

Title IX on the Line: Ethical Implications of Title IX Sexual Assault Enforcement and Lawyers' Roles

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INTRODUCTION

Sexual misconduct on college campuses is a tragically ubiquitous and highly politicized phenomenon. It affects innumerable students every year, yet few understand the legal framework of its adjudication, even as they are aware of the controversy surrounding it. As an undergraduate, I was continuously cognizant of the shortfalls of my school's system for addressing student-on-student sexual misconduct through publicity surrounding the constant scandals it was embroiled in and from anecdotal evidence of the nightmarish outcomes my friends and peers experienced when they interacted with our Title IX office. Like many students, my impression of what followed reporting an allegation of sexual misconduct was a prolonged, intrusive, and opaque bureaucratic process run by indifferent administrators whose priority was minimizing the school's vulnerability to public relations damage.

After learning in-depth about the legal framework of campus sexual assault adjudication and the recent enforcement climate, my impression still has not changed much. Sexual misconduct in schools is adjudicated through Title IX of the Education Amendments of 1972, which prohibits sex discrimination by institutions receiving federal funds¹ and has been interpreted to include sexual misconduct as creating a discriminatory hostile environment.² Each school is required by the Department of Education's ("DOE") regulations on Title IX to have a full-time Title IX administrator, who is responsible for creating procedures that are compliant with Title IX and adjudicating individual complaints.³ These adjudications, run by the school's Title IX administrator and whatever staff they hire, are often the final word on whether sexual misconduct occurred and, if so, what the consequences will be. As such, these administrators and their staff yield a huge amount of power over individual students' lives and are usually the group to blame when an outcome of a particular case or set of procedures becomes

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1. 20 U.S.C. §§ 1681–1688 (2012).

2. *See generally* Franklin v. Gwinnet Cty. Pub. Schs., 503 U.S. 60 (1992).

3. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/77HV-M8HD>] [hereinafter 2011 DCL].

controversial.⁴ As this Note will show, Title IX sexual assault adjudications (which attracted so much scandal at my alma mater) can be and often are catastrophically disruptive to the lives of the students involved, effectively furthering the discrimination the law aims to prevent. Importantly, many schools rely on retaining outside lawyers to adjudicate individual complaints, who sometimes possess sole fact-finding and decision-making discretion with little to no oversight.⁵ Title IX law considers inadequate or noncompliant adjudication procedures to be evidence of an overall discriminatory atmosphere;⁶ therefore the lawyers making procedural and substantive decisions in these cases are in effect responsible for creating or contributing to discrimination against students on the basis of sex.

This Note will argue that these lawyers are at the cusp of an unstable ethical realm marked by rapidly changing social norms and federal enforcement priorities. Furthermore, when found to be noncompliant with Title IX and thus responsible for perpetuating further discrimination, the actions of these lawyers may be prohibited under a recent amendment to the *Model Rules of Professional Conduct*. Model Rule 8.4(g) makes it professional misconduct for lawyers to engage in conduct that constitutes discrimination on the basis of sex, among other attributes, in the course of their practice.⁷ However, it defines prohibited misconduct based on substantive non-discrimination law,⁸ which in the case of Title IX sexual assault adjudication, does not provide sufficient clarity to meaningfully guide lawyers' actions.

I. TITLE IX ENFORCEMENT FRAMEWORK

This Part will explain in detail how Title IX's prohibition against sex discrimination is enforced in the context of sexual harassment and misconduct and illustrate how lawyers are involved in the process. Section A will first explain the conceptual background of sexual misconduct as an element of civil rights law and how it was applied to the educational context. Section B will describe the legal structures that dominate the present enforcement climate and the implications of the current system's reliance on administrative oversight, and Section C will describe the changes proposed by the Trump administration and their impact on regulated entities.

4. See generally, e.g., Nancy Gertner, *Sex, Lies, and Justice*, THE AM. PROSPECT (Jan. 12, 2015) [<https://perma.cc/E6VV-JQUP>].

5. This is especially the case at schools that use a fact-finding and decision-making process known as the "single investigator" model, in which a single individual has authority to find all the facts relevant to the investigation. See *id.*; Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 932 (2016).

6. See generally OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/VRN8-8R7P>] [hereinafter 2001 GUIDANCE].

7. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

8. MODEL RULES OF PROF'L CONDUCT R. 8.4(g) cmt. 3.

A. HOSTILE ENVIRONMENT SEXUAL HARASSMENT IS SEX DISCRIMINATION UNDER TITLE IX

Surprisingly to many, the concept and legal recognition of sexual harassment as a separate harm from rape and sexual assault is a relatively recent development.⁹ Feminist academics such as Catharine MacKinnon are credited with first articulating in the 1970s a phenomenon that sounded familiar to many women: routine sexual coercion or advances in the workplace that often produced significant adverse impacts on their personal and economic livelihoods but did not rise to the level of any tort or criminal prohibition.¹⁰ They called it “sexual harassment,”¹¹ and analogized this ubiquitous occurrence to the ways that racism systematically disadvantaged people of color. They argued that since the harassment affected women based on the immutable trait of gender,¹² it should be actionable in the same way that harms resulting from racism are—as civil rights violations.

Although the statutory enforcement framework had not yet developed, the concept of sexual harassment as sex discrimination prohibited by Title IX was endorsed by the courts in *Alexander v. Yale University*.¹³ Although the plaintiffs’ claims were eventually dismissed, the district court agreed that “academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education.”¹⁴ The holding was limited to concrete quid-pro-quo violations, but this understanding would soon be expanded to include more amorphous environmental factors, and importantly, the court acknowledged that the university’s failure to respond appropriately can amount to “condoning or ratifying the . . . invidiously discriminatory conduct.”¹⁵

This paralleled developments in the employment context, culminating in the landmark decision in *Meritor Savings Bank v. Vinson*, in which the Supreme Court officially extended Title VII, the law prohibiting sex discrimination in the workplace, to cover sexual harassment.¹⁶ Furthermore, the Court held that actionable sexual harassment was not limited to quid-pro-quo situations (soliciting or demanding sexual favors in return for an employment benefit) but included

9. See Anna Dorn, *Workplace Sexual Harassment Law: A Primer*, MEDIUM (Dec. 22, 2017), <https://medium.com/s/all-rise/workplace-sexual-harassment-law-a-primer-4119b44d992b> [https://perma.cc/ZQC9-PBUT].

10. *Id.*

11. Lin Farley, *I Coined the Term ‘Sexual Harassment.’ Corporations Stole It*, N.Y. TIMES (Oct. 18, 2017), <https://www.nytimes.com/2017/10/18/opinion/sexual-harassment-corporations-steal.html> [https://perma.cc/8FXV-QKFT].

12. To be clear, sexual harassment can and does affect individuals of all gender identities, including men. See, e.g., Michael Alison Chandler, *Men Account for Nearly 1 in 5 Complaints of Workplace Sexual Harassment with the EEOC*, WASH. POST (April 8, 2019), https://www.washingtonpost.com/local/social-issues/men-account-for-nearly-1-in-5-complaints-of-workplace-sexual-harassment-with-the-eec/2018/04/08/4f7a2572-3372-11e8-94fa-32d48460b955_story.html [https://perma.cc/KWC3-YCZZ].

13. 459 F. Supp. 1 (D. Conn. 1980).

14. *Id.* at 4.

15. *Id.* (quoting *Barnes v. Costle*, 561 F.2d 983, 1000 (D.C. Cir. 1977) (MacKinnon, J. concurring)).

16. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986).

intangible noneconomic injuries such as the creation of a “hostile or abusive work environment.”¹⁷ The standards the Court laid out to determine whether a hostile environment exists continue to define sexual harassment law to this day: the conduct must be “severe or pervasive” and the sexual advances must be “unwelcome,” which the Court distinguished from “voluntariness.”¹⁸ The requirement of severity *or* pervasiveness allowed for the possibility that a single instance of misconduct, if severe enough (such as rape or sexual assault) to create a sufficiently hostile environment.¹⁹

“Voluntariness” (or consent), by contrast, is the basis for determining permissibility of sexual conduct in the criminal context, and this important difference reflects on Title VII’s nature as a civil rights law analyzing an overall work environment. Specifically, “welcomeness” encourages a more holistic analysis of a disputed claim of harassment than merely asking whether the victim’s response was strictly “voluntary.”²⁰ This requires considering a broad range of contextual factors such as the relative authority of the employees involved, the offensiveness and duration of the conduct, and the effect on the victim, including her employment and productivity.²¹ A “hostile environment,” for its part, must be determined by the totality of the circumstances, and the Court offered the guidance that it essentially “[forces] a man or woman [to] run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living”²²

These substantive elements of the newly-developed hostile environment sexual harassment claim under Title VII were carried over to academia, where students can sue their schools for a sexually hostile environment that functions to deny them equal access to an education.²³ A major turning point was the Supreme Court’s decision in *Franklin v. Gwinnet County Public Schools*, which held that students could recover for violations of Title IX as a result of a hostile environment created by another student, rather than someone employed at the school.²⁴ This kind of case—student-on-student sexual harassment and assault—was becoming synonymous with the general idea of sexual misconduct on campus. It remains so today, as it is well accepted that most rapes are committed by someone

17. *Id.* at 66.

18. *Id.* at 67–68.

19. *Richardson v. N.Y. State Dep’t of Corr. Serv.*, 180 F.3d 426, 437 (2d Cir. 1999) (quoting *Torres v. Pisano*, 116 F.3d 625, 631 (2d Cir.1997)).

20. Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J. FORUM 281, 300 (2016), <http://www.yalelawjournal.org/forum/for-the-title-ix-civil-rights-movement-congratulations-and-cautions> [https://perma.cc/RM6N-UYAU].

21. *See id.* at 300–01.

22. *See Meritor*, 477 U.S. at 67 (quoting *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982)).

23. *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 897–99 (1st Cir. 1988). The Supreme Court had previously ruled that Title IX contained an implied right of action, but until this point had not ruled on the question of whether students could collect monetary damages. *Cannon v. University of Chicago*, 441 U.S. 677, 688–89 (1979).

24. *Franklin v. Gwinnet Cty. Pub. Schs.*, 503 U.S. 60, 75 (1992).

known to the victim, as opposed to a stranger.²⁵ The “severe or pervasive” standard from *Meritor* that had been applied to the educational realm also included the negligence standard that had been established for the vicarious liability of the employer. This meant that schools could be held civilly liable for failing to correct a hostile environment it knew or should have known would be created by the conduct of a student.²⁶

B. ENFORCEMENT MECHANISMS AND IMPLICATIONS

By the beginning of the 1990s, public consciousness around issues of sexual violence, particularly at colleges, was increasing and putting pressure on lawmakers to react.²⁷ Congress responded to the shocking and well-publicized rape and murder of a college student named Jeanne Clery in her dorm room by enacting the Clery Act of 1990, requiring schools to report incidents of violent crime in and around their campus and their policies for responding.²⁸ In 1994, it passed the Violence Against Women Act (the “VAWA”), which included an “unprecedented” federal cause of action for the right to be free from sexual violence, allowing victims to sue their alleged assaulters under a similar civil rights framework as that underlying the Title IX hostile environment remedy.²⁹ The Clinton administration’s DOE Office for Civil Rights (the “OCR”), likely also responding to the increasing political pressure to address the problem, issued policy guidance in 1997. It warned that it considered a school’s failure to take “immediate and appropriate corrective action” when it knew or should have known about a hostile environment to constitute a violation of Title IX, and that it would actively monitor compliance.³⁰

1. DECLINE IN ENFORCEMENT THROUGH PRIVATE ACTION

For better or worse, it was only a few years before the Supreme Court issued a series of decisions that significantly limited the ability of plaintiffs to recover monetary damages for sexual assault, especially in the educational context. In *Davis v. Monroe County Board of Education*, the Court held that in order to prove a school’s liability for a hostile environment under Title IX, students had to prove that their school was deliberately indifferent to the abuse, requiring a showing of

25. *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://www.rainn.org/statistics/perpetrators-sexual-violence> [<https://perma.cc/6CDT-BQTK>].

26. See *Franklin*, 503 U.S. at 75.

27. See Karen M. Tani, *An Administrative Right to Be Free from Sexual Violence? Title IX Enforcement in Historical and Institutional Perspective*, 66 *DUKE L.J.* 1848, 1854–55 (2017).

28. *Id.*

29. *Id.* at 1860 (quoting Victoria F. Nourse, *Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy*, 11 *WIS. WOMEN’S L.J.* 1, 5, 7 (1996)).

30. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., *SEXUAL HARASSMENT GUIDANCE 1997: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 6* (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/K85J-USL2>].

actual knowledge by the school³¹ and that it acted “clearly unreasonably”³² in light of it. Troubling to many, the Court explained that schools were not liable for sexual harassment of the students in their care unless they “cause students to undergo harassment” or “make them . . . vulnerable” to it.³³

Despite the *Davis* Court’s insistence that limiting schools’ liability (to a more forgiving standard than exists in the employment context)³⁴ would not drastically affect the ability of meritorious plaintiffs to recover,³⁵ scholars argue that the result has been just that.³⁶ The circuit courts have differed in their application of the test, but as Catharine MacKinnon (architect of the conceptual framework of sexual harassment as sex discrimination) points out, the trend is clear:

The standard is easy for schools to satisfy, including on motions to dismiss or summary judgment, while doing little about sexual abuse – either its perpetrator or its consequences for survivors and other potential targets . . . Varying by circuit, heedless incompetence or even malignant coverups may not always qualify as deliberately indifferent.³⁷

Showing actual knowledge is the first hurdle for plaintiffs to clear and has proven difficult and unpredictable, even in cases where authorities or officials at the school were factually informed of an ongoing abusive situation. One threshold issue is who can be said to have authority to represent the school: there seem to be no intelligible principles across cases for determining who has the requisite authority to receive notice.³⁸ In addition to causing the dismissal of worthwhile claims, this unpredictability incentivizes schools to “avoid knowledge rather than set up procedures by which survivors can easily report.”³⁹ This stands in stark contrast to the constructive knowledge standard, which encourages schools to

31. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998) (requiring actual knowledge by the school and a deliberately indifferent response in cases of teacher-student sexual harassment).

32. *Davis ex rel Shonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648–49 (1999) (applying actual knowledge/deliberate indifference standard to student-on-student sexual harassment and clarifying that deliberate indifference required a showing that the school enacted not only unreasonably, but *clearly* unreasonably).

33. *Id.* at 645.

34. Employers are liable for failing to correct a hostile environment or adequately address quid-pro-quo harassment between employees if they knew or should have known about the harassment and acted negligently. *See Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986).

35. *Davis*, 526 U.S. at 649.

36. *See, e.g.*, Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 *YALE L.J.* 2038, 2040–41 (2016); Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence*, 43 *LOY. U. CHI. L.J.* 205, 227 (2011).

37. MacKinnon, *supra* note 36, at 2068.

38. *See Cantalupo, supra* note 36, at 227–28 (noting that “In some cases . . . where the harasser is a teacher or school official, if only another teacher or official of equal rank has knowledge of the harassment,” courts have found this insufficient to satisfy actual knowledge.).

39. Cantalupo, *supra* note 36, at 232.

institute procedures designed to discover and address harassment, out of fear a court will find that they should have known and are liable.⁴⁰

Furthermore, many courts will not find actual knowledge satisfied without a series of sufficiently similar complaints that the school ignored. Some courts have required such extremely specific and individualized notice concerning the particular perpetrator, the particular victim, and the specific manner of abuse, that they would not find a school to have proper notice of abuse unless “they are informed of an exact specific possibility that then becomes an actuality.”⁴¹ This interpretation of the actual knowledge prong requires more abuse to occur before a school can be held to have “actual knowledge” of an existing incident of misconduct, and has led to dismissal of claims in which it was undisputed that the school allowed a known harasser to remain in contact with students prior to the litigated incident.⁴²

There is absolutely no predisposition that courts are concerned about incentivizing schools to take appropriate measures or err on the safe side. For example, the 7th Circuit has held that a school cannot have sufficient warning of existing, escalating abuse to be held liable unless it is informed of harm that is “almost certain to materialize if nothing is done.”⁴³ This is just one example among a comprehensive survey MacKinnon provides of cases in which courts have interpreted the actual knowledge prong to amount to a virtual “one free rape” rule, precluding recovery unless there is a sufficiently similar prior incident of abuse about which the school was informed.⁴⁴

Furthermore, the deliberate indifference prong, asking whether the school’s response was “clearly unreasonable in light of known circumstances”⁴⁵ has not made things much easier for Title IX plaintiffs, even under the most egregious factual circumstances.⁴⁶ Almost any nominal response by the school upon learning of the harassment, including when it is predictably ineffective at abating or remedying it, can be sufficient to absolve the institution of liability under deliberate indifference. For example, schools have been found to have acted

40. *Id.* at 232 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 296 (1998) (Stevens, J., dissenting)).

41. MacKinnon, *supra* note 36, at 2070. MacKinnon gives numerous examples of cases in which the court found the school lacked actual knowledge based on not “knowing” which particular student would be targeted, even after having been properly informed that the same teacher had abused a different student or students. *See, e.g.*, *E.R. v. Lopatcong Twp. Middle Sch.*, No. 13-1550, 2015 WL 4619665, at *2-3 (D. N.J. July 31, 2015). Additionally, schools have been let off the hook for actual knowledge of abuse that was “too different” in manner than conduct of which they had previously been informed, even when involving the same teacher and student(s). *See, e.g.*, *Harden v. Rosie*, 99 A.3d 950, 954-63 (Pa. 2014).

42. *See* MacKinnon, *supra* note 36, at 2071.

43. *Hansen v. Bd. of Trs. of Hamilton Se. Sch. Corp.*, 551 F.3d 599, 606 (7th Cir. 2008) (quoting *Delgado v. Stegall*, 367 F.3d 668, 672 (7th Cir. 2004)).

44. MacKinnon, *supra* note 36, at 2078 (quoting *S.S. v. Alexander*, 177 P.3d 724, 741 (Wash. Ct. App. 2008)).

45. *Davis ex rel Shonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 648 (1999).

46. *E.g.*, *Porto v. Town of Tewksbury*, 488 F.3d 67, 69-71 (1st Cir. 2007).

“reasonably” for actions such as giving the perpetrator a firm talking-to not to sexually harass that student again,⁴⁷ or suggesting that the parents of the student call the police, even as the abuse is ongoing and the perpetrator remains in contact with students.⁴⁸ The strongest cases for plaintiffs on this issue tend to have occurred no more recently than the early 2000s⁴⁹ (in the first few years of the deliberate indifference standard). More recently, courts have been even more reluctant to exercise hindsight bias by second-guessing the actions of school officials,⁵⁰ especially when the case is brought by the harassment victim.⁵¹

Importantly, this exacting standard for school liability is even harder for plaintiffs to meet when they attempt to claim for harassment committed by another student, cases which are much more commonly adjudicated by school Title IX offices. In its opinion establishing the deliberate indifference standard, the *Davis* Court found that peer-sexual harassment is less likely to be serious enough to amount to discrimination under Title IX, and that even when it is, schools are responsible for responding only to the extent that they are able to exercise “substantial control” over the perpetrator and the harassing behavior.⁵²

This dicta has proven problematic for survivors at the higher education level, where an epidemic of peer sexual assault is flourishing precisely in the kinds of factual situations that the courts appear to think schools should not be responsible for. For example, one school was held not to have responded “clearly unreasonably” when a rape occurred in an off-campus apartment.⁵³ Courts are instructed to engage in a fact-centric inquiry to judge whether a school’s response to a properly-reported instance of harassment was “clearly unreasonable,” but also that it is supposed to be an “extremely high standard to meet.”⁵⁴ As a result, and courts allow for a finding of deliberate indifference only in “limited circumstances.”⁵⁵

MacKinnon’s survey of the cases decided on this prong makes clear that such a high bar for deliberate indifference functions to virtually preclude recovery under Title IX for the vast majority of factual scenarios that arise in the college sexual assault context. She predicts in addition to causing the dismissal of claims as a matter of law, the dim chances for success under deliberate indifference discourages would-be plaintiffs from bringing claims at all.⁵⁶ This prediction does make

47. See, e.g., *Litman v. George Mason Univ.*, 186 F.3d 544, 547 (4th Cir. 1999).

48. See, e.g., MacKinnon, *supra* note 36, at 2080.

49. *Id.* at 2081.

50. *Porto*, 488 F.3d at 74, 76.

51. As will be elaborated later, the recent trend is an increase in civil claims under Title IX brought by individuals accused of harassment, rather than the alleged victims. See, e.g., Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED (October 3, 2019), <https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings> [<https://perma.cc/CLA2-X5JD>].

52. *Davis ex rel Shonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 645 (1999).

53. See, e.g., *Roe v. St. Louis Univ.*, 746 F.3d 874, 884 (8th Cir. 2014).

54. MacKinnon, *supra* note 36, at 2083 (quoting *Stewart v. Waco Indep. Sch. Dist.*, 711 F.3d 513, 519 (5th Cir. 2013) (quoting *Domino v. Tex. Dep’t of Criminal Justice*, 239 F.3d 752, 756 (5th Cir. 2001))).

55. *Id.* (quoting *Doe v. Bd. of Educ. of Prince George’s Cty.*, 982 F. Supp. 2d 641, 654 (D. Md. 2013)).

56. *Id.* at 2083.

logical sense. The prohibitive cost of litigation—combined with the knowledge that courts tend to accept almost any purportedly responsive action by the school as satisfactory short of explicit hostility towards the complainant—likely is sufficient to discourage most college student survivors from attempting to vindicate their Title IX rights through private action.

Between the deliberate indifference requirement of Title IX and the Supreme Court's decision in *United States v. Morrison*, survivors of sexual assault in the educational context have few options for individualized recovery. In 2000, the Supreme Court held that the private right of action under VAWA, allowing survivors of gendered violence to sue their assaulters in federal court, was an overreach of Congress' authority under the Commerce Clause and invalidated that provision of the statute.⁵⁷ Although there had not been a huge number of claims brought under VAWA, the symbolic significance of eliminating the civil rights remedy arguably is the turning point marking the beginning of the enforcement regime in effect today.⁵⁸ One of the last actions by the Clinton Administration's Department of Education was issuing the "Revised Sexual Harassment Guidance in 2001," which made a point to emphasize that its oversight of schools' compliance with Title IX would not be bound by the limitations imposed by the Supreme Court on the plaintiffs' recovery through private action.⁵⁹ The guidance document reaffirmed its earlier regulations and clarified that compliance with Title IX required schools to act to address sexual harassment that they knew or should have known about, thereby explicitly rejecting the more permissible deliberate indifference standard for institutional responsibility in favor of constructive knowledge.⁶⁰

2. ACTIVIST ENFORCEMENT THROUGH ADMINISTRATIVE OVERSIGHT

While the case law discussed above made clear that the private right of action could not be depended upon to secure favorable outcomes for survivors of sexual assault, contours of the more recent enforcement climate began to take shape that revolved around the Department of Education's oversight authority rather than private suits brought by individual plaintiffs. Even during the Bush Administration, its OCR indicated its willingness to hold schools to a higher standard when it came to their responses to peer-sexual harassment, especially sexual assault. One foreshadowing example in 2003 was the case of Georgetown University, which required a sexual assault victim to sign a non-disclosure agreement before it would inform her of the results of the adjudicatory proceeding

57. *United States v. Morrison*, 529 U.S. 598, 602 (2000).

58. Tani, *supra* note 27, at 1855–1863.

59. 2001 GUIDANCE, *supra* note 6, at ii.

60. *Id.* at iv.

against the accused student.⁶¹ She filed a complaint with OCR, which ultimately found a violation of Title IX and signed a resolution agreement with Georgetown requiring the university to completely change its procedures for adjudicating such claims, notably including the use of a preponderance of the evidence standard for determining guilt.⁶²

This pattern of enforcement—revolving around the Department of Education’s authority to revoke a school’s federal funding⁶³—came to dominate. Rather than (or often in addition to) filing a claim against the school in federal court, the target of the alleged discriminatory conduct files a complaint with OCR. OCR then conducts an investigation, and if it agrees that Title IX was violated, it typically signs a “voluntary” resolution agreement with the school, including both systemic policy changes needed to bring the school into compliance and measures to resolve the individual complaint.

A crucial turning point was the issuance of what has come to be known as the Dear Colleague Letter (the “DCL”) in April 2011, an informal guidance document detailing the Obama Administration’s requirements for schools to remain in compliance with Title IX.⁶⁴ President Obama made sexual assault on college campuses a political priority,⁶⁵ and his DOE’s interpretation of Title IX responded to this pressure. It required the “prompt and equitable”⁶⁶ resolution of complaints and broadly defined both sexual harassment (“unwelcome conduct of a sexual nature”)⁶⁷ and a discriminatory hostile environment (“conduct . . . sufficiently serious that it interferes with or limits a student’s ability to participate in or benefit from the school’s program”).⁶⁸ Importantly, it explicitly stated that conduct which occurred exclusively off-campus could suffice to create one.⁶⁹ In 2014, it followed up the DCL with the “Questions and Answers” guidance document (the “Q&A Document”),⁷⁰ which affirmed the DCL’s principles and expanded its substantive requirements, discussed in detail below. Complaints quickly skyrocketed, and OCR correspondingly launched dozens of investigations and publicized which schools were under investigation and the content of

61. Nick Timiraos, *Disclosure Struck by Federal Review*, THE HOYA (Aug. 27, 2004), <https://thehoya.com/disclosure-struck-by-federal-review/> [<https://perma.cc/KY3P-JLT>].

62. Tani, *supra* note 27, at 1868.

63. Provision of federal funds is the basis for Congress’ authority to regulate private schools in the first place.

64. *See generally* 2011 DCL, *supra* note 3.

65. *See* KC Johnson & Stuart Taylor, Opinion, *The Path to Obama’s ‘Dear Colleague’ Letter*, WASH. POST (Jan. 31, 2017), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/> [<https://perma.cc/673Y-TWDJ>].

66. 2011 DCL, *supra* note 3, at 8.

67. *Id.* at 3.

68. *Id.*

69. *Id.* at 4.

70. OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/LHF3-JEGL>] [hereinafter Q&A DOCUMENT].

the resolution agreements into which students entered.⁷¹ The political climate surrounding the “epidemic” of campus sexual assault remained heated, and schools that were seen as not responsive enough to the problem developed severe public relations problems that threatened their ability to attract students.⁷²

The enforcement regime created by these two documents has been widely criticized as pro-complainant, mandating procedures that unfairly disadvantage students accused of assault. One of the most controversial requirements imposed by these regulations was the use of the preponderance of the evidence standard throughout all parts of the adjudicatory process. Previously, the DOE had not specified any required evidentiary standard and some schools’ policies used the higher “clear and convincing evidence” standard.⁷³ The regulations also included measures designed to protect the complainant from being further traumatized by the adjudication, responding to a common criticism of the existing procedures at many schools.⁷⁴ Many critics were strongly troubled that this meant schools now had an explicit responsibility to provide interim accommodations allowing the complainant to avoid the alleged perpetrator, before there had been any finding of guilt.⁷⁵ Such measures could include imposing restrictions on the accused student’s behavior and access to campus programs.⁷⁶ Further, the DCL strongly discouraged schools from allowing the parties to an adjudication to personally cross-examine one another or requiring them to remain in the same room, all of which was seen by critics as constituting an impermissible and significant infringement on the due process rights of accused students.⁷⁷

The DCL and Q&A Document mandated the appointment of a designated Title IX Coordinator at each school to oversee complaints; however, other than specifying that this person not have a conflict of interest with any other roles at

71. See, e.g., OFFICE FOR CIVIL RIGHTS, U.S. DEP’T OF EDUC., PENDING CASES CURRENTLY UNDER INVESTIGATION AT ELEMENTARY-SECONDARY AND POST-SECONDARY SCHOOLS AS OF JANUARY 3, 2019 7:30 AM SEARCH, (2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html> [<https://perma.cc/NTV6-588T>].

72. Media such as *The Hunting Ground* documentary drew attention to the nationwide prevalence of campus sexual assault, and to the failures of specific schools whose students spoke out about their negative experiences attempting to pursue adjudications through the campus disciplinary process. *THE HUNTING GROUND* (The Weinstein Company 2015). Even though some of these specific examples were disputed (at least in some degree), the image of schools orchestrating cover-ups and attempting to minimize the perceived incidence of sexual misconduct became entrenched. See, e.g., Casey Quinlan, *The Rolling Stone Story Had a Lasting Effect on the UVA Campus*, THINK PROGRESS (Nov. 1, 2016), <https://thinkprogress.org/the-rolling-stone-story-had-a-lasting-effect-on-the-uva-campus-eb2ef822b160/> [<https://perma.cc/BE5P-U2NJ>].

73. *Responding to Criticisms of the Proposed Department of Education Title IX Regulations*, THE FIRE (Nov. 20, 2018), <https://www.thefire.org/responding-to-criticisms-of-the-proposed-department-of-education-title-ix-regulations/> [<https://perma.cc/Z6AX-PQ82>].

74. See, e.g., Jennifer J. Freyd, Ph.D., *Institutional Betrayal and Institutional Courage*, UOREGON.EDU (2019), <https://dynamic.uoregon.edu/jjf/institutionalbetrayal/> [<https://perma.cc/QMP9-G5J7>].

75. See Q&A DOCUMENT, *supra* note 70, at 32.

76. See, e.g., Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. FORUM 103, 116 (Feb. 18, 2015) [<https://perma.cc/NF7R-9X8Q>].

77. *Id.*

the school, it left much of the structure of the adjudicatory process to the discretion of each school. Schools were not required to allow hearings, but if they did, they could not require the complainant to attend. All that was required was the opportunity for both parties to present witnesses and other evidence,⁷⁸ although they could not permit the introduction of evidence of the complainant's sexual history with anyone other than the respondent.⁷⁹ Lawyers, expert testimony, and the opportunity to appeal a decision were optional as long as they were equally available to both parties.⁸⁰ Public schools had to comport with constitutional guarantees of procedural due process, but the Q&A Document stressed that it was unnecessary to guarantee the procedural protections expected in criminal proceeding, because Title IX adjudications could not result in incarceration.⁸¹

Keeping in mind these requirements and the publicity pressure to appear sensitive to the needs of survivors and “crack down” on the epidemic, schools revamped their disciplinary policies and adjudicatory procedures. Since 2011, OCR has investigated and signed resolution agreements with hundreds of schools.⁸² Even though they were triggered by individual complaints alleging a hostile environment created by the school's response in a particular case, OCR investigations under the Obama Administration typically systemically analyzed a school's policies and overall caseload, actively looking for Title IX violations. As such, they often took years to complete and resulted in broad, large-scale changes to the school's policies.⁸³

The “pro-complainant” substance of the requirements under the Obama Administration's enforcement regime sparked fierce backlash immediately, as did the outcomes of the resulting adjudicatory procedures instituted at schools. A diverse range of legal scholars criticized the Obama DOE's approach for incentivizing the use of procedures that protected the alleged victim from further traumatization at the expense of the due process rights of the accused student, pointing out that the sanctions that often accompany a finding of guilt for sexual misconduct—such as expulsion—are severe and long-lasting, and should thus be considered significant deprivations meriting robust procedural protections.⁸⁴ Their point of view was reflected in a number of successful lawsuits brought by

78. Q&A DOCUMENT, *supra* note 70, at 12.

79. *Id.* at 31.

80. *Id.* at 26.

81. *Id.* at 27.

82. *See, e.g.*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., PENDING CASES CURRENTLY UNDER INVESTIGATION AT ELEMENTARY-SECONDARY AND POST-SECONDARY SCHOOLS as of January 3, 2019 7:30 am Search, (2019), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/open-investigations/index.html> [<https://perma.cc/NTV6-588T>].

83. *See generally* Alyssa Peterson & Olivia Ortiz, Feature, *A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints*, 125 *YALE L.J.* 2132 (2016).

84. *See, e.g.*, Tovia Smith, *Harvard Law Professors Say New Sexual Assault Policy Is One-Sided*, NPR (Oct. 15, 2014), <https://www.npr.org/2014/10/15/356424999/harvard-law-professors-say-new-sexual-assault-policy-is-one-sided> [<https://perma.cc/5FZ3-QZRW>].

accused students who alleged that they had been judged guilty in unfair adjudications in which procedural elements had failed to consider or give proper weight to exculpatory evidence.⁸⁵

One common procedural deficiency which gave rise to litigation under the DCL regime was the use of the single-investigator model, in which a single individual was vested with fact-finding and decision-making authority, including talking to witnesses, gathering and examining other evidence, and making the ultimate determination of guilt or innocence. Plaintiffs argued, and judges often agreed, that due process could not be achieved in a procedure where one individual has such unbridled discretion, especially given the less rigorous evidentiary standard and restrictions on cross-examining one's accuser.⁸⁶ Furthermore, in many cases, the decisions of the single investigators were effectively shielded from review or oversight; schools were not required to offer an appeals process, so aggrieved students' only options for recourse were costly litigation or filing a complaint with OCR, both of which would almost certainly take years to complete even in the best-case scenario. Advocates for accused students emphasized that single-investigators were biased by institutional incentives to err on the side of protecting complainants to avoid the public relations nightmare of being labeled as insensitive to the needs of assault victims or risk a finding of noncompliance with the DOE's activist interpretation of Title IX that could jeopardize their federal funding.⁸⁷

However, the single-investigator model made Title IX adjudications vulnerable to criticism from complainants and their advocates as well. For example, during my last year at California Polytechnic State University, San Luis Obispo ("Cal Poly"), the school's use of a single investigator to resolve an already controversial case helped inflame the scandal.⁸⁸ The single investigator, an experienced attorney who specialized in Title IX adjudications,⁸⁹ investigated and dismissed three of seven separate complaints filed against a single respondent.⁹⁰ Two of those complainants turned over the official reports of their adjudications to the student newspaper, which named the single investigator and published the

85. See, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 569 (D. Mass. 2016). In that example, the plaintiff won on a breach of contract theory, since private schools are not subject to constitutional due process guarantees.

86. See *id.* at 604–605.

87. Gersen & Suk, *supra* note 5, at 909.

88. See, e.g., Gina Randazzo, *One of Three Title IX Cases Filed Against Same Individual Alleges Non-Consensual Oral Sex, Investigator Denies Misconduct in All*, MUSTANG NEWS (May 16, 2018), <https://mustangnews.net/one-of-three-title-ix-cases-filed-against-same-individual-alleges-non-consensual-oral-sex-investigator-denies-misconduct-in-all/> [<https://perma.cc/FZ7M-FM59>].

89. Liz Paris, *Partner, AWI-CH, Our Team*, VAN DERMYDEN MADDUX, <https://vmlawcorp.com/our-team/liz-paris/> [<https://perma.cc/B47N-QHEW>].

90. Randazzo, *supra* note 88; Gina Randazzo, *Student Speaks Out About Title IX Case Involving Repeat Sexual Assailant*, MUSTANG NEWS (Dec. 2, 2017), <https://mustangnews.net/student-speaks-title-ix-case-involving-alleged-repeat-sexual-assailant/> [<https://perma.cc/G66U-N84X>].

reasons she gave for dismissing the charges.⁹¹ Many students were dissatisfied with the investigator's conclusions and reasoning, leading to protests at that year's graduation ceremonies and widespread criticism.⁹² The perception amongst many students was that this single individual, vested with sole fact-finding and decision-making authority, had come to a series of decisions that appeared to defy the preponderance of the evidence that had been made public.⁹³ Regardless of whether her conclusions regarding the allegations were reasonable or her fact-finding and decision-making processes were standard, the notion that one individual seemed to possess unlimited discretion with no oversight to decide such a contentious issue exacerbated some students' frustrations.⁹⁴ The publicity these cases received contributed to the ongoing controversy surrounding the school's Title IX system, which has undermined its credibility in the eyes of the student body it is supposed to serve.⁹⁵

C. TRUMP ADMINISTRATION REFORMS

In 2017, the Trump Administration's DOE, headed by Betsy DeVos, rescinded both the DCL and the Q&A Document, reflecting the administration's purported policy aim of restoring the due process rights of accused students.⁹⁶ It also explicitly repudiated the Obama DOE's activist approach to the federal government's role in Title IX sexual assault policy; it promptly closed over 100 investigations into alleged school hostile environments and stopped OCR's former practice of publicizing investigations prior to their resolution.⁹⁷ In November 2018, it proposed a new rule to codify these goals. Although the rule has not yet gone into

91. Randazzo, *supra* note 88.

92. Andrew Sheeler, 'Your Voice Matters': Calls for Activism at Cal Poly Graduation Caps Tumultuous Year, SLO TRIBUNE (June 16, 2018) <https://www.sanluisobispo.com/news/local/education/article213284024.html> [<https://perma.cc/2XNG-E8DK>]; @NoRedTapeCalPoly, *President Armstrong Has Failed. Title IX Has Failed*, FACEBOOK, https://www.facebook.com/events/1222597967877263/?active_tab=discussion (a Facebook event page inviting students to protest at graduation in response to the school's handling of the case) [<https://perma.cc/V4KX-TPJC>].

93. @NoRedTapeCalPoly, *President Armstrong has failed. Title IX has failed*, FACEBOOK, https://www.facebook.com/events/1222597967877263/?active_tab=discussion [<https://perma.cc/V4KX-TPJC>].

94. *See id*; Gina Randazzo, *Time's Up Student Activists Release Demands for Administration Regarding Sexual Assault on Campus*, MUSTANG NEWS (Mar. 7, 2018) <https://mustangnews.net/times-student-activists-release-demands-administration-regarding-sexual-assault-campus/> [<https://perma.cc/5LM6-PWKH>].

95. *See* Sabrina Pascua, *A Senior Turned Her Story into a Sexual Assault Investigation of 61 Student Survivors*, MUSTANG NEWS (April 11, 2019), <https://mustangnews.net/a-senior-turned-her-story-into-a-sexual-assault-investigation-of-61-student-survivors/> [<https://perma.cc/MV9M-5WT5>].

96. DEP'T OF EDUC., PRESS OFFICE, DEPARTMENT OF EDUCATION ISSUES NEW INTERIM GUIDANCE ON CAMPUS SEXUAL MISCONDUCT (Sept. 22, 2017) <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/QJ26-LF5W>].

97. *Experts Warn Betsy DeVos's New Title IX Rules Will Lead to Onslaught of Pricey Lawsuits as Feds Take Huge Step Back from Sexual Assault Cases*, THE 74 MILLION (June 17, 2019), <https://www.the74million.org/article/experts-warn-betsy-devos-new-title-ix-rules-will-lead-to-onslaught-of-pricey-lawsuits-as-feds-take-huge-step-back-from-sexual-assault-cases/> [<https://perma.cc/DJW6-G87Z>].

effect, some schools paused ongoing investigations while they rewrote policies to comply with the changes in the proposed rule.⁹⁸

The proposed rule would institute changes to the DOE's administrative oversight of schools' Title IX obligations, some of which sound familiar. It includes a much narrower definition of hostile environment sexual harassment that constituted prohibited discrimination compared to that contained in both the DCL and the 2001 Guidance: unwelcome conduct on the basis of sex that is "so severe, pervasive, and objectively offensive" that it effectively denies a person equal access to the recipient's education program or activity.⁹⁹ Notably, this definition is identical to the one laid out in *Davis v. Monroe County Board of Education*, the 1999 Supreme Court decision delineating actionable harassment in the context of civil damages liability. The proposed rule also holds that a school only is responsible for addressing allegations of sexual harassment about which it has "actual knowledge," defined as notice received by a school's Title IX Coordinator or an official with authority to institute corrective measures.¹⁰⁰ It explicitly rejects any imputation of knowledge to a school on the basis of *respondeat superior* or constructive knowledge,¹⁰¹ which had been the standard for triggering a school's Title IX obligations in the administrative realm since 2001.¹⁰² Furthermore, the Trump DOE would require schools to respond only to harassment that occurs within its "educational program or activity."¹⁰³ This is a notable departure from the Obama Administration's policy of requiring schools to consider off-campus conduct in evaluating whether a hostile environment existed. Additionally, under the Trump DOE's proposal, a school is in violation of Title IX if its response to harassment (of which it is properly notified) is "deliberately indifferent," or "clearly unreasonable in light of the known circumstances."¹⁰⁴

The proposed rule also includes specific procedural requirements designed to protect the due process rights of accused students. It states that a school's response to an allegation of harassment can constitute discrimination based on its treatment of either the complainant or respondent.¹⁰⁵ It also requires that Title IX

98. See, e.g., Ashley Ladin, *CSU-Wide Title IX Changes Mean Sexual Misconduct Investigations Are Paused and Some Reopened*, MUSTANG NEWS (Feb. 9, 2019), <https://mustangnews.net/csu-wide-title-ix-changes-mean-sexual-misconduct-investigations-are-paused-and-some-reopened/> [<https://perma.cc/7ZBP-FPAU>]. Importantly, halting investigations based on the extended timeline of the notice-and-comment period for legislative rulemaking means that many of the students involved will graduate before their cases are resolved, thus becoming moot.

99. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf> [<https://perma.cc/45FR-EUBG>].

100. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,496 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106.30).

101. *Id.*

102. 2001 GUIDANCE, *supra* note 6, at iv.

103. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61,468, 61,497.

104. *Id.* at 61,466.

105. *Id.* at 61,497.

proceedings at any institution of higher education must include a live hearing, with the right of cross-examination conducted by the party's advisor (which schools are required to permit), although the parties may remain in separate rooms and submit to questioning through the use of technology.¹⁰⁶ Determinations of responsibility would be able to use either the preponderance of evidence standard, or clear and convincing evidence, but schools can use the former only if the same applies for non-sexual conduct violations as well. Finally, the ultimate decision-maker cannot be the school's Title IX Coordinator, or the person who investigates facts in the case,¹⁰⁷ thereby prohibiting use of the single-investigator model discussed above.

II. ETHICAL IMPLICATIONS

Clearly, the meaning of Title IX as it applies to sexual harassment and assault in higher education is unsettled. However, the broader framework within civil rights law remains consistent: the inadequate response of individual schools to an existing hostile environment constitutes additional discrimination. Because Title IX's prohibition against sexual assault in education is now enforced largely in individual adjudications and OCR oversight of schools, lawyers who adjudicate individual cases play a primary role in giving the law itself meaning. Which factual situations are considered to create a hostile environment that schools are responsible for addressing and which actions by the school constitute discrimination will be illustrated in the years to come—by the outcomes of adjudications at individual schools, OCR investigations into compliance, and litigation following both. Even if the administrative definition of a hostile environment remains static and in effect for long enough to generate illustrative case law, swiftly changing societal norms surrounding sexual harassment and assault generally will complicate enforcement practices at the country's colleges and universities. Lawyers who play a role in adjudicating cases at the school disciplinary level, such as at my college, are on notice that their professional actions might amount to actionable discrimination on the basis of sex, and will undoubtedly play a role in the broader movement to end sexual misconduct.

Model Rule 8.4(g) makes it professional misconduct for a lawyer to “engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.”¹⁰⁸ Importantly, the Rule itself goes on to state that this “does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph

106. *Id.* at 61,498.

107. *Id.* at 61,499.

108. MODEL RULES OF PROF'L CONDUCT R. 8.4(g).

does not preclude legitimate advice or advocacy consistent with these Rules.”¹⁰⁹ Given this qualification, it is unlikely that individual attorneys will face sanctions for their role in a Title IX adjudication that is later found to be part of a discriminatory hostile environment, absent unusual circumstances. However, at least thirty-four states have adopted Rule 8.4(g) or similar language,¹¹⁰ which reflects an important shift in the legal profession and the problem of sexual harassment. The adoption of this language was motivated by an approaching consensus that harassing or discriminatory conduct by a lawyer should not be justified simply because it is done in the service of advocacy for one’s client or genuine job performance.

Even if lawyers do not have to worry immediately about formal sanctions for contributing to a discriminatory hostile environment by conducting Title IX adjudications, there might be consequences for the legal profession as a whole. The comments to Rule 8.4(g) explain that it was adopted because “[d]iscrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system.”¹¹¹ Social norms surrounding sexual misconduct are changing as swiftly as the DOE’s interpretation of Title IX, which complicates the efforts of adjudicators to comply with even the most objective, neutrally-written policies. The events at Cal Poly in 2018 should provide a reminder that black-letter law cannot be separated from the actions and choices of individual lawyers executing or otherwise interacting with it, at least in terms of how it affects regulated parties like schools and students. As various industries confront their own histories of condoning sexual harassment and discrimination generally, the legal profession must pay close attention to its unique role in the evolving frontier of the campus sexual assault epidemic.

The comments to Rule 8.4(g) recognize that not only will the legal profession suffer from the perception that it serves to perpetuate or otherwise condone discrimination by schools, the efficacy of the law itself is at stake. The perceived failures of Title IX at Cal Poly dominated campus discourse for the entire school year, and continued to define students’ impression of the enforcement system as a whole after the alleged assailant had graduated.¹¹² Even if the actions of the adjudicator of the case in 2018 were justified by her professional obligations to the school, the controversy the case generated has undermined the credibility of the Title IX system as students’ primary non-criminal recourse when they are sexually assaulted. This perceived lack of reliability is compounded by uncertainty regarding the effect of the Trump administration’s proposed changes, which have

109. MODEL RULES OF PROF’L CONDUCT R. 8.4(g).

110. Kristine A. Kubas, Cara D. Davis, & Mary E. Schwind, *The Evolution of Model Rule 8.4 (g): Working to Eliminate Bias, Discrimination, and Harassment in the Practice of Law*, AM. BAR ASS’N (March 12, 2019) https://www.americanbar.org/groups/construction_industry/publications/under_construction/2019/spring/model-rule-8-4/ [https://perma.cc/YQ3E-XSXXG].

111. MODEL RULES OF PROF’L CONDUCT R. 8.4(g) cmt. 3.

112. See Pascua, *supra* note 95.

already begun to cause controversy and undermine confidence in the efficacy of the Title IX enforcement system.¹¹³

Currently, the comments to Model Rule 8.4(g) state that “the substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).”¹¹⁴ It is unclear whether this means that a violation is automatically established by a finding that a school’s response to sexual misconduct in which a lawyer participated (such as a Title IX adjudication) constituted an illegal hostile environment. The text of the Rule itself seems to weigh against this, but the substantive law of Title IX makes clear that the prohibited conduct at which the law aims can include a school’s response to existing discrimination, whether executed by a lawyer or not. To effectively guide lawyers practicing in Title IX adjudications, the comments to Rule 8.4(g) should be amended to address when a lawyers’ work in service of their clients constitutes a violation. It is not sufficient to defer to the substantive non-discrimination law, as illustrated by the fluctuation and uncertainty underlying the future of Title IX regulations. The legal profession must provide its members with guiding principles to help them navigate the complicated dynamics surrounding the adjudication of sexual misconduct, so that lawyers may remain in compliance with Model Rule 8.4(g) even as their clients or their policies may be out of compliance with Title IX.

Even more than other industries and the rest of society, the legal profession must be conscious of its role in addressing sexual misconduct and other forms of discrimination. The laws governing sexual assault in schools are rapidly changing and subject to the political motivations of regulators,¹¹⁵ which make the actions of individual lawyers acting on behalf of regulated entities central to the impact of the entire enforcement system. This phenomenon is not unique to the Title IX sexual assault context, but this evolving area of law raises novel issues regarding the balance lawyers must strike between zealous advocacy for their clients and avoiding the perpetuation of further discrimination.

CONCLUSION

Having attended my college graduation ceremony with “IX” marked on my cap in red duct tape in protest of the Title IX system, I began my legal education with a visceral understanding of the capacity of individual lawyers to exacerbate a discriminatory environment, even unintentionally. This Note seeks to illustrate the complicated ethical issues raised by the current Title IX enforcement climate, and the need for professional guidance aimed at lawyers navigating this important area of law.

113. See Kyla Osburn, *Cal Poly Fights Back Against Proposed Title IX Changes*, MUSTANG NEWS (Feb. 25, 2019) <https://mustangnews.net/cal-poly-fights-back-against-proposed-title-ix-changes/> [<https://perma.cc/73A9-DS5T>].

114. MODEL RULES OF PROF’L CONDUCT R. 8.4(g) cmt. 3.

115. See, e.g., Johnson & Taylor, *supra* note 66 (arguing that the Obama administration’s approach to Title IX sexual assault enforcement reflected particular political priorities).

Substantive Title IX law continues to evolve, but what remains constant is the underlying premise that recipients of federal funds (schools) can themselves be responsible for committing illegal discrimination by inadequately responding to existing acts of discrimination, including sexual harassment or assault by students. The DOE is authorized to revoke the funding of schools whose response to actionable discrimination violates Title IX by creating or failing to alleviate a hostile environment for the victim of that discrimination. Unfortunately, what constitutes actionable discrimination, and what response by the school is appropriate, is unsettled. As the Trump administration's Proposed Rule proceeds through notice-and-comment rulemaking, lawyers who execute Title IX compliance policies on behalf of schools and adjudicate individual cases are tasked with fulfilling their obligations to their clients while navigating complex societal norms around consent. The *Model Rules* have been amended to prohibit the perpetuation of discrimination by lawyers but fail to provide sufficient clarity regarding what actions by lawyers are included. Although Rule 8.4(g) does not evince an intent to sanction lawyers whose clients are responsible for discrimination, it relies on substantive non-discrimination law to determine prohibited conduct. In the Title IX realm, where the meaning of the law is inseparable from the actions of lawyers executing it (even if the enforcement climate was not rapidly changing), simply deferring to the contours of substantive law is not sufficient. To accomplish the *Model Rules'* aim of protecting the reputation of the legal profession and prevent the unwitting perpetuation of discrimination by its members, Rule 8.4(g) should be amended to address the ethical obligations of lawyers whose professional roles make them subject to Title IX.

Title IX remains controversial at Cal Poly. Many students who witnessed the protests at my graduation, for the class of 2018, still attend the school, and run the student newspaper that stepped in to document an injustice. The future of Title IX's enforcement climate and substantive requirements is unclear, but whatever the DOE says, the meaning at Cal Poly will be even less stable. The widespread distrust students feel for Cal Poly's Title IX system means that it will not be capable of "effective protection" regardless of what its policies are, and to some extent, sexual misconduct at the school will be harder to address without a means of non-criminal recourse students can rely on. This is largely due to the effects of one lawyer's role, and indicates the gravity of the responsibility lawyers accept when they practice in this area. In an area where the legality is so conceptually dynamic, the ethical rules must be refined to guide lawyers' conduct and prevent damaging the reputation and credibility of the legal profession when it comes to discrimination.