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## Flip It and Reverse It: Examining Reverse Gender Discrimination Claims Brought Under Title IX

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# Flip It and Reverse It: Examining Reverse Gender Discrimination Claims Brought Under Title IX

Courtney Joy McMullan\*

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### I. Introduction

John Doe was beginning his senior year when his University received three anonymous complaints filed against him by Janes 1, 2, and 3.<sup>1</sup> Jane 1 described the night John offered to walk her home from the bar. She was heavily intoxicated from a party, but John followed her into her dorm room and proceeded to digitally penetrate her. Jane 2 told the University of an evening where John was touching, kissing, and trying to force himself on her despite her extreme intoxication and visible discomfort. Jane 3 recounted a night that John followed her into a bathroom and began touching her and exposing himself to her until she ran away.

The University conducted an investigation into the complaints and held three hearings. John claimed little memory of the evenings, and the hearing panel found his testimony unpersuasive. The University ultimately found John responsible for the sexual misconduct and expelled him. In response, John sued his University and its officials, claiming, among other things, that the University proceedings were tainted with gender bias against him. John explained that the federal government's pressure on the University to address sexual assault issues, combined with student activism to raise awareness about campus sexual assault, influenced his University to find him guilty—all because he is a male and the victim of reverse gender discrimination.<sup>2</sup>

The conversation surrounding sexual discrimination, sexual harassment, and sexual misconduct in general has undergone a

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1. The following facts are based on the factual allegations in *Doe v. Colgate University*, No. 5:15-CV-1069 (LEK/DEP), 2017 WL 4990629 (N.D.N.Y. Oct. 31, 2017), which is further discussed *infra* Part IV.B.1.

2. While men and women can both be victims or perpetrators of sexual assault, for the purposes of this Note and its discussion of reverse Title IX claims, the plaintiff/accused will be referred to with masculine pronouns and the victim/accuser will be referred to with feminine pronouns.

drastic transformation over the past few years.<sup>3</sup> The volume of public discussion regarding sexual assault on college campuses, in particular, has significantly increased in recent years.<sup>4</sup> The federal government,<sup>5</sup> university students,<sup>6</sup> and the public at large<sup>7</sup> have begun to put pressure on universities to change their policies surrounding sexual assault allegations. Many universities have

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3. A large portion of this conversation began in the employment setting, with sexual harassment being brought to the forefront under the #MeToo movement. For a discussion of the social movement and its effects on employment discrimination law, see, for example, Vicki Schultz, *Open Statement on Sexual Harassment from Employment Discrimination Law Scholars*, 71 STAN. L. REV. ONLINE 17 (2018) (outlining ten principles within the sexual harassment arena that need to be addressed in reform efforts); Joanna L. Grossman, *The Aftermath of the #MeToo Movement*, JUSTIA (June 26, 2018), <https://perma.cc/2KZF-445C> (last visited Nov. 11, 2019) (describing how the landscape has shifted “seismically” because of the damage that a high-profile outing under the social movement can have an on employer) (on file with the Washington and Lee Law Review).

4. See, e.g., Bethany A. Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and Twombly/Iqbal in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2676 (2017) (noting that “the dialogue surrounding sexual assault on campuses has grown exponentially in recent years”); Aya Gruber, *Rape Law Revisited*, 13 OHIO ST. J. CRIM. L. 279, 280 (2016) (stating that the “volume of public discussion about rape . . . certainly is widespread, ever increasing and affecting law and policy at a rapid rate”).

5. See *infra* Part II.B (discussing the development of Title IX through guidance from the federal government).

6. See Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 822–23 (2017) (“Student organizers, many of whom publicly identify as survivors, used a combination of legal complaints, public protest, and powerful narratives to pressure their schools—often successfully—to change their approach to sexual violence reports.”); David DeMatteo, *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL’Y & L. 227, 227 (2015) (stating that “a recent series of highly publicized sexual assaults on college campuses involving questionable responses by academic institutions has resulted in calls for change from several groups” including victimized college students and their parents who “have expressed outrage at the response of some academic institutions”).

7. See Libby Sander, *Quiet No Longer, Rape Survivors Put Pressure on Colleges*, CHRON. OF HIGHER EDUC. (Aug. 12, 2013), <https://perma.cc/9RCY-3WJS> (last visited Nov. 18, 2019) (explaining that “hundreds of students and activists nationwide have formed a movement to force colleges to change how they handle reports of rape” because they are “angry with their colleges for turning a blind eye to sexual violence and for failing to help prevent it”) (on file with the Washington and Lee Law Review).

taken procedural and substantive efforts to address the issue of campus sexual misconduct.<sup>8</sup>

Although there are vocal supporters of the policy changes, there are also many who oppose such measures.<sup>9</sup> Many universities that have made efforts to improve and strengthen their sexual assault disciplinary processes have faced backlash for such measures.<sup>10</sup> Some opponents view the campus disciplinary process as unfair to the accused students.<sup>11</sup> Another criticism of

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8. See, e.g., Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1980–81 (2016) (highlighting that over 1,000 colleges and universities now use affirmative consent rules for sexual misconduct and that these standards “enhance sexual autonomy” and “mirror the history of progressive attempts to reform rape law”); Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 71 (2017) (“The increase in both enforcement and public attention has motivated colleges and universities to improve their policies and practices for addressing sexual assault, including their disciplinary processes.”).

9. See, e.g., Corbin, *supra* note 4, at 2713 (stating that “the erosion of legal rights” by the federal government guidance on Title IX issues “is fundamentally problematic”); Joe Dryden, *Title IX Violations Arising from Title IX Investigations: The Snake is Eating its Own Tail*, 53 IDAHO L. REV. 639, 641 (2017) (“The motivation for this paper arose out of a concern for the rights of the accused in sexual assault investigations, and a disbelief in the statistics being used to justify additional governmental intrusion into the operation of public and private colleges and universities.”).

10. See Brodsky, *supra* note 6, at 825 (“Many Title IX opponents deploy a rhetoric of ‘overcorrection’ and a pendulum swinging too far, as though a single axis of justice exists on which every gain for one side is a loss for the other.”); Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 634 (2018) (“One paramount concern has been that in the resultant rush to protect victims and comply with [Office of Civil Rights (OCR)]’s new policies, schools did not adequately protect the accused students’ procedural due process rights.”); Tyra Singleton, Note, *Conflicting Definitions of Sexual Assault and Consent: The Ramifications of Title IX Male Gender Discrimination Claims Against College Campuses*, 28 HASTINGS WOMEN’S L.J. 155, 172 (2017) (“It is not a rare occurrence that institutions, relying on state funding and private endowments, will be swayed by public opinion as it makes controversial decisions.”).

11. See Brodsky, *supra* note 6, at 831 (“Many critics have painted recent survivor-protective efforts by the Department of Education, tasked with enforcing Title IX, as an attack on accused students’ rights.”); Corbin, *supra* note 4, at 2715 (“Accused assailants frequently endure skewed investigatory and adjudicatory processes that lack basic truth-seeking structures.”); Diane L. Rosenfeld, *Uncomfortable Conversations: Confronting the Reality of Target Rape on Campus*, 128 HARV. L. REV. F. 359, 369 (2015) (“Critics argue that alleged instances of sexual assault are often mere miscommunications, in which an alleged perpetrator believes that consent has been given when in fact it has not.”).

the university disciplinary model generally is that the issues should not be handled administratively but rather processed through the criminal justice system.<sup>12</sup> These critics often emphasize the seriousness of the allegations being made against accused students.<sup>13</sup> Opponents also defend accused students using rhetoric such as the “he had such a bright future” argument in order to highlight the negative consequences for those being found responsible under the campus disciplinary system.<sup>14</sup>

Students accused of sexual harassment or assault have increasingly begun to sue their colleges and universities in order to seek redress for alleged unfairness during their university’s disciplinary proceedings.<sup>15</sup> The accused students pursue many theories of liability, including breach of contract,<sup>16</sup> denial of

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12. See Anderson, *supra* note 8, at 1994 (stating that “[d]espite a long and continued history of bias against victims of sexual assault, oft-repeated arguments by opponents of Title IX tend to idealize the criminal law and disparage the campus disciplinary system” as “ill equipped to handle complaints,” unlike “the criminal justice system where real justice resides”); DeMatteo, *supra* note 6, at 227 (explaining that there has been “significant debate regarding how much the criminal justice system can and should be involved when sexual assaults occur on college campuses”); Dryden, *supra* note 9, at 677 (arguing that guilt or innocence “should not be determined by the media, or by the court of public opinion, or by potentially biased school administrators who are trying to avoid negative publicity and the ire of the OCR” but rather “should be administered in front of an impartial tribunal”). *But see* Brodsky, *supra* note 6, at 829–30 (“In many critics’ misguided judgment, the obvious solution to school disciplinary failures is to cede all authority to police.”).

13. See Brodsky, *supra* note 6, at 841 (“[C]ritics bemoan the failure of campus ‘rape trials’ to live up to the standards of actual criminal rape trials—thus styling Title IX’s protections for victims as fundamentally at odds with expected protections for the accused . . .”); Singleton, *supra* note 10, at 156 (“[F]inding an accused student responsible for sexual misconduct carries a seriousness within both a university judicial system and larger society. An accused student’s good name, reputation, honor, integrity, and liberty are at stake.”).

14. See Anderson, *supra* note 8, at 1992–93 (“The sympathy many express for those accused of sexual assault in campus proceedings, which have extremely limited consequences relative to the criminal justice system, contrasts sharply with the disdain society has expressed for sex offenders outside of the campus setting.”).

15. See *infra* notes 16–87 and accompanying text (highlighting examples of claims against universities and the theories of liability students have pursued).

16. See, e.g., *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 220 (D. Mass. 2017) (finding that a male student expelled for violating his private college’s sexual misconduct policy alleged sufficient bases for his breach of contract claim because the fact-finding process was not impartial and fair, as promised in the school’s

constitutional due process rights,<sup>17</sup> breach of the implied covenant of good faith and fair dealing,<sup>18</sup> defamation,<sup>19</sup> estoppel,<sup>20</sup> tortious interference,<sup>21</sup> and more.<sup>22</sup> Students have also pursued claims

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policies and procedures); *Doe v. Trs. of the Univ. of Pa.*, 270 F. Supp. 3d 799, 807–08 (E.D. Pa. 2017) (stating that a university could be held liable for a breach of contract claim when it did not train investigators and hearing panel members as outlined in its disciplinary procedure policies).

17. See, e.g., *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961, 978–79 (S.D. Ohio 2018) (concluding that a student had presented plausible allegations that the university had violated his procedural due process rights by not allowing him to mount a meaningful defense against the sexual assault claim); *Tanyi v. Appalachian State Univ.*, No. 5:14-CV-170RLV, 2015 WL 4478853, at \*7 (W.D.N.C. July 22, 2015) (stating that the university official made a decision against the student that could be considered arbitrary or motivated by bad faith, allowing the student’s substantive due process claim to proceed); see also J. Brad Reich, *When Is Due Process Due?: Title IX, “The State,” and Public College and University Sexual Violence Procedures*, 11 CHARLESTON L. REV. 1, 19–27 (2017) (discussing why due process protections are necessary during public university Title IX disputes to protect the presumed innocence of alleged offenders).

18. See *Amherst*, 238 F. Supp. 3d at 220 (finding that a jury could reasonably conclude that the college denied the student a fair adjudication of the complaint against him, thereby breaching the covenant of good faith and fair dealing).

19. See *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746, 749–50 (S.D. Ohio 2014) (allowing a male student’s libel claims against his university to survive a motion to dismiss because the university’s statements regarding his expulsion marked him as a person expelled for a serious violation).

20. See *Doe v. Case W. Reserve Univ.*, No. 1:17-CV-414, 2017 WL 3840418, at \*13 (N.D. Ohio Sept. 1, 2017) (determining that the university’s unambiguous representations and promises to not deny the student his procedural rights and to provide support to anyone involved could reasonably be relied on to the student’s detriment).

21. See *Collick v. William Paterson Univ.*, No. 16-471 (KM) (JBC), 2016 WL 6824374, at \*21 (D.N.J. Nov. 17, 2016) (explaining that the university’s statements against two male students could constitute tortious interference with prospective economic advantage by severing their relationships with the Educational Opportunity Fund Program that provided them with loans).

22. See *Doe v. Univ. of St. Thomas*, 240 F. Supp. 3d 984, 994–95 (D. Minn. 2017) (explaining that a negligence claim against a university can survive because universities could owe students a duty of care under their special relationships to conduct the sexual assault proceedings in a non-negligent manner); *Dempsey v. Bucknell Univ.*, No. 4:11-CV-1679, 2012 WL 1569826, at \*24 (M.D. Pa. May 3, 2012) (allowing a student’s claim for intentional infliction of emotional distress to survive a motion to dismiss because he had sufficiently alleged that officials acted intentionally, maliciously, or recklessly and that the student suffered severe emotional distress); *Doe v. Univ. of the S.*, No. 4:09-CV-62, 2011 WL 1258104, at \*20 (E.D. Tenn. Mar. 31, 2011) (allowing a student to proceed with a quasi-contractual claim that his university was unjustly enriched under its policies regarding sexual assault).

against their universities alleging reverse gender discrimination under Title IX of the Education Amendments Act.<sup>23</sup>

Title IX states that “[n]o 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 . . . .”<sup>24</sup> Title IX was originally enacted because “Congress wanted to avoid the use of federal resources to support discriminatory practices” and “to provide individual citizens effective protection against those practices.”<sup>25</sup> Students who have experienced sexual harassment<sup>26</sup> or sexual assault<sup>27</sup> in the educational context may take action under Title IX.<sup>28</sup> Additionally, students *accused* of sexual harassment or assault have brought claims against universities under reverse Title IX theories.<sup>29</sup> This Note examines if, and to what degree, courts should consider the pressure put on universities to address sexual misconduct on campus as support for an accused student’s Title IX claim of gender discrimination during university disciplinary proceedings.

This Note begins in Part II by discussing the prevalence of campus sexual assault and the ways in which Title IX is used to address it on university campuses. Part III examines reverse Title IX claims by accused students, including the various causes of action and the pleading standards required. Part III also surveys

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23. 20 U.S.C. § 1681 (2018).

24. *Id.*

25. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

26. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 64 (1986) (determining that unwelcome sexual advances constitute sex discrimination if they render a workplace hostile to the members of a sex).

27. *See Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (stating that sexual abuse and assault “obviously qualify as . . . severe, pervasive, and objectively offensive sexual harassment”).

28. *See, e.g., Sander, supra* note 7 (“Meant to prohibit sex discrimination at institutions that receive federal funds, the law requires colleges to investigate and resolve reports of sexual misconduct, including assault . . .”). For a discussion of the effect of sexual violence in other educational settings, see Emma Brown, *Sexual Violence Isn’t Just a College Problem. It Happens in K-12 Schools, Too.*, WASH. POST (Jan. 17, 2019), <https://perma.cc/3MY2-BKHU> (last visited Nov. 11, 2019) (on file with the Washington and Lee Law Review).

29. *See infra* Part III; *see also Corbin, supra* note 4, at 2714 (“The climate of Title IX sexual assault litigation is changing. Previously viewed as a victim protections statute, Title IX is increasingly being invoked by accused perpetrators of sexual violence to demand fair and equitable disciplinary proceedings.”).



the success of reverse Title IX claims using public pressure on universities to address sexual assault to support their allegations of gender discrimination. Part IV then evaluates the way summary judgment rules and burden-shifting frameworks affect the likelihood of success for reverse Title IX claims. Finally, Part V emphasizes the need for clarity and consistency in the evaluation of reverse Title IX claims. In considering the purposes and policies of Title IX, this Note ultimately argues that reverse Title IX claims, especially those relying on external pressure on universities, should be assessed in a strict and limited manner going forward. This Note concludes in Part VI by discussing the possibilities of proposed changes to federal regulations and their impact on reverse Title IX claims.

## *II. Overview of Campus Sexual Assault*

### *A. Campus Sexual Assault*

In the modern climate,<sup>30</sup> there is a great deal of tension on college campuses regarding rape culture and sexual assault.<sup>31</sup> College campus conversations relating to sexual assault are

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30. See Anderson, *supra* note 8, at 1969 (“An increasing awareness of the widespread nature of campus sexual assault facilitated legal change at the state and federal level to address it. No matter to which study one refers, campus sexual assault is a large problem.”); Gruber, *supra* note 4, at 279–83 (discussing the “post-millennial sex war” and stating that “the claim that rape is a widespread and worsening problem that affects all women and reflects deep gender inequality is no longer just a feminist mantra, but an increasingly accepted, uncontroversial, and even undebatable claim”); Diane Heckman, *The Proliferation of Title IX Collegiate Mishandling Cases Involving Sexual Misconduct Between 2016–2018: The March to the Federal Circuit Courts*, 358 ED. L. REP. 697, 698 (2018) (asserting that the nomination of Justice Kavanaugh to the Supreme Court “acutely put sexual misconduct on the national landscape, with the televised hearings, radio, and press coverage”).

31. See DeMatteo, *supra* note 6, at 227 (“A recent series of highly publicized campus sexual assaults and the questionable responses by the academic institutions where they occurred has led some policymakers and academic administrators to call for legislative and institutional change.”); Laura L. Dunn, *Addressing Sexual Violence in Higher Education: Ensuring Compliance with the Clery Act, Title IX and VAWA*, 15 GEO. J. GENDER & L. 563, 564 (2014) (“Unlike ever before, there is national pressure on colleges and universities to address campus sexual violence.”).

currently quite polarized, impassioned, and controversial.<sup>32</sup> Despite the fact that both sides of the argument appear to be rooted in a value for students' access to education, the debate instead focuses on the consequences for either the accused or the accuser in sexual assault situations.<sup>33</sup>

Evidence shows that campus sexual assault is a serious problem.<sup>34</sup> Even with the significant data that exists regarding the prevalence of sexual assault and harassment on college campuses,<sup>35</sup> the statistics likely understate the actual pervasiveness due, at least in part, to underreporting by victims.<sup>36</sup> Common reasons for the low reporting of sexual assault incidents<sup>37</sup>

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32. See, e.g., Annaleigh E. Curtis, *Due Process Demands as Propaganda: The Rhetoric of Title IX Opposition*, 29 YALE J.L. & HUMAN. 273, 278–81 (2017) (outlining how rape culture is a “social phenomenon” that can give rise to “propagandistic speech”); Rosenfeld, *supra* note 11, at 359 (“The longstanding epidemic of campus sexual assault has finally reached a flashpoint, igniting a national dialogue.”).

33. See Brodsky, *supra* note 6, at 827–28 (discussing the shared values between the two “warring interests” based on the shared “unifying principle” centering around “the need to combat unjust deprivations of the right to learn, whether the threat is unaddressed gender violence or, less frequently, false accusations”). Despite Brodsky’s belief that shared values unite both sides of the argument, she also refers to the national discussion as “the ill-informed circus of debate on Title IX” and “a wrongheaded and counterproductive battle.” *Id.* at 848.

34. See Dunn, *supra* note 31, at 565 (“While murder rarely occurs on college and university campuses, sexual violence is endemic.”).

35. See generally Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL’Y & L. 1 (2015) (evaluating not only the data reported by universities regarding campus sexual assault but also the discrepancy between rates reported before and after an audit and theorizing that universities undercount incidents of sexual assault).

36. See, e.g., DeMatteo, *supra* note 6, at 228 (stating that “[e]ven more striking than the published statistics on the prevalence of college sexual assaults is the likelihood that these reported statistics significantly underestimate the actual prevalence of campus sexual assaults due to remarkably low levels of incident reporting”); Rosenfeld, *supra* note 11, at 367 (“Roughly one-third of students who experience unwanted sex do not report the incident to *anyone*, including friends or family. No more than 10% report their experiences to a school official.”) (emphasis in original).

37. See Rosenfeld, *supra* note 11, at 367 (citing the reasons for not reporting as including “fear of not being believed or taken seriously, not knowing it was sexual assault, not wanting others to know about the experience, belief that nothing will be done, insufficient proof, and fear of retaliation from the offender or his friends”); Grayson Sang Walker, Note, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 98 (2010) (“Filing a formal complaint with school officials often triggers a lengthy and embarrassing

include wariness regarding the school's investigatory and adjudicatory processes, lack of awareness about the definition and classification of sexual assault, the victim's fear of retaliation, and lack of punishment given to perpetrators.<sup>38</sup> If colleges and universities are to truly "effectively address campus sexual violence," they "must develop progressive campus policies to contend with these realities."<sup>39</sup> Recent university reform under Title IX has sought to do just that.

### B. Title IX and Federal Guidance

Traditionally, most of the focus of Title IX enforcement has been aimed at addressing gender discrimination by providing female athletes in university sports with equal opportunities.<sup>40</sup> In 2011, the Department of Education (DOE) and the Office for Civil Rights (OCR) published a Dear Colleague Letter (DCL),<sup>41</sup> which adjusted the goals of Title IX. The 2011 DCL drew attention to sex discrimination on college campuses outside of the athletic context and shifted the focus of Title IX enforcement toward addressing issues of campus sexual assault.<sup>42</sup> The Trump administration has

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investigation, even if the case is never referred to a local prosecutor. Survivors naturally fear a loss of privacy and control during this process . . .").

38. See Brodsky, *supra* note 29, at 2678–79 (discussing the mindsets of sexual violence survivors including the victims' discouragement regarding the "lax punishment afforded to perpetrators by university officials"). For a discussion of the "range of penalties associated with administrative adjudication of campus sexual assault cases" and the reluctance of schools to expel sexual assault perpetrators, see DeMatteo, *supra* note 6, at 230.

39. See Dunn, *supra* note 31, at 565–66 (explaining that the "silent epidemic" which "masks the reality of perpetration on campus" stems from the inability to identify sexual assault, the fear of social stigma, the self-blame, and the hesitancy to label the perpetrator as a rapist).

40. See Walker, *supra* note 37, at 99 (explaining that "Title IX is best known for its role in expanding women's sports at the high school and collegiate levels"); Corey Rayburn Yung, *Is Relying on Title IX a Mistake?*, 64 U. KAN. L. REV. 891, 902 (2016) ("Traditionally, Title IX litigation and regulation has been focused on addressing unlawful disparities in athletic departments and sex discrimination in hierarchal relationships.").

41. U.S. DEPT OF EDUC., DEAR COLLEAGUE LETTER (Apr. 4, 2011), <https://perma.cc/5B4C-GAM2> (PDF) [hereinafter 2011 DCL].

42. See Katharine Silbaugh, *Reactive to Proactive: Title IX's Unrealized Capacity to Prevent Campus Sexual Assault*, 95 B.U. L. REV. 1049, 1065 (2015) (stating that the 2011 DCL, in particular, has "shifted the equality conception of

abandoned many of the requirements and protections reinforced under the 2011 DCL.<sup>43</sup> New policies will likely be enforced by Secretary of Education Betsy DeVos and could have a significant impact on all forms of Title IX claims, which is discussed later in this Note.<sup>44</sup> However, these changes do not impact this Note's discussion of cases referencing "federal pressure,"<sup>45</sup> which refers generally to federal guidance before the proposed changes, specifically the 2011 DCL and direction under the Obama Administration.<sup>46</sup>

The 2011 DCL begins by discussing the requirements and responsibilities of schools to address sexual misconduct and "concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence."<sup>47</sup> The letter indicates that compliance with Title IX requires "publishing a notice of nondiscrimination, designating an employee to coordinate Title IX compliance, and adopting and publishing grievance procedures."<sup>48</sup> These measures "serve as preventive measures against

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Title IX" to "one aimed at rape and other sexual assault on college campuses" which has "accelerated exponentially" the "pace of the discussion of sexual assault on college campuses"); *see also* Walker, *supra* note 37, at 99 ("The focus on sports has limited the transformative power of Title IX's non-discrimination mandate . . . Title IX was intended to protect *all* students, not just female athletes, from gender discrimination in federally funded educational programs and activities.") (emphasis in original).

43. For a general description of the Department of Education's new policy and guidance under the Trump administration, including withdrawal of the 2011 DCL, see Press Release, U.S. Dep't of Educ., Dep't of Educ. Issues New Interim Guidance on Campus Sexual Misconduct (Sept. 22, 2017), <https://perma.cc/C24Y-4V2P> (last visited Nov. 11, 2019) [hereinafter 2017 Press Release] (on file with the Washington and Lee Law Review).

44. *See infra* Part VI.

45. *See* Silbaugh, *supra* note 42, at 1065 ("Both fueled by the public discussion of campus sexual assault and also fueling the discussion, the DOE is a significant player in raising the profile of this issue in the past several years.").

46. *See* Doe v. Colgate Univ., No. 5:15-CV-1069 (LEK/DEP), 2017 WL 4990629, at \*13 (N.D.N.Y. Oct. 31, 2017) (stating that the "2017 DCL does not impact the Court's analysis of Plaintiff's Title IX claim" because updated interpretation "simply demonstrates that OCR can 'from time to time change its interpretation' of a statute" and does not mean that the University's compliance with the 2011 guidelines violated Title IX (quoting Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 863 (1984))).

47. *See* 2011 DCL, *supra* note 41, at 2 (providing examples of ways that schools can "end such conduct, prevent its recurrence, and address its effects").

48. *Id.* at 5.

harassment” and “bring potentially problematic conduct to the school’s attention before it becomes serious enough to create a hostile environment.”<sup>49</sup> While universities are threatened with loss of federal funding for failure to comply with Title IX requirements, Title IX also provides universities with a mechanism to more proactively address campus sexual assault.<sup>50</sup>

Sexual violence is an extreme example of sexual harassment, which is a subset of the sexual discrimination forbidden under Title IX.<sup>51</sup> According to the 2011 DCL, “[a] number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery and sexual coercion,” all of which “are forms of sexual harassment covered under Title IX.”<sup>52</sup> Sexual harassment consists of any “unwelcome conduct of a sexual nature,” which also includes “unwelcome sexual advances, request for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”<sup>53</sup> To be actionable under Title IX, the sexual discrimination must have a connection to the complainant’s ability to access her education<sup>54</sup> because “Title IX guarantees protections

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49. *Id.* at 5–6.

50. *See* Mann, *supra* note 10, at 6333 (stating that Title IX serves as a starting place for addressing sexual assault complaints because, “[a]s is typical for a civil rights statute, Title IX codifies the societal interest in protecting victims against certain types of discrimination and requires schools to provide an equal access to education”); *see also* Brodsky, *supra* note 6, at 823 (“Decades after an appellate court first held that the sex discrimination law Title IX requires schools to address allegations of sexual harassment, many colleges undertook serious reform efforts, recognizing the legal and reputational threat of their own noncompliance with civil rights law for the first time.” (referencing *Alexander v. Yale Univ.*, 631 F.2d 178, 181–83 (2d Cir. 1980))). *But see* Yung, *supra* note 40, at 893 (arguing that “it is a mistake to solely or primarily depend on Title IX to deter and punish offenders in university sexual assault cases” because of the “uncertainty related to various aspects of Title IX doctrine and the regulatory regime that has emerged to enforce the statute”).

51. *See* Yung, *supra* note 40, at 895 (providing a chart explaining the subcategories but clarifying that “[d]espite the assumption that sexual assault is a subset of sexual harassment, there are numerous differences between university sexual assault cases and the more typical sexual harassment claims brought under Title IX”).

52. 2011 DCL, *supra* note 41, at 1–2.

53. *Id.* at 3.

54. *See* Mann, *supra* note 10, at 641–42 (“There are many ways in which the two can be tied; examples include claims of being unable to attend class or engage in shared activities (such as the dining hall) for fear of encountering the accused student.”). For a further explanation of the connection between sexual assault,

to student survivors of gender violence because such violence creates an unconscionable sex-based obstacle to the pursuit of an education.”<sup>55</sup>

A significant development from the 2011 DCL came from the ways in which it “strengthened the rights and protections for victims of sexual misconduct and affirmed the university’s proactive obligations to eliminate sexual violence.”<sup>56</sup> On the other hand, the shift toward sexual violence victim protection was accompanied by an increase in perpetrator victim mentality, which further contributes to the polarized debate on college campuses.<sup>57</sup> Although the 2011 DCL is not binding law or rulemaking,<sup>58</sup> the federal government threatened to investigate and withhold federal funding from universities who did not comply, putting significant pressure on universities to address sexual assault.<sup>59</sup> Many students and scholars claim that this public pressure on universities makes them inevitably unfair places for adjudication of the issues.<sup>60</sup> Some scholars view balancing the rights of the

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sexual harassment, and sex discrimination, see Yung, *supra* note 40, at 895–98 (explaining that “[m]any of the shortcomings related to Title IX’s application to peer-to-peer sexual assault cases arise because the statute, by its own terms, must confront such cases as a form of sexual harassment which, in turn, is a form of sex discrimination”).

55. Brodsky, *supra* note 6, at 828.

56. Corbin, *supra* note 4, at 2676.

57. See Buzuvis, *supra* note 8, at 85 (theorizing that the trend of cases involving disciplined students after the 2011 DCL is explained “by increased reporting of sexual assault and the corresponding increase in the number of students disciplined” due to universities’ altered disciplinary practices).

58. See Silbaugh, *supra* note 42, at 1064 (explaining that while each of the OCR’s Dear Colleague Letters “carries less formal weight than regulations or Guidance, colleges and universities respond to them wisely as expressions of OCR’s intentions in conducting investigations of colleges for compliance with Title IX”); see also Brodsky, *supra* note 6, at 823 (explaining that “counternarrative[s] emerged from some law professors, reporters, libertarians critical of the administrative state, and those skeptical of the existence of campus rape: that schools, in their attempts to conform to the Department of Education’s nonbinding recommendations, were now violating the rights of students accused of gender violence”).

59. See Silbaugh, *supra* note 42, at 1065 (“The DOE is signaling its active use of administrative enforcement of Title IX to address peer assault since the 2011 Dear Colleague [L]etter, and colleges are scrambling to react. . . . Colleges feel greatly increased pressure to do what the DOE is requiring . . .”).

60. See, e.g., Singleton, *supra* note 10, at 155 (“[M]any colleges and universities, in an effort to comply, went outside the scope of what Title IX

accused with the rights of the complainant as an impossible situation for universities to balance.<sup>61</sup> Either way, universities are open to civil liability under Title IX,<sup>62</sup> especially if their established grievance procedures and disciplinary processes are not strictly followed.

### C. University Disciplinary Processes

Generally, student victims who experience sexual assault have a few options, including pursuing criminal and civil cases against the perpetrators.<sup>63</sup> Additionally, students have the option to seek relief through their educational institutions.

Educational institutions provide remedies that are unique to the educational setting,<sup>64</sup> and the educational forum can have

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required and developed procedures that are overwhelmingly stacked against the accused and infringe on the accused's constitutional rights.”). Compare Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 80–83 (2013) (arguing that universities should not handle sexual assault claims because of their inevitable bias stemming from public pressure to punish sexual misconduct more aggressively), with Brodsky, *supra* note 6, at 825 (“[I]n the narrower college rape context, many advocates and most popular accounts tell a tale of warring interests. Schools can either prevent and respond to gender violence or protect accused students’ rights; these aims are imagined to be entirely mutually exclusive.”).

61. *But see* 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, 293 (2009) (stating that neither due process nor Title IX “creates a ‘Catch 22’ for colleges and universities” because “each provides procedural safeguards that are congruent with the other, and thus schools do not have to choose between the rights of the accused student or the rights of the student complainant”).

62. *See* Yung, *supra* note 40, at 902 (“Because the university might be sued in either case, likely under Title IX in both situations, it is in a situation ripe with potential conflicts of interest. A litigation-averse university will likely pursue the course least likely to create civil liability.”).

63. *See* Mann, *supra* note 10, at 639 (describing the avenues and remedies available to sexual assault student victims, including “contacting the police to see if a criminal case could be pursued, filing a civil tort case, filing a civil restraining order, and/or pursuing actions at the student’s educational institution”).

64. *See* Walker, *supra* note 37, at 98–99 (“Universities possess a wide range of remedial powers, including orders of protection, suspension, and expulsion.”).

many advantages<sup>65</sup> over the criminal<sup>66</sup> and civil<sup>67</sup> fora. Campus disciplinary proceedings can “provide survivors with access to justice and remove threats to the student body” without requiring formal court proceedings.<sup>68</sup> However, “nothing prevents the dual adjudication of campus sexual assaults,”<sup>69</sup> and student victims may pursue an administrative remedy through university proceedings while also seeking redress through the court system.

The required characteristics of university Title IX disciplinary proceedings changed significantly with the 2011 DCL and are continuously undergoing further change under the Trump Administration.<sup>70</sup> The 2011 DCL provided significant guidance as to adequate grievance procedures and “devotes, conservatively counted, fifteen of the nineteen pages to how a college should respond to a sexual assault.”<sup>71</sup> First, Title IX compliance requires notice to students and employees of the grievance procedures, including the appropriate place to file complaints.<sup>72</sup> Next, schools

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65. See Mann, *supra* note 10, at 640

Student victims often turn first to their educational institution for remedies because this is the most effective and direct way they can get what they need to continue their education. [They] often prefer to see remedies from their community directly, rather than proceeding through the civil or criminal process . . . .

66. See *id.* at 639 (describing how officers rather than victims are in charge of criminal cases and that the “punishment would not necessarily assist the student victim with remaining at school pending the outcome of the criminal case”).

67. See *id.* at 640 (acknowledging that civil cases are often lengthy and “courts are often reluctant to issue stay-away orders that affect the accused student’s ability to attend class, as they view this as interfering with the educational institution’s sphere of authority”).

68. See Walker, *supra* note 37, at 99 (noting that campus proceedings do not necessitate the participation of law enforcement authorities and require a lower burden of proof than a criminal trial).

69. See DeMatteo, *supra* note 6, at 230 (“Simultaneously pursuing remedies through the academic institution and criminal justice system would provide victims with a range of options in seeking redress for the offense.”).

70. See *infra* Part VI (outlining the impact of the 2017 DCL and DeVos’s proposed regulation).

71. See Silbaugh, *supra* note 42, at 1066 (explaining the DCL includes “guidance on training employees to recognize and report a sexual assault that has occurred; the duties of a Title IX coordinator to oversee complaints of sexual assault; and the requirements of an adequate grievance procedure for addressing complaints of sexual assault”).

72. See 2011 DCL, *supra* note 41, at 9 (recommending that the grievance



are required to provide “equitable grievance procedures,” which are “adequate, reliable and impartial” and generally include “conduct[ing] investigations and hearings to determine whether sexual harassment or violence occurred.”<sup>73</sup> Traditionally under Title IX, once the educational institution has actual or constructive notice of potential sexual discrimination, the statute obligates the school to act in response.<sup>74</sup>

The 2011 DCL indicated that “preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”<sup>75</sup> The letter also states that Title IX requires that a school allow both parties an equal opportunity to present relevant witnesses and other evidence at the investigation and hearing and give both parties “similar and timely access to any information that will be used at the hearing.”<sup>76</sup> OCR indicated that it would regulate whether the schools’ grievance procedures specify reasonably prompt time frames within which the procedures will take place.<sup>77</sup> The 2011 DCL makes clear that “[w]hen OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, [it] will seek appropriate

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procedures “be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school”).

73. *Id.* at 9–10.

74. *See* Corbin, *supra* note 4, at 2677 (“When a university knows or reasonably should know of an incident of sexual violence, it must take action to eliminate the harassing environment.”); Silbaugh, *supra* note 42, at 1066 (“Any fair reading of the [2011] DCL leads to the conclusion that its primary goal is to communicate to colleges and universities how they must conduct their discipline or grievance processes after learning of a possible sexual assault in order to remain in compliance with Title IX.”). This rule was enforced under the 2011 DCL. *See* 2011 DCL, *supra* note 41, at 4. However, the proposed regulations under the current administration seek to eliminate the “reasonably should know” requirement.

75. *See* 2011 DCL, *supra* note 41, at 11 (stating that school procedures which currently use the “clear and convincing standard” are inconsistent with the standard of proof used in civil rights violations, making them inequitable under Title IX).

76. *Id.*

77. *See id.* (“Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.”).

remedies for both the complainant and the broader student population,” which could include withdrawal of federal funding by the DOE or referral to the U.S. Department of Justice for litigation.<sup>78</sup> Notably, the 2011 DCL explicitly states that “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant,” seemingly emphasizing complainant discrimination protections over the procedural rights of the accused.<sup>79</sup>

#### *D. Title IX and Due Process*

In general, the 2011 DCL Title IX guidance provides “more robust procedural protections for both parties than does the Constitution—or any other federal law or regulation.”<sup>80</sup> While the Constitution applies only to public schools that function as an arm of the state, Title IX applies to any school receiving federal funding. The Constitution provides some procedural due process rights to students at public universities, but “students at private schools have no procedural due-process rights; the fairness of their schools’ disciplinary processes is a matter of contract, and disciplinarians need only conform to their written policies.”<sup>81</sup> In this way, Title IX as applied to gender violence presents “a more robust vision of fair process on campus than does the Constitution.”<sup>82</sup> It broadens the scope of protection because it extends “for the first time in federal law a basic fair-process mandate to all private universities that receive any federal assistance, not just those public schools subject to constitutional due-process requirements.”<sup>83</sup>

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78. *Id.* at 16.

79. *Id.* at 12.

80. Brodsky, *supra* note 6, at 831.

81. *Id.* *But see* Buzuvis, *supra* note 8, at 101 (“Though the Constitution’s Due Process Clause does not bind private colleges, courts have in many cases insisted that private universities have an obligation not to treat students unfairly or with malice,” which “is sometimes rooted in the contract doctrine of good faith and fair dealing.”).

82. Brodsky, *supra* note 6, at 832.

83. *Id.* at 836.

While due process discussions are often intertwined with Title IX procedural violations, due process claims individually against a university are typically more successful than Title IX claims.<sup>84</sup> Due process claims “can survive motions to dismiss, and even win outright, without the unnecessary step of linking procedural error to gender bias.”<sup>85</sup> The claims also sometimes avoid the negative backlash that results from a reverse Title IX claim—“because universities’ due process obligations do not conflict with those under Title IX, litigation on due process grounds can hold universities accountable for procedural fairness without weakening the university’s sexual assault response or exposing the university to a risk of liability under Title IX.”<sup>86</sup> Because many Title IX theories can be supported by evidence of procedural flaws, due process violations are often discussed in relation to Title IX violations. However, it is important to remember that the two claims are distinct from one another.

### *III. Stating a Reverse Title IX Claim*

Many courts recognize a cause of action under Title IX for a student accused of sexual assault against a university for discrimination in disciplinary proceedings if it appears the student’s gender influenced the disciplinary action.<sup>87</sup> These claims

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84. See Corbin, *supra* note 4, at 2712–13 (noting that “the current pleading climate suggests that due process and breach of contract actions . . . are easier to plead and thus more likely to proceed to discovery”); Yung, *supra* note 40, at 897 (stating that Title IX requirements can be difficult for plaintiffs to meet because “[i]f a plaintiff does not show clear evidence of a decline in academic performance due directly to sexual victimization or denial of university services, Title IX might not apply”).

85. Buzuvis, *supra* note 8, at 101.

86. *Id.*

87. See *Doe v. Columbia Univ.*, 831 F.3d 46, 57–59 (2d Cir. 2016) (recognizing a cause of action if the university discipline is motivated by the student’s gender); *Yusuf v. Vassar Coll.*, 35 F.3d 709, 714–16 (2d Cir. 1994) (acknowledging a cause of action and dividing the claims into two categories based on erroneous outcome and selective enforcement); *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 589–87 (E.D. Va. 2018) (stating that a cause of action could arise from a university’s disciplinary proceedings if the university demonstrated gender bias against an accused male student); *Saravanan v. Drexel Univ.*, No. 17-3409, 2017 WL 4532243, at \*4 (E.D. Pa. Oct. 10, 2017) (recognizing that a male student accused of sexual harassment and stalking, whose gender was a motivating factor for the

have drawn on many aspects of the disciplinary process as evidence of discrimination<sup>88</sup> and had varied success at different stages of litigation.<sup>89</sup> Title IX is enforceable through an implied private right of action,<sup>90</sup> the remedy being monetary damages<sup>91</sup> or injunctive relief.<sup>92</sup>

A recent trend in these claims is that students will use the public pressure put on universities as evidence that the university was biased against them.<sup>93</sup> It is not always clear if this strategy is based in “political outrage,”<sup>94</sup> but the claims often do serve

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university’s deciding to discipline, had a cause of action); *Doe v. Case W. Reserve Univ.*, No. 1:17-CV-414, 2017 WL 3840418, at \*3 (N.D. Ohio Sept. 1, 2017) (stating that a private cause of action exists because a university is not allowed to implement discipline if gender is a motivating factor behind the decision); *Doe v. Lynn Univ., Inc.*, 224 F. Supp. 3d 1288, 1291 (S.D. Fla. 2016) (recognizing a cause of action that could be divided into selective enforcement and erroneous outcome challenges); *Ritter v. Okla. City Univ.*, No. CIV-16-0438-HE, 2016 WL 3982554, at \*2 (W.D. Okla. July 22, 2016) (allowing a cause of action for a male student claiming gender discrimination in his university’s disciplinary action); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 185 (D.R.I. 2016) (recognizing a cause of action if gender is a motivating factor behind a university’s disciplinary action).

88. See, e.g., *infra* notes 105–109 and accompanying text.

89. See, e.g., *Doe v. Valencia Coll.*, 903 F.3d 1220, 1236 (11th Cir. 2018) (evaluating an erroneous outcome challenge to university disciplinary proceedings on a motion for summary judgment by the University); *Doe v. George Washington Univ.*, 305 F. Supp. 3d 126, 133–34 (D.D.C. 2018) (evaluating an accused student’s claim at the preliminary injunction stage and concluding he did not sufficiently demonstrate a likelihood to succeed on the merits); *Rolph v. Hobart & William Smith Colls.*, 271 F. Supp. 3d 386, 399–404 (W.D.N.Y. 2017) (evaluating the plaintiff’s Title IX claims at a motion to dismiss and deciding that the plaintiff had stated a claim under erroneous outcome, but not under selective enforcement).

90. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979) (“Not only the words and history of Title IX, but also its subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination.”).

91. See *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992) (concluding that “a damages remedy is available for an action brought to enforce Title IX”).

92. See *Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 247 (2009) (explaining that Title IX allows for a plaintiff to seek the full range of remedies, including injunctive relief (citing *Franklin*, 503 U.S. at 76)).

93. See *infra* notes 134–137 and accompanying text.

94. See *Corbin*, *supra* note 4, at 2712–13 (“The driving force behind reverse Title IX actions is the desire to proclaim political outrage at the extent to which OCR has manipulated the educational disciplinary framework . . . . Because OCR failed to equally protect male students, alleged perpetrators have no choice but to

(whether intentionally or unintentionally) a political agenda aimed at protections for the accused.<sup>95</sup>

### A. Causes of Action

Most courts have explicitly recognized at least four Title IX theories of liability under which a student may attack his university's disciplinary proceedings on the basis of gender bias against him<sup>96</sup>: (1) erroneous outcome;<sup>97</sup> (2) selective enforcement;<sup>98</sup> (3) deliberate indifference;<sup>99</sup> and (4) archaic assumptions.<sup>100</sup> Occasionally a plaintiff will bring claims under

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seek judicial relief.”). Corbin also blames the universities for the need for such claims, stating that “the closure of justice’s doors during the university disciplinary process has forced accused students to seek vindication of their rights in courts of law.” *Id.* at 2685.

95. See Buzuvis, *supra* note 8, at 107

[D]isciplined-student plaintiffs’ emphasis on Title IX claims contributes, perhaps by design, to anti-feminist backlash. Because Title IX’s application to sexual assault is destabilizing to those who participate in and benefit from the cultural association of masculinity with power that stems from rape, it may be the case that some disciplined-student plaintiffs find particular satisfaction in attacking the university with the same weapon that resulted in their expulsion in the first place. They may seek to impeach Title IX in the political arena by arguing that the statute is inherently contradictory and biased in favor of one sex.

96. See *Doe v. Miami Univ.*, 882 F.3d 579, 589–95 (6th Cir. 2018) (evaluating a student’s Title IX claims against his university under erroneous outcome, selective enforcement, and deliberate indifference theories, as well as a hostile-environment theory); *Doe v. Rider Univ.*, No. 3:16-CV-4882-BRM-DEA, 2018 WL 466225, at \*8 (D.N.J. Jan. 17, 2018) (evaluating the plaintiff’s claim under the four theories of liability even though the Third Circuit had not previously analyzed a Title IX claim arising from university disciplinary proceedings); *Stenzel v. Peterson*, No. CV 17-580 (JRT/LIB), 2017 WL 4081897, at \*4 (D. Minn. Sept. 13, 2017) (explaining that Title IX claims arising out of university disciplinary hearings can be analyzed under the four theories of liability and deciding to evaluate plaintiff’s claim under the selective enforcement standard).

97. See *infra* notes 104–112 and accompanying text.

98. See *infra* notes 113–115 and accompanying text.

99. See *infra* notes 117–119 and accompanying text.

100. See *infra* notes 121–123 and accompanying text.

hostile-environment<sup>101</sup> and retaliatory action<sup>102</sup> theories also. In all of these Title IX claims, “a plaintiff must allege facts he was discriminated against *because of sex*.”<sup>103</sup>

Erroneous outcome challenges to university proceedings are the most common claims brought, as well as the most successful thus far. Under erroneous outcome challenges, plaintiffs assert that they were “innocent and wrongly found to have committed an offense.”<sup>104</sup> An erroneous outcome challenge to university disciplinary proceedings requires a plaintiff to plead facts sufficient (1) to cast doubt on the accuracy of the proceeding against him<sup>105</sup> and (2) to establish a causal connection between gender bias and the flawed outcome of the proceedings.<sup>106</sup> The allegations vary from internal procedural flaws<sup>107</sup> to error by individual investigators<sup>108</sup> to external pressure upon the university.<sup>109</sup> Once doubt has been cast, the plaintiff must allege that the erroneous outcome was caused by gender bias against him.<sup>110</sup> The plaintiff must present “a particularized allegation

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101. See *infra* notes 124–125 and accompanying text.

102. See *infra* notes 126–127 and accompanying text.

103. Saravanan v. Drexel Univ., No. 17-3409, 2017 WL 4532243, at \*4 (E.D. Pa. Oct. 10, 2017) (citing Winter v. Pa. St. Univ., 172 F. Supp. 3d 756, 776 (M.D. Pa. 2016)) (emphasis in original).

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

105. See *id.* (explaining that the articulable doubt must exist from the record that was in front of the disciplinary tribunal at the time).

106. See *id.* (noting that the “[a]llegations of a causal connection in the case of university disciplinary cases can be of the kind that are found in the familiar setting of Title VII cases”).

107. See Doe v. Miami Univ., 882 F.3d 579, 592–94 (6th Cir. 2018) (determining that unresolved inconsistency in the female complainant’s statements and an erroneous definition of consent, taken with statistical evidence showing a “potential pattern of gender-based decision-making” and pressure on the University to combat sexual assault on campus, were sufficient to support reasonable inference of gender discrimination under erroneous outcome).

108. See Yusuf, 35 F.3d at 715 (stating that “some allegations, such as statements reflecting bias by members of the tribunal, may suffice both to cast doubt on the accuracy of the disciplinary adjudication and to relate the error to gender bias”).

109. See Doe v. Lynn Univ., Inc., 224 F. Supp. 3d 1288, 1342 (S.D. Fla. 2016) (holding that the nationwide pressure on universities along with the University’s representatives’ awareness of the criticism of the University’s handling of complaints was enough to support “the plausible inference of a causal connection between the flawed outcome and gender bias”).

110. See Yusuf, 35 F.3d at 715 (explaining that “allegations of a procedurally

relating to a causal connection between the flawed outcome and gender bias.”<sup>111</sup> The allegations must “go well beyond the surmises of the plaintiff as to what was in the minds of others and involve provable events that in the aggregate would allow a trier of fact to find that gender affected the outcome of the disciplinary proceeding.”<sup>112</sup>

A selective enforcement claim under Title IX “asserts that, regardless of the student’s guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student’s gender.”<sup>113</sup> To successfully bring a selective enforcement claim, a plaintiff must demonstrate that a similarly-situated member of the opposite sex was treated more favorably under the disciplinary proceedings due to gender.<sup>114</sup> These claims often prove difficult for male plaintiffs due to the lack of similarly-situated female perpetrators.<sup>115</sup> Under a selective enforcement claim, a plaintiff must at least “demonstrate an inconsistency that warrants further inquiry.”<sup>116</sup>

Under the theory of deliberate indifference, “educational institutions may be held liable for their deliberate indifference to

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or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient” unless there are “particular circumstances relating to a causal connection between the flawed outcome and gender bias” alleged).

111. *Id.*

112. *Id.* at 716.

113. *Id.* at 715.

114. *See Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048, 1067–68 (S.D. Ohio 2017) (concluding that because the plaintiff could not identify a similarly-situated female accused of violating the University’s code of conduct and not being dismissed from the University, he had not sufficiently pled a claim for selective enforcement).

115. *See, e.g., Doe v. Columbia Coll. Chi.*, 299 F. Supp. 3d 939, 958–59 (N.D. Ill. 2017) (rejecting plaintiff’s selective enforcement claim because of his conclusory statements and “especially in light of [his] allegation that ‘virtually all’ sexual assault complaints were lodged by females against males, which suggests that [the University] has not had the opportunity to refuse to discipline female students because of sexual assault”); *Prasad v. Cornell Univ.*, 2016 WL 3212079, at \*18 (N.D.N.Y. Feb. 24, 2016) (stating that the plaintiff “seemingly negates the possibility of establishing that female students were treated more favorably than males in similar circumstances” by alleging that the University had no reported incidents of male students submitting sexual assault or misconduct complaints against female students).

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

acts of peer sexual harassment where their lack of response to the harassment is “clearly unreasonable in light of the known circumstances.”<sup>117</sup> To maintain a claim for deliberate indifference under Title IX and be able to hold a university responsible for sexual harassment, a plaintiff must demonstrate that a university official had actual notice of, and was deliberately indifferent to, the misconduct.<sup>118</sup> A failure to follow Title IX regulations is not alone sufficient to allege sexual harassment under a deliberate indifference claim.<sup>119</sup> A claim for deliberate indifference was designed for students alleging sexual harassment, which goes well beyond sexual discrimination under Title IX disciplinary proceedings—the behavior must constitute pervasive harassment.<sup>120</sup>

Occasionally plaintiffs attempt to use an archaic-assumptions theory under Title IX, alleging that the university acted based on outdated, biased beliefs of gender dynamics.<sup>121</sup> Plaintiffs assert that universities maintain a perception of women as victims and men as aggressors and therefore have an archaic assumption based in gender bias.<sup>122</sup> Courts have refused thus far to apply the

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117. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

118. *See Horner v. Ky. High Sch. Athletic Ass’n*, 206 F.3d 685, 692–93 (6th Cir. 2000) (concluding that the relief under Title IX was only available when the policy is facially neutral if an intentional violation is shown, which requires actual notice of the harassment and deliberate indifference to it).

119. *See Z.J. v. Vanderbilt Univ.*, 355 F. Supp. 3d 646, 675 (M.D. Tenn. 2018) (stating that the plaintiff’s deliberate indifference claim failed because the allegedly biased disciplinary process was not sufficient to support “pervasive and widespread harassment” that was actionable under Title IX (referencing *Carmichael v. Galbraith*, 574 F. App’x 286, 289–90 (5th Cir. 2014))).

120. *See Doe v. Baum*, 903 F.3d 575, 588 (6th Cir. 2018) (“[T]hough sexual harassment is a form of discrimination for purposes of Title IX, we have held that to plead a Title IX deliberate-indifference claim, ‘the misconduct alleged must be sexual harassment,’ not just a biased disciplinary process.” (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 591 (6th Cir. 2018))).

121. *See id.* at 587–88 (explaining that the archaic-assumptions theory has been used to “show that a school denied a student an equal opportunity to participate in an athletic program because of historical assumptions about boys’ and girls’ physical capabilities” (citing *Mallory v. Ohio Univ.*, 76 F. App’x 643, 638–39 (6th Cir. 2003))).

122. *See Mallory*, 76 Fed. App’x at 640 (describing the plaintiff’s archaic-assumptions allegations that the University held an attitude that “men cannot be violated,” which led to an assumption that the woman was the victim in this situation).



theory outside of the athletics context to a reverse Title IX claim arising out of sexual assault disciplinary proceedings.<sup>123</sup>

Courts also have refused to apply the hostile-environment theory to reverse Title IX cases arising out of disciplinary proceedings. Under hostile-environment claims, plaintiffs allege that their educational experiences were severely altered by their universities' discriminatory environments.<sup>124</sup> Because the hostile-environment theory is based on sexual harassment rather than discrimination, plaintiffs must present "sex-specific language or conduct designed to humiliate, ridicule, intimidate, or insult," which is typically more severe than the experience allegedly caused by discrimination in disciplinary proceedings.<sup>125</sup>

Finally, a plaintiff can attempt to bring a reverse Title IX claim if he believes his university pursued action against him in a retaliatory manner.<sup>126</sup> Under a claim of retaliatory action, the plaintiff must demonstrate the university's, or university official's, differential treatment of a complaint that the plaintiff in good faith believes to be gender-based harassment.<sup>127</sup> Therefore, the male plaintiff must demonstrate that he has been sexually harassed by

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123. See *Baum*, 903 F.3d at 588 (refusing the plaintiff's request to extend the theory because that court had never applied it outside of the athletic context and did not see a reason to change course); *Saravanan v. Drexel Univ.*, No. 17-3409, 2017 WL 4532243, at \*7 (E.D. Pa. Oct. 10, 2017) (stating that the standard applies "only in cases alleging that a public school entity has denied equal opportunities to participate in athletic programs based on unfounded and antiquated historical notions about the physical capabilities of girls and boys" (citing *Doe v. Baum*, 227 F. Supp. 3d 784, 821 (E.D. Mich. 2017))).

124. See *Vanderbilt*, 355 F. Supp. 3d at 674 ("To sustain this claim, a plaintiff must allege, among other things, that his educational experience was 'permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive [so as] to alter the conditions of the victim's educational environment.'" (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 590 (6th Cir. 2018))).

125. *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 765 (D. Md. 2015) (quoting *Doe v. Salisbury Univ.*, 107 F. Supp. 3d 481, 487-90 (D. Md. 2015)).

126. See *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173-74 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action. Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment." (quoting 20 U.S.C. § 1681 (2018))).

127. See *id.* at 174 (concluding that when a university "retaliates against a person because he complains of sex discrimination, this constitutes intentional 'discrimination' 'on the basis of sex,' in violation of Title IX") (emphasis in original).

the action brought against him, which is factually different from most claims brought under reverse Title IX theories.<sup>128</sup>

### *B. Pleading Standards and Motions to Dismiss*

The first hurdle for a plaintiff is to sufficiently state his claim against the defendant and survive the defendant's motion to dismiss. In order to survive a 12(b)(6) motion<sup>129</sup> in a reverse Title IX claim, a plaintiff must allege facts that create a plausible inference that the university engaged in sexual discrimination against him.<sup>130</sup> The plaintiff's complaint must contain enough factual content to allow the court to reasonably infer that the plaintiff would be entitled to relief if he proved everything in his complaint.<sup>131</sup> There is significant case law exploring the pleading standards and causality requirements under Title IX claims.<sup>132</sup>

Courts have reacted differently to the plausibility and pleading standards used in relation to Title IX reverse discrimination claims.<sup>133</sup> One area in which courts differ is in their willingness to accept allegations that public criticism and outside pressure on universities demonstrate gender bias in the accused

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128. See *Salisbury*, 123 F. Supp. 3d at 769–70 (noting that the plaintiff's complaint regarding the minor discipline he received was “exactly the kind of petty slight or minor annoyance that does not constitute an adverse act” under retaliatory action).

129. See FED. R. CIV. P. 12(b)(6) (setting forth that a party may assert the defense that the pleading party has failed to “state a claim upon which relief can be granted”).

130. See Corbin, *supra* note 4, at 2688–89 (evaluating the different judicial responses to reverse Title IX lawsuits under *Twombly*, *Iqbal*, and *Swierkiewicz*).

131. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678–79 (2009) (stating that while legal conclusions and naked assertions are not sufficient, the court may determine that facts taken as true and inferences drawn in favor of the plaintiff plausibly give rise to an entitlement to relief).

132. See, e.g., *Doe v. Columbia Univ.*, 831 F.3d 46, 56–59 (2d Cir. 2016) (permitting an action to proceed against the University when the evaluator of the claim formed a conclusion against the weight of the evidence, which substantially favored the plaintiff/accused); *Doe v. Cummins*, 662 Fed. App'x 437, 452 (6th Cir. 2016) (stating that the plaintiff had failed to create a reasonable inference that gender bias was the cause of the allegedly deficient proceedings against him).

133. See Corbin, *supra* note 4, at 2697–2702 (explaining that the majority of courts improperly dismiss reverse Title IX claims while a minority of courts permit the claims to proceed to the discovery phase).

students' disciplinary proceedings.<sup>134</sup> Some courts view these allegations as gender neutral or at most showing a bias favoring assault victims rather than favoring female students over male students.<sup>135</sup> Other courts have determined that the external pressure on universities can give rise to a plausible explanation for gender bias.<sup>136</sup> The legitimacy of the causal connection between the pressure upon the school and the alleged erroneous outcome or selective enforcement is not consistent across the courts and warrants further exploration and clarification.<sup>137</sup>

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134. *See, e.g.*, *Ruff v. Bd. of Regents of Univ. of N.M.*, 272 F. Supp. 3d 1289, 1296–97 (D.N.M. 2017) (stating that male college students failed to allege facts demonstrating that outside pressure actually influenced the University's pursuit of the sexual assault case in a gender-biased manner rather than because of the serious nature of the female student's allegations); *Rolph v. Hobart & William Smith Colls.*, 271 F. Supp. 3d 386, 396–405 (W.D.N.Y. 2017) (stating that the male student's criminal charge of a sex crime did not negate the inference of the College's gender bias, which the student plausibly pled stemmed from media criticism of the College causing it to take a stance disadvantaging the plaintiff as compared to the female complainant).

135. *See, e.g.*, *Doe v. Coll. of Wooster*, 243 F. Supp. 3d 875, 886 (N.D. Ohio 2017) (determining that public criticism of the College did not suggest an adequate basis for gender bias and that the fact that the College was seeking to comply with federal regulation was not an indication of gender bias); *Doe v. Univ. of Colo., Boulder*, 255 F. Supp. 3d 1064, 1078 (D. Colo. 2017) (“[P]ressure from the federal government to investigate sexual assault allegations more aggressively—either general pressure exerted by the Dear Colleague Letter or specific pressure exerted by an investigation directed at the University, or both—says nothing about the University's alleged desire to find men responsible because they are men.”).

136. *See, e.g.*, *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (stating that all of the public attention and federal pressure alone is not enough to state a claim but rather “provides a backdrop that, when combined with other circumstantial evidence of bias in Doe's specific proceeding, gives rise to a plausible claim”); *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018) (addressing allegations that “pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply, led Miami University to discriminate against men in its sexual-assault adjudication process”).

137. *Compare Baum*, 903 F.3d at 589 (Gilman, J., concurring in part and dissenting in part) (stating that the majority ruled in plaintiff's favor despite his failure “to show how general pressure on the University's administration to pursue and effectively address sexual-assault complaints” led the school to “take actions against him based on gender bias), *with Columbia*, 831 F.3d at 57 (allowing plaintiff's claim to proceed because it was “entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from

*1. Yusuf Baseline Standard*

*Yusuf v. Vassar*<sup>138</sup> was one of the first reverse Title IX claims to reach the appellate level and clearly establish a standard for pleading a reverse Title IX sex discrimination claim.<sup>139</sup> The Second Circuit stated that facts linking alleged procedural failures to underlying gender bias are necessary because “[a]llegations of a procedurally or otherwise flawed proceeding that has led to an adverse and erroneous outcome combined with a conclusory allegation of gender discrimination is not sufficient to survive a motion to dismiss.”<sup>140</sup> The court determined that causation sufficient to state a claim for Title IX discrimination can be shown by “statements by members of the disciplinary tribunal, statements by pertinent university officials, or patterns of decision-making that also tend to show the influence of gender.”<sup>141</sup> The court ruled that the male student’s allegations regarding the circumstances around his disciplinary proceedings demonstrated events that could “sufficiently put into question the correctness of the outcome of that proceeding.”<sup>142</sup> The court determined that these facts taken with the allegations that male students were historically, systematically, and invariably found guilty established a causal connection that gender bias affected the outcome of his discipline.<sup>143</sup>

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sexual assault”).

138. 35 F.3d 709 (2d Cir. 1994).

139. *See id.* at 712–13 (discussing the male student’s claim against his private college alleging that his hearing was unfair when the College would not allow two of his witnesses to testify).

140. *Id.* at 715.

141. *See id.* at 715–16 (“The allegations in support of the Title IX claim do more than merely recite the pleader’s conclusion that the complained-of conduct was discriminatory. Instead, the complaint alleges events that, if proven, would support an inference of discrimination.”).

142. *Id.* at 716.

143. *See id.* (“The allegation that males invariably lose when charged with sexual harassment at Vassar provides a verifiable causal connection similar to the use of statistical evidence in an employment case.”).

## 2. Yusuf Applied at Motions to Dismiss

In *Doe v. Columbia University*,<sup>144</sup> the Second Circuit again examined a reverse Title IX claim against a university.<sup>145</sup> The plaintiff alleged that criticism directed at the University for its poor handling of female students' sexual assault complaints against male students<sup>146</sup> and the fact that the University was cognizant of that criticism caused the University to act upon impermissible bias.<sup>147</sup> The court stated that there was "nothing implausible or unreasonable about the Complaint's suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults."<sup>148</sup> The court concentrated on the individual investigator's background<sup>149</sup> and her significant influence over the proceedings against the plaintiff.<sup>150</sup> The court

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144. 31 F.3d 46 (2d Cir. 2016).

145. *See id.* at 53 (alleging that the University's investigator was motivated by pro-female sex bias, attributable in part to a desire to refute criticisms of herself and of the University for their past handling of similar complaints, causing her to conduct "a sex-biased and deficient investigation that was hostile to his claim").

146. *See id.* at 50–51 (explaining the criticism of the University among the students and student organizations as well as in the press for its previous leniency toward sexual assault allegations). For an example of some of the criticism of Columbia at the time, see Tara Palmeri, *Columbia Drops Ball on Jock Rapist' Probe: Students*, N.Y. POST (Dec. 11, 2013, 6:43 AM), <https://perma.cc/EJ2B-Y4WK> (last visited Nov. 11, 2019) (quoting female students as saying "their cases are just one example of the school's mishandling of sex complaints" and "demanding that Columbia release more information about its in-house probes on sex assaults") (on file with the Washington and Lee Law Review).

147. *See Columbia Univ.*, 831 F.3d at 56 (describing the plaintiff's allegations "that Columbia's hearing panel (which erroneously imposed discipline on the Plaintiff), its Dean (who rejected his appeal), and its Title IX investigator (who influenced the panel and the Dean by her report and recommendation), were all motivated in those actions by pro-female, anti-male bias").

148. *Id.* at 58.

149. *See id.* (explaining that the investigator "had suffered personal criticism in the student body for her role in prior cases in which the University was seen as not taking seriously the complaints of female students").

150. *See id.* (illustrating that although she "was not the decision-maker, she allegedly had significant influence, perhaps even determinative influence, over the University's decision").

then concluded that the male student had stated a plausible claim that the decision was motivated by a “pro-female, anti-male bias,” which caused the University to reach an incorrect conclusion.<sup>151</sup>

In *Doe v. University of Chicago*,<sup>152</sup> an Illinois federal court evaluated a male student’s claim that his University discriminated against him because of his gender<sup>153</sup> and encouraged discriminatory retaliatory action against him.<sup>154</sup> While the court recognized as plausible the student’s allegation that the University’s administration had encouraged his accuser to file a retaliatory action against him because of gender bias,<sup>155</sup> it did not accept his allegations that the University’s overall climate was biased against him or deliberately indifferent to sex-based harassment directed at him.<sup>156</sup> Significantly, the court also noted,

[T]he parties should bear in mind that the facts sufficient to survive a motion to dismiss may not be enough at a later stage of the case, especially after discovery. The Court expects that more specific details . . . will emerge in discovery. At this point, however the Court is not deciding whether John Doe is likely to win, only whether he has a story that holds together.<sup>157</sup>

While many reverse Title IX claims are beginning to survive motions to dismiss, including when using public pressure as

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151. See *id.* at 57 (stating that “it is entirely plausible that the University’s decision-makers and its investigator were motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault”).

152. No. 16-C-08298, 2017 WL 4163960 (N.D. Ill. Sept. 20, 2017).

153. See *id.* at \*4 (“John Doe’s gender discrimination claim boils down to a contention that he was treated adversely in the Title IX disciplinary process because he is male, and that Jane Doe, a female student, was treated better because she was female.”).

154. See *id.* at \*9 (agreeing that the University official’s alleged conduct was “so inexplicable that there is room for a retaliatory inference in John Doe’s favor to explain” the official’s behavior).

155. See *id.* at \*5 (“If [the investigator] intentionally encouraged Jane Doe to file a false complaint—that is, he knew or believed that her complaint was false and encouraged her to file it anyway—then it is plausible that [he] did so based on gender bias.”).

156. See *id.* at \*7 (explaining that the female student’s actions, including a public accusation against the plaintiff and Title IX complaint accusing him of sexual misconduct, even if false, were not harassment *because of sex* and, therefore, could not be considered actionable sexual harassment (citing *Mary M. v. N. Lawrence Cmty. Sch. Corp.*, 131 F.3d 1220, 1228 (7th Cir. 1997))).

157. *Id.* at \*6 (citing *Swanson v. Citibank*, 614 F.3d 400, 404 (7th Cir. 2010)).

evidence of discriminatory intent, the *Chicago* court correctly acknowledged that the facts sufficient at this stage will likely not be enough to survive later stages of litigation. Therefore, reverse Title IX plaintiffs must be prepared to demonstrate specific details regarding the sexual discrimination against them.

#### *IV. Reverse Title IX and Summary Judgment*

Once a plaintiff's claim survives a motion to dismiss, the cases often move to the discovery stage<sup>158</sup> or the parties reach a settlement.<sup>159</sup> Once past these stages, the university will likely next ask the court for a grant of summary judgment.<sup>160</sup>

##### *A. Summary Judgment Burdens and Burden Shifting*

A court may grant summary judgment if the moving party shows that there is no genuine dispute as to any material fact that must be decided by a fact-finder, so that the moving party is entitled to judgment as a matter of law.<sup>161</sup> A party asserting that there is no genuine dispute must support the assertion by showing that the non-moving party cannot produce any admissible evidence to support the facts necessary to its claim.<sup>162</sup> To successfully oppose a motion for summary judgment, the non-moving party bears the burden of demonstrating that a genuine issue of fact exists as to

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158. See John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L.J. 547, 549 (2010) (explaining that discovery can “comprise between 50 percent and 90 percent of total litigation costs” in a case).

159. See *infra* note 178 and accompanying text.

160. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (opining that the rules of evidence “mandate[] the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party’s case”).

161. FED. R. CIV. P. 56; see, e.g., *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986) (explaining that a material fact is any specific fact that might affect the lawsuit’s outcome under the relevant law).

162. See *Celotex*, 477 U.S. at 323 (explaining that the party should inform “the district court of the basis for its motion, and identify[] those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact”).

an essential element of the case.<sup>163</sup> The party opposing summary judgment must do “more than simply show that there is some metaphysical doubt as to material facts.”<sup>164</sup> The court at this stage should review all evidence in the record and “draw all reasonable inferences in favor of the nonmoving party,” but the court “may not make credibility determinations or weigh the evidence.”<sup>165</sup>

In *McDonnell Douglas Corporation v. Green*,<sup>166</sup> the Supreme Court evaluated a claim under the Civil Rights Act of 1964<sup>167</sup> in which an employment applicant alleged that he had been unfairly rejected based on his race for a position for which he was qualified.<sup>168</sup> The Court addressed the “notable lack of harmony” that existed regarding the “applicable rules as to burden of proof and how this shifts upon the making of a prima facie case” of employment discrimination under Title VII.<sup>169</sup> In describing the complainant’s initial burden to establish a prima facie case of racial discrimination in a Title VII trial, the Court explained,

This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.<sup>170</sup>

The Court determined that once the plaintiff has established the prima facie case, the “burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the

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163. *See id.* at 321–22 (stating that to oppose a motion for summary judgment, the non-moving party cannot rest on mere allegations).

164. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

165. *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000).

166. 411 U.S. 792 (1973).

167. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2018).

168. *See McDonnell Douglas*, 411 U.S. at 801 (stating that the plaintiff respondent charged that he was denied employment because of his race and his involvement in civil rights activities, which was supported by the fact that petitioner “sought mechanics, respondent’s trade, and continued to do so after respondent’s rejection” despite acknowledging his past satisfactory work performance).

169. *Id.* at 801.

170. *Id.* at 802.



employee's rejection."<sup>171</sup> If the defendant employer succeeds in demonstrating a reason, the plaintiff is given the opportunity to show that the reason is actually pretextual in nature, meant to disguise racial discrimination.<sup>172</sup> The Court also elaborated on certain evidence that would be relevant to a showing of pretext, such as statistics regarding the employer's general discrimination against African American employees and evidence that white employees involved in similar acts were treated more favorably by the employer.<sup>173</sup>

The *McDonnell Douglas* framework allows plaintiffs alleging discrimination a temporary presumption of the defendant's discriminatory motive in order to avoid the obstacle of only being able to produce circumstantial, conclusory evidence.<sup>174</sup> Since the Supreme Court's decision in 1973, courts have applied the *McDonnell Douglas* framework in various analogous discrimination situations,<sup>175</sup> including Title IX cases.<sup>176</sup> The

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171. *Id.*

172. *See id.* at 805 (ruling that the plaintiff respondent "must be given a full and fair opportunity to demonstrate by competent evidence that the presumptively valid reasons for his rejection were in fact a coverup for a racially discriminatory decision").

173. *See id.* at 804 (stating that the employer "may justifiably refuse to rehire one who was engaged in unlawful, disruptive acts against it, but only if this criterion is applied alike to members of all race").

174. *See Doe v. Columbia Univ.*, 831 F.3d 46, 54 (2d Cir. 2016) (stating that "until the defendant furnishes a nondiscriminatory reason for the adverse action it took against the plaintiff, the plaintiff needs to present only minimal evidence supporting an inference of discrimination in order to prevail").

175. *See, e.g., Janczak v. Tulsa Winch, Inc.*, 621 Fed. App'x 528, 534–35 (10th Cir. 2015) (applying the burden shifting framework when an employee was terminated while on Family and Medical Leave Act leave and determining the employee sufficiently made out a prima facie retaliation claim but the employer demonstrated a legitimate, non-retaliatory reason for the action); *Moore v. City of Charlotte*, 754 F.2d 1100, 1105 (4th Cir. 1993) (allowing plaintiff to create a presumption of racially discriminatory intent when employer disciplined him more severely than other employees who engaged in similar conduct but were not members of his protected class); *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 239 (4th Cir. 1982) (applying the *McDonnell Douglas* framework to an allegedly discriminatory discharge of an employee by requiring the plaintiff to meet the initial burden of demonstrating that the employee hired someone else to do the same work despite the fact that he performed at the level of the employer's expectations).

176. *See Columbia*, 831 F.3d at 55–56 ("Yusuf made clear that Title VII cases provide the proper framework for analyzing Title IX discrimination claims. We therefore hold that the temporary presumption afforded to plaintiffs in

framework serves as a tool for plaintiffs who can typically only point to circumstantial evidence of discriminatory intent.

### *B. Cases Reaching Summary Judgment*

Not many reverse Title IX cases have reached or passed the summary judgment stage.<sup>177</sup> The majority of these cases are either dismissed for failure to state a claim or subsequently settled after the court denies a motion to dismiss and allows the claim to move to discovery.<sup>178</sup> However, a few circuit courts and several district courts have heard reverse Title IX claims on motions for summary judgment and have consistently ruled against the accused plaintiffs in favor of the universities.

#### *1. First Circuit*

Recently, the First Circuit reviewed a trial court's decision to grant summary judgment of Title IX claims against Boston College.<sup>179</sup> The court affirmed summary judgment for the defendants on the plaintiffs' Title IX claims under erroneous outcome.<sup>180</sup> The parties agreed that the applicable standard for the

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employment discrimination cases under Title VII applies to sex discrimination plaintiffs under Title IX as well.”); *see also* *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011) (stating that in some respects, “a Title IX sex discrimination claim requires the same kind of proof required in a Title VII sex discrimination claim” (citing *Torres v. Pisano*, 116 F.3d 625, 630 n.3 (2d Cir. 1997))).

177. *See* *Buzuvis*, *supra* note 8, at 91–93 (stating that “there are far fewer summary judgment decisions evaluating plaintiffs’ evidentiary support for erroneous outcome claims than opinions deciding motions to dismiss claims for insufficient pleading” and that “no selective enforcement claims have yet survived motions for summary judgment”).

178. *See id.* at 85–86 (explaining that “many university defendants have prevailed on motions to dismiss the plaintiff’s claim for insufficient pleading, though courts have permitted disciplined-student plaintiffs’ Title IX claims to proceed to the discovery phase” which positions the student in a good position to procure a settlement from the university (referencing *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014))).

179. *Doe v. Trs. of Boston Coll.*, 892 F.3d 67 (1st Cir. 2018).

180. *See id.* at 90–93 (explaining the plaintiffs’ deliberate indifference claim but focusing on the erroneous outcome standard because the deliberate indifference claim relied on the underlying acts of discrimination under the

erroneous outcome claim required the plaintiffs “offer evidence ‘cast[ing] some articulable doubt on the accuracy of the outcome of the proceeding,’ and indicating that ‘gender bias was a motivating factor.’”<sup>181</sup> The plaintiffs argued that the record contained “sufficient evidence to support their erroneous outcome claim that [the college]’s procedures were infected with gender bias.”<sup>182</sup> They contended that the college’s “pervasive belief” that perpetrators are always male and accusers always female was evidenced in its written policies and procedures.<sup>183</sup> The plaintiffs also maintained that the disciplinary proceedings were impacted by gender bias arising from outside pressure against the college and evidenced by a “pattern of decision-making” motivated by gender bias against the accused plaintiff.<sup>184</sup>

The First Circuit determined that the plaintiffs failed on the second *Yusuf* prong—that gender was a motivating factor in the accuracy of the outcome—by only putting forth “superficial assertions of discrimination.”<sup>185</sup> In ruling against the plaintiffs, the court emphasized that “[c]onclusory allegations are not enough” to survive a motion for summary judgment<sup>186</sup> and determined that the plaintiffs’ argument that the college’s “administrators were influenced by outside pressure, in particular the U.S. Department of Education’s April 2011 ‘Dear Colleague’ Letter” was “both conclusory and meritless.”<sup>187</sup> Accordingly, the court ruled that the

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erroneous outcome claim (citing *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (per curiam))).

181. *Id.* at 90 (quoting *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994)).

182. *Id.* at 90–91.

183. *See id.* (describing the plaintiffs’ allegations that the College’s bias was “confirmed by the terminology [it] employs in its written policies and procedures: accusers are branded ‘victims’ or ‘victims/survivors,’ while an accused student is labeled a ‘perpetrator’”).

184. *See id.* at 91 (noting that the plaintiffs cited several occurrences of college administrators’ treatment of the accused, as well as the fact that the criminal charges against him were dismissed, evidencing his supposed innocence).

185. *Id.* at 91–92.

186. *Id.* at 92.

187. *See id.* (“The Does have not explained how the Dear Colleague Letter reflects or espouses gender bias. This necessarily dooms their argument that the Letter somehow infected the proceedings at issue here with gender bias. More than ‘conclusory allegations, improbable inferences, and unsupported speculation’ is required to defeat summary judgment.” (citing *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 842 (1st Cir. 1993))).

plaintiffs did not meet the standard for challenging the college's sexual assault disciplinary procedures.<sup>188</sup>

In 2017, a federal district court in New York evaluated a reverse Title IX claim against Colgate University.<sup>189</sup> The plaintiff in *Colgate* had been accused by three females of similar incidents of sexual misconduct.<sup>190</sup> After he was expelled from the University, he brought an erroneous outcome challenge,<sup>191</sup> alleging that his expulsion was based on gender bias against him.<sup>192</sup> The court addressed each of the plaintiff's arguments individually and concluded that he failed to provide "sufficient evidence that gender bias motivated Colgate's decision to expel him."<sup>193</sup>

The plaintiff alleged that the panel's training was gender-biased, the panel itself suffered from bias, the investigation was biased because the investigator once worked at a sheriff's office, and the hearing was procedurally unfair.<sup>194</sup> The plaintiff also cited the University's "sexual climate," including student activism and federal influence,<sup>195</sup> at the time of the incident as evidence of the pressure "that caused Plaintiff's proceeding to be tainted by gender bias."<sup>196</sup> The court compared the plaintiff's assertions to those in *Columbia*, but explained that the parties had "reached the summary judgment stage and [Plaintiff] must

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188. *See id.* ("As this case comes to us on a motion for summary judgment, after the parties have engaged in substantial discovery, a complete lack of evidence—whether direct or circumstantial—will not allow a party to survive a motion for summary judgment.")

189. *Doe v. Colgate Univ.*, No. 5:15-CV-1069 (LEK/DEP), 2017 WL 4990629 (N.D.N.Y. Oct. 31, 2017).

190. *See id.* at \*2–5 (describing the three alleged instances of sexual misconduct and the investigation and hearings that followed).

191. For a discussion of the plaintiff's other claims under New York state law, including theories of breach of contract, breach of the covenant of good faith and fair dealing, and equitable estoppel, see *id.* at \*18–25.

192. *See id.* at \*11 (describing the requirements for an erroneous outcome claim under *Yusuf* and *Columbia*).

193. *Id.*

194. *See id.* at \*14–18 (addressing and rejecting each of plaintiff's allegations).

195. *See infra* notes 198–201 and accompanying text (elaborating on the sources the plaintiff pointed to as examples of influences on the disciplinary process).

196. *Colgate*, 2017 WL 4990629, at \*12.

demonstrate a genuine issue of material fact, not merely allegations of a plausible inference of gender bias.”<sup>197</sup>

First, the plaintiff pointed to student activism on campus, including the 2014 Sexual Climate Forum,<sup>198</sup> and general survivor support on campus, including a student group called “Breaking the Silence.”<sup>199</sup> The court found no evidence of bias against men due to either example of student activism. Next, the plaintiff pointed to the 2011 DCL as pressure on the University to erroneously discipline men, but the court explained that “Colgate’s effort to comply with the 2011 DCL, standing alone, is not evidence of gender bias.”<sup>200</sup> The plaintiff cited university officials’ statements regarding sexual assault to demonstrate pressure put on the hearing panel, but the court was again unconvinced.<sup>201</sup> Overall, the court did not find the plaintiff’s evidence sufficient “to permit a reasonable jury to find that Colgate faced pressure that caused gender bias to infect” the plaintiff’s hearing.<sup>202</sup> The court observed that all the alleged procedural flaws to which the plaintiff pointed were “a combination of unsubstantiated assertions based on plaintiff’s subjective impressions at the hearing,” and accordingly the court granted the University’s motion for summary judgment.<sup>203</sup>

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197. *Id.* (quoting *Doe v. Trs. of Boston Coll.*, No. 15-cv-10790, 2016 WL 5799297, at \*25 n.7) (alteration in original).

198. *See id.* (observing that plaintiff’s statements revolving around the forum and statements made in relation to the forum and its speaker often mischaracterize the record).

199. *See id.* (“[T]he only evidence regarding Breaking the Silence suggests that it sought to raise awareness of sexual assault at Colgate, making no distinction between male and female victims . . . [R]aising awareness of sexual assault, without drawing gendered assumptions about males, does not raise an inference of anti-male bias.”).

200. *Id.* at \*13.

201. *See id.* (stating that one official’s indication to parents that the University had expelled students found responsible for sexual misconduct did not indicate a promise of future punishment and that another official’s statements regarding “a world without rape” did not demonstrate an impact on the University or pressure on its administrators).

202. *Id.*

203. *Id.* at \*17.

## 2. Sixth Circuit

The Sixth Circuit has seen more of these reverse Title IX cases than other circuits to date.<sup>204</sup> The Sixth Circuit reviewed a grant of summary judgment of a student's federal claim for sexual discrimination under Title IX in *Mallory v. Ohio University*.<sup>205</sup> The plaintiff was a male student who was found culpable and expelled by the University for sexual misconduct after an incident involving his sexual encounter with a female student.<sup>206</sup> Along with state law defamation claims against witnesses in the proceedings,<sup>207</sup> the plaintiff alleged that the University discriminated against him under Title IX "by initiating a disciplinary proceeding against him and concluding that he committed sexual assault under the University's code of student conduct."<sup>208</sup>

Because the Supreme Court and the Sixth Circuit had not "set forth a standard for determining when intentional discrimination has occurred in a case where a student has relied on Title IX to challenge either the initiation or the outcome of the disciplinary proceeding," the court followed the analytical framework provided in *Yusuf*.<sup>209</sup> Under the *Yusuf* framework, the Sixth Circuit affirmed the district court's determination that the plaintiff had "failed to present a genuine issue of material fact regarding his selective

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204. See generally *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Cummins*, 662 Fed. App'x 437, 452 (6th Cir. 2016).

205. 76 Fed. App'x 634 (6th Cir. 2003).

206. See *id.* at 636–37 (describing the situation leading to the plaintiff's expulsion, as well as a charge of felony battery, in which several people witnessed the plaintiff engaging in sexual activity with a severely intoxicated female while the plaintiff had also been consuming alcohol).

207. See *id.* at 637 (summarizing plaintiff's claims against several students for statements they made in connection with the incident but noting that the court dismissed the claims for various reasons and plaintiff was not appealing these dismissals).

208. See *id.* at 636–37 (noting that the University board's rationale for the plaintiff's guilt came from the victim's significant impairment, preventing her from being able to engage in consensual contact with the plaintiff).

209. See *id.* at 638 (explaining that the Second Circuit in *Yusuf* analogized Title IX claims to Title VII law and required a plaintiff to demonstrate that the University's conduct was motivated by sexual bias).

enforcement claims under Title IX under either an erroneous result or selective enforcement theory.”<sup>210</sup>

Under the plaintiff’s claim for erroneous outcome,<sup>211</sup> he argued that the University had improper focus in the investigation, leading to an incorrect result.<sup>212</sup> The plaintiff claimed that the University’s focus revealed that it held “an antiquated notion that ‘men are sexual aggressors and women are victims,’”<sup>213</sup> but the court concluded that “the University’s decision to focus on the ability to consent merely demonstrates the University’s policy decision to punish those who engage in sexual conduct with another person when the first person is aware of the other’s inability to consent.”<sup>214</sup> Finally, the plaintiff pointed to discrimination against him as evidenced by the allegedly prejudicial procedures which resulted in the erroneous outcome.<sup>215</sup> The court found that the plaintiff had not demonstrated a pattern of biased decision-making by the University or by a university official with allegedly biased views.<sup>216</sup>

The court also rejected the plaintiff’s argument for selective enforcement,<sup>217</sup> which was based on another allegation of archaic

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210. *See id.* at 642 (confirming that the district court properly granted summary judgment in favor of the University).

211. *See id.* (describing the plaintiff’s argument under erroneous outcome as attempting to point to prejudicial deficiencies in the proceedings).

212. *See id.* at 639 (explaining the plaintiff’s argument that “the hearing panel’s focus upon whether [the victim] was able to consent supports finding an erroneous outcome here because the University’s definition of sexual assault does not extend to situations where the offender merely knows that the other person’s ability to consent is impaired”).

213. *Id.*

214. *See id.* (stating that even if the University erroneously interpreted the Student’s Code’s language regarding consent, the plaintiff presented “no evidence that this interpretation was discriminatorily applied or motivated by a chauvinistic view of the sexes”).

215. *See id.* (enumerating plaintiff’s claims regarding his lack of legal counsel, the process for cross-examination, and the scheduling of the hearing during the pendency of criminal charges against him).

216. *See id.* at 639–40 (referencing the plaintiff’s reliance on a previous complaint against the university official but stating that without evidence of other students accused of and disciplined for sexual assault and without indication that the official attempted to wrongfully steer the result, there was no genuine issue of material fact).

217. *See id.* at 640 (“The focal point of this argument is that the incident report equally implicated both him and [the victim] because they were both

assumptions by the University about the identity of the aggressor.<sup>218</sup> The court found that the plaintiff could not demonstrate that the female victim was in a sufficiently similar situation because he ignored critical facts of the incident which differentiated the two.<sup>219</sup> Accordingly, the court decided that the plaintiff failed to point to a sufficiently similarly-situated female and had not presented a genuine issue of material fact under the selective enforcement claim.<sup>220</sup> Finally, the court found no support for the plaintiff's argument on appeal regarding the University's deliberate indifference.<sup>221</sup> Overall, the court held that the plaintiff had not "presented a genuine issue of material fact with regard to whether the University, in its initiation and prosecution of the disciplinary action, excluded [him] because of his sex"<sup>222</sup> and granted the University's motion for summary judgment.

### 3. Title IX and McDonnell Douglas

In 1996, the Eastern District of Virginia evaluated a Title IX suit against a university at the summary judgment stage and applied the *McDonnell Douglas* burden shifting framework in *Haley v. Virginia Commonwealth University*.<sup>223</sup> The case's facts differed from cases previously discussed in a few respects,<sup>224</sup> but

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intoxicated while having sex. These circumstances, [plaintiff] argues, presented a fair question about 'who assaulted whom.'")

218. *See id.* (pointing to the plaintiff's argument that the University possessed an attitude that men could not be violated).

219. *See id.* at 640–41 (explaining that the plaintiff's argument ignores the fact that he was sufficiently more aware than the victim, "which was not based on the different sexes of the individuals . . . and does nothing to establish that the University's initiation of an investigation against Mallory was motivated by sex").

220. *See id.* at 641 (distinguishing the plaintiff's evidence regarding an affidavit in a previous case and affirming the district court's grant of summary judgment on the selective enforcement claim).

221. Regarding the deliberate indifference argument, as well as plaintiff's argument for an archaic-assumptions standard, the court explains that the plaintiff asks the court on appeal to read the standards into the *Yusuf* framework, but the court does not elaborate further on plaintiff's specific allegations under those theories. *Id.* at 638.

222. *Id.*

223. 948 F. Supp. 573 (E.D. Va. 1996).

224. *See id.* at 575–76 (discussing at length the underlying facts between the male plaintiff, a graduate student and employee of the University, and the female



the claim under the Title IX claim of gender bias fell under the *Yusuf* framework.<sup>225</sup> The court determined that despite the plaintiff properly setting forth a claim for relief under Title IX, “the pleadings, affidavits, transcripts, and other evidence” showed that there was no genuine issue of material fact as to the Title IX claim and granted the University judgment as a matter of law.<sup>226</sup>

The court stated that “the substantive elements of a federal discrimination claim are (1) that the plaintiff is a member of a protected class, (2) that the plaintiff suffered an unfavorable action, and (3) that but for the plaintiff’s membership in the protected class, the adverse action would not have been made.”<sup>227</sup> The third element “requires proof of discriminatory intent.”<sup>228</sup> The court determined that the record established no direct or indirect evidence of a discriminatory intent<sup>229</sup> and that there was also not sufficient evidence to create a presumption of such an intent under the *McDonnell Douglas* framework.<sup>230</sup> The court explained that, while courts must necessarily alter the exact terms of *McDonnell Douglas* outside of the hiring context, “the basic requirement remains the same: the plaintiff, in order to create a presumption of illegal discrimination and shift the burden to the defendant, must show that he has been treated differently from similarly-situated people outside of the protected class.”<sup>231</sup>

The court summarized the Fourth Circuit’s adaption of the *McDonnell Douglas* framework in two analogous cases—*Lovelace*

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complainant, a fellow student and employee, who accused him of sexual harassment, after which he was excluded from the school for two years).

225. *See id.* at 578 (citing *Yusuf* as instructive because Title IX, which prohibits sex discrimination in education, has been interpreted by looking at Title VI and VII case law).

226. *Id.*

227. *Id.*

228. *Id.*

229. *See id.* (stating that the plaintiff seemed to have “a fundamental misunderstanding of what it takes to prove a discrimination claim” because his allegations “at best reflect[ed] a bias against people accused of sexual harassment and in favor of victims and indicate[d] nothing about gender discrimination”).

230. *See id.* at 579 (“In discrimination cases analogous to [plaintiff’s], where there is no direct proof of an illegal bias, the plaintiff can still survive a properly instituted motion for summary judgment by taking advantage of the *McDonnell* scheme of burdens and rebuttable presumptions.”).

231. *Id.* at 580.

*v. Sherwin-Williams Co.*<sup>232</sup> and *Moore v. City of Charlotte*<sup>233</sup>—and analyzed the plaintiff's claim under each.<sup>234</sup> In *Lovelace*, the court adapted the framework to a case alleging discriminatory discharge from employment, allowing the plaintiff to “shift the initial burden by showing that he was performing at a level that met employer's legitimate expectations and that the employer sought someone else to do the same work.”<sup>235</sup> The *Haley* court described the plaintiff's first option for classification of his allegations under *McDonnell Douglas* as an allegation under *Lovelace* that it was “discriminatory to separate him from the school.”<sup>236</sup> The *Haley* court determined this claim would fail for two reasons. First, because the plaintiff was found to have harassed the female complainant, he would not be able to “show that he was performing at a level that met his employer's or his educational institution's legitimate expectations, and thus cannot shift the burden to [the University] to adduce a non-discriminatory reason for his separation from the university.”<sup>237</sup> Even if the plaintiff could shift the burden, the court determined that the University produced a non-discriminatory rationale for its suspension of the plaintiff—his sexual harassment of the accuser—and he had not demonstrated this rationale was pretextual.<sup>238</sup> The court reasoned that while “the plaintiff need not present new evidence at this stage of the analysis, the evidence presented” by the plaintiff did “not meet the heightened level of specificity called for by *Lovelace*.”<sup>239</sup>

The *Haley* court next explored the *Moore* adaptation of the burden shifting scheme in a claim alleging race discrimination in

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232. 681 F.2d 230 (4th Cir. 1982).

233. 754 F.2d 1100 (4th Cir. 1985).

234. See *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 580 (E.D. Va. 1996) (“In the case at bar, there are two ways to frame Haley's allegations, but neither suffices under the *McDonnell* scheme as adapted in analogous cases.”).

235. *Id.* (citing *Lovelace*, 681 F.2d at 239).

236. *Id.*

237. *Id.*

238. See *id.* (explaining that the University's legitimate, non-discriminatory rationale would shift the burden, and the plaintiff “had adduced no evidence whatsoever” that the rationale was pretextual).

239. *Id.*

the enforcement of employee disciplinary measures.<sup>240</sup> In *Moore*, the plaintiff “could create the presumption of discriminatory intent through a showing that the prohibited conduct he engaged in was similar to that engaged in by employees outside of the protected class and that he received more severe disciplinary measures than those others.”<sup>241</sup> The *Haley* court explained that the plaintiff’s claim could be viewed under *Moore* as an allegation that he was discriminated against in the way the disciplinary proceedings were held, making his initial burden that of showing female students accused of similarly prohibited conduct were disciplined less severely.<sup>242</sup> This allegation, however, did not survive summary judgment because all of the plaintiff’s evidence pertained only to his own proceedings with no evidence about how other students similarly accused were treated by the University.<sup>243</sup> In conclusion, the court held that the plaintiff could not set forth a prima facie case of sexual discrimination, or in the alternative, demonstrate that the University’s reasons for its disciplinary action were pretextual, making summary judgment for the University appropriate.<sup>244</sup>

Few other cases have reached the summary judgment stage in reverse Title IX claims,<sup>245</sup> making the future of the claims unclear.

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240. *Id.*

241. *Id.* (referencing *Moore*, 754 F.2d at 1105–06); *see also* *Evans v. Techs. Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996) (applying the *McDonnell Douglas* framework to a claim of gender discrimination in employer’s promotion of employees).

242. *See Haley*, 948 F. Supp. at 580–81 (explaining that this allegation could also be supported “by data showing that women rarely, if ever, are accused of sexual harassment, coupled perhaps with evidence that women accused of other [university] rules violations are treated differently than men are”).

243. *See id.* at 581 (noting that the plaintiff presented “absolutely no evidence about how other students are treated” in the University’s disciplinary proceedings).

244. *See id.* at 583 (“[T]he record establishes that there is no direct or indirect evidence or [sic] discriminatory intent, nor is there sufficient evidence to establish a presumption of such intent under the *McDonnell* framework and its various adaptations.”).

245. *See, e.g.,* *Bleiler v. Coll. of the Holy Cross*, No. CIV.A. 11-11541-DJC, 2013 WL 4714340, at \*7 (D. Mass. Aug. 26, 2013) (holding that the male student had failed to raise a genuine issue of material fact as to whether the college acted with gender bias in its proceedings because no reasonable jury could find that the College’s code of conduct was gender biased).

*V. Argument*

The rival interests involved in campus sexual misconduct cases are evidenced in the polarized debate that surrounds the issue. Despite some similarities shared on each side of the conversation, the differences rule the day.<sup>246</sup> The conflicting guidance put forth by the Department of Education in recent years verifies the opposing priorities of the competing factions—while the Obama administration, specifically through the 2011 DCL, generally sought to strengthen victim protections,<sup>247</sup> the Trump administration’s 2017 DCL and subsequent proposed regulations highlight the importance of protections for the accused students.<sup>248</sup> This tension seems unlikely to resolve itself in the near future, increasing the chances that the types of claims discussed will continue to increase in frequency. Unfortunately, “[l]ower courts appear divided in whether allegations of a reverse gender backlash from the 2011 DCL and DOE’s enforcement thereof are sufficient, standing alone, to plead Title IX gender bias.”<sup>249</sup>

The courts need to provide clarity regarding their acceptance of both federal and public pressure as evidence supporting an inference of gender bias. As more cases are surviving motions to dismiss, inevitably the amount of cases reaching the summary judgment stage will increase as well. Therefore, it is necessary to establish a consistent and clear framework for evaluating a plaintiff’s evidence that a genuine issue of material fact exists.

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246. See Brodsky, *supra* note 6, at 827–31 (exploring the shared values between the warring interests and asserting that “the long-term realization of accused and victimized students’ interests depends on the perceived legitimacy of disciplinary procedures for gender violence”).

247. See 2011 DCL, *supra* note 41 (emphasizing that “schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant”).

248. See 2017 Press Release, *supra* note 43 (announcing the end of “the era of rule by letter,” which “created a system that lacked basic elements of due process and failed to ensure fundamental fairness”).

249. Neal v. Colo. St. Univ.-Pueblo, No. 16-cv-873-RM-CBS, 2017 WL 633045, at \*11 (D. Colo. Feb. 16, 2017).

*A. Limiting Courts' Consideration of Pressure on Universities*

It is common for reverse Title IX plaintiffs to cite pressure on universities as evidence of an incentive for the universities to be biased against them, and many plaintiffs cite *Columbia* as support for the assertion that public criticism of universities can be used to plead a reverse Title IX claim.<sup>250</sup> However, *Columbia* should be narrowly limited to its particular set of facts, including particularized allegations against individual university officials in connection with the proceedings.<sup>251</sup> *Columbia* does not support the broad assertion that pressure to address sexual assault indicates gender bias; at most, such criticism supports the proposition that universities are persuaded to favor victims.<sup>252</sup> Without significantly more evidence of motivation by gender bias, courts should not give weight to pressure on universities as support for discriminatory intent—at most the combination of federal pressure and public criticism should provide a backdrop against which to assess the allegations of gender bias.<sup>253</sup>

Furthermore, pressure is being put on universities from both sides, as evidenced by the intensely debated issues surrounding campus sexual assault policies. The public pressure by students and advocates must be considered in the overall context of the campus sexual assault debate, which includes arguments by critics concerned that “women will ‘cry rape’ and men will be unfairly

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250. See, e.g., *Doe v. Colgate Univ.*, No. 5:15-CV-1069 (LEK/DEP), 2017 WL 4990629 (N.D.N.Y. Oct. 31, 2017) (analyzing a plaintiff's claim using the 2011 DCL and *Columbia* for evidence that the University had pressure to be biased against him).

251. See *supra* notes 145–153 and accompanying text (enumerating the plaintiff's many examples of bias by individuals involved in the plaintiff's investigation and hearing). The court in *Columbia* stated that the “alleged biased attitudes were, at least in part, adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students' charges of sexual assault by male students.” *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 1996).

252. See, e.g., *Austin v. Univ. of Or.*, 205 F. Supp. 3d 1214, 1226 (D. Or. 2016) (refusing “to extend [*Columbia's*] reasoning because Plaintiffs make no similar allegations of an atmosphere of scrutiny, and even had they done so, there remains no plausible inference that a university's aggressive response to allegations of sexual misconduct is evidence of gender discrimination”).

253. See *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (utilizing the “backdrop” strategy to analyze the plaintiff's claim).

punished.”<sup>254</sup> There are many “loud[] voices decrying the treatment of students accused of gender violence” who “appear deeply unconcerned with victims’ educations” and have “rooted their campaign in misogyny and misinformation about sexual assault.”<sup>255</sup> Some scholars argue that “[f]iling suit under Title IX is a political declaration that male rights matter . . . .”<sup>256</sup> Therefore, courts should examine the overall public pressure put on universities as a broader backdrop against which to assess allegations of gender discrimination.

### *B. Policies and Purposes of Title IX*

A large majority of the claims being brought under reverse Title IX theories are essentially at odds with the purposes of Title IX and of the sex discrimination theories of liability. Broadly speaking, university Title IX policies aim to increase awareness of sexual assault, protect the victims of such conduct, and adequately address such issues.<sup>257</sup> It is an unreasonable inference that by creating and acting under policies with such goals, a university is biased against men or individual plaintiffs. The purpose of Title IX was not only to prevent federal funding from supporting discriminatory practices based on gender but also to provide individual protection to citizens against such discrimination.<sup>258</sup>

Allowing federal pressure on universities to support a claim of reverse Title IX gender discrimination is contrary to the underlying explanations of the causes of action pursued. The concepts of deliberate indifference, hostile environment,

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254. See Rosenfeld, *supra* note 11, at 368 (arguing that these critics should not minimize the aftereffects for women alleging sexual assault, including PTSD and emotional fallout from the assault itself).

255. Brodsky, *supra* note 6, at 826.

256. Corbin, *supra* note 4, at 2669.

257. See Rosenfeld, *supra* note 11, at 362 (“The three main responsibilities of a school are best described as prevention, response, and resolution of matters involving sexual misconduct.”).

258. See *supra* notes 24–25 and accompanying text; see also Dana Bolger, *Betsy DeVos’s New Harassment Rules Protect Schools, Not Students*, N.Y. TIMES, Nov. 28, 2018, at A27 (“We have federal civil rights law like Title IX for a reason. Fifty years ago, schools were allowed to impose all sorts of sexist restrictions on girls’ ability to learn. . . . We passed Title IX to end that.”).

archaic-assumptions, selective enforcement, and erroneous outcome are based upon the terminology that essentially serves as the justification for federal pressure upon universities. However, through the 2011 DCL, the Obama administration sought to *remove hostility* from campus environments, *reduce deliberate indifference* by universities, *eradicate archaic assumptions* about gender dynamics in sexual assault scenarios, *prevent selective enforcement* of university disciplinary policies, and *avoid erroneous outcomes* in their disciplinary proceedings.<sup>259</sup>

Generally, courts have been correctly rejecting claims under several theories of reverse Title IX claims, including hostile-environment,<sup>260</sup> deliberate indifference,<sup>261</sup> and archaic-assumptions.<sup>262</sup> These claims should be limited to situations in which a plaintiff has experienced harassing conduct outside of the Title IX disciplinary proceedings against him.

The 2011 DCL repeatedly refers to Title IX's protections in the context of addressing situations that create a "hostile environment" for students.<sup>263</sup> These frequent references to Title IX's attempts at elimination or alleviation of hostile environments demonstrate the underlying purpose of the federal guidance to (or pressure on) universities—to ensure that all students feel safe in their schools and can fully benefit from their educational experiences.<sup>264</sup> Therefore, it is appropriate for courts to limit the

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259. See generally 2011 DCL, *supra* note 41 (providing significant guidance as to the purposes of the federal instructions).

260. See *supra* notes 124–125 and accompanying text (specifying the heightened severity of behavior that must exist to create a hostile environment).

261. See *supra* notes 117–120 and accompanying text (explaining that the sexual harassment underlying a deliberate indifference claim must consist of more than only sex discrimination in disciplinary proceedings).

262. See *supra* notes 121–123 and accompanying text (limiting the application of the archaic-assumptions theory to sex discrimination in athletics).

263. See 2011 DCL, *supra* note 41, at 3 (explaining that a "single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe"); *id.* 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."); *id.* at 5–6 (stating that adopting the suggested policies could "bring potentially problematic conduct to the school's attention before it becomes serious enough to create a hostile environment").

264. See *id.* at 2 ("The Department is deeply concerned about this problem and is committed to ensuring that all students feel safe in their school . . .").

application of the hostile-environment theory to sexual harassment significantly above and beyond alleged discrimination in disciplinary proceedings. Similarly, most courts have not allowed deliberate indifference claims to challenge allegedly unfair disciplinary proceedings without a showing of the more classic situations of sexual harassment.<sup>265</sup> Finally, courts have also correctly refused to apply an archaic-assumptions theory to the reverse Title IX claims.<sup>266</sup> Expansion of these three theories to sex discrimination experienced in university disciplinary action is inapposite to the actual concepts behind the theories of liability.

### *C. Maintaining a High Discriminatory Intent Burden*

Similar to the employment discrimination legal landscape that existed when the Court decided *McDonnell Douglas*, the reverse Title IX discrimination jurisprudence demonstrates a “notable lack of harmony.”<sup>267</sup> As more reverse Title IX claims reach the summary judgment stage, it is possible the *McDonnell Douglas* burden shifting framework will play a more significant role in plaintiffs’ attempts to support their claims of discriminatory intent.<sup>268</sup> Theoretically, the frameworks laid out by the court in *Haley*<sup>269</sup> can be applied to selective enforcement and erroneous outcome claims. However, the application should be strictly limited.

While most selective enforcement theories have yet to succeed under reverse Title IX claims, courts have entertained the idea that such a claim is viable if the plaintiff student produced more

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265. See *Doe v. Miami Univ.*, 882 F.3d 579, 591–92 (6th Cir. 2018) (explaining that deliberate indifference must rise to the level of sexual harassment and that one incident of non-consensual kissing was not enough to meet that standard). Thus far, *Wells v. Xavier University*, 7 F. Supp. 3d 746, 751–52 (S.D. Ohio 2014), seems to be the only case in which a court explicitly allowed a deliberate indifference claim under reverse Title IX to proceed without a clear showing of sexual harassment.

266. See *supra* notes 121–123 and accompanying text.

267. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973).

268. See *supra* notes 174–176 and accompanying text.

269. See *supra* Part IV.B.3.



evidence supporting the theory.<sup>270</sup> The *Moore*<sup>271</sup> adaptation of the *McDonnell Douglas* framework has many similarities to the selective enforcement theory under Title IX. Under the *Moore* burden shifting framework, the plaintiff can establish a presumption of bias by demonstrating that the prohibited conduct in which he engaged was similar to that engaged in by students outside of his protected class (females) and that he received more severe disciplinary measures than those others.<sup>272</sup> If the plaintiff can establish that females at his school were engaged in similar conduct to that of which he was accused and disciplined without receiving disciplinary action themselves, this would create a temporary presumption of discriminatory intent.<sup>273</sup>

An erroneous outcome claim is somewhat analogous to the *Haley* court's other adaptation of *McDonnell Douglas* burden shifting, which fell under the *Lovelace* framework.<sup>274</sup> The *Lovelace* adaptation allows the plaintiff to allege that he was discriminatorily separated from his university and shift the initial burden "by showing that he was performing at a level that met the employer's legitimate expectations and that the employer sought someone else to do the same work."<sup>275</sup> The underlying rationale behind the erroneous outcome theory is that the plaintiff is "innocent and wrongly found to have committed an offense,"<sup>276</sup> which could be used to demonstrate that the student was performing at a level that met his university's legitimate

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270. See *supra* notes 114–115 and accompanying text (citing cases in which courts have analyzed claims under the selective enforcement theory before dismissing due to insufficient allegations).

271. See *supra* notes 240–244 and accompanying text (evaluating the claim in *Haley* under *Moore*'s framework for discriminatory employee discipline).

272. See *Moore v. City of Charlotte*, 754 F.2d 1100, 1105–06 (4th Cir. 1993) (applying the burden-shifting framework).

273. But see *Saravanan v. Drexel Univ.*, No. 17-3409, 2017 WL 5659821, at \*6 (E.D. Pa. Nov. 24, 2017) (denying a male plaintiff's selective enforcement claim alleging that he and his female accuser were similarly-situated because she was disciplined for sexual harassment while he was accused of sexually harassing and stalking her).

274. See *supra* notes 235–239 and accompanying text.

275. *Haley v. Va. Commonwealth Univ.*, 948 F. Supp. 573, 580 (E.D. Va. 1996).

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

expectations of him. It is possible courts could apply this theory to create a temporary presumption of discriminatory intent.

However, even if plaintiffs successfully establish a presumption of gender bias under the discriminatory intent framework, the burden would shift to the university, allowing it the opportunity to provide a legitimate, nondiscriminatory reason for taking disciplinary action against the plaintiff.<sup>277</sup> Because the plaintiff in an erroneous outcome theory will have been found to have committed the underlying offense, this burden will be easy for universities to meet.<sup>278</sup> If reverse Title IX claims make it to this stage of burden shifting, courts should apply a high standard in allowing plaintiffs the opportunity to demonstrate that the university's proffered nondiscriminatory reason was a cover-up for gender discrimination. If the *McDonnell Douglas* burden shifting framework is further applied to reverse Title IX claims in the future, plaintiffs must be required to meet a heightened level of specificity.

## VI. Conclusion

Every year, more and more reverse Title IX claims are being brought by accused students against universities. The reverse discrimination causes of action under Title IX have become widely recognized by federal courts. In many circuits, accused students are having some success in using the modern conversation surrounding campus sexual assault to create a plausible inference of gender bias against them during their disciplinary proceedings. In essence, reverse Title IX plaintiffs are using the statute to impair the universities' ability to provide students protections under the statute, which is not what Congress intended under Title IX.<sup>279</sup> The policies and purposes behind Title IX strongly encourage restraint by the courts in accepting some types of reverse Title IX

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277. See *McDonnell Douglas*, 411 U.S. at 802–03 (explaining that it is not necessary for the court to attempt “to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire”).

278. See, e.g., *Haley*, 948 F. Supp. at 580.

279. See *Yusuf*, 35 F.3d at 715 (“We do not believe that Congress meant Title IX to impair the independence of universities in disciplining students against whom the evidence of an offense, after a fair hearing, is overwhelming, absent a claim of selective enforcement.”).

claims going forward. Aside from consistency and clarity in judicial resolution of these claims, an essential aspect going forward centers around schools' abilities to create and consistently follow clear guidance in these procedures. When looking at the big picture and "to the larger political landscape, the long-term realization of accused and victimized students' interests depends on the perceived legitimacy of disciplinary procedures for gender violence."<sup>280</sup>

The conversation surrounding campus sexual assault is as pertinent and present as ever, as further evidenced by the enormous amount of comments in response to the Trump administration's proposed regulations.<sup>281</sup> Among other things, the proposed regulations would institute an actual knowledge requirement for universities instead of a constructive knowledge requirement, which would raise the standard for holding universities accountable under deliberate indifference, raise the standard of evidence for sexual violence claims, making them more difficult to prove, and release universities from liability for off-campus incidents between students.<sup>282</sup>

It is unclear exactly what impact these regulations would have on reverse Title IX claims, especially those blaming federal pressure for their universities' alleged discrimination against them. Because of the uncertainty going forward, as well as the continuing intensity between competing factions, clarity among the courts and consistency within universities are the best ways to ensure fair proceedings. Courts need to provide precision in the evaluation of reverse Title IX claims and should consider the purposes and policies of Title IX in future analyses of such claims.

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280. Brodsky, *supra* note 6, at 829.

281. The Proposed Rule had received 105,842 comments when the comment period closed on February 16, 2019. *See generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

282. *Id.*