

# Abuse of Freedom: Balancing Quality and Efficiency in Faculty Title IX Processes

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## I. INTRODUCTION

In early 2015, an essay authored by University of California President Janet Napolitano called for greater clarity and simplicity in federal oversight and described how the university adapted to the changing regulations and “experienced three separate and comprehensive investigations of its Title IX and Clery practices related to sexual violence . . . .”<sup>1</sup> Despite federal investigations and oversight, following Napolitano’s essay the UC Berkeley campus experienced three high-profile sexual misconduct cases involving faculty and administrators.<sup>2</sup> Napolitano then created a committee of administrators, faculty, and students to review sexual misconduct complaints against tenured faculty members.<sup>3</sup> After a third case arose involving the Berkeley Law dean,<sup>4</sup> both its provost, Claude Steele, and its chancellor,

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1. Janet Napolitano, *‘Only Yes Means Yes’: An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387, 397 (2015).
2. Phil Matier & Andy Ross, *UC Bigwig, Bounced in Sex-Harass Scandal, is Pulled from New Job*, *S.F. CHRON.*, Mar. 12, 2016, <http://www.sfchronicle.com/bayarea/article/UC-bigwig-bounced-in-sex-harass-scandal-is-6886519.php>; *Statement by Astronomy Faculty of the University of California, Berkeley, on Geoffrey Marcy*, *N.Y. TIMES*, Oct. 12, 2015, <http://www.nytimes.com/interactive/2015/10/14/science/updated-berkeley-astronomy-statement.html>; Jeffrey Mervis, *Berkeley Astronomer Found Guilty of Sexual Harassment*, *SCIENCE*, Oct. 9, 2015, <http://www.sciencemag.org/news/2015/10/berkeley-astronomer-found-guilty-sexual-harassment>.
3. Sarah Brown, *Why Colleges Have a Hard Time Handling Professors Who Harass*, *CHRON. HIGHER EDUC.*, Oct. 22, 2015, <http://chronicle.com/article/Why-Colleges-Have-a-Hard-Time/233884>.
4. See UC Office for the Prevention of Harassment and Discrimination, Report of Investigation and Findings (July 7, 2015), <https://www.law.berkeley.edu/wp-content/uploads/2016/03/Choudhry-Investigation-Report-7-7-15-REDACTED.pdf> [hereinafter *Sujit Choudhry Investigation Report*]; Alexandra Yoon-Hendricks & Suhauna Hussain, *Berkeley Law Dean Takes Leave of Absence Amid Allegations of Sexual Harassment*, *DAILY CALIFORNIAN*, March 9, 2016, <http://www.dailycal.org/2016/03/09/>

Nicholas Dirks, resigned.<sup>5</sup> President Napolitano could not have foreseen the resignation of the Berkeley provost, chancellor, and law dean when writing her 2015 essay on campus sexual misconduct. If the University of California, an institution that experienced three comprehensive federal investigations before these three incidents, is still struggling to correct their policies and procedures, how are institutions of higher education more broadly handling the conflict between Title IX and protecting faculty due-process rights?

This article examines faculty sexual misconduct complaints and the challenge of implementing Title IX's requirements. Sexual misconduct in this article is used as an overarching term to describe incidents ranging from sexual assault to sexual harassment. What constituted compliance with Title IX shifted dramatically in 2011 with the Department of Education Office for Civil Rights' "Dear Colleague" letter requiring colleges to resolve and prevent instances of student-to-student sexual misconduct.<sup>6</sup> Faculty, raising concerns regarding the limited right of confrontation and the lower preponderance-of-the-evidence standard, are calling for greater procedural protection of students accused of violating Title IX.<sup>7</sup> The vast majority of literature written in the past year about the changes in Title IX focus on university processes and their impact on students' rights.<sup>8</sup> This article compares three public universities' procedures and how student processes compare with those of tenured or tenure-track faculty.

As universities solidify their Title IX operations for students, administrators are recognizing and seeking to correct inconsistencies with faculty Title IX

dean-campus-law-school-takes-leave-absence-position-allegations-sexual-harassment-arise/.

5. Nick DeSantis, *UC-Berkeley's Chancellor Will Resign*, CHRON. HIGHER EDUC., Aug. 16, 2016, <http://www.chronicle.com/blogs/ticker/uc-berkeleys-chancellor-will-resign/113532>; Thomas Fuller, *Provost Resigns Amid Sexual Harassment Case at Berkeley*, N.Y. TIMES, Apr. 15, 2016, <https://www.nytimes.com/2016/04/16/us/provost-resigns-amid-sexual-harassment-case-at-berkeley.html>.
6. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 12 (2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter 2011 Dear Colleague Letter].
7. Opinion, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE, Oct. 15, 2014, <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [hereinafter Harvard Law Professors Op-Ed] (containing a statement of twenty eight members of Harvard Law School faculty); *Open Letter from Members of the Penn Law School Faculty* 1, Feb. 28, 2015, <http://media.philly.com/documents/OpenLetter.pdf> [hereinafter Penn Law School Faculty Letter]; Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault 1, May 16, 2016, <https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf> [hereinafter Law Professors' Open Letter] (containing signatures of professors or law from various U.S. institutions).
8. See, e.g., Tamara Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 U. KAN. L. REV. 915; Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair? The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289 (2016); Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L. J. FORUM 281 (2016).

processes. In doing so, principles of shared governance are placed at risk. This article describes three universities' procedures to demonstrate how faculty, despite greater due-process rights, often receive fewer procedural safeguards than students accused of sexual misconduct. University faculty must step forward to report and prevent the few faculty abusing the freedom inherent in their roles by perpetuating sexual misconduct. At the same time, universities must include faculty in all elements of Title IX work to ensure academic freedom and due process are protected, along with the legitimacy of campus efforts to effectively handle and prevent campus sexual misconduct.

## II. THE PROBLEM OF FACULTY SEXUAL MISCONDUCT

Employee sexual misconduct occurs on university campuses as indicated by the Jerry Sandusky child sexual abuse scandal and scandals at Syracuse University, University of Texas, the University of Arkansas, and many other universities.<sup>9</sup> In large part the decentralized environment, the focus on academic pursuits, and the hierarchical intellectual environment allow harassing behaviors to go unchecked in academic institutions.<sup>10</sup> In 2015 an American Association of Universities (AAU) survey of 150,072 graduate and undergraduate students from twenty-seven institutions of higher education described the breadth and depth of the problem.<sup>11</sup> According to the survey, sexual harassment is far more prevalent than sexual assault, and students are overwhelmingly identified as the most frequent perpetrators of stalking (63.4%) and harassing behaviors (90%). Notably, the survey did not ask the identity of the perpetrators in situations involving assault.

9. See, e.g., Christian Dennie, *Post-Penn State: Protecting Against Sexual Harassment and Misconduct in Athletics*, 75 TEX. B.J. 828, 830 (2012).
10. Robert J. Tepper & Craig G. White, *Workplace Harassment in the Academic Environment*, 56 ST. LOUIS U. L.J. 81, 83 (2011).
11. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT VI (2015), [https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU\\_Campus\\_Climate\\_Survey\\_12\\_14\\_15.pdf](https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf) [hereinafter 2015 AAU Climate Survey].

Type of Sexual Misconduct <sup>12</sup>	All Women (n = 87,737)	Undergraduate Women (n = 55,552)	Graduate Women (n = 32,185)
<b>Penetration</b> by Physical Force/ Incapacitation <sup>13</sup>	7.3%	10.8%	3.9%
<b>Sexual Touching</b> by Physical Force/ Incapacitation <sup>14</sup>	14.4%	17.7%	6.4%
<b>Penetration/Sexual Touching</b> by Physical Force/Incapacitation <sup>15</sup>	18.1%	23.1%	8.8%
<b>Stalking</b> <sup>16</sup>	6.1%	6.7%	5.2%
Faculty Member Responsible	3.6%	1.9%	6.6%
Other Staff/Admin Responsible	2.9%	1.8%	4.9%
Student Responsible	63.4%	69.7%	52.5%
<b>Harassment</b> <sup>17</sup>	55.4%	61.9%	44.1%
Faculty Member Responsible	12%	5.9%	22.4%
Other Staff/Admin Responsible	5.8%	3.4%	9.9%
Student Responsible	90%	94.6%	82%

Notably, female graduate students tend to experience sexual harassment and stalking by faculty members at higher rates than undergraduates (6.6% versus 3.6% for stalking and 22.4% versus 12% for harassment), although this varies widely by institution. For example, in a 2015 Harvard University survey, almost half of female graduate and professional school students reported experiencing sexual harassment, with 21.8% reporting a faculty member was responsible for the sexual harassment.<sup>18</sup> In comparison, an Indiana University Survey from 2015 found 3.8% of graduate school women reported experiencing

12. All categories document misconduct “since enrolling” in the institution of higher education.
13. *Id.* at 56-58, Tables 3-1, 3-2, 3-3.
14. *Id.*
15. *Id.*
16. *Id.* at 96, Table 4-5 (Stalking defined as the following activities that caused fear for personal safety: unwanted calls/emails/messages/pictures/video on social networking, showing up somewhere/waiting for student, spying on/watching/following.).
17. *Id.* at 84, Table 4-1 (Harassment is defined as sexual remarks, insulting/offensive jokes or stories, inappropriate comments regarding body/appearance/sexual activity, crude/gross sexual comments, transmitting offensive sexual remarks/stories/jokes/pictures/videos, and being asked to go out/get dinner/get drinks/have sex, despite refusal.).
18. Christina Pazzanese, *Troubling Findings on Sexual Assault: Harvard’s Portion of National Study Paints Disturbing Picture*, HARVARD GAZETTE, Sept. 21, 2015, <http://news.harvard.edu/gazette/story/2015/09/troubling-findings-on-sexual-assault/>; DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, HARVARD UNIVERSITY 24 (2015), [https://harvardgazette.files.wordpress.com/2015/09/final\\_report\\_harvard\\_9.21.15.pdf?m=1442784546&utm\\_source=SilverpopMailing&utm\\_medium=email&utm\\_campaign=Mailing%209.21.15%2](https://harvardgazette.files.wordpress.com/2015/09/final_report_harvard_9.21.15.pdf?m=1442784546&utm_source=SilverpopMailing&utm_medium=email&utm_campaign=Mailing%209.21.15%2).

sexual misconduct by a professor or instructor.<sup>19</sup> A detailed Penn State survey of a random sample of graduate students asked specifically about harassing or offensive acts committed by faculty or staff, and 32.9% of graduate/professional students indicated experiencing one of nineteen offensive or harassing behaviors.<sup>20</sup> In terms of physicality, 3.8% of graduate or professional female students reporting being touched by faculty or staff in uncomfortable ways,<sup>21</sup> and 4% of graduate or professional students reporting intimate partner violence or domestic violence perpetrated by faculty or staff.<sup>22</sup> The available data demonstrate sexual harassment is the most common form of misconduct perpetuated by faculty.

In my research interviewing twenty-seven Title IX coordinators and ombudsmen between 2011 and 2014, faculty and staff misconduct dominated the early narratives, with student misconduct becoming more prevalent as the data collection entered 2014. An early theme was the persistent nature of faculty-student relationships, with Title IX coordinators and ombudsmen noting both consensual relationships and nonconsensual misconduct:

I have threatened to put a policy together [banning faculty/student relationships] and get it approved and you would have thought that I called every faculty member on this campus a pedophile, the uproar about me having the nerve to do such a thing . . . because why would I do that if there's no problem . . . . On the flip side of that I have students running around here who are marking a chalkboard about how many professors they've bagged. (T11B46:20).

[O]n any . . . research university campus there are a number of faculty who take advantage of their positions to . . . develop amorous relationships with their . . . graduate students. One [in particular had] a habit of inviting students to co-author [something] which . . . is going to look really great on their resume when they [are on the job market]. [This offer always came with an] invit[ation] to engage in sexual acts . . . [that created] the perception on the part of the graduate student, "[I]f I say no, I will lose this professional opportunity." I have had any number of [this faculty member's] students come to me [over the years] . . . .<sup>23</sup>

19. INDIANA UNIV. BLOOMINGTON, DIV. OF STUDENT AFFAIRS, COMMUNITY ATTITUDES AND EXPERIENCES WITH SEXUAL ASSAULT-SURVEY REPORT 13 (2015), <http://stopsexualviolence.iu.edu/doc/climate-survey/climate-survey-full-report.pdf>.
20. PENN STATE STUDENT AFFAIRS, 2015 PENN STATE SEXUAL MISCONDUCT CLIMATE SURVEY, SUMMARY REPORT: UNIVERSITY PARK 10 (2015), <https://psu.app.box.com/s/q6d51wshwql4omqxy4etoazboo4hnwtd>.
21. *Id.* at 10.
22. *Id.* at 17.
23. Brian A. Pappas, *Out from the Shadows: Title IX, University Ombuds, and the Reporting of Campus Sexual Misconduct*, 94 DENV. L. REV. 71, 122 (2016).

Another theme was the difficulty of removing repeat offenders with lifetime appointments. A saying heard multiple times is most captured by the following ombudsman:

I've never seen anybody win their case . . . . [T]here's a saying that in order for a tenured faculty member to have any kind of consequences for their behavior they have to not just be sleeping with a student, but the student has to be dead at the time. It's a horrible saying, but [at some organizations] it's true. Something has to be that bad and that documented and that obvious for something to go through the processes for the claimant to see a positive outcome, an outcome in their favor. (O8A51:40-53)

Organizationally, studies reveal that where a choice of sanctions for harassment is available, it is common for the least stringent to be selected, such as a formal or informal warning without further action.<sup>24</sup> Such responses indicate a deflection of organizational responsibility and may indicate a “climate of tolerance.”<sup>25</sup> Employee perceptions of organizational tolerance of sexual harassment are significantly related to the frequency of sexual harassment incidents and the effectiveness in combating the problem.<sup>26</sup> Tenure adds an additional layer and makes it especially difficult to remove a professor from campus, even one the subject of regular misconduct complaints.<sup>27</sup> College administrators fear damaging the institution's reputation, and students fear complaints will not be taken seriously.<sup>28</sup>

Before 2011, universities were not responsible for student-to-student sexual misconduct under Title IX.<sup>29</sup> With tens of thousands of students, the added compliance requirements resulted in a dramatic expansion of university Title IX efforts and shifted the focus to developing systems and processes for student-to-student cases. University processes were met with complaints that student perpetrators were being denied fundamental due-process rights. The next section describes the new Title IX requirements, faculty and student due-process rights, and the arguments raised both for and against the new standards.

24. Denise Salin, *Organizational Responses to Workplace Harassment: An Exploratory Study*, 38 PERS. REV. 26 (2009).

25. Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 INT'L J. MGMT. REVS. 1 (2012).

26. Camille Gallivan Nelson, Jane A. Halpert & Douglas F. Cellar, *Organizational Responses for Preventing and Stopping Sexual Harassment: Effective Deterrents or Continued Endurance?*, 56 SEX ROLES 811 (2007); Kathi Miner-Rubio & Lilia M. Cortina, *Working in a Context of Hostility Toward Women: Implications for Employees' Well-Being*, 9 J. OCCUPATIONAL HEALTH PSYCHOL. 107 (2004).

27. Brown, *supra* note 3.

28. *Id.*

29. 2011 Dear Colleague Letter, *supra* note 6, at 12.

### III. DUE PROCESS AND A NEW ERA OF TITLE IX COMPLIANCE

The “Dear Colleague” letter issued by the Department of Education’s Office for Civil Rights (OCR) on April 4, 2011, dramatically shifted the interpretation of Title IX enforcement by prescribing a preponderance-of-the-evidence standard for handling sexual misconduct disputes and by requiring universities to address student-to-student sexual misconduct whether on or off campus.<sup>30</sup> The letter explains that campus adjudicatory proceedings are wholly distinct from criminal proceedings and that neither proceeding’s outcome should affect the other.<sup>31</sup> The letter also provides guidance on what constitutes fair procedures, including discouraging schools from allowing the parties to question or cross-examine one another and giving institutions discretion to determine whether to permit parties to have counsel (provided both sides are treated equally).<sup>32</sup> A Q&A document released by OCR in 2014 clarifies the interplay between due process and Title IX: “The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights.”<sup>33</sup>

#### *Faculty Due-Process Rights at Public Universities*

Faculty at public colleges and universities have constitutionally guaranteed due-process rights under the Fifth and Fourteenth Amendments, as a specific property interest exists for faculty in their tenured employment.<sup>34</sup> An accused professor also likely has a liberty interest in clearing his name, requiring stigma to reputation plus the deprivation of an additional right.<sup>35</sup> Balancing the *Mathews* factors, tenured faculty members at public colleges and universities are minimally owed a degree of process before termination, including notice of the charges, an explanation of the employer’s evidence, and an opportunity to present their side of the story.<sup>36</sup> First Amendment protections and contract law

30. *Id.*

31. *Id.* at 10.

32. *Id.* at 12.

33. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 13 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter Q&A Document].

34. U.S. Const. Amends. V & XIV, § 1 (protecting against property deprivations “without due process of law”); *Bd. of Regents v. Roth*, 408 U.S. 564 (1972); *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (tenure has the status of a property right and may be revoked only pursuant to constitutionally adequate procedures).

35. Donna R. Euben & Barbara A. Lee, *Faculty Discipline: Legal and Policy Issues in Dealing with Faculty Misconduct*, 32 J.C. & U.L. 241, 301, note 435 (2006); *Brown v. Montgomery Cnty.*, 470 Fed. Appx. 87, 91 (3d Cir. 2012) (explaining that stigma requires showing “1) publication of 2) a substantially and materially false statement that 3) infringed upon the ‘reputation, honor, or integrity’ of the employee.”).

36. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (to determine what process is due, courts balance 1) the private interest affected, 2) the risk of an erroneous deprivation of the interest

provide another layer of protection as policies within faculty handbooks or policy manuals may be construed as a binding contract.<sup>37</sup> Private institutions do not face the same requirements and have broad discretion regarding their disciplinary procedures, but must comply with their own rules and procedures.<sup>38</sup>

### *Student Due-Process Rights*

Students in publicly funded schools do have a property interest in their education, and thus are entitled to notice and hearing when facing suspension or expulsion.<sup>39</sup> Further, the proceedings need not have the procedural formality of a criminal trial but must ensure the basics of a fair procedure.<sup>40</sup> While more formal procedures may be required for longer suspensions or expulsions, students are not guaranteed an opportunity to secure counsel, to confront and cross-examine witnesses, or to call witnesses for brief disciplinary suspensions.<sup>41</sup> Universities have greater flexibility in providing due process

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through the procedures used and the value, if any, of additional or substitute safeguards, and 3) the government's interest in efficiency); Cleveland Bd. of Educ., 470 U.S. at 546 ("The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.")

37. WILLIAM A. KAPLIN & BARBARA A. LEE, *THE LAW OF HIGHER EDUCATION* 151-52, 297 (3d ed. 1995); Euben & Lee, *supra* note 35 at 302; AM. ASS'N OF UNIV. PROFESSORS, *FACULTY HANDBOOKS AS ENFORCEABLE CONTRACTS: A STATE GUIDE* (2009), <https://www.aaup.org/sites/default/files/files/Faculty%20Handbooks%20as%20Contracts%20Complete.pdf>; *see, e.g.*, DeJohn v. Temple University, 537 F.3d 301, 320 (3d Cir. 2008) (finding the Temple University Sexual Harassment Policy was overly broad and the First Amendment protected speech prohibited by the policy); *but see, e.g.*, Johnson-Kurek v. Abu-Absi, 423 F.3d 590, 594-95 (6th Cir. 2005) (finding that public university academic employees have no First Amendment right to academic freedom beyond those rights held by other public employees).
38. *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 378, 432 Mass. 474, 478 (Mass. 2000); *see Coveney v. Pres. of Coll. of the Holy Cross*, 388 Mass. 16, 19-20, 445 N.E.2d 136 (Mass. 1983).
39. *Goss v. Lopez*, 419 U.S. 565, 574, 579 (1975) (finding notice and a hearing as the minimum required process for interference with a protected property interest); *see, e.g.*, *Gorman v. Univ. of R.I.*, 837 F.2d 7, 9, 12 (1st Cir. 1988) (extending the *Goss* ruling to public college and university students by holding that public university students have a constitutionally protected liberty and property interest in their education).
40. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961); *see also Schaer*, 735 N.E.2d at 381 ("A university is not required to adhere to the standards of due process guaranteed to criminal defendants or to abide by rules of evidence adopted by courts.").
41. *Goss*, 419 U.S. at 583-84. Federal courts are divided regarding student rights to counsel and to cross-examine witnesses. *See Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978); *Black Coal. v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045(9th Cir. 1973) (holding students be allowed to secure representation); *see Osteen v. Henley*, 13 F.3d 221, 225 (7th Cir. 1993) (holding the right to counsel in a disciplinary hearing is not absolute); *compare Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (holding the right to cross-examine witnesses was not a due-process requirement), with *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978) (holding that due process required cross-examination opportunity in situations where witness testimony was essential to the findings).



than either a court or administrative agency,<sup>42</sup> and often the “investigation” satisfies the “hearing” requirement.<sup>43</sup> Students have fewer due-process rights than tenured faculty, who have a liberty interest in continued employment and other contractual protections.

#### *Due-Process Concerns*

The number of complaints filed with OCR against colleges rose from eleven complaints in 2009 to 335 open investigations in June 2016.<sup>44</sup> An analysis of Title IX complaints filed with the Department of Education from 2003 to 2013 found that fewer than one in ten led to a formal agreement to change campus policies.<sup>45</sup> In a 2014 survey of more than 300 schools, more than forty percent of U.S. colleges and universities conducted no investigations of sexual assault allegations over the past five years.<sup>46</sup> With evidence of an ineffective and inconsistent university response to sexual misconduct, neither victims nor alleged perpetrators are satisfied with how universities handle complaints.<sup>47</sup> Concerns also abound from university faculty, including those at Harvard and the University of Pennsylvania, regarding how universities handle complaints of sexual misconduct.<sup>48</sup>

42. Bd. of Curators of the Univ. of Missouri v. Horowitz, 435 U.S. 78 (1978) (applying Mathews, 424 U.S. at 335 (1976)); Walter Saurack, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearing*, 21 J.C. & U.L. 785, 792 (1994-1995).
43. See *infra* notes 49-50 and accompanying text.
44. Jonah Newman & Libby Sander, *A Promise Unfulfilled*, CHRON. HIGHER EDUC., May 9, 2014, at A24; *Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., <http://projects.chronicle.com/titleix/> (last visited Apr. 12, 2018) (listing 337 open federal investigations).
45. *Id.*
46. Mary Beth Marklein & Deirdre Shesgreen, *Colleges Ignoring Sexual Assault, Senator Charges*, USA TODAY, July 9, 2014, <http://www.usatoday.com/story/news/nation/2014/07/09/claire-mccaskill-college-sexual-assault-report/12400401/>.
47. Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 129-30 (2016); see, e.g., Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015, 4:45AM), <http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights>; Jamie Altman, *Former UC-Berkeley Students Sue University for Mishandling Sexual Assaults*, USA TODAY, July 1, 2015, <http://college.usatoday.com/2015/07/01/former-uc-berkeley-students-sue-university-for-mishandling-sexual-assaults/>.
48. Harvard Law Professors Op-Ed, *supra* note 7 (Procedures “lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation.”); Eugene Volokh, *Open Letter From 16 Penn Law School Professors About Title IX and Sexual Assault Complaints*, WASH. POST, Feb. 19, 2015, [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/?utm\\_term=.a925689fbc66](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/?utm_term=.a925689fbc66); Penn Law School Faculty Letter, *supra* note 7, at 1 (arguing federal government’s approach “exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.”); AM. ASS’N OF UNIV. PROFESSORS, *THE HISTORY, USES, AND ABUSES OF TITLE IX* 90 (2016), <https://www.aaup.org/file/TitleIXreport.pdf>

The first due-process concern involves the right to a hearing, as what constitutes a hearing places additional pressure on both the right to confrontation and the evidentiary standard used. Investigation is broadly defined by OCR to include the investigation, any hearing, the decision-making process used to determine if the conduct occurred, and the determination of what subsequent actions will be taken.<sup>49</sup> An “investigation” providing an equal opportunity for both parties to suggest witnesses, provide information and other evidence, even without an adversarial hearing, satisfies Title IX requirements of what constitutes a fair process.<sup>50</sup>

Without a traditional “hearing,” the right to confrontation, a second due-process concern, is significantly attenuated. According to an AAUP report, the key safeguards of the right to an attorney and to confront and cross-examine witnesses either do not exist or are limited in campus processes.<sup>51</sup> If a hearing is provided, OCR does not require universities to allow cross-examination of either side or their witnesses.<sup>52</sup> OCR “strongly discourages a school from allowing the parties to personally question or cross-examine each other” as it “may perpetuate a hostile environment.”<sup>53</sup> Going further than merely discouraging the confrontation, in resolution agreements with Southern Virginia University and Rockford University, OCR has prohibited direct questioning by the parties themselves.<sup>54</sup> Courts are beginning to question university procedures in recent cases involving Brandeis University,<sup>55</sup> the University of California San Diego,<sup>56</sup> and the University of Southern

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[hereinafter AAUP Title IX] (The university response and the criminal justice system serve “neither survivors nor alleged perpetrators with any notable degree of fairness.”).

49. Q&A Document, *supra* note 33, at 24-25.

50. *Id.* at 24-26.

51. AAUP Title IX, *supra* note 48, at 79.

52. *Id.* at 31.

53. *Id.*

54. U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, RESOLUTION AGREEMENT, SOUTHERN VIRGINIA UNIVERSITY, CASE NOS. 11-14-2288 and 11-14-2290 2 (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/11142290-b.pdf> (requiring “[i]f cross-examination of parties is permitted, a statement that the parties will not be permitted to personally question or cross-examine each other”); U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, RESOLUTION AGREEMENT, ROCKFORD UNIVERSITY, DOCKET #05-15-2031 3 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05152031-b.pdf> (requiring “[n]otice that the parties may not personally question or cross-examine each other during a hearing”).

55. *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 604-05 (D. Mass. 2016) (Denying Brandeis University’s motion to dismiss, the court noted Brandeis imposed overly restrictive limits on the scope of cross-examination, including not allowing respondent to cross-examine either the complainant or complainant’s witnesses).

56. *Doe v. Regents of the University of California San Diego*, 2015 WL 4394597, at \*2 (Cal. Super. 2015) (finding petitioner’s right to cross-examine the primary witnesses was unfairly limited as only nine of the thirty-two questions posed were actually asked by the panel chair, “curtail[ing] the right of confrontation crucial to any definition of a fair hearing.”).

California.<sup>57</sup> Erin Buzuvis, director of the Center for Gender and Sexuality Studies at Western New England University, argues these cases indicate some colleges are “going beyond what Title IX requires and in ways that are infringing on the rights of disciplined students.”<sup>58</sup>

Significant disagreement exists regarding the third due-process issue, the OCR-mandated use of the preponderance-of-the-evidence standard.<sup>59</sup> Given the limitations described above, commenters argue “clear and convincing” proof is the standard necessary to ensure adequate protection of the accused student’s right to procedural due process.<sup>60</sup>

In response, pro-preponderance commenters note colleges and universities are not required to imitate the criminal justice system, and adopting higher standards of proof typically provided to criminal defendants contravenes the intent of campus peer sexual violence laws to bring forward and handle complaints.<sup>61</sup> The Association for Student Conduct Administration also argues for application of the preponderance-of-the-evidence standard, noting, “Any other standard creates a roadblock to reporting which does nothing to make campuses or society safer.”<sup>62</sup> In contrast to the student preponderance standard, faculty disciplinary processes typically require “clear and convincing.”<sup>63</sup> The

57. *Doe v. University of Southern California*, 246 Cal. App. 4th 221, 248 (2016) (finding the hearing lacked fairness for many reasons, among them the petitioner’s not having an opportunity to appear directly before the decision-making panel to rebut evidence).
58. Jake New, *Out of Balance*, INSIDE HIGHER ED, Apr. 14, 2016, <https://www.insidehighered.com/news/2016/04/14/several-students-win-recent-lawsuits-against-colleges-punished-them-sexual-assault> (last visited June 8, 2017).
59. Q&A Document, *supra* note 33, at 26.
60. Lavinia M. Weizel, Note, *The Process that Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault*, 53 B.C. L. REV. 1613, 1639 (2012) (citing *Smyth v. Lubbers*, 398 F. Supp. 777, 799, suggesting in situations in which university students are charged with serious infractions, the clear-and-convincing standard may be required); AAUP Title IX, *supra* note 48, at 79 (arguing for the clear-and-convincing evidence standard to “help overcome the lack of the full scope of due-process protections that guard against erroneous findings of sexual harassment and sexual assault.”).
61. Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 508, 512 (2012); *See generally* TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf> [hereinafter Law Professors’ White Paper].
62. CHRIS LOSCHIAVO & JENNIFER L. WALLER, ASS’N FOR STUDENT CONDUCT ADMIN., THE PREPONDERANCE OF EVIDENCE STANDARD: USE IN HIGHER EDUCATION CAMPUS CONDUCT PROCESSES 4 (2016), <http://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.
63. *See, e.g.*, UNIV. OF WISCONSIN-MADISON, FACULTY POLICIES AND PROCEDURES, CHAPTER 9: DISCIPLINE AND DISMISSAL OF FACULTY FOR CAUSE § 9.09 (1978, rev. 2016), <https://secfac.wisc.edu/wp-content/uploads/sites/50/2017/06/FPP-chapter-9-2016-May-17.pdf> [hereinafter Wisconsin Procedures] (“A finding of just cause for the imposition of discipline or just cause for dismissal must be based on clear and convincing evidence in the hearing record.”).

next section reviews university procedures and their hearing, confrontation, and standard of proof provisions

#### IV. UNIVERSITY PROCEDURES

The value of fairness in procedures serves two important goals: treating the parties with dignity by fully hearing their perspectives, and accurately determining a just outcome. For victims, fairness requires universities to follow the law and investigate, punish, and deter misconduct to ensure a hostility-free educational environment. For alleged perpetrators, it requires universities to adequately protect their right to due process. Fairness also serves the goal of avoiding mistakes in assessing the facts. Nonetheless, pursuing fairness, if taken to an extreme, can be extremely time-consuming and inefficient, and institutions have a strong interest in hearing and deciding on complaints in an efficient manner. The result is tension between fair procedures and efficiency in hearing and deciding a contested complaint.

Traditionally, faculty disciplinary policies utilize one of two approaches, which can be described as the investigation and hearing models.<sup>64</sup> In the investigation model, an administrator conducts a process to determine whether a violation has occurred and to issue sanctions. The faculty member then may appeal the decision to a faculty grievance committee.<sup>65</sup> At other universities, a hearing model is utilized in which the administrator charges the faculty member with misconduct, but a faculty hearing panel determines whether misconduct has occurred and recommends a sanction.<sup>66</sup> A higher-level administrator then makes a final determination.<sup>67</sup> The investigation and hearing models are also utilized by universities for resolving allegations of sexual misconduct against students.<sup>68</sup> A third approach, typically used for students, involves a “hybrid” of hearing and investigation models in which an investigator makes the initial finding, which then may be appealed to a hearing before an administrator or a panel.<sup>69</sup> Each of these models is now highlighted using university examples. The key differences between these models involve 1) whether the initial investigation results in a charge or a finding, and 2)

64. Euben & Lee, *supra* note 35, at 297-98.

65. Wisconsin Procedures, *supra* note 63, at § 9.06-07.

66. Euben & Lee, *supra* note 35.

67. *Id.* (citing, e.g., STANFORD UNIV., FACULTY HANDBOOK, § 4.3: THE STATEMENT ON FACULTY DISCIPLINE, <http://facultyhandbook.stanford.edu/ch4.html> (last visited Apr. 13, 2018)).

68. ASS'N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 15 (2014), <http://www.myacpa.org/sites/default/files/ASCA%202014%20Gold%20Standard%20Report.pdf> [hereinafter ASCA 2014 White Paper].

69. W. SCOTT LEWIS ET AL., ASS'N FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 40 (2013), <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc> [hereinafter ATIXA].

whether the investigation process constitutes the “hearing” or whether there is a later process in which an adversarial hearing is provided.

MODEL	STEP 1	STEP 2	STEP 3
<b>Investigation</b>	Administrator(s) investigate(s), determine(s) facts, outcome and sanctions (hearing for Title IX purposes) [preponderance standard]	n/a	Appeal to administrator or a panel with a potential hearing [must meet grounds for review]
<b>Hearing</b>	Administrator(s) investigate(s), determine(s) facts, substantiate(s) charge [preponderance standard]	Hearing before panel or administrator to determine outcome and sanction [preponderance standard]	Appeal to an administrator [must meet grounds for review]
<b>Hybrid</b>	Administrator(s) investigate(s), determine(s) facts and outcome [preponderance outcome]	Panel or administrator determines sanctions	Appeal to a hearing before an administrator or panel [must meet grounds for review]

### *The Hearing Model*

In the hearing model, an investigation takes place before a hearing to determine whether there is enough information to substantiate a complaint, to provide separation between the investigation and adjudication functions, and to allow a trained professional to complete the fact-finding work for the hearing body.<sup>70</sup> The fact-finding report, presented to the hearing body, typically includes a conclusion on whether the preponderance standard was met.<sup>71</sup> The key aspect of the hearing model is that the initial determination is made by the panel or administrator, and the Title IX coordinator or designate is limited to an initial investigation and charge. As described below, Indiana University utilizes a hearing model for students in which an investigation is conducted to determine if a charge is justified. A hearing is then held with the right to have a silent advisor present and the ability to ask questions of the other side through the panel. While limited, the hearing model provides for greater confrontation and ability to question witnesses than the investigation model utilized at Indiana University for complaints against faculty.

### *Investigation Model*

In contrast to the hearing model, the investigation model notably lacks an adversarial hearing. Under an investigation model, a complaint is assigned to an investigator. The alleged perpetrator is then informed of the complaint, and both sides have the opportunity to meet with the investigator. Witnesses may be interviewed and the investigator drafts a summary of the information, reviewable by both the victim and alleged perpetrator. An investigation report is created and either the investigator or a second administrator issues

70. ASCA 2014 White Paper, *supra* note 68, at 15.

71. ATIXA, *supra* note 69, at 51.

findings and sanctions.<sup>72</sup> For Indiana faculty, if the grounds for appeal are met, the determination can be appealed to a board of review or the Provost/Chancellor.<sup>73</sup>

#### Indiana University Title IX Processes<sup>74</sup>

Students: Hearing Model	Faculty: Investigation Model
<p><b>1) Investigation Results in a Charge</b></p> <ul style="list-style-type: none"> <li>• Interviews with both sides, examination of documents and other evidence</li> <li>• Both sides have ability to identify witnesses</li> <li>• May have a silent advisor present</li> <li>• Preponderance standard utilized</li> </ul>	<p><b>1) Investigation Results in a Determination</b></p> <ul style="list-style-type: none"> <li>• Same process as student, with interviews, evidence examination, ability to identify witnesses, use of the preponderance standard, and a silent advisor</li> <li>• Investigation results in a determination of facts, findings, and sanctions</li> <li>• Decisional officer confirms decision/sanction</li> </ul>
<p><b>2) Hearing Is Guaranteed</b></p> <ul style="list-style-type: none"> <li>• Respondent must participate, but claimant may decide whether to participate and to what extent</li> <li>• Equal opportunity to present a statement and written or oral evidence</li> <li>• May have a silent advisor present throughout</li> <li>• Confrontation through submitting questions to a panel, with questions screened</li> <li>• Preponderance standard utilized</li> </ul>	<p><b>2) Appeal to Faculty Board of Review</b></p> <ul style="list-style-type: none"> <li>• Grounds: 1) significant procedural error, 2) significant bias in the process, 3) the finding is in error, or 4) the sanction's appropriateness</li> <li>• Board may not conduct new fact-finding or revisit factual determination</li> <li>• Respondent must participate, but claimant may be present or submit a written statement</li> <li>• No witnesses are allowed, and all parties may have an advisor present who may not speak but may read the party's written statement</li> <li>• The board may confirm the decision/sanction, or recommend an alternative to the Provost/Chancellor</li> </ul> <p><b>Or Provost/Chancellor for Review</b></p> <ul style="list-style-type: none"> <li>• Same grounds for appeal as faculty board</li> <li>• Reviewer will not revisit findings of fact, and will 1) affirm the finding/sanction, 2) impose a new finding/sanction, or 3) order a new investigation</li> </ul>
<p><b>3) Appeal to an Administrator</b></p> <ul style="list-style-type: none"> <li>• Grounds: significant procedural error OR sanction disproportionate to violation</li> <li>• Administrator will not consider new information to 1) affirm decision/sanction, 2) impose a new sanction/decision, or 3) order a new hearing</li> <li>• The administrator's decision is final</li> </ul>	

In effect, the procedures for faculty provide a hearing with no ability to confront the accuser. Specifically, the Indiana policy notes: "Adversary hearings, including confrontation, cross-examination by the parties and active advocacy by attorneys or other advocates, are neither appropriate nor

72. ASCA 2014 White Paper, *supra* note 68, at 16.

73. INDIANA UNIV., OFFICE OF STUDENT WELFARE AND TITLE IX, UNIVERSITY POLICIES: SEXUAL MISCONDUCT UA-03 16, "Appeals to Appellate Officer" (2015, last updated Jan. 1, 2017), <http://policies.iu.edu/policies/categories/administration-operations/equal-opportunity/sexual-misconduct.shtml> [hereinafter IU Sexual Misconduct].

74. *Id.*

permitted during the investigation or appeal phase of these processes.”<sup>75</sup> Afforded a hearing model, students at Indiana University are provided with greater confrontation and due process than faculty. First, the investigation process for students results in a charge, while the investigation process ends for faculty with a decision by an administrator.<sup>76</sup> Next, students may request a hearing with an opportunity to present oral and/or written evidence and to ask questions of the other side through the panel chair.<sup>77</sup> For faculty, the decision may be appealed to either a faculty board of review or the Provost or Chancellor.<sup>78</sup> In either route the faculty member must meet grounds for appeal that create a significant hurdle for faculty desiring a hearing. Even if the grounds for review are met, hearings are conducted without any witnesses, and attorneys are limited to reading their clients’ written statements.<sup>79</sup> As the hearing model provides for more confrontation, students receive greater due process than faculty.

While providing greater process, hearings are also less efficient, as they take more time, expend greater resources and require effectively training panels to hear complaints. My dissertation research in 2011 to 2014 observed several schools moving toward the hearing model. Utilizing a hearing model was met with resistance by many Title IX coordinators:

[Previously] this office had the authority to make the decision about whether or not the policy had been violated. In the wake of the Dear Colleague letter, our attorneys had decided that we can’t make that decision [or even a recommendation], we can only decide if it’s worthy of a hearing . . . . [I]t’s insulting . . . [it goes] in front of a hearing panel [of students and faculty], who ironically can’t serve on those panels until they’ve had two hours of training on Title IX from me, [and I’ve had] . . . years of training.<sup>80</sup>

The same coordinator next describes the rationale for not allowing the coordinator to make recommendations, arguing it contravenes OCR’s intent:

General Counsel said that they have a due process right to an adjudicated hearing. Don’t know if that’s true or not. In every other way and in every other situation, we are allowed to make decisions and recommendations . . . . But [not] in this situation, and I think it’s a power thing . . . . We have just legalized this thing to death and it is not what OCR meant, in my opinion. . . . ATIXA just did a webinar and it says “recommendations: do not let the Title IX office make the decision. Put it in front of an adjudicator.”<sup>81</sup>

75. *Id.* at 17.

76. *Id.* at 11,1.g; 15 “Finding and Decision.”

77. *Id.* at 12, 4.e.ii-iii.

78. *Id.* at 16, “Appeals.”

79. *Id.* at 17.

80. Pappas, *supra* note 47, at 158-59.

81. *Id.* at 162.

While many institutions moved to a hearing model to provide greater due process, it is more efficient to institute investigation processes that do not include a hearing component.

### *Hybrid Model*

A third approach, typically used for students, is a hybrid of hearing and investigation models. After finalizing the complaint and the notice of charges, the Title IX coordinator or staff member will then “commence a thorough, reliable and impartial investigation . . . .”<sup>82</sup> Following the initial determination of fault at the investigation phase, a panel or administrator then determines the appropriate sanctions, which then can be appealed in the form of a hearing before an administrator or a panel. There are several hybrid permutations that may be utilized.

At the University of Kansas, students facing major discipline utilize a hybrid process beginning with an investigation followed by a hearing and then an opportunity for appeal. Faculty at the University of Kansas facing less than dismissal have fewer procedural rights than students. While students have a right to a hearing, faculty have only the opportunity to request one.<sup>83</sup> Further, the grounds for appeal are more restrictive, and if the matter proceeds to hearing, the burden of proof is higher than preponderance, as the appellant must prove by clear and convincing evidence “a violation of established university procedure . . . adversely affect[ing] an established faculty right.”<sup>84</sup>

82. ATIXA, *supra* note 69, at 39.

83. UNIV. OF KANSAS, FACULTY CODE OF RIGHTS, RESPONSIBILITIES, AND CONDUCT, ARTICLE III: FACULTY RIGHTS (1971, rev. 2016), <http://policy.ku.edu/FacultyCodeKULawrence/faculty-code-of-rights> [hereinafter KU Faculty Code].

84. UNIV. OF KANSAS, FACULTY SENATE RULES AND REGULATIONS, ARTICLE VII: FACULTY RIGHTS AND RESPONSIBILITIES (2007, rev. 2017), <http://policy.ku.edu/governance/FSRR#art7sect3> [hereinafter KU Faculty Senate Rules and Regulations].



University of Kansas Title IX Processes<sup>85</sup>

Students	Faculty
<p><b>1) Same Investigation Process for Both Faculty and Students</b></p> <ul style="list-style-type: none"> <li>Investigator meets separately with each side (who may bring a representative, including an attorney)</li> <li>Each side may identify witnesses and present evidence, but the investigator determines whom to interview</li> <li>Evidentiary standard is preponderance of the evidence</li> <li>Investigator provides written findings to each side and administrators, who determine an appropriate resolution</li> </ul>	
<p><b>2) Hearing</b>—For a sanction of at least suspension, students may request:<sup>86</sup></p> <p>A) Informal Administrative Hearing or</p> <p>B) Formal Panel Hearing</p> <ul style="list-style-type: none"> <li>The respondent may present evidence and witnesses, question statements, and bring up to three advisors</li> <li>Chair may allow direct questioning of witnesses, or may disallow, reframe, or require chair to pose questions</li> <li>Witnesses/complainant may choose not to participate, and may submit a written statement</li> <li>Using a preponderance standard, the hearing panel makes a finding and determines sanctions</li> <li>Vice Provost for Student Affairs reviews panel's report and hearing materials to make a decision</li> </ul> <p><b>3) Either Side May Appeal</b></p> <ul style="list-style-type: none"> <li>Grounds: failure to follow or inconsistent procedures, unsupported factual determinations, arbitrary and capricious decisions, and review of a complaint dismissal<sup>87</sup></li> <li>The other side may review the appeal and respond. The appeal body reviews record, appeal, and response</li> </ul>	<p><b>2) Hearing</b>—For major sanctions, faculty may request a Faculty Rights Board hearing</p> <p><b>A) If Facing Censure, Suspension, Leave:</b><sup>88</sup></p> <ul style="list-style-type: none"> <li>Grounds: administrative authority's actions violated procedure and adversely affected faculty rights</li> <li>Despite meeting the grounds, the board may forgo a hearing and use the record</li> <li>Appellant must prove a violation of faculty right by clear and convincing evidence</li> <li>At a hearing, cross-examination is allowed, and it is the parties' responsibility to question witnesses</li> <li>Chancellor/Provost reviews the board's recommendation to make the final decision</li> </ul> <p><b>B) If Facing Dismissal:</b><sup>88</sup></p> <ul style="list-style-type: none"> <li>No grounds threshold, and the Provost must prove the charges by clear and convincing evidence</li> <li>Respondent may be represented by counsel and "confrontation and full examination of the evidence shall prevail throughout the hearing"</li> </ul> <p><b>3) No Appeal</b><sup>89</sup></p>

85. UNIV. OF KANSAS, INSTITUTIONAL OPPORTUNITY & ACCESS PROCEDURE, SEXUAL HARASSMENT AND SEXUAL VIOLENCE (2012, rev. 2016), <https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures> [hereinafter KU Sexual Harassment]; UNIV. OF KANSAS, INSTITUTIONAL OPPORTUNITY & ACCESS POLICY, DISCRIMINATION COMPLAINT RESOLUTION PROCESS (1977, rev. 2016), <http://policy.ku.edu/IOA/discrimination-complaint-resolution> [hereinafter KU Discrimination Process].
86. UNIV. OF KANSAS, STUDENT AFFAIRS PROCEDURE, STUDENT NON-ACADEMIC CONDUCT PROCEDURES, VI.C.I.C Option for Resolution of Conduct Charges (2013, rev. 2016), <http://policy.ku.edu/student-affairs/non-academic-student-conduct> [hereinafter KU Student Non-Academic Conduct Procedures].
87. UNIV. OF KANSAS, GOVERNANCE POLICY, UNIVERSITY SENATE RULES AND REGULATIONS, 6.7.3 Grounds for Appeal (2012, rev. 2017) <http://policy.ku.edu/governance/USRR#art6sect7> [hereinafter KU University Senate Rules and Regulations].
88. *Id.* at VII.C.4, Appeal Record.
89. UNIV. OF KANSAS, GOVERNANCE PROCEDURE, PROCEDURES OF THE FACULTY RIGHTS BOARD FOR HEARING APPEALS IN CASES INVOLVING ADMINISTRATIVE ACTION OF DISMISSAL OF A TENURED FACULTY MEMBER AND OF DISMISSAL PRIOR TO THE EXPIRATION OF TERM APPOINTMENTS (1973, rev. 2016), <http://policy.ku.edu/provost/FRB-appeals-procedure-for-dismissal> [hereinafter KU FRB Procedures-Dismissal].

These procedures at the University of Kansas came under dispute in *Bavel v. University of Kansas*.<sup>90</sup> After an investigation found Professor Bavel guilty of violating the sexual misconduct policy in 2011 and his request for appeal of the administrative determination was denied, Bavel filed suit arguing the university failed to follow its prescribed procedures.<sup>91</sup> In opposition the University of Kansas argued “[h]earing’ does not mean a formal, adversarial, evidentiary proceeding,” and the sexual harassment investigator and the employee’s supervisor (who determined punishment) were “hearing” officers for due-process purposes.<sup>92</sup> Any appeal from the determination was limited to an appeal on grounds of procedural error. The Kansas Court of Appeals agreed that the university followed its own procedures, noting employment discipline is an administrative proceeding and not a formal criminal trial.<sup>93</sup>

As indicated in the University of Kansas chart above, had Bavel been dismissed instead of merely suspended, an alternative policy governed.<sup>94</sup> In that situation faculty are provided with full due-process rights.<sup>95</sup> There is, however, conflicting guidance in University of Kansas policy and procedure regarding the correct standard of proof. According to the dismissal appeals procedures, the Provost must prove the charges by clear and convincing evidence.<sup>96</sup> Under the University Senate Code, the party seeking the sanctions shall have the burden of proof, utilizing the preponderance-of-the-evidence standard.<sup>97</sup> Under the Faculty Senate Rules and Regulations, a faculty member appealing must prove, by clear and convincing evidence, “a violation of established university procedure . . . [that] adversely affected an established faculty right.”<sup>98</sup> Finally, under the University’s Sexual Harassment and Sexual Violence policy, a preponderance-of-the-evidence standard is to be used “in investigating and adjudicating violations . . . .”<sup>99</sup> The key question for Title IX purposes is whether a “clear and convincing evidence” standard for faculty dismissal passes muster under the Office for Civil Rights requirement of

90. 346 P.3d 1112, 2015 WL 1783249 (Kan. Ct. App. 2015).

91. Chandler Blanton, *Professor Who Violated Sexual Harassment Policy is Still Working to Appeal KU’s Decision*, UNIV. DAILY KAN., Dec. 7, 2014, [http://www.kansan.com/news/professor-who-violated-sexual-harassment-policy-is-still-working-to/article\\_f4d8a590-7e65-11e4-8783-9fc5e755dfdl.html](http://www.kansan.com/news/professor-who-violated-sexual-harassment-policy-is-still-working-to/article_f4d8a590-7e65-11e4-8783-9fc5e755dfdl.html).

92. 346 P.3d 1112, 2015 WL 1783249 at \*3.

93. 346 P.3d 1112, 2015 WL 1783249 at \*5.

94. KU FRB Procedures-Dismissal, *supra* note 89.

95. *Id.* at §10, 12.

96. *Id.*

97. UNIV. OF KANSAS, GOVERNANCE POLICY, UNIVERSITY SENATE CODE, Art. XII, Sec. 2, Procedural Guarantees II, X (1994, rev. 2017) <http://policy.ku.edu/governance/university-senate-code#art12sect2> [hereinafter KU University Senate Code].

98. KU Faculty Senate Rules and Regulations, *supra* note 87, at 7.3.2.f, Faculty Rights Board, Procedures.

99. KU Sexual Harassment, *supra* note 85, at I. Definitions, “Burden of Proof.”

utilizing a preponderance-of-the-evidence standard.<sup>100</sup> This question is further explored in reviewing the Penn State policy.

The University of Kansas procedures exemplify the confusion existing at many universities and the challenge of updating, revising, and reconciling the maze of policies and procedures governing faculty sexual misconduct. The University of Kansas recently completed a review and update of its Faculty Code of Rights, Responsibilities, and Conduct, but not without considerable negotiation.<sup>101</sup>

Administrative policies are crafted and enforced with varying degrees of faculty input. Notably, the University of Kansas Sexual Harassment and Sexual Violence Policy was originally articulated on the Institutional Opportunity and Access website and was then migrated into the policy library.<sup>102</sup> In contrast, the Indiana University policy was approved directly by the University Faculty Council through shared governance procedures.<sup>103</sup> The University of Kansas procedures for faculty dismissal provide for full due-process rights, but also a clear-and-convincing-proof standard that conflicts with other University of Kansas policies and OCR requirements. For Indiana faculty and University of Kansas faculty facing less than dismissal, students have greater due-process rights. Penn State, another university utilizing a hybrid approach, provides the example of policies that may conflict with OCR requirements or contravene established procedures providing greater protections for faculty.

#### *Pennsylvania State University Title IX Processes*

Beginning in fall 2015, Pennsylvania State University provided administrators with the ability to utilize either an investigation or a hearing model.<sup>104</sup> The process was revised on September 29, 2016, to create a hybrid process.<sup>105</sup> Initially, a case manager meets with the complainant and a disciplinary conference takes place with the respondent.<sup>106</sup> Both sides may be

100. 2011 Dear Colleague Letter, *supra* note 6, at 12.

101. KU Faculty Code, *supra* note 83, at Review, Approval & Change History; KIRK MCCLURE, UNIVERSITY OF KANSAS, MEMORANDUM TO MEMBERS OF THE FACULTY SENATE COMMITTEE ON RIGHTS, PRIVILEGES AND RESPONSIBILITIES (2015), <https://governance.ku.edu/sites/governance.ku.edu/files/files/20151118FRPRMinutes.pdf> (describing committee recommendation to stop negotiations because of an administration proposal that denied due process to faculty members, reduced the right of faculty to participate in policy development, and threatened tenure).

102. KU Sexual Harassment, *supra* note 85, at Review, Approval, and Change History.

103. IU Sexual Misconduct, *supra* note 73, at History.

104. *University Implements New Model for Investigating Sexual Assault Cases*, PENN STATE NEWS, Apr. 29, 2015, <http://news.psu.edu/story/355163/2015/04/29/administration/university-implements-new-model-investigating-sexual-assault>.

105. PENN STATE UNIV., STUDENT AFFAIRS, CODE OF CONDUCT & STUDENT/STUDENT ORGANIZATION CONDUCT PROCEDURES, revised Aug. 23, 2017, <https://studentaffairs.psu.edu/support-safety-conduct/student-conduct/code-conduct> 1/ [hereinafter PSU Student Code & Procedures].

106. *Id.* at V.D.1.

accompanied by an advisor at any point,<sup>107</sup> but the advisor may not disrupt the proceedings, cause emotional distress, make a presentation, or speak on behalf of his or her advisee.<sup>108</sup> Additional investigation may take place before the case manager recommends charges and sanctions.<sup>109</sup>

If the respondent contests the charges, the matter is forwarded either to an administrative hearing officer (for cases in which suspension or expulsion will not result) or to a decision panel (in instances in which suspension or expulsion may occur or there are allegations of physical or sexual violence or nonconsensual penetration).<sup>110</sup> Either the administrative hearing officer or the decision panel has five business days to review the investigative packet and submit additional questions to the investigator before the hearing.<sup>111</sup> The respondent and complainant may address the hearing authority in person, may observe the other's address through remote video or audio, and may suggest questions to be posed to the other party by the hearing authority after a review for relevance and appropriateness.<sup>112</sup> No new evidence may be provided unless it was previously unavailable and is relevant to responsibility.<sup>113</sup> Following deliberation, the hearing authority determines responsibility using a preponderance-of-the-evidence standard and, if applicable, imposes an appropriate sanction.<sup>114</sup>

In cases resulting in sanctions of suspension or expulsion, the respondent may appeal in writing to the Student Conduct Appeals Officer.<sup>115</sup> Grounds for appeal include deprivation of rights or violation of stated procedures affecting the outcome, in which case a new hearing officer or panel will rehear the case.<sup>116</sup> Another ground for appeal is newly available and relevant evidence, in which case the matter is returned to the original hearing officer or panel to rehear the new evidence.<sup>117</sup> A final ground for appeal is an imposed sanction that is not justified, and in such cases it may be modified by the appeals officer.<sup>118</sup> If the appeal is denied, there are no further actions taken in the case.<sup>119</sup> The Student Conduct Appeals Officer will review the record and may sustain,

107. *Id.*

108. *Id.* at II.

109. *Id.* at V.D.1.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at V.G.2.

116. *Id.*.

117. *Id.*

118. *Id.*

119. *Id.*

modify, or reverse the original determination and sanction, and must consult with administrators on any modification or reversal.<sup>120</sup>

While Penn State provides for a hearing and some form of confrontation in both the administrative officer and panel processes, the faculty process affords no hearing. The Affirmative Action Office oversees Penn State's Sexual and/or Gender-Based Harassment and Misconduct Policy.<sup>121</sup> Surprisingly, I was unable to find published procedures for handling Title IX investigations against faculty or staff. I was able to locate a website hosted in the Affirmative Action Office detailing procedures for allegations against employees.<sup>122</sup> First a formal investigation is completed by the Affirmative Action Office (AAO), with a written determination report provided to both sides and the appropriate dean or administrative officer with the authority to impose sanctions.<sup>123</sup> The AAO then holds a disciplinary meeting to provide each side "separate opportunities to comment on the conclusions and recommendations of the Determination Report."<sup>124</sup> Each side may have an advisor of its choice throughout the process. Following the meeting, the AAO, in consultation with the human resources office, renders a decision regarding a policy violation by preponderance of the evidence, decides appropriate sanctions and prepares a disciplinary report.<sup>125</sup>

Clearly the policy applies to tenured faculty, as discipline may include tenure revocation, termination, and a range of other sanctions.<sup>126</sup> Either side may appeal to the Vice Provost for Academic Affairs, under certain grounds for appeal: procedural error, previously unavailable relevant evidence affecting the outcome, or a sanction substantially disproportionate to the findings.<sup>127</sup> The key point: The Title IX process at Penn State provides notably more opportunities for confrontation for students than for faculty. Faculty members have no opportunity for a hearing in which their accuser participates, and may participate only in a disciplinary meeting.

120. *Id.*

121. PENN STATE UNIV., ACADEMIC POLICIES, AD85 SEXUAL AND/OR GENDER-BASED HARASSMENT AND MISCONDUCT (INCLUDING SEXUAL HARASSMENT, SEXUAL ASSAULT, DATING VIOLENCE, DOMESTIC VIOLENCE, STALKING, AND RELATED INAPPROPRIATE CONDUCT) (2014, rev. 2017), <https://policy.psu.edu/policies/AD85> [hereinafter Penn State AD85].

122. PENN STATE UNIV., AFFIRMATIVE ACTION OFFICE, EMPLOYEE DISCIPLINARY PROCEEDINGS FOR REPORTS OF SEXUAL ASSAULT, DATING VIOLENCE, DOMESTIC VIOLENCE AND STALKING AGAINST AN EMPLOYEE (2015, rev. 2017) <http://www.psu.edu/dept/aaoffice/disciplinary1.htm> [hereinafter Penn State Employee Disciplinary Proceedings].

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

*University Processes and Policies in Conflict*

Pennsylvania State University's website notice regarding sexual misconduct processes for accused faculty appears to conflict with other established policies and procedures.<sup>128</sup> While the online notice references Penn State's main Title IX policy, AD85, the website does not reference Policy AC70, Dismissal Procedure for Tenured and Tenure-Eligible Faculty Members.<sup>129</sup> The online notice regarding sexual misconduct processes for accused faculty does cross-reference AC76, Faculty Rights and Responsibilities.<sup>130</sup> AC76 provides for a Committee on Faculty Rights and Responsibilities that reviews petitions from faculty members and administrators asserting an injustice resulting from academic freedom, procedural fairness, or professional ethics violations.<sup>131</sup> While not mentioned in the main sexual misconduct policy (AD85), AC76 requires allegations of sexual harassment to be referred to the Office of Affirmative Action.<sup>132</sup>

To implicate the Faculty Rights and Responsibilities policy, the allegation must include sexual harassment *plus* complaints of violations of academic freedom, procedural fairness, or professional ethics.<sup>133</sup> In such situations, the policy provides for a simultaneous and independent investigation by the Committee on Faculty Rights and Responsibilities and the Office of Affirmative Action.<sup>134</sup> The burden of proof is on the complaining faculty member to establish a *prima facie* case, and the committee has the authority to reject the complaint, establish a hearing board, or conduct an informal review before rejecting the complaint, attempting to effectuate a settlement, establishing a hearing board, or bringing a recommendation before a full committee review for a vote.<sup>135</sup>

A faculty member accused of sexual misconduct at Penn State would conceivably first proceed through the administrative procedure outlined in the online policy.<sup>136</sup> If there were a finding of misconduct and the sanction was termination, AD85's cross-referencing AC76 suggests AC70 would not

128. *Id.* (Citing Penn State AD85, *supra* note 171).

129. *Id.*; PENN STATE UNIV., ACADEMIC POLICIES, AC70 DISMISSAL PROCEDURE FOR TENURED AND TENURE-ELIGIBLE FACULTY MEMBERS (FORMERLY HR70) (2005), <https://policy.psu.edu/policies/ac70> [hereinafter Penn State AC70].

130. Penn State Employee Disciplinary Proceedings, *supra* note 122.

131. PENN STATE UNIV., ACADEMIC POLICIES, AC76 FACULTY RIGHTS AND RESPONSIBILITIES (FORMERLY HR76) B.1 (1973, rev. 2011), <https://policy.psu.edu/policies/ac76> [hereinafter Penn State AC76].

132. *Id.* at F.

133. *Id.* at F, B1, "Consultation between Bodies."

134. *Id.* at F, B1, "Consultation between Bodies."

135. *Id.* at "Operation of the Committee."

136. Penn State Employee Disciplinary Proceedings, *supra* note 122.

apply.<sup>137</sup> AC70 was last updated November 23, 2005, and while it provides for a hearing with right to an attorney, and full confrontation, it does not mention the main sexual misconduct policy (AD85).<sup>138</sup> The multiple policies and processes raise the specter of an administrative process finding facts and reaching one conclusion and sanction, followed by a second process utilizing different standards and reaching different conclusions. Given the complex interrelationship between these policies, it is likely a faculty member at Penn State facing dismissal would petition the Committee on Faculty Rights and Responsibilities under AC76 for a procedural fairness violation in addition to the sexual harassment allegation.<sup>139</sup> In this scenario, unless there were coordination between the Office of Affirmative Action and the Committee on Faculty Rights and Responsibilities at the outset, a second investigation might take place.<sup>140</sup>

The key point: An online policy that is not codified in any university policy suggests a lack of finality regarding the policies and procedures in place. To be fair, the procedures mentioned at Penn State, Indiana, and Kansas all appear to be in an annual state of revision. To what degree are faculty included, and how should they be included, in these policy revision discussions? Penn State's Policy on Policies states, "If a University Policy would significantly affect academic issues and/or the faculty, the Responsible Official must consult as appropriate or required with the Provost's Office, the University Faculty Senate, and the Academic Leadership Council prior to final approval."<sup>141</sup> Given AD85's effective date of September 29, 2016, and the online policy date of April 22, 2015, it appears to be a choice not to reference procedures for faculty in the AD85 policy.<sup>142</sup> Contrasting the three universities' policies, Indiana examined all affected policies when it updated the university sexual misconduct policy. Kansas began the process of revising its faculty code, leading to a negotiation with the faculty. Penn State's conflicting policies demonstrate the vast numbers of governance mechanisms which must be coordinated in order comply with Title IX and the discrepancies often seen between student and faculty processes.

### *Processes in Conflict at Berkeley*

What happens when a complaint of misconduct against a faculty member is received at an institution with confusion over which procedures to use? This is precisely what occurred at the University of California, Berkeley, with

137. Penn State AD85, *supra* note 121.

138. Penn State AC70, *supra* note 129 at C. Referral to Standing Joint Committee on Tenure.

139. Penn State AC76, *supra* note 131.

140. *Id.* at F, B1, "Consultation Between Bodies."

141. PENN STATE UNIV., ACADEMIC POLICIES, AD00 POLICY ON POLICIES, "Approval," (2013, rev. 2015), <https://policy.psu.edu/policies/AD00> [hereinafter Penn State AD00].

142. Penn State AD85, *supra* note 171; Penn State Employee Disciplinary Proceedings, *supra* note 121.

a case involving Law Dean Sujit Choudhry. In July 2015 an investigation found Choudhry responsible for a violation of the university's misconduct policy against his assistant Tyann Sorrell.<sup>143</sup> On July 30, 2015, Executive Vice Chancellor and Provost Claude Steele handed down the sanctions in a letter that noted if there were any further violations, "you may be subject to immediate further disciplinary action, up to and including your termination as Dean."<sup>144</sup> Provost Steele, who resigned in April 2016, later lamented the sanctions: "I would not defend those sanctions. At the time, we thought they were adequate . . . I'm not confident that they really rendered justice or a sense of fairness . . . ."<sup>145</sup>

Following a lawsuit Sorrell filed in March 2016 against Choudhry and the UC Board of Regents, Choudhry took an indefinite leave of absence from his position as Dean but remained on faculty.<sup>146</sup> UC President Napolitano, in a letter to UC Berkeley Chancellor Nicholas Dirks, asked Dirks to ban Choudhry from campus for the rest of the semester and called for the Academic Senate to initiate disciplinary proceedings that could result in employment termination.<sup>147</sup> Choudhry then filed a grievance for the launching of a second disciplinary process, arguing it violated fair procedures and due process.<sup>148</sup>

Choudhry cited the investigation report indicating that before approving the discipline, Provost Steele was to review the matter under the Faculty Code of Conduct.<sup>149</sup> Choudhry also cited the Faculty Code of Conduct and Disciplinary Procedures for the Berkeley campus: "Before filing formal charges with [the Committee on Privilege and Tenure], the [Executive Vice

143. Sujit Choudhry Investigation Report, *supra* note 4, at 3; Sam Levin, 'I Was Expendable': How UC Berkeley Failed a Woman Being Sexually Harassed, *GUARDIAN*, Aug. 15, 2016, <https://www.theguardian.com/us-news/2016/apr/26/uc-berkeley-sexual-harassment-tyan-sorrell-sujit-choudry>.

144. Letter from Sujit Choudhry, I. Michael Heyman Professor of Law, University of California, Berkeley, School of Law, to Vern Paxson, Chair of the UC Berkeley Privilege and Tenure Committee, Exhibit A "Sanctions Letter" 23-24 (Aug. 1, 2016), <http://leiterlawschool.typepad.com/files/2016-08-01----ltr-to-paxson.pdf> [hereinafter Choudhry Aug. 1 Letter].

145. Levin, *supra* note 143.

146. Yoon-Hendricks & Hussain, *supra* note 4; Tyann Sorrell v. Regents of the University of California, No. RG16806802, 2016\_WL\_943629 (Cal. Super. 2016).

147. Andra Platten, *Napolitano Addresses Sexual Misconduct Cases, Orders Graham Fleming Fired From New Post*, *DAILY CALIFORNIAN*, Mar. 12, 2016, <http://www.dailycal.org/2016/03/12/graham-fleming-fired-from-role-as-berkeley-global-campus-ambassador/>.

148. Choudhry Aug. 1 Letter, *supra* note 144; Letter from Sujit Choudhry, I. Michael Heyman Professor of Law, University of California, Berkeley, School of Law, to Vern Paxson, Chair of the UC Berkeley Privilege and Tenure Committee (Apr. 22, 2016), <http://leiterlawschool.typepad.com/files/2016-04-22-grievance-letter-with-exhibits.pdf>.

149. Choudhry Aug. 1 Letter, at Exhibit E (July 20, 2016 Letter from William Taylor III, Zuckerman Spaeder LLP, to Marie Trimble Holvick and Michael Lucey, Gordon Rees Scully Mansukhani, LLP (citing Sujit Choudhry Investigation Report, *supra* note 4, at 12 ("This report will be forwarded to the Provost's Office for further review under the Faculty Code of Conduct.")).



Chancellor and Provost] may offer a settlement involving a proposed sanction. If the sanction is accepted by the accused faculty member, a hearing . . . shall not be necessary.”<sup>150</sup> According to Choudhry, “I was assured repeatedly that the sanctions I agreed to in July 2015 were the sole and final ones to which I would or could be subjected.”<sup>151</sup>

On May 31, 2016, the Committee on Privilege and Tenure denied Choudhry’s grievance, determining that the first disciplinary case reflected an administrative process rather than a faculty discipline process.<sup>152</sup> On September 15, Choudhry sued the University of California, Berkeley, claiming racial discrimination and seeking injunctive relief and damages for violation of his due-process rights.<sup>153</sup> In April 2017 Choudhry reached a settlement with the UC Board of Regents, which agreed to terminate the disciplinary process against Choudhry in return for Choudhry’s dropping his lawsuit and paying restitution to Sorrell.<sup>154</sup>

In the midst of the Choudhry situation, a Joint Committee of the Administration and Academic Senate issued a report in April 2016 outlining its findings on how the University of California manages disciplinary proceedings for faculty respondents in sexual misconduct cases.<sup>155</sup> The committee found that campus policies and procedures were “fundamentally sound but that misunderstandings and misinformation sometimes impede full and optimal implementation . . . .”<sup>156</sup> The committee’s report also raised several key questions: What is the role of the Title IX officer in determining faculty code violations? Does the Title IX office determine discipline? What is the interface between the Title IX investigation and the subsequent disciplinary hearing investigation?<sup>157</sup> The committee first circulated the report for comments, and one notable area of concern involved the standard of proof required for

150. Choudhry Aug. 1 Letter, at Exhibit E (quoting UC Berkeley’s Faculty Code of Conduct, APM-015, then in effect).

151. Choudhry Aug. 1 Letter, at 5.

152. Choudhry Aug. 1 Letter, at Exhibit B, 41 (Letter from Paxson to Choudhry denying grievance).

153. Fernanda Zamudio-Suarez, *Former Law Dean Accused of Harassment Sues Berkeley*, CHRON. HIGHER EDUC., Sept. 15, 2016, <http://www.chronicle.com/blogs/ticker/former-law-dean-accused-of-harassment-sues-berkeley/114302>.

154. Chantelle Lee, Jessica Lynn & Pressly Pratt, *UC Board of Regents Reaches Settlements with Sujit Choudhry, Tyann Sorrell*, DAILY CALIFORNIAN, Apr. 14, 2017, <http://www.dailycal.org/2017/04/14/tyann-sorrell-settles-lawsuit-against-sujit-choudhry-uc-regents/>.

155. UNIV. OF CALIFORNIA, REPORT OF THE JOINT COMMITTEE OF THE ADMINISTRATION AND ACADEMIC SENATE (Apr. 2016), [http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee\\_Report-Faculty-Discipline-Process.040416.pdf](http://sexualviolence.universityofcalifornia.edu/files/documents/Joint-Committee_Report-Faculty-Discipline-Process.040416.pdf) [hereinafter University of California Joint Committee Report].

156. *Id.* at 4.

157. *Id.* at 4-5.

Title IX versus faculty disciplinary procedures.<sup>158</sup> While Title IX requires a “preponderance of evidence,” the faculty discipline procedures require “clear and convincing evidence” to show a violation of the Faculty Code of Conduct.<sup>159</sup> The committee called for a clarification of the use of these different standards.<sup>160</sup> The Choudhry situation at UC Berkeley highlights the quandary that takes place when conflicting policies and procedures are invoked to remove faculty with the right to a level of due process before termination. Notably, the dispute highlights a campus working through shared governance to determine how to address issues of faculty sexual misconduct.

## V. CONCLUSION AND RECOMMENDATIONS

At Indiana University, the University of Kansas (if the sanction is less than dismissal), and Penn State University, students are afforded hearings at the initial determination level, but faculty at each institution have no such right. Even where a hearing is provided, the rights to confrontation and to attorney representation are attenuated at best. Questions remain regarding the preponderance standard of evidence, a standard that conflicts in nearly every instance with the clear-and-convincing standard of proof required to dismiss a tenured faculty member. As evidenced by all three institutions’ policies, it is very difficult to understand the maze of policies and procedures governing instances of campus sexual misconduct. To effectively handle and prevent occurrences of sexual misconduct, universities must include faculty in all elements of Title IX work to ensure academic freedom and due process are protected, along with the legitimacy of campus efforts to effectively handle and prevent campus sexual misconduct.

Universities and their faculties must respect academic freedom and tenure as both rights and responsibilities.<sup>161</sup> The AAUP Statement of Ethics clearly prohibits sexual misconduct: As teachers, professors are to “avoid any exploitation, harassment, or discriminatory treatment of students,” and to “not discriminate against or harass colleagues.”<sup>162</sup> As mandatory reporters, faculty must step forward when they know of instances of faculty malfeasance

158. *Id.* at 44.

159. *Id.*

160. *Id.* (The committee suggested two different purposes for the standards, and noted “a preponderance of the evidence is required to implement Title IX and impel the Administration to act on the complainant’s behalf, to stop the behavior of the respondent, prevent its reoccurrence, take action to insure the safety and well-being of the complainant, and remedy the situation on behalf of the complainant. Clear and convincing evidence is required to invoke formal discipline of the faculty respondent beyond invoking intervention and remediation.”).

161. AM. ASS’N. U. PROFESSORS, 1940 STATEMENT OF PRINCIPLES ON ACADEMIC FREEDOM AND TENURE 14 (1940, rev. 1970) <https://www.aaup.org/file/1940%20Statement.pdf> [hereinafter AAUP 1940 Statement] (“Academic freedom . . . applies to both teaching and research . . . . It carries with it duties correlative with rights.”).

162. AM. ASS’N. U. PROFESSORS, STATEMENT ON PROFESSIONAL ETHICS #2-3 (1966, rev. 2009), <https://www.aaup.org/report/statement-professional-ethics> [hereinafter AAUP Ethics].

toward students, staff, or other faculty. Faculty perpetrators act with impunity because of student and staff fear of retaliation, because administrators and faculty colleagues decline to challenge politically strong individuals, or out of a desire to protect the institution from negative publicity. Untenured faculty, staff, and students are at greater risk for retaliation when making reports against established and respected faculty. Further, retaliation is not always easy to identify or prove. To encourage reporting, faculty must advocate for the institution to take active steps to monitor possible signs of retaliation. This includes redefining retaliation not simply as reprisal regarding promotion, evaluation, or denial of benefits, but also ostracism, maltreatment, and bullying. A range of penalties for retaliation must be clearly articulated and publicized.

Second, the use of an ombudsman can help potential complainants think through the issue in a confidential manner. Most notably, an ombudsman can focus additional training or prevention programming in departments deemed at risk without violating the confidentiality of the potential complainant. Even where the complainant decides not to move forward with an official complaint, through general anonymous reports by the ombudsman the university still collects data that can be helpful. Understanding incredibly complex policies necessitates a confidential resource.<sup>163</sup> Educating the campus about ombudsmen and their benefits can increase utilization rates, both by complainants unsure they want to report and by mandatory reporters struggling with how to respect complainant wishes while also complying with university policy.

Finally, procedurally just and understandable policies will help to boost reporting. If potential complainants do not believe the processes to be fair or legitimate, they will be less likely to bring a complaint forward. As mandatory reporters who work most frequently with students, faculty must ensure sexual misconduct policies are understandable, just, and implemented. Law faculty can play an especially important role by educating their colleagues to understand:

- The deference provided to university administrative processes by our current jurisprudence, and the differences between administrative and criminal processes.
- The negative impact on victims and the campus climate of criminalizing campus sexual misconduct procedures.<sup>164</sup>
- The due-process disadvantage many faculties face as compared with students.
- The benefits to reporting and to the legitimacy of the system of faculty buy-in and active participation in the design of Title IX procedures.
- The strengths and weaknesses of the three main complaint handling models.

163. Pappas, *supra* note 23.

164. Cantalupo, *supra* note 61, at 523 (arguing that schools assuming a traditional policing, criminal justice approach to victim reporting perpetuate a high victim non-reporting rate and contravene the intent of the law).

MODEL	STEP 1	STEP 2	STEP 3
<b>Investigation</b>	Administrator(s) investigate(s), determine(s) facts, outcome and sanctions (hearing for Title IX purposes) [preponderance standard]	n/a	Appeal to administrator or a panel with a potential hearing [must meet grounds for review]
<b>Hearing</b>	Administrator(s) investigate(s), determine(s) facts, substantiate(s) charge [preponderance standard]	Hearing before panel or administrator to determine outcome and sanction [preponderance standard]	Appeal to an administrator [must meet grounds for review]
<b>Hybrid</b>	Administrator(s) investigate(s), determine(s) facts and outcome [preponderance outcome]	Panel or administrator determines sanctions	Appeal to a hearing before an administrator or panel [must meet grounds for review]

The main benefits of the investigation model are that it encourages complaints and limits harmful confrontation. With an administrative investigation and determination and no adversarial hearing, the process is faster, involves fewer actors, and is likely more consistent than hearing models, in which a variety of trained panel members may make decisions. Further, without any direct engagement between the complainant and the respondent, the investigation model may encourage more potential complainants to come forward.

The disadvantages of the investigation model are the advantages of the hearing model. While a hearing in the investigation model, if offered, is possible only after meeting limited grounds for review, in the hearing model, after an administrative “charge,” a hearing and some form of confrontation occurs at the initial level. Additionally, in the hearing model typically the investigator and the administrator or panel making the decision are not one and the same. The weaknesses of the hearing model include less efficiency, as it requires a larger number of cases to go through hearings. As a result, the model may discourage complainant reporting. Alternatively, providing greater process and separating investigation from determination and sanctioning strengthens the reliability of the results and the integrity and reputation of the system.

The hybrid model attempts to rectify the investigation model’s main weakness by separating the investigative and determination/sanction functions while retaining much of the efficiency of the investigation model. The hybrid model does, however, still require appellants to meet certain grounds for review to access a hearing before a panel or administrator. As illustrated by the Indiana, Kansas, Penn State, and Berkeley examples, each model is designed and executed in a slightly different way. With multiple policies and procedures implicated, a collaborative and inclusive process involving faculty, staff, and students must be utilized to ensure the best possible system is designed and properly executed.

Administrative policies describing student sexual misconduct procedures are often promulgated without significant faculty involvement. Imposing the

student procedures on faculty, or utilizing existing faculty processes while eroding the standard of proof and other procedural safeguards without faculty input and ratification, erodes shared governance. A June 2016 AAUP report, *The History, Uses, and Abuses of Title IX*, describes Title IX policy development:

The process of adopting and implementing Title IX procedures has been carried out in parallel with—but independent of—the policies and practices of academic freedom, due process, and shared governance, all of which are crucial to the work of faculty members and students at all stages of their academic careers as well as to sustaining the university’s educational mission.<sup>165</sup>

The report describes campus Title IX policy development as overreliance on administrative discretion, prioritizing liability risks over addressing the real problem of campus inequality.<sup>166</sup> The report argues such “administrative overreliance also erodes faculty governance and academic freedom—the very preconditions necessary to address such inequality on campus and beyond.”<sup>167</sup> For faculty to buy into a mandatory reporting regime, shared governance processes must be utilized to ensure a legitimate administrative process complying with OCR requirements and faculty due-process rights.

So how can universities comply with both OCR mandates and faculty due-process requirements? It would be a grave mistake for faculty to assume the issue no longer requires attention because of the election of Donald Trump. Federal oversight of how colleges and universities handle sexual assault may subside or disappear.<sup>168</sup> But despite facing less enforcement from the federal government, universities and colleges will likely still follow the letter and spirit of the law as Title IX and the accompanying regulations will still be obligatory.<sup>169</sup>

OCR mandates can be followed, and faculty rights protected, as efficiency and quality are not mutually exclusive concepts. For example, where OCR requires preponderance but many faculty dismissal procedures require clear and convincing, it is not all or nothing. First, it is possible to comply with the OCR required preponderance standard without doing so in every type of hearing. For example, Michigan State University’s faculty handbook notes, “In all faculty discipline, the University bears the burden of proof that adequate cause exists; it will be satisfied only by clear and convincing evidence unless a different standard is required by law.”<sup>170</sup> While sexual misconduct allegations

165. AAUP Title IX, *supra* note 48, at 87.

166. *Id.* at 21.

167. *Id.*

168. Robin Wilson, *Trump Administration May Back Away From Title IX, But Campuses Won't*, CHRON. HIGHER EDUC., Nov. 11, 2016, <http://www.chronicle.com/article/Trump-Administration-May-Back/238382?elqTrackId=ffb39ad426d40b9a0c8bc988b4af3c5&elq=1a834a475d714e53817f10d78bfa4245&elqaid=11452&elqat=1&elqCampaignId=4477>.

169. *Id.*

170. MICH. STATE U., FACULTY HANDBOOK, DISCIPLINE AND DISMISSAL OF TENURED FACULTY FOR

require a preponderance level of proof, Michigan State is not extending that standard to all faculty dismissal hearings.

Second, utilizing a higher burden of proof to protect against procedural irregularities is merely a Band-Aid. Instead, universities should focus on the actual problem and work to eliminate the procedural irregularities. The AAUP recommends “developing policies and procedures that are responsive to the laudable goals of Title IX yet are respectful of . . . [the] due-process rights of faculty members and students alike.”<sup>171</sup> For example, it is possible to provide greater confrontation of witnesses while respecting the OCR requirements. First, schools should allow faculty or students to present the fact-finder or hearing board with questions to ask the other side “to further the truth-seeking goals of the proceedings.”<sup>172</sup> Utilizing technology where the complainant and respondent attend in separate rooms, revictimization can be avoided while still preserving the right of confrontation.<sup>173</sup> Where the complainant chooses not to participate, interrogatories should be provided to ensure confrontation. Third, given the prescribed nature of the hearings, universities should provide greater freedom for attorney participation to enhance the proceedings’ legitimacy with little impact on efficiency. Fourth, the move toward investigation and hybrid models may be motivated by the difficulty in finding qualified panelists. Law faculty, if they properly understand the administrative versus criminal nature of Title IX, are ideally situated to assist on Title IX panels. Finally, universities must find creative ways of avoiding all-or-nothing sanctions. In a September 19, 2016, *Chronicle of Higher Education* op-ed, Brian Leiter argued that existing sexual misconduct penalties either are *de minimis* or they send terminating faculty and their bad behavior to other universities or private-sector jobs.<sup>174</sup> Leiter advocates for serious internal sanctions to change behavior but also incentives to provide an opportunity for redemption.<sup>175</sup> This commentary similarly rejects an all-or-nothing approach and recommends faculty and administrators collaborate on Title IX.

With the exception of the AAUP Title IX report, the vast majority of the commentary and writings regarding the new Title IX compliance regime are directed at the risks to student respondents.<sup>176</sup> Significant disparities exist between student and faculty due-process rights in campus Title IX processes. The argument is not in favor of more or less rights for students or faculty, but

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CAUSE, V. Types of Discipline (1967, rev. 2015), [https://www.hr.msu.edu/policies-procedures/faculty-academic-staff/faculty-handbook/tenure\\_discipline\\_dismissal.html](https://www.hr.msu.edu/policies-procedures/faculty-academic-staff/faculty-handbook/tenure_discipline_dismissal.html).

171. AAUP Title IX, *supra* note 48, at 19-20.

172. Law Professors’ White Paper, *supra* note 61, at 8.

173. See, e.g., PSU Student Code & Procedures, *supra* note 154, at V.D.I.j.iv-vi.

174. Brian Leiter, *Academic Ethics: What Should We Do With Sexual Harassers in Academe?*, *CHRON. HIGHER EDUC.*, Sept. 19, 2016, <http://www.chronicle.com/article/Academic-Ethics-What-Should/237821>.

175. *Id.*

176. See, e.g., *supra* note 9.

for the university community to work collaboratively to create clear policies and procedures. OCR does not compel institutions to choose between fundamental fairness and continued acceptance of federal funding.<sup>177</sup> While administrators and faculty may disagree with the OCR guidance or universities' legal due-process requirements, by including faculty in all stages of Title IX policy development, implementation, and enforcement, universities will create policies that protect due process and ensure the legitimacy of campus efforts to combat sexual misconduct.

177. Law Professors' Open Letter, *supra* note 7, at 1 ("In pursuing its objectives, however, OCR has unlawfully expanded the nature and scope of institutions' responsibility to address sexual harassment, thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding.").