; The Injustice She Felt Afterward Only Added To Her Pain*, The Kansas City Star (December 9, 2017), available at http://www.kansascity.com/sports/college/big-12/university-of-kansas/article119977028.html?utm_content=buffer5f7e3&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

⁵⁴ James Pilcher, *NKU Basketball Players Involved in Sex 'Incident'*, Cincinnati.com (September 8, 2016), available at <http://www.cincinnati.com/story/news/your-watchdog/2016/09/08/nku-basketball-players-involved-sex-incident/89993064/>.

⁵⁵ Fox 5 DC, *Two Victims of Sexual Assault File Federal Complaint Against UMD*, November 2, 2016, available at http://www.fox5dc.com/news/215171080-story?utm_content=buffer11197&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

⁵⁶ Andrew M. Duehren & Daphne C. Thompson, *In Title IX Suit, Harvard Will Go to Court*, The Harvard Crimson (September 7, 2016), available at <http://www.thecrimson.com/article/2016/9/7/Harvard-preps-for-Title-IX-suit/>.

SAVE

months later, Roskin-Frazeé claimed she was brutally raped again by another unknown assailant while entering her dorm room. She was reluctant to file a complaint due to the response from her prior complaint. Roskin-Frazeé filed a Title IX lawsuit on March 21, 2017, alleging university staffers were “apathetic and unresponsive” to her reported rape and multiple sexual harassment claims.⁵⁷

Cornell University, Ithaca: In February 2017, four attorneys from the Department of Education’s Office for Civil Rights visited Cornell University to hold open discussions about the campus climate surrounding sexual assault. The consensus among attendees: “it’s bad.” Meeting participants charged that the university Title IX office cared more about avoiding litigation than seeking justice. Respondents had no ability to examine or confront accusers or to question witnesses or be represented by an attorney, and complainants were not informed of the investigation’s timeline.⁵⁸

NEW MEXICO

University of New Mexico, Albuquerque: A former student sued the university alleging university administrators interfered with a police investigation into her gang rape by two football players and a third student. Following an investigation, the Justice Department concluded that the University of New Mexico’s Office of Equal Opportunity created a system so traumatizing that “almost all complainants with whom the United States spoke said that they wished they had never gone through the process and would not refer another student who had experienced sexual assault to OEO.”⁵⁹

OREGON

University of Oregon, Eugene: A woman sued the university, alleging that she was raped by three basketball players and that the school tailored and delayed their discipline so the men could still play in the NCAA tournament. She also said the university gave its lawyers her counseling records. The university settled with her. The university now is being sued by the three basketball players.⁶⁰

TENNESSEE

University of Tennessee, Knoxville: Eight women sued the University for “deliberate indifference” regarding sexual assault by athletes. Among the lawsuit’s more troubling allegations, when football player Drae Bowles tried to help a woman who said she had been raped by other players, the coach called him a “traitor” and multiple players

⁵⁷ Kaja Whitehouse, *Columbia Ignored Me When I Was Raped In My Dorm: Lawsuit*, New York Post (March 21, 2017), available at http://nypost.com/2017/03/21/former-student-says-columbia-didnt-care-she-was-viciously-raped-on-campus/?utm_content=bufferb5c8b&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

⁵⁸ Drew Musto, *OCR Open Forum Reveals Concerns Regarding University’s Title IX Office*, The Cornell Daily Sun (March 2, 2017), available at <http://cornellsun.com/2017/03/02/ocr-open-forum-reveals-concerns-regarding-universitys-title-ix-office/>.

⁵⁹ Diana Moskovitz, *supra* at note 49.

⁶⁰ *Id.*

attacked him for helping her. In the settlement, UT agreed to pay the eight women a total of \$2.48 million.⁶¹

TEXAS

Baylor University: A federal Title IX lawsuit filed against BU, by a former female student, in January 2017, was the sixth of its kind filed in the wake of an investigation that revealed the university failed to properly respond to and address allegations of sexual assault committed by students. An independent report charged, “coaches were inappropriately involved in disciplinary and criminal matters or ‘engaged in improper conduct that reinforced an overall perception that football was above the rules,’ and did more to hinder, not help, women who made allegations of assault or domestic violence.”⁶²

UTAH

Utah State University, Logan: Several students made complaints of sexual violence by Jason Relopez. No action was taken and Relopez was permitted to remain on campus. Subsequently, Victoria Hewlett, a USU student who was unaware of the first incident, reported that she was raped by Relopez. When Hewlett went to police, Relopez was arrested and charged criminally. He received a one-year jail sentence. Hewlett subsequently filed a federal lawsuit against USU for not taking appropriate action in the face of complaints by multiple victims.⁶³

VIRGINIA

Richmond University: Cecilia Carreras reported being sexually assaulted by a fellow student. Carreras later claimed that the Title IX coordinator gave an inappropriate justification for the actions of the accused student. Further, she claimed the university didn’t do enough to keep the alleged attacker away; that administrators responded with insensitivity when dealing with the case.⁶⁴

WASHINGTON, D.C.

⁶¹ Id.

⁶² Paula Lavigne and Mark Schlabach, *New Baylor Lawsuit Alleges Culture In Which Drugs, Alcohol And Sex Were Encouraged*, ESPN.com (January 28, 2017), available at http://www.espn.com/college-football/story/_/id/18569197/latest-lawsuit-filed-baylor-university-alleges-culture-which-drugs-alcohol-sex-were-encouraged.

⁶³ Alex Stuckey, *Rape Victim Says She Was Sixth To Report Utah State Student, Sues School For Not Acting*, The Salt Lake Tribune (November 7, 2016), available at http://www.sltrib.com/home/4342991-155/rape-victim-says-she-was-sixth?utm_content=bufferce226&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer

⁶⁴ Tyler Kingkade, *Student Says University Botched Rape Case, Then Called Her A Liar*, Buzz Feed News (September 14, 2016), available at https://www.buzzfeed.com/tylerkingkade/university-of-richmond-campus-rape-victim-called-a-liar?utm_term=.fuKMMJQ5N&utm_content=buffer76fef&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer#.ieaKKR0pV.

SAVE

American University, Washington DC: In 2016, a male student admitted responsibility for allegations of sexual assault against a female AU student. The male student was placed on probation for one year, banned from Greek life, and required to take an online educational module on sexual assault. The victim filed a Title IX suit challenging the fact that she was forced to sign a gag order about the case.⁶⁵

WISCONSIN

University of Wisconsin – Whitewater: Two identified victims filed a Title IX complaint against the school, saying administrators failed to interview key witnesses in their cases. One student charged, “I don’t think anybody should be treated the way that I was. It was worse than the assault, a lot worse. I regret with everything, coming forward and saying anything.”⁶⁶

⁶⁵ Tyler Kingkade, *He Admitted to Sexual Assault, But She’s The One They Tried to Silence*, The Huffington Post (March 8, 2016), available at http://www.huffingtonpost.com/entry/college-sexual-assault-gag-orders_us_56ddd17ae4b0ffe6f8ea278c.

⁶⁶ Kate Briquet, *College Coach: I Was Fired for Reporting Campus Rape to Police*, The Daily Beast (August 25, 2016), available at http://www.thedailybeast.com/articles/2016/08/25/college-coach-i-was-fired-for-reporting-campus-rape-to-police.html?utm_content=bufferb5f9c&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

APPENDIX B

Lawsuits by Accused Students

CALIFORNIA

University of California, Davis: Without holding a hearing, the university suspended a male student on an allegation of sexual misconduct, and ordered him to stay out of the city of Davis. The Yolo County Superior Court granted a motion to stay the interim suspension, ruling “due process has been completely obliterated by the University’s failure to get this case adjudicated...if anyone has failed the alleged victim in this case, [it] is the University.”⁶⁷

University of California-San Diego: A male student was suspended based on an allegation on non-consensual sex. Concluding “the hearing against petitioner was unfair,” the Superior Court of California found serious procedural flaws in the university’s handling of the case including its reliance on the single investigator model: “It was the panel’s responsibility to determine whether it was more likely than not that petitioner violated the policy and not defer to an investigator who was not even present to testify at the hearing. ‘Due process requires that a hearing...be a real one, not a sham or pretense.’”⁶⁸

COLORADO

Colorado State University – Pueblo: A former football player is suing the university and the U.S. Department of Education. Grant Neal said in his lawsuit that the university suspended him despite the woman involved explicitly telling the director of athletic training “I’m fine and I wasn’t raped.” Neal was suspended for as long as the woman remained at the university.⁶⁹

DELAWARE

Wesley College, Dover: In October 2016, the Department of Education determined that Wesley violated the gender discrimination law Title IX when it disregarded the due process rights of students accused of sexual misconduct. During its investigation, OCR found that the college ignored the accused student’s right to due process, as well as its own policies and procedures. Specifically, the college never interviewed four students accused of non-consensually recording a sexual encounter, and administrators never

⁶⁷ Stop Abusive and Violent Environments (SAVE), *Court Decisions*, available at <http://www.saveservices.org/sexual-assault/court-decisions/>.

⁶⁸ Id.

⁶⁹ Diana Moskovitz, *Why Title IX Has Failed Everyone On Campus Rape*, Deadspin (July 7, 2017), available at http://deadspin.com/why-title-ix-has-failed-everyone-on-campus-rape-1765565925?utm_content=bufferb0b24&utm_medium=social&utm_source=facebook.com&utm_campaign=buffer.

SAVE

provided the men with a copy of the incident report or the college's investigative findings.⁷⁰

IOWA

Iowa State University, Ames: Yempabou Palo was suspended from the ISU basketball team in 2012 during the proceedings of criminal charges of sexual assault against fellow student H.B. The criminal charges were dropped in early 2013. The allegations were also considered by the university's Administrative Law Judge, who ruled the accusations were "not founded." The decision was appealed to the ISU president and then the Iowa Board of Regents, which ruled in late 2013 that Palo would not be allowed to participate in intercollegiate athletics. In 2014 the Iowa District Court stayed the Board of Regents' decision. In 2015 the Iowa Court of Appeals dismissed the appeal by the Board of Regents, saying the case was moot because Palo had already graduated.⁷¹

INDIANA

DePauw University, Greencastle: As a result of an alcohol-fueled incident of sexual contact at a fraternity followed by a complaint of non-consensual sexual assault, the university ordered a one-year suspension of Benjamin King. The Southern District Court of Indiana granted King a preliminary injunction allowing him to return to school.⁷²

LOUISIANA

Tulane University, New Orleans: Following an acquittal of criminal charges of sexual assault, Tulane University conducted a three-day hearing and suspended I.F. for his entire senior year. The student's petition was denied by the trial court. The case was appealed to the Fourth Circuit Court of Appeal and remanded to the trial court. Following an adverse ruling, the case was appealed a second time to the Court of Appeal, which reversed the trial court's decision, ruling that I.F.'s "procedural due process rights were ill-defined, ambiguously applied, and, as such, presumptively violated."⁷³

MARYLAND

Salisbury University: Suspended from the university, a male student filed a Title IX complaint alleging his suspension was motivated by his gender. A few months later he reapplied to the university. During the reapplication process, the university opened a Title IX investigation into the student's alleged involvement in a sexual assault which the university had investigated years earlier without charging the student. The student filed a

⁷⁰ Jake New, *A Title IX Win for Accused Students*, Inside Higher Education (October 13, 2016), available at <https://www.insidehighered.com/news/2016/10/13/us-says-wesley-college-violated-rights-students-punished-over-sexual-misconduct>.

⁷¹ SAVE, *supra* at note 67.

⁷² Id.

⁷³ SAVE, *supra* at note 67.

lawsuit against the university alleging retaliatory violations of Title IX. The Maryland District Court rejected the university's motion to dismiss.⁷⁴

MICHIGAN

University of Michigan, Ann Arbor: Drew Sterrett alleged numerous due process violations by the university. The Michigan District Court held that the university's procedures may have violated the plaintiff's due process right to adequate notice, and his due process rights for denying him a hearing after he had specifically requested one.⁷⁵

MINNESOTA

University of Minnesota, Minneapolis: In March 2017, sexual assault charges were dropped due to a lack of probable cause and UM Law Professor Francesco Parisi was released after spending 3 weeks in jail. Parisi's ex-girlfriend apparently filed charges for retaliatory reasons after losing a property case to him in civil court. Parisi has filed a defamation suit for lost income and lost reputation.⁷⁶

MONTANA

University of Montana, Missoula: John Doe was expelled on charges of sexually assaulting a fellow student at an off-campus residence. Doe filed claim seeking a preliminary injunction against the university investigator's continued involvement in the case. The Montana District Court ruled against the student's request on technical grounds. The judge also noted that the university's investigation and prosecution of the case "offends the Court's sense of fundamental fairness and appears to fall short of the minimal moral obligation of any tribunal to respect the rights and dignity of the accused."⁷⁷

NORTH CAROLINA

Duke University, Durham: Senior Lewis M. McLeod was expelled for sexual misconduct shortly before final exams, thus preventing his imminent graduation. The Superior Court issued a preliminary injunction against the expulsion, ruling that Duke "breached, violated, or otherwise deprived [McLeod] of material rights related to the misconduct allegations against him and the resulting disciplinary process addressing such allegations."⁷⁸

NORTH DAKOTA

⁷⁴ Id.

⁷⁵ Id.

⁷⁶ Kathryn Rubino, *Rape Charges Against Law Professor Dropped*, Above the Law (March 10, 2017), available at <http://abovethelaw.com/2017/03/rape-charges-against-law-professor-dropped/>.

⁷⁷ Id.

⁷⁸ SAVE, *supra* at note 67.

SAVE

University of North Dakota, Grand Forks: Caleb Warner was found responsible for allegations of sexual assault by the UND disciplinary committee who used a preponderance (50.01%) of evidence standard. A concurrent investigation by police, using the same evidence, revealed that the complainant lied about the incident. After a year and a half, UND officials determined that the university's finding of guilt against student Caleb Warner was "not substantiated" in the face of the evidence, cleared him of the charges, and reinstated him at the school.⁷⁹

OHIO

Xavier University, Cincinnati: Following an allegation of sexual assault, basketball player Dez Wells alleged that as a male student, he "was fundamentally denied due process as to be virtually assured of a finding of guilt." The Southern Ohio District Court denied the university's motion to dismiss, holding that Wells had sufficiently alleged "a pattern of decision-making that has ultimately resulted in an alleged false outcome that he was guilty of rape."⁸⁰

PENNSYLVANIA

Saint Joseph's University, Philadelphia: Brian Harris filed a suit alleging that a member of the campus disciplinary committee stated that the university had "adopted a policy favoring female accusers as SJU was concerned about Title IX charges by female students." The Eastern Pennsylvania District Court allowed the plaintiff's Title IX claim to proceed, holding that "[a]llegations such as statements by members of the disciplinary tribunal or pertinent university officials are sufficient at this stage of the proceedings to support a Title IX claim."⁸¹

RHODE ISLAND

Brown University, Providence: A federal judge overturned a university disciplinary panel's 2-1 decision which found John Doe responsible for sexual assault in 2015. According to the Court, the school violated its own policies by not applying the student code of conduct which was in place at the time of the alleged incident. As a result, Doe was permitted to return to campus because he did not receive a fair adjudicatory proceeding. The ruling did not prohibit the school from retrying the case.⁸²

⁷⁹ Robert Shibley, *Victory for Due Process: Student Punished for Alleged Sexual Assault Cleared by University of North Dakota; Accuser Still Wanted for Lying to Police*, Foundation for Individual Rights in Education (October 18, 2011), available at <https://www.thefire.org/victory-for-due-process-student-punished-for-alleged-sexual-assault-cleared-by-university-of-north-dakota-accuser-still-wanted-for-lying-to-police-2/>.

⁸⁰ SAVE, *supra* at note 67.

⁸¹ *Id.*

⁸² Jackson Chaiken, *Judge Invalidates Brown Ruling In Sexual Assault Lawsuit*, The Brown Daily Herald (September 29, 2016), available at <http://www.browndailyherald.com/2016/09/29/judge-invalidates-brown-ruling-sexual-assault-lawsuit/>.

TENNESSEE

University of Tennessee-Chattanooga: Accused of rape, nationally ranked wrestler Corey Mock was precluded from participation in collegiate athletics. The Chancery Court of Davidson County, Tennessee noted that the university’s affirmative consent standard was unfair because the rule “erroneously shifted the burden of proof” to the defendant, robbing the student of his due process rights, and that “requiring the accused to affirmatively prove consent... is flawed and untenable if due process is to be afforded to the accused.”⁸³

VERMONT

Middlebury College: Following a decision to expel the plaintiff, the male student filed a breach of contract action, alleging “Middlebury’s investigation and decision were biased, unfair, and discriminatory and in violation of Middlebury’s policies.” The Vermont District Court issued an emergency preliminary injunction allowing the plaintiff to attend fall classes.⁸⁴

VIRGINIA

Washington and Lee University, Lexington: Two students had a sexual encounter. The female student later attended a presentation which advanced the idea that “regret equals rape.” She then filed a sexual assault complaint against the male student, resulting in his expulsion. Ruling in favor of the male student’s Title IX claim, the Western Virginia District Court concluded the university’s bare-bones adjudication processes served to “railroad” students who are wrongly accused of sexual assault.⁸⁵

⁸³ SAVE, *supra* at note 67.

⁸⁴ Id.

⁸⁵ Id.

SAVE

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