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Title IX in the Age of Trump: An Evaluation of Institutional Administrators' Responses to the Proposed New Guidelines

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Title IX in the Age of Trump:

An Evaluation of Institutional Administrators' Responses to the Proposed New Guidelines

PUBLIC POLICY & LAW HONORS THESIS

BY BROOKE LePAGE

**Fall 2018-Spring 2019
Trinity College, Hartford, CT**

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TABLE OF CONTENTS

| | |
|---|----|
| ACKNOWLEDGEMENTS..... | 3 |
| ABSTRACT..... | 4 |
| INTRODUCTION..... | 5 |
| CHAPTER 1: Roadmap of Controversy: A Comprehensive History of Title IX..... | 7 |
| • Introduction to Title IX | |
| • Two Major Areas of Implementation (1972-Present) | |
| • Secretary DeVos (2017-Present) | |
| • Conclusion | |
| CHAPTER 2: Roadmap of Guidance: A timeline of the new proposed Title IX guidance and an analysis of its major differences from the Obama-era guidance..... | 23 |
| • Background & Timeline | |
| • Major Changes in the Proposed Guidance | |
| • Conclusion | |
| CHAPTER 3: Methodology and Results..... | 36 |
| • Introduction | |
| • Methodology | |
| • Results | |
| • Conclusion | |
| CONCLUSION..... | 59 |
| APPENDIX 1: 2011/2014 and 2018 Comparison Chart..... | 60 |
| BIBLIOGRAPHY..... | 64 |

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This project also would not have been possible without the support of my thesis advisors: Professor Adrienne Fulco and Professor Rachel Moskowitz. The amount that I learned from both of you cannot properly be expressed in these short remarks. You both taught me to be an advocate for women and to be a strong woman myself. Additionally, you both had more confidence in me when I seemed to have lost it in myself. The success of my project is as much yours as it is mine. I am forever indebted to you both for all of the lessons you taught me. Thank you, thank you, thank you.

Finally, to survivors of sexual assault and sexual harassment: I hear you and I believe you.

ABSTRACT

This thesis examines the impact of the Title IX proposed new guidance that Secretary of Education under President Trump, Betsy DeVos, released in November 2018 as well as institutional administrator's responses regarding how these proposed changes will impact their students and their ability to do their jobs. Ultimately, the answers to these questions are used to evaluate the level to which institutional administrators are committed to the Obama-era guidance in light of the new proposed guidance. In order to assess these questions, this thesis utilizes an IRB-approved survey about the proposed change in definition of sexual harassment, change in an institutions' off-campus responsibilities, change in definition of an institution having actual knowledge of an incident and change in standard of evidence sent to Title IX Coordinators/Deputy Title IX Coordinators, VPs/Deans of Students/Campus Life and Directors of Women/Gender/Equity centers at 28 colleges and universities in the northeast. The results indicate that, overall, institutional administrators are committed to the Obama-era guidance and that there may be relationships between job title/position and gender identification and the degree to which institutional administrators agree or disagree with these components of the proposed new guidance.

INTRODUCTION

Sophomore year, I took a Public Policy & Law course at Trinity College called *Title IX: Changing Campus Culture*. This course opened my eyes to the role of sexual harassment and sexual assault in gender inequity in higher education. This course inspired me to work alongside my fellow bantams on the student working group Addressing Sexual Misconduct. My junior year, rather than partaking in a traditional study abroad program, I did a semester in Washington D.C. taking courses at American University and interning three days a week at the United States Department of Education as the higher education intern in the Office of Legislation and Congressional Affairs. This allowed me to learn as much as I could about the government entity that creates, and rolls back, Title IX guidance. Senior year, I ultimately decided to write my senior honors thesis on Title IX. Because of my research, I have had the opportunity to be the teacher's assistant for the same course that fostered my passion for the issue, work closely with the professor of the course who became my thesis advisor and assist Trinity with crafting its response during the notice-and-comment period.

This thesis adds something unique to Title IX literature during a time when Title IX has nearly become another third-rail of politics. In November 2018 while I was in the middle of writing the first chapter of my thesis, Secretary DeVos released her long-awaited, newly proposed Title IX guidance. Although there is existing literature on the implications of some of the components such as how a change in standard of proof may affect students and the process, there is not much existing literature evaluating how institutional administrators foresee the proposed new guidance impacting their students and their ability to do their jobs. There is also not much existing literature assessing their commitment to the Obama-era guidance despite the fact that a new administration has proposed different guidance. Knowing this, my thesis adds a

unique evaluation of how institutional administrators at New England Small College Athletic Conference (NESCAC), Ivy League and their respective flagship state school foresee these changes impacting their students, whether their priorities match that of the Department of Education and ultimately their commitment to the Obama-era guidance.

CHAPTER 1: Roadmap of Controversy

A Comprehensive History of Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”¹

Introduction to Title IX

On June 23, 1972, President Richard Nixon signed Title IX of the Federal Education Amendments of 1972 intending to decrease gender disparity in higher education programs receiving federal funds.² Title IX, formally known as Title 20 U.S.C. Sections 1681-1688, is the product of hearings held by Congresswomen Edith Green from Oregon in 1970.³ The daughter of two school teachers, Congresswomen Green has often been thought of fondly as “Mrs. Education” and “the Mother of Higher Education.”⁴ The hearings she held in the early 1970s on educational inequity are often considered the first legislative step toward the passage of Title IX.⁵ During the hearings, Congresswomen Green claimed, “let us not deceive ourselves, our educational institutions have not proven to be no bastions of democracy.”⁶ Although she insisted that she avoided women’s issues because she would “become too emotionally involved,”

¹ “Title IX, Education Amendments of 1972 - Office of the Assistant Secretary for Administration and Management (OASAM) - United States Department of Labor.” Accessed October 22, 2018.

<https://www.dol.gov/oasam/regs/statutes/titleix.htm>.

² “Title IX, Education Amendments of 1972”

³ “Title IX, Education Amendments of 1972.”

“Title IX: A Sea Change in Gender Equity in Education.” Statistical Reports. Accessed November 19, 2018.

<https://www2.ed.gov/pubs/TitleIX/part3.html>.

⁴ “GREEN, Edith Starrett | US House of Representatives: History, Art & Archives.” Accessed November 14, 2018.

<https://history.house.gov/People/Detail/14080>.

⁵ “Title IX: A Sea Change in Gender Equity in Education.”

⁶ “GREEN, Edith Starrett”

Congresswomen Green indeed advanced women’s rights as it pertains to equity in higher education.⁷

Initially, Congresswoman Green intended to combat sex discrimination by adding the word “sex” to Title VI of the Civil Rights Act.⁸ When civil rights leaders were hesitant to reopen Title VI, Green changed her political strategy.⁹ As a member of the House Committee on Education and Labor, she planned to add it to an omnibus education bill.¹⁰ Knowing it was controversial in the context of the 1970s, Green realized she would not get much support and decided against lobbying for the bill.¹¹ Then, Senator Birch Bayh from Indiana introduced the portion of the bill that dealt with sex discrimination on the Senate floor.¹² The House and Senate versions were then reconciled in committee and the bill was sent to President Richard Nixon to be signed on June 23, 1972.¹³

Boston College professor R. Shep Melnick argues Title IX has followed an unconventional regulatory path characterized by ‘institutional leapfrogging’ and controversy in his new book published by the Brookings Institution *The Transformation of Title IX: Regulating Gender Equality in Education*. He argues this occurs through the utilization of Dear Colleague Letters (DCL) and court cases in the Executive and Judicial Branches rather than the normal amendment process through the Legislative Branch. Yet, Jeannie Suk Gersen, a Harvard Law School professor, argues that this is not surprising:

Most laws have openness to them and words that are not clearly defined, and it is understood that agencies under the president or under a particular administration will

⁷ “GREEN, Edith Starrett.”

⁸ Melnick, R. Shep. *The Transformation of Title IX: Regulating Gender Equality in Education*. Brookings Institution Press, 2018.

⁹ Melnick, *The Transformation of Title IX*, p. 40.

¹⁰ Melnick, *The Transformation of Title IX*, p. 40.

¹¹ Melnick, *The Transformation of Title IX*, p. 40.

¹² Melnick, *The Transformation of Title IX*, p. 41.

¹³ Melnick, *The Transformation of Title IX*, p. 41;
“Title IX, Education Amendments of 1972.”

interpret those congressional laws, and that policymaking is what happens when those laws are interpreted.¹⁴

Additionally, with a Republican-controlled Congress after the 2010 midterm elections and an administration that has an affinity for identity politics, it is no surprise that President Obama and his Assistant Secretary for Civil Rights at the Department of Education Russlynn Ali, for example, used Dear Colleague Letters as their vehicle for Title IX guidance.¹⁵ Gerson goes on to explain that this is to account for changing administrations and also a changing social landscape.¹⁶ It is this idea of a changing social landscape that causes different policy components to become controversial at different times. Since its passage, Title IX has had two major areas of implementation and controversies: athletics and sexual assault.

Two Major Areas of Implementation (1972-Present)

Athletics

A: The Controversy

As Nancy Hogshead-Makar, former president of the Women's Sports Foundation explains, because sports are the only aspects of society still segregated entirely by sex, it naturally became controversial under Title IX.¹⁷ At the time of its passage, athletics was hardly considered programming that would be affected by Title IX. The only mention of sports was from the amendment's main Senate sponsor, Birch Bayh, who assured the Senate during the floor debate, "we are not requiring that intercollegiate football be desegregated, nor that the men's

¹⁴ Camera, Lauren. "Title IX Faces Down the Culture Wars." US News & World Report. Accessed December 1, 2018. <https://www.usnews.com/news/the-report/articles/2018-11-02/trump-obama-use-title-ix-as-a-tool-in-the-culture-wars>.

¹⁵ "Opinion | The Path to Obama's 'Dear Colleague' Letter." Washington Post. Accessed December 1, 2018. <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/>.

¹⁶ Camera, "Title IX Faces Down the Culture Wars."

¹⁷ Melnick, *The Transformation of Title IX*, p. 79.

locker room be desegregated.”¹⁸ Yet, athletics has become so closely associated with the amendment that a women’s sports apparel company calls itself *Title Nine*.¹⁹

Another reason that athletics became the first area of controversy was because in the 1970s, women in athletics, much like women in politics, were seen as out of place.²⁰ At the time, it was common for states to have rules that both barred women from playing on men’s teams even when there was no female team and from playing on teams that competed with men’s teams even when the sport was a no-contact sport like swimming or golf.²¹ While women’s groups like the Education Task Force advocated for expanding the scope of Title IX to address these disparities through regulations, the National Collegiate Athletic Association (NCAA) and the American Football Coaches Association (AFCA) were in opposition, fearing it may affect their funding and alter the long-established dynamics of some of the country’s favorite sports.²²

Upon realizing that the large size of football programs precluded that defining equality as the same number of men’s and women’s teams, women’s sports advocates argued for equality of funding.²³ Ultimately, equality was understood as the number of athletes on male and female varsity teams.²⁴ Finally, athletic programs landed equality in the number of athletes on varsity teams.²⁵ After deciding this, the question then became how to determine the number of athletes. The ‘Parity’ theory posed a ratio based on the *total number* of males and females in the student

¹⁸ Melnick, *The Transformation of Title IX*, p. 79.

¹⁹ Melnick, *The Transformation of Title IX*, p. 77.

²⁰ Bachman, Rachel. “Thank Edith Green for Title IX.” OregonLive.com, January 17, 2010. http://www.oregonlive.com/opinion/index.ssf/2010/01/thank_edith_green_for_title_ix.html.

²¹ Mezey, Susan Gluck. *Elusive Equity: Women’s Rights, Public Policy, and the Law*. Lynne Rienner Publishers, Inc., 2011.

²² Mezey, *Elusive Equity: Women’s Rights, Public Policy, and the Law*.

²³ Melnick, *The Transformation of Title IX*, pp. 82-86.

²⁴ Melnick, *The Transformation of Title IX*, pp. 82-86.

²⁵ Melnick, *The Transformation of Title IX*, pp. 82-86.

body while the ‘Relative Interest’ theory relied upon a ratio based on the number of males and females in the student body that *specifically have an interest in varsity sports*.²⁶

Table 1.1 The Factions’ Preferred Fractions

| | | |
|--|------------------------|--|
| <u>Number of male varsity Athletes</u> Males in Student Body | "Parity" = | <u>Number of Female Varsity Athletes</u> Females in Student Body |
| | "Relative Interest" | |
| <u>Number of Male Varsity Athletes</u> Males in Student Body with Interest in Varsity Sports | = | <u>Number of Female Varsity Athletes</u> Females in Student Body with Interest in Varsity Sports |

Source: Table by Melnick, *The Transformation of Title IX.*, p. 83.

Additionally, in 1979, OCR promulgated a “Three-Part Test” in order to assist in the adjudication of cases, by providing standards and policy clarity.²⁷ This Test stated that an institution is compliant if it meets any of the three parts:

- 1) The number of male and female athletes is substantially proportionate to their respective enrollments; or
- 2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
- 3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.²⁸

²⁶ Melnick, *The Transformation of Title IX*, p. 83.

²⁷ Melnick, *The Transformation of Title IX*, pp. 99-101.

²⁸ “Intercollegiate Athletics Policy: Three-Part Test -- Part Three Q’s & A’s.” Policy Guidance. Accessed November 26, 2018. <https://www2.ed.gov/about/offices/list/ocr/docs/title9-qa-20100420.html>.

Since its creation, various administrations beginning in the 1990's have attempted to clarify this test's implementation.²⁹

The first major application of the 1979 guidance's Three-Part Test occurred in the 1992 federal court case *Cohen v. Brown University*.³⁰ Responding to financial pressures, Brown University demoted the women's volleyball and gymnastics teams and men's golf and water polo teams to club status.³¹ Members of the women's volleyball and gymnastics teams then brought suit against the institution, arguing that it violated components of the Three-Part Test.³² In 1992, the district court ruled that Brown was not in compliance with the first prong because of the difference between the percentage of women enrolled at the institution and the number of athletic opportunities available to them.³³ In 1996, upon appeal, the First Circuit affirmed the opinion of the lower court and confirmed that cutting men's teams is an appropriate strategy to be compliant with Title IX.³⁴ *Cohen* exemplifies how controversial Title IX implementation in athletics has been and continues to be. In 2010, President Obama's administration released a Dear Colleague Letter making it even harder for schools to evade the first prong of the test.³⁵ A more in-depth analysis of this guidance appears later in this work.

B. What Has Been Accomplished

A little over 46 years old, Title IX has made strides for women in athletics. In his remarks for the 40th Anniversary of Title IX, Secretary of Education under President Obama, Arne Duncan, remarked that "one study of Title IX by Wharton Professor Betsey Stevenson found that up to 40

²⁹ Melnick, *The Transformation of Title IX*, pp. 117-129.

³⁰ Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

³¹ Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

³² Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

³³ Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

³⁴ Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

³⁵ Melnick, *The Transformation of Title IX*, p. 124.

percent of the overall rise in employment among women in the 25 to 34-year-old age group was attributable to Title IX.”³⁶ He went on to explain:

When Title IX was enacted in 1972, less than 30,000 female students participated in sports and recreational programs at NCAA member institutions nationwide. Today, that number has increased nearly six-fold. And at the high school level, the number of girls participating in athletics has increased ten-fold since 1972, to three million girls today.³⁷

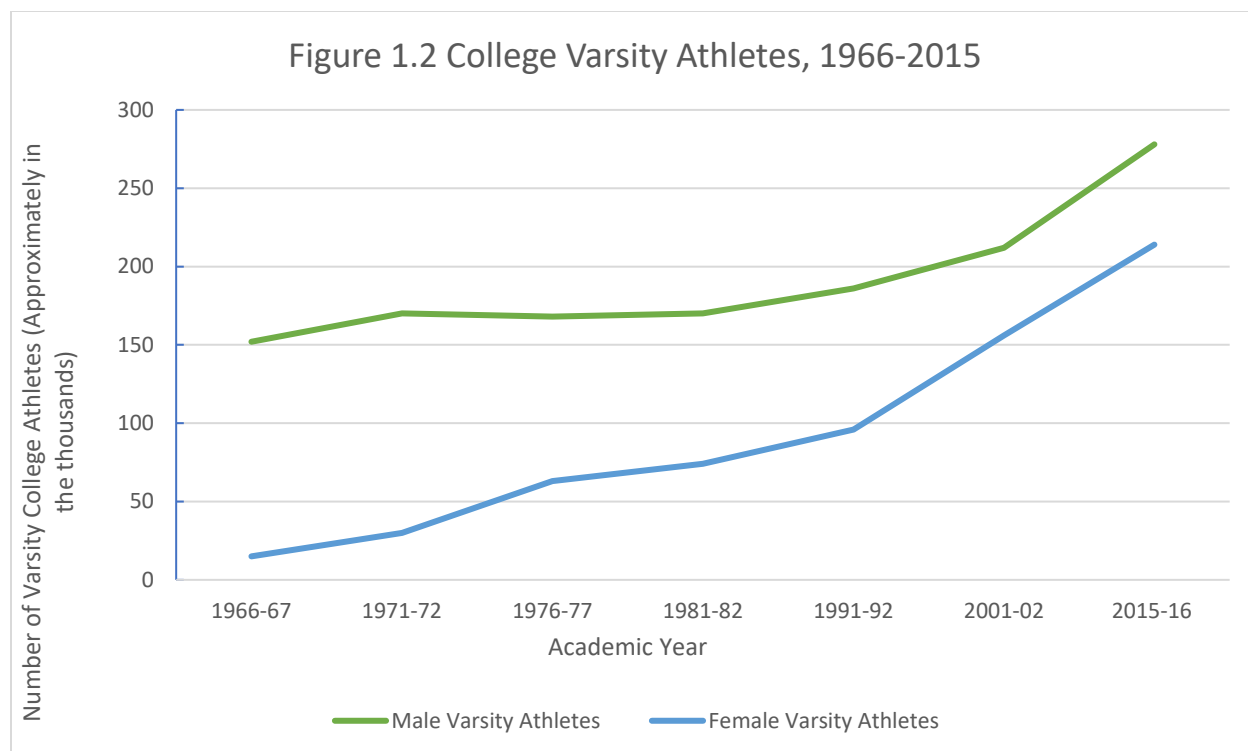
Not only has the number of women involved in intercollegiate sports risen from 15,000 women in the mid-1960s to over 200,000 in 2014-2015, but the number of varsity teams offered for women has risen from an average of 2.5 in 1970 to almost 9 today.³⁸ Although it is clear that the number of female athletes and athletic opportunities has greatly increased, it is also clear that proportionally, the number of female athletes is not equivalent to the proportion of female students.³⁹ It is also clear that the number of men’s teams has increased since Title IX, squashing fears that adding women’s athletic teams would always come at the expense of men’s athletic teams. The figure below illustrates the expansion of male and female varsity athletic opportunities over the past five decades, while the following figure captures the changes in the number of male and female varsity teams.

³⁶ “Remarks of U.S. Secretary of Education Arne Duncan on the 40th Anniversary of Title IX | U.S. Department of Education.” Accessed November 15, 2018. <https://www.ed.gov/news/speeches/remarks-us-secretary-education-arne-duncan-40th-anniversary-title-ix>.

³⁷ “Remarks of U.S. Secretary of Education Arne Duncan on the 40th Anniversary of Title IX.xf”

³⁸ Melnick, *The Transformation of Title IX*, p. 86.

³⁹ Melnick, *The Transformation of Title IX*, p. 86.



Source: Data from Susan Ware, *Title IX: A Brief History with Documents*, p. 20 (for years 1966 to 1977); NCAA, *Student-Athlete Participation*, 1981-82—2015-2016 (October 2016), pp. 11-80 (for years 1981 to 2016) and reproduced by Melnick, *The Transformation of Title IX*.

Table 1.3 Changes in Number of Men's and Women's College Varsity Teams, 1988-2016

| | <i>Division I</i> | <i>Division II</i> | <i>Division III</i> | <i>Total</i> |
|--------------------------|-------------------|--------------------|---------------------|--------------|
| Men's Teams Added | 658 | 1,378 | 2,009 | |
| Men's Teams Eliminated | 986 | 783 | 1,249 | |
| Net Change, Men | -330 | +594 | +751 | +1,015 |
| Women's Teams Added | 1,268 | 1,836 | 2,502 | |
| Women's Teams Eliminated | 468 | 589 | 1,125 | |
| Net Change, Women | +803 | +1,253 | +1,379 | +3,436 |

Source: NCAA, *Student-Athlete Participation*, 1981-82—2015-16 (October 2016), pp. 183-84, 161-62, 272-73. Chart by Melnick, *The Transformation of Title IX*.

Sexual Assault

A. The controversy

President Barack Obama released a task force report in 2014 that states “one in five women is sexually assaulted in college.”⁴⁰ Although many question this statistic’s legitimacy, it is the catalyst that brought the issue of sexual assault on college campuses to the attention of media.⁴¹ In 2014, President Obama created the task force comprised of senior administration officials in order to address campus sexual assault.⁴² They were given 90 days to recommend best practices for colleges.⁴³ The task force was a response to students across the country writing anonymous letters to the Department of Education and making public statements about their institutions’ mishandling sexual assault allegations and reporting inaccurate numbers to save their reputation.⁴⁴

In 2014, the Department of Education’s Office for Civil Rights (OCR) released a Dear Colleague Letter to all colleges and universities receiving federal funding that outlined guidelines for interpretation, as well as an additional document titled “Questions and Answers on Title IX and Sexual Assault.”⁴⁵ These documents aimed to clarify institutions’ legal obligations to investigate and adjudicate instances of sexual violence on their campuses.⁴⁶ The 2014 Dear Colleague Letter and Q&A guidance also includes regulations regarding compliance with the statute. These components include having a Title IX Coordinator to ensure compliance, a formal

⁴⁰ Melnick, *The Transformation of Title IX*, p. 149.

⁴¹ Melnick, *The Transformation of Title IX*, p. 149.

⁴² Calmes, Jackie. “Obama Seeks to Raise Awareness of Rape on Campus.” *The New York Times*, January 22, 2014. <https://www.nytimes.com/2014/01/23/us/politics/obama-to-create-task-force-on-campus-sexual-assaults.html>.

⁴³ Calmes, “Obama Seeks to Raise Awareness of Rape on Campus.”

⁴⁴ Pickler, Nedra. “Obama Establishes Task Force to Respond to College Rapes.” *Daily Hampshire Gazette*. Accessed December 1, 2018. <https://www.gazettenet.com/Archives/2014/01/collegesexual-hg-012414.aspx>.

⁴⁵ Melnick, *The Transformation of Title IX*, pp. 152-153.

⁴⁶ “Achieving Simple Justice: Highlights of Activities, Office for Civil Rights 2009-2016.” Government. U.S. Department of Education’s Office for Civil rights, n.d. <https://www2.ed.gov/about/reports/annual/ocr/achieving-simple-justice.pdf>.

notice of nondiscrimination, the standard of evidence that should be used, and the institutions' obligation to provide the complainant with accommodations.⁴⁷ With these documents, OCR also announced investigations into 55 universities.⁴⁸ Prior to fiscal year 2009, OCR's case management database did not even track Title IX complaints involving sexual violence.⁴⁹ The number of complaints involving sexual violence jumped from 9 in 2009 to 177 in 2016.⁵⁰

Protectors of due process rights soon began to argue that the Obama-era guidance went too far. In 2014, 28 Harvard Law School professors wrote an open letter arguing that Harvard's new procedures "lack the basic elements of fairness and due process" and "are overwhelmingly stacked against the accused."⁵¹ Similarly, in 2015, 16 Penn Law School professors wrote an open letter stating: "We do not believe that providing justice for victims of sexual assault requires subordinating so many protects long deemed necessary to protect from injustice those accused of serious offenses."⁵² One consistent argument relates to the standard of proof used by schools in their adjudication procedures for sexual assault cases. The preponderance of evidence standard, used in civil suits and required by the Obama-era guidance, is far less rigorous than the beyond a reasonable doubt standard used in criminal cases and makes it easier for the accused to be convicted.⁵³ Because sexual assault is a criminal offense in the legal system, advocates for the criminal standard of proof find it to be appropriate.⁵⁴ On the other hand, because all other school

⁴⁷ "Achieving Simple Justice:"

⁴⁸ Melnick, *The Transformation of Title IX*, p. 151.

⁴⁹ "Achieving Simple Justice."

⁵⁰ "Achieving Simple Justice."

⁵¹ Bagenstos, Samuel R. "What Went Wrong with Title IX?" *Washington Monthly*, 2015.

<https://washingtonmonthly.com/magazine/septoct-2015/what-went-wrong-with-title-ix/>.

⁵² Volokh, Eugene. "Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints." *The Washington Post*, February 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=.f19c8e161a40.

⁵³ Bagenstos, "What Went Wrong with Title IX?"

⁵⁴ Bagenstos, "What Went Wrong with Title IX?"

disciplinary proceedings use the civil standard of proof, advocates for this standard of proof find it to be most appropriate.⁵⁵ The standard of proof is one of many points of controversy in the scope of the investigation and adjudication of sexual assault cases on college campuses.

B. What Has Been Accomplished

The 2014 Obama-era guidance claims aimed to show institutions that the Department of Education would hold them accountable for investigating and adjudicating claims of sexual assault. The Department of Education received 96 complaints of institutions mishandling sexual assault allegations- up threefold from fiscal year 2013.⁵⁶ The Department of Education first conducted investigations into complaints from some of the nation's best-known universities.⁵⁷ By doing this, OCR hoped to win victories over institutions that were extremely invested in protecting their reputations and would likely aim to create fair, efficient processes.⁵⁸

Additionally, Peter Lake, Director of the Center for Excellence in Higher Education Law and Policy at Stetson University College of Law estimates that institutions spent more than \$100 million from 2011-2015 to comply with Title IX, and much of this funding was used to employ the Title IX Coordinator and their staff.⁵⁹ Although OCR's original 'stick' of restricting federal funds has proven to not be wise in practice because it ends up hurting those it is actually trying to protect, students, institutions still strive for compliance under Title IX to avoid reputation-tarnishing investigations that may affect their admissions.⁶⁰ This concept has become ever more important in the era of the #MeToo movement.

⁵⁵ Bagenstos, "What Went Wrong with Title IX?"

⁵⁶ Mantel, Barbara. "Campus Sexual Assault." CQ Researcher by CQ Press, October 31, 2014. <http://library.cqpress.com/cqresearcher/cqresrre2014103100>.

⁵⁷ Melnick, The Transformation of Title IX, p. 211.

⁵⁸ Melnick, The Transformation of Title IX, p. 211.

⁵⁹ Melnick, The Transformation of Title IX, p. 217.

⁶⁰ Melnick, The Transformation of Title IX, p. 15.

Secretary DeVos (2017-Present)

During the summer of 2017, President Donald Trump's Secretary of Education Betsy DeVos met with both victims of sexual violence on college campuses and those who were wrongfully accused as she aimed to provide clarity and guidance on the lasting controversies and confusions in the scope of sexual assault under Title IX.⁶¹ Then, in a speech given in September 2017 at George Mason University, Secretary DeVos rolled back Obama-era guidelines.⁶² In her speech and in reference to the Obama administration's Dear Colleague Letter, Secretary DeVos remarked:

The failed system-imposed policy by political letter, without even the most basic safeguards to test new ideas with those who know this issue all too well. Rather than inviting everyone to the table, the Department insisted it knew better than those who walk side-by-side with students every day. That will no longer be the case. The era of 'rule by letter' is over.⁶³

In its place, Secretary DeVos provided interim Q&A guidance that both reaffirmed institutions' obligation to address sexual violence while giving them discretion over major policy components such as the standard of evidence.⁶⁴

Then, in November 2018, Secretary DeVos released a 144-page notice of proposed rulemaking that underwent a 60-day public comment period prior but has not yet been made official.⁶⁵ The proposed rules narrow the definition of sexual harassment, only require institutions to investigate instances physically on their campus, give institutions discretion to

⁶¹ Melnick, *The Transformation of Title IX*, p. 152.

⁶² Saul, Stephanie, and Kate Taylor. "Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations." *The New York Times*, December 22, 2017, sec. U.S.

⁶³ "Secretary DeVos Prepared Remarks on Title IX Enforcement | U.S. Department of Education," September 7, 2017. <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

⁶⁴ "Q&A on Campus Sexual Misconduct." United States Department of Education Office for Civil Rights, September 2017. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

⁶⁵ Green, Erica L. "Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability." *The New York Times*, November 17, 2018, sec. U.S. <https://www.nytimes.com/2018/11/16/us/politics/betsy-devos-title-ix.html>.

choose their own standard of evidence, and allow for both the accuser and accused to have equal access to all of the evidence and opportunity for appeal.⁶⁶ Victims' rights advocates argue that the proposed guidelines rollback protections for victims, attempting to sweep sexual violence on college campuses under the rug, and turning college disciplinary hearings into spectacles similar to what happened with the Senate Judiciary Committee and Dr. Christine Blasey Ford.⁶⁷ On the other hand, legal scholars argue that the Department of Education is aligning its guidance with legal precedent in favor of the accused established in *Doe v. Baum, et al.* (2018), which said that students or their representative must be allowed to directly question their accuser in live Title IX hearings.⁶⁸ It is clear that Title IX has endured a long and complicated history, the timeline of which appears below.

⁶⁶ Green, "Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability."

⁶⁷ Green, "Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability."

⁶⁸ *Doe v. Baum, et al.*, No. No. 17-2213 (United States Court of Appeals for the Sixth Circuit September 7, 2018) and Green, "Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability."

| | |
|---------------|---|
| 1970 | Per the recommendation of Congresswomen Edith Green, Congress begins holding hearings on gender inequity in higher education. These hearings are often thought of as the first legislative step toward the passing of Title IX. ⁶⁹ |
| June 23, 1972 | Title IX of the Education Amendments of 1972 is signed by President Richard Nixon. ⁷⁰ |
| 1979 | OCR announces the "Three-Part Test" regarding compliance with Title IX in athletics. ⁷¹ |
| 1980 | The United States Department of Education is created, and oversight of Title IX is given to the Office for Civil Rights (OCR). ⁷² |
| 1992 | <i>Cohen v. Brown University</i> confirms that cutting men's teams is an appropriate strategy to be compliant with Title IX. ⁷³ |
| 2011 | Under President Obama, the Department of Education issues policy guidance on interpretation of Title IX and ensures institutions' obligation to protect students from sexual assault under Title IX. ⁷⁴ |
| 2014 | Additional guidance under President Obama is issued re-affirming institutions commitment to combating sexual assault and providing more interpretive regulations and guidelines including a consistent standard of evidence. ⁷⁵ 28 Harvard Law School professors write an open letter arguing that Harvard's new procedures lack due process. ⁷⁶ |
| 2015 | 16 Penn Law School professors write an open letter arguing that the protections for victims does not have to come at the cost of due process. ⁷⁷ |
| Summer 2017 | Secretary DeVos meets with victims and wrongfully accused. ⁷⁸ |
| Sep-17 | Secretary DeVos, in a speech at George Mason University, announces a rollback of Obama-era guidelines and in its place provides barebones interim guidance. ⁷⁹ |
| Nov-18 | Secretary DeVos releases a 144-page notice of proposed rulemaking. The proposed rules enter a 60-day public comment period before they will be complete. ⁸⁰ |

⁶⁹ "GREEN, Edith Starrett"

⁷⁰ "Title IX, Education Amendments of 1972"

⁷¹ Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

⁷² "ERA's Title IX Timeline." Equal Rights Advocates. Accessed November 19, 2018.

<https://www.equalrights.org/title-ix-timeline/>.

⁷³ Mezey, *Elusive Equity: Women's Rights, Public Policy, and the Law*.

⁷⁴ "ERA's Title IX Timeline."

⁷⁵ Melnick, *The Transformation of Title IX*, pp. 152-153.

⁷⁶ Bagenstos, "What Went Wrong with Title IX?"

⁷⁷ Volokh, "Open Letter from 16 Penn Law School Professors About Title IX and Sexual Assault Complaints."

⁷⁸ Melnick, *The Transformation of Title IX*, p. 152.

⁷⁹ Saul and Taylor. "Betsy DeVos Reverses Obama-Era Policy on Campus Sexual Assault Investigations."

⁸⁰ Green "Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability."

What Does Title IX Still Have to Accomplish?

Advocates and education-policy gurus will continue to work toward striking the right balance between ensuring protections for students seeking to make claims while protecting the due process rights of the accused. Although Secretary DeVos has provided the latest attempt by the federal government to do just that, the investigation and adjudication processes of claims of sexual assault on college campuses continue to be extremely divisive and emotional topics. But, how will institutions of higher education, the ones with the actual authority to craft policies that govern their campus react to these new guidelines?

The unsettling truth is that nobody knows. Because the guidelines are so new, there is very little data on how institutions are likely to respond. As Eric Butler, Title IX Coordinator at the University of Denver, put it after the Obama-era guidelines were rolled back in September 2017, “the retraction will present schools with the first true test of their commitment to the progress of the last several years.”⁸¹ Institutions have spent a good deal of time and money shaping their policies to protect victims and comply with the 2014 Obama-era guidance. Secretary DeVos’ new guidelines will require institutions to change certain components of their policies while giving them discretion over other components, such as the standard of evidence.

Conclusion

At a time where there is very little data on how institutions of higher education will respond to federal guidance on an extremely sensitive yet divisive issue, my thesis aims to provide data and clarity. It is ever important to ascertain how institutions are likely to address Title IX compliance as it relates to sexual assault on college campuses. I seek to learn how this,

⁸¹ Brown, Sarah. “What Does the End of Obama’s Title IX Guidance Mean for Colleges?” The Chronicle of Higher Education, September 22, 2017. <https://www.chronicle.com/article/What-Does-the-End-of-Obama-s/241281>.

along with other cultural and societal factors, influence the way that institutions interpret and therefore implement Title IX of the Education Amendments of 1972.

CHAPTER 2: Roadmap of Guidance

A timeline of the new proposed Title IX guidance and an analysis of its major differences from the Obama-era guidance.

Background & Timeline

Pre-Roll Back of Guidance

As discussed in Chapter 1, Donald Trump’s Secretary of Education, Betsy DeVos, took meetings during the Summer of 2017 with Title IX stakeholders in order to learn about the ways in which Title IX was not functioning properly.⁸² More specifically, Secretary DeVos was taking meetings with both students seeking to make claims and those wrongfully accused.⁸³ Although she did not roll-back Obama’s Title IX guidance just yet, after a day full of these exploratory meetings in July of 2017, Secretary DeVos held a 15-minute Q&A session with reporters where she explained that she was looking into the legal questions related to the standard of evidence, due process and public input on the process, all of which were areas of criticism directed at the Obama-era guidance.⁸⁴ Also in July 2017, then Acting Assistant Secretary for Civil Rights, Candice Jackson, made a comment in the *New York Times* minimizing the seriousness of Title IX complaints:

Rather, the accusations — 90 percent of them — fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right,’ Ms. Jackson said.⁸⁵

⁸² Melnick, R. Shep. *The Transformation of Title IX: Regulating Gender Equality in Education*. Brookings Institution Press, 2018.

⁸³ Melnick, *The Transformation of Title IX*, p. 152.

⁸⁴ Kreighbaum, Andrew. “DeVos Hints at Changes in Title IX Enforcement.” *Inside Higher Ed*, July 14, 2017. <https://www.insidehighered.com/news/2017/07/14/after-full-day-meetings-title-ix-devos-says-improvements-needed>.

⁸⁵ Green, Erica L., and Sheryl Gay Stolberg. “Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear.” *The New York Times*, July 12, 2017, sec. U.S. <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

Jackson also explained that many students are ‘branded’ rapists when “the facts just don’t back that up.”⁸⁶ Although Jackson, a victim of sexual assault herself, shortly rolled back her statements explaining that all allegations should be taken seriously, her comment is representative of a common criticism. Despite this, by taking meetings with ‘fringe’ groups that are often considered ‘bullies of sexual assault survivors’ like the National Coalition for Men and Stop Abusive and Environments (SAVE), Jackson and DeVos showed more commitment to protecting the accused rather than students seeking to make claims of sexual harassment.⁸⁷ Indeed, this appeared to be a principal focus of their efforts to modify the Obama-era guidance.

Roll Back and Interim Guidance

On September 7, 2017, Secretary DeVos gave a speech at George Mason University rolling back the Obama-era 2011 Dear Colleague Letter and 2014 Q&A clarification document claiming “the era of ‘rule by letter’ is over” and “the notion that a school must diminish due process rights to better serve the "victim" only creates more victims.”⁸⁸ In a press release on September 22, 2017, Secretary DeVos says "in the coming months, hearing from survivors, campus administrators, parents, students and experts on sexual misconduct will be vital as we work to create a thoughtful rule that will benefit students for years to come.” She also provided interim guidance in the form of Q&A that re-affirmed institutions’ responsibility to address sexual misconduct while giving them more discretion over things like the standard of proof.⁸⁹ Beyond this, the interim guidance both retained part of the Obama guidance and did not make any drastic changes. Advocacy groups on both sides of the issue quickly responded. One

⁸⁶ Green, Erica L., and Sheryl Gay Stolberg. “Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear.” *The New York Times*, July 12, 2017, sec. U.S. <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html>.

⁸⁷ Green and Stolberg, “Campus Rape Policies Get a New Look as the Accused Get DeVos’s Ear.”

⁸⁸ “Secretary DeVos Prepared Remarks on Title IX Enforcement | U.S. Department of Education.”

⁸⁹ “Q&A on Campus Sexual Misconduct.”

students' rights advocacy group, Foundation for Individual Rights in Education (FIRE), celebrated the opportunity to improve due process rights for accused students.⁹⁰ FIRE's mission is to defend the rights of students and faculty members like freedom of speech, religious liberty and due process.⁹¹ On the other hand, groups like SurvJustice, a victim's rights advocacy group, lamented the roll-back of protections for victims.⁹² SurvJustice uses law and policy to make sexual respect a norm and to increase protections for students seeking to make claims of sexual harassment.⁹³ Their founder, Laura Dunn, JD, was sexually assaulted while an undergraduate. Upon being denied justice, she filed a Title IX complaint.⁹⁴

New Proposed Guidance and Notice & Comment Period

From September 2017 when the guidance was rolled back until November 2018, there was no update to Title IX regulations. The only exception was in August 2018 when the *New York Times* writer Erica Green, who had been following Title IX, wrote an article about a preliminary copy of the new regulations and guidelines of which the Department of Education denied.⁹⁵ In her article, Green categorizes the new guidelines as “[bolstering] the rights of students accused of assault, harassment or rape, reduce liability for institutions of higher education and encourage schools to provide more support for victims.” For just over a year, institutions of higher education had little guidance on both how to investigate something as sensitive and dangerous as sexual assault claims on their campus and also on how to be in

⁹⁰ “Dear Colleague: It’s over! Education Department Rescinds Controversial 2011 Letter.” *FIRE* (blog), September 22, 2017. <https://www.thefire.org/dear-colleague-its-over-education-department-rescinds-controversial-2011-letter/>.

⁹¹ “Mission.” FIRE (blog). Accessed February 5, 2019. <https://www.thefire.org/about-us/mission/>.

⁹² Morris, Catherine. “DeVos Rolls Back Obama Title IX Rules on Campus Sexual Assault.” *Diverse Issues in Higher Education* (blog), September 24, 2017. <https://diverseeducation.com/article/102070/>.

⁹³ “Our Story.” SurvJustice. Accessed February 5, 2019. <https://survjustice.org/about/our-story/>.

⁹⁴ “Our Story.” SurvJustice.

⁹⁵ Green, Erica. “New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges - The New York Times.” *The New York Times*, August 29, 2018. <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html>.

compliance with federal policy. This created more confusion and inconsistency. Then, on November 17, 2018, 144 pages of proposed guidance was finally released and entered into a notice-and-comment period upon submission to the federal register.⁹⁶ By entering a notice-and-comment period, this meant that the regulations were not final. By going onto regulations.gov, anyone was able to submit a comment on behalf of themselves or an organization.⁹⁷ As of the comment period's closing date of February 15, 2019 at 11:59 PM EST, the Department of Education received 113, 846 comments.⁹⁸

Major Changes in the Proposed Guidance

Below, I have highlighted the four major changes with the most impact on Title IX processes for both students seeking to make claims of sexual harassment and the accused. They include a change in the definition of sexual harassment, an institution's responsibility to investigate off-campus instances, the definition of an institution having 'actual knowledge' of an incident and the standard of evidence. (Appendix 1 at the end of this thesis provides a chart directly comparing all of the language for these changes.)

The chart below includes brief summaries of the caselaw that these four changes used as justification. They will be discussed in more depth later on in this chapter.

⁹⁶ Green, Erica L. "Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability." The specifics of the proposed guidance will be discussed in the next section of this chapter.

⁹⁷ "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance." Regulations.gov. Accessed January 10, 2019. <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001>.

⁹⁸ "Regulations.Gov - Docket Browser." Accessed January 14, 2019. <https://www.regulations.gov/docketBrowser?rpp=25&so=DESC&sb=commentDueDate&po=0&dct=PS&D=ED-2018-OCR-0064>.

| Case | Highest Court the Case Was Heard By | Question | Decision | Conclusion |
|--|--|---|----------|---|
| <i>Davis v. Monroe County Board of Education</i> (1999) | Supreme Court of the United States | Can a school board be held responsible under Title IX of the Education Amendments of 1972, meant to secure equal access of students to educational benefits and opportunities, for "student-on-student" harassment? | | Yes: There is an implied right to education under Title IX. Institutions can be held liable if they act with deliberate indifference to harassment that is so severe it affects an individual's ability to enjoy educational opportunities |
| <i>Kristin Samuelson v. Oregon State University</i> (2018) | United States Court of Appeals for the Ninth Circuit | Is an instance of sexual violence that occurs campus by students of another institution within a student's home institution's jurisdiction? | N/A | No: [The student] "failed to allege that her sexual assault occurred 'under' [their home institutions' programs or activities.]" It is not the responsibility of an institution to investigate instances that happen "off campus by a non-university student at a location that had no sponsorship by or association with [the institution.]" |
| <i>Farmer v. Kansas State University</i> (2017) | United States District Court, D. Kansas | Does a fraternity count as an educational program or activity of a university under Title IX if it resides off campus and receives national funding? | N/A | Yes: Fraternities, although off-campus, receive promotion and oversight from their university and resources such as the Office of Greek Affairs. Additionally, parties are open only to students of the university. Fraternities are typically directed by an instructor or employee of the university |
| <i>Doe v. Brown University</i> (2018) | United States Court of Appeals for the First Circuit | Does a student have a plausible Title IX claim for an instance that happened off-campus by students of a different institution? | N/A | No: The student has a right to a complaint under the other institution's student code of conduct but not Title IX because they "had not availed [themselves] or attempted to avail [themselves] of any of [the institution's] educational programs and therefore could not have been denied those benefits |
| <i>Gebser v. Lago Vista Independent School District</i> (1998) | Supreme Court of the United States | Can a federally funded educational program or activity be required, under Title IX of the Education Amendments of 1972, to pay sexual harassment damages to a student who was involved in a secret relationship with a member of its staff? | | No: Set a standard for when an individual can recover sexual harassment damages: (1) a school district official with the ability to institute corrective measures was aware (2) Despite having this knowledge, a school district official failed to properly respond |
| <i>Lee v. University of New Mexico</i> (2018) | United States District Court, D. New Mexico | Was a student accused of sexual misconduct denied due process and treated unfairly? | N/A | Yes: The student's university failed to provide proper safeguards for the accused student's rights including: <ul style="list-style-type: none"> ⊕ Using the preponderance of the evidence standard which is inappropriate for such cases because the result is too "permanent and far-reaching" ⊕ opportunity to cross-examine accuser ⊕ adequate notice of allegations and opportunity to respond ⊕ identification of all evidence and witnesses used against them ⊕ participation of legal counsel |

Definition of Sexual Harassment

Under Obama-guidance, the definition of sexual harassment was deemed “unwelcome conduct of a sexual nature.”¹⁰⁰ Under the new proposed guidance, the narrower definition is limited to “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.”¹⁰¹ As justification, Secretary DeVos relied on *Davis v. Monroe County Board of Education* which utilized the proposed limited definition.¹⁰² By narrowing the definition, Secretary DeVos raised the threshold one must reach in order for an instance to be defined as sexual harassment. Earlier Title IX guidance explains that institutions have a responsibility to respond to instances if they create a ‘hostile environment’ for a student.¹⁰³ The #MeToo movement has brought forward many women who have for a long time been silent about their experiences with sexual harassment. A 1999 article on sexual harassment argues:

There are two main lines of research relevant to a discussion of how men tend to view sexual harassment. The first suggests that men view fewer behaviors as harassing than

⁹⁹ DeVos, “Notice of Proposed Rulemaking,” p. 9.

“*Davis v. Monroe County Board of Education*.” Oyez. Accessed January 10, 2019.

<https://www.oyez.org/cases/1998/97-843>.

Davis v. Monroe County Board of Education.” Oyez.

DeVos, “Notice of Proposed Rulemaking,” p. 25.

“KRISTIN SAMUELSON V. OREGON STATE UNIVERSITY, No. 16-35216 (9th Cir. 2018).” Justia Law.

Accessed February 5, 2019. <https://law.justia.com/cases/federal/appellate-courts/ca9/16-35216/16-35216-2018-06-06.html>.

DeVos, “Notice of Proposed Rulemaking,” p. 25.

DeVos, “Notice of Proposed Rulemaking,” p. 25.

DeVos, “Notice of Proposed Rulemaking,” p. 25.

DeVos, “Notice of Proposed Rulemaking,” p. 26.

“*Gebser v. Lago Vista Independent School District*.” Oyez. Accessed January 21, 2019.

<https://www.oyez.org/cases/1997/96-1866>.

Lee, J. “IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO,” n.d., 5.

¹⁰⁰ Ali, Russlynn. “Dear Colleague Letter: Sexual Violence.” Dear Colleague Letter, April 4, 2011.

¹⁰¹ DeVos, Betsy. “Notice of Proposed Rulemaking.” United States Department of Education, November 2018.

¹⁰² DeVos, “Notice of Proposed Rulemaking,” p. 9.

“*Davis v. Monroe County Board of Education*.”

¹⁰³ Russlynn, “Dear Colleague Letter: Sexual Violence,” p. 3.

women, and the second suggests that men tend to perceive most harassing behavior as normal.¹⁰⁴

This suggests that there is no clear threshold of what is ‘objectively offensive.’ Additionally, an instance of sexual violence does not have to be ‘objectively offensive’ in order to create a ‘hostile environment’ for students seeking to make claims of sexual harassment. Feelings are subjective rather than objective in nature. Finally, if the definition of sexual harassment is in fact narrowed, experts expect already-low-reporting rates to decrease as students seeking to make claims of sexual harassment “may not know if their experiences are ‘severe’ or ‘pervasive’ enough to qualify as sexual harassment.”¹⁰⁵ For example, a 2001 study of 171 of sexual assaults noted that two weeks after the instance, 69% had more negative beliefs in their own judgments.¹⁰⁶ If students seeking to make claims are less likely to believe their own judgments, they may be more likely to minimize the situation and assume their experience would not reach the burden of the definition. This would mean that fewer cases would be investigated and fewer perpetrators punished, leaving the victim without justice and the campus vulnerable to recidivism on the part of the perpetrator.

Off-Campus Responsibilities

Rather than focusing on the ‘hostile environment’ as discussed earlier when determining if an instance that occurred off-campus is an institution’s responsibility to adjudicate, the proposed guidance encourages institutions to “[determine] whether a sexual harassment incident

¹⁰⁴ Dougherty, Debbie S. “Dialogue through Standpoint,” n.d., 33.

¹⁰⁵ Yuen, Victoria, and Osub Ahmed. “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.” Center for American Progress, November 16, 2018. <https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/>.

¹⁰⁶ Frazier, Patricia, Amy Conlon, and Theresa Glaser. “Positive and Negative Changes Following Sexual Assault.” *Journal of Consulting and Clinical Psychology* 69, no. 6 (2001): 1048–55. <https://doi.org/10.1037/0022-006X.69.6.1048>.

occurred within a recipient’s program or activity.”¹⁰⁷ In order to assist institutions in determining this, Secretary DeVos provides three lower-court rulings:

1. *Samuelson v. Oregon State University* (2018): “affirming dismissal of plaintiff’s Title IX claim against OSU because she ‘failed to allege that her sexual assault occurred ‘under’ an OSU ‘program or activity’ where plaintiff alleged that she was assaulted ‘off campus by a non-university student at a location that had no sponsorship by or association with OSU.’”¹⁰⁸
2. *Farmer v. Kansas State University* (2017): “holding that a KSU fraternity is an ‘education program or activity’ for purposes of Title IX because ‘KSU allegedly devotes significant resources to the promotion and oversight of fraternities through its website, rules, and Office of Greek Affairs. Additionally, although the fraternity is housed off campus, it is considered a ‘Kansas State University Organization,’ is open only to KSU students, and is directed by a KSU instructor.”¹⁰⁹
3. *Doe v. Brown University* (2018): “affirming judgment on the pleadings and ‘[f]inding no plausible claim under Title IX’ where plaintiff alleged that, while a Providence College student, three Brown University students sexually assaulted her on Brown’s campus, and Brown notified the plaintiff that she had a right to file a complaint under Brown’s Code of Student Conduct—but not Title IX—because she had not availed herself or attempted to avail herself of any of Brown’s educational programs and therefore could not have been denied those benefits.”¹¹⁰

Yet, these court rulings, particularly *Samuelson* and *Doe* do not take into account that these incidents create ‘hostile environments’ for the complaining student’s home campus and on their educational experience regardless of where it happened and whether or not the students attend their institution. A 2016 article explains that “many harassed students experience negative academic efforts, such as decreased academic satisfaction, perceptions of faculty, engagement, and performance.”¹¹¹ Additionally, Terry Hall from the Bureau of Justice Statistics found in 2015 that for the 2014-2015 school year, 32.8% of undergraduate female rape incidents

¹⁰⁷ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹⁰⁸ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹⁰⁹ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹¹⁰ DeVos, “Notice of Proposed Rulemaking,” p. 26.

¹¹¹ Gonzalez, Heather B, and Jody Feder. “Sexual Violence at Institutions of Higher Education,” April 15, 2016, 35.

happened on campus while 65.6% occurred off-campus. By giving institutions discretion over when off-campus incidents are their responsibility to investigate and providing examples of guidance such as *Samuelson* and *Doe*, DeVos is effectively discouraging institutions from investigating off-campus instances of sexual violence and thereby potentially reducing their liability. This is worrisome considering that the majority of incidents do in fact happen off campus. Yet as mentioned above, if institutions investigate fewer incidents, perpetrators might engage in recidivism, creating a new cycle of problems for the institution and its students.

Definition of Actual Knowledge

Both the Obama-era guidance and the current proposed guidance define what it means for an institution to have “actual knowledge” of an instance of sexual violence on their campus, therefore triggering a Title IX investigation. The Obama-era guidance defined ‘actual knowledge’ as “if a responsible employee knew, or should have known, or if an institution received notice in an indirect manner such as from a member of the community or social media.”¹¹² This broad definition accounted for various avenues of direct or indirect reporting.

The proposed guidance defines ‘actual knowledge’ as:

Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient...¹¹³

The proposed guidance also explains that “the mere ability or obligation to report sexual harassment does not qualify an employee.”¹¹⁴ By limiting the number of reporting opportunities

¹¹² Lhamon, Catherine E. “Questions and Answers on Title IX and Sexual Violence.” United States Department of Education Office for Civil Rights, April 29, 2014. <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹¹³ DeVos, “Notice of Proposed Rulemaking,” p. 18.

¹¹⁴ DeVos, “Notice of Proposed Rulemaking,” p. 25.

that trigger Title IX measures, the proposed changes would likely reduce reporting rates.¹¹⁵ The Department of Education’s proposed definition of ‘actual knowledge’ is in line with both *Davis v. Monroe County Board of Education* (1999), discussed earlier, and *Gebser v. Lago Vista Independent School District* (1998), a 5-4 decision of the Rehnquist Court that created two-part criterion determine if a party can recover sexual harassment damages, to justify its definition:

1. “The party must show that a school district official, with the ability to institute corrective measures knew of the forbidden conduct”
2. “A showing must be made that despite having knowledge of the forbidden conduct, the educational establishment deliberately failed to respond in a proper manner.”¹¹⁶

This is extremely problematic because shame, guilt, embarrassment, fear of retaliation, confidentiality concerns, fear of not being believed and many other reasons serve as the most common barriers to reporting for college-age female and male students seeking to make claims of sexual harassment leading to already low reporting rates.¹¹⁷ Rather than being able to choose the employee that they trust and feel comfortable confiding in, students seeking to make claims of sexual harassment will be forced to make a formal complaint to the Title IX Coordinator.¹¹⁸ Additionally, as mentioned above, a majority of instances happen off-campus. If there are fewer reporting options, less instances may be reported and investigated.

Standard of Evidence

The Obama administration’s 2014 guidance required institutions to use the preponderance of evidence standard of evidence, essentially meaning that decision-makers must

¹¹⁵ Yuen, Victoria, and Osub Ahmed, “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.”

¹¹⁶ DeVos, “Notice of Proposed Rulemaking,” p. 20.

¹¹⁷ Sable, Marjorie R., Fran Danis, Denise L. Mauzy, and Sarah K. Gallagher. “Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students.” *Journal of American College Health* 55, no. 3 (2006): 157–62.

¹¹⁸ Yuen, Victoria, and Osub Ahmed, “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.”

have believed that it was ‘more likely than not that sexual violence occurred.’¹¹⁹ Under Secretary DeVos proposed guidance, institutions have the opportunity to use either the preponderance of evidence standard, or the clear and convincing standard which requires more certainty, and therefore makes it more difficult, to find the accused guilty.¹²⁰ In her explanation, Secretary DeVos concedes that the preponderance of evidence standard may be appropriate because it is used in civil litigation. Some experts believe that Title IX grievance procedures are very similar.¹²¹ Yet, she goes on to point out that the procedures have key differences from civil litigation, such as a lack of discovery period and the opportunity for recipients choosing to opt out of having legal counsel.¹²² Because of this, Secretary DeVos argues that the grievance procedures are more closely aligned with that of civil administrative proceedings which uses the clear and convincing standard.¹²³ As evidence, she cites *Lee v. University of New Mexico* (2018), the case that found the preponderance of evidence standard is inappropriate for Title IX claims because the result is too “permanent and far-reaching” with respect to the effects of students being expelled upon being found guilty.¹²⁴ It is difficult to fully anticipate the effects of this decision without understanding which standard of evidence institutions find to be most appropriate. For example, if they feel that the preponderance of evidence standard is most appropriate, this change will not have significant implications. However, if institutions decide that the clear and convincing standard is more appropriate, this change will drastically impact the outcomes of Title IX claims. As Victoria Yuen and Osub Ahmed addresses this matter in their article for the Center for American Progress:

¹¹⁹ Lhamon, Catherine E, “Questions and Answers on Title IX and Sexual Violence,” p. 13.

¹²⁰ DeVos, “Notice of Proposed Rulemaking,” p. 61.

¹²¹ DeVos, “Notice of Proposed Rulemaking,” p. 60-62.

¹²² DeVos, “Notice of Proposed Rulemaking,” p. 60-62.

¹²³ DeVos, “Notice of Proposed Rulemaking,” p. 60-62.

¹²⁴ DeVos, “Notice of Proposed Rulemaking,” p. 60-62.

The clear and convincing standard stacks the process against the survivor and sets an unreasonably high bar for evidence that is difficult to achieve in many sexual assault cases. By allowing schools to adopt this standard, the Department of Education is signaling to survivors that they will need even more proof of the assault, discouraging many survivors from reporting.

Concerns that they will not be believed already serves as a reporting barrier for students seeking to make claims.¹²⁵ Upping the threshold that these students must reach in order to prove that an instance occurs will only increase these concerns and emphasize this barrier. Much like the proposed change to off-campus responsibilities, the proposed change of the standard of evidence gives institutions discretion over the impact it will have.

Conclusions

Substance

Overall, by adopting policies that narrow the definitions of ‘sexual harassment’ and ‘actual knowledge,’ decrease an institution’s required responsibilities over adjudicating instances that happen off-campus, and increase an institution’s discretion over which standard of proof it will use, the new proposed guidance may decrease reporting rates and justice for students seeking to make claims. While the Obama-era guidelines targeted “rape culture” as a systemic issue, the proposed guidelines focus on the “few bad apples” theory.¹²⁶ This approach emphasizes that the problem is largely a few “bad” individuals and, once they are removed from the campus, the threat has ceased.¹²⁷ In order to justify these changes, Secretary DeVos utilizes

¹²⁵ Sable, Marjorie R., Fran Danis, Denise L. Mauzy, and Sarah K. Gallagher, “Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students” p. 159.

¹²⁶ Melnick, R. Shep. “The Department of Education’s Proposed Sexual Harassment Rules: Looking beyond the Rhetoric.” *Brookings* (blog), January 24, 2019. <https://www.brookings.edu/blog/brown-center-chalkboard/2019/01/24/the-department-of-educations-proposed-sexual-harassment-rules-looking-beyond-the-rhetoric/>.

¹²⁷ Melnick, R. Shep. “The Department of Education’s Proposed Sexual Harassment Rules: Looking beyond the Rhetoric.” *Brookings* (blog), January 24, 2019. <https://www.brookings.edu/blog/brown-center-chalkboard/2019/01/24/the-department-of-educations-proposed-sexual-harassment-rules-looking-beyond-the-rhetoric/>.

court precedent. Although the purpose of this is to set clear standards for institutions to be in compliance, some of the components such as the adjudication of off-campus instances and the standard of evidence, give institutions discretion. Rather than setting clear standards, this perpetuates the lack of uniform guidance. Additionally, rather than use caselaw, Secretary DeVos should have used information from her meetings with students who sought to make claims for sexual harassment and the wrongfully accused in the summer of 2017 as justification or a combination of the two.

Structure

The Department of Education issued interim guidance that governed for over a year rather than waiting until they had new guidance, thereby perpetuating the confusion and lack of uniformity that already plagued Title IX. Additionally, a quarter of the proposed guidance is dedicated to the cost-benefit analysis of the proposed guidance. Although the Department of Education may have delayed final guidance in an attempt to be thorough, it appears to be insensitive and a misplaced focus for the report. Thousands of comments were submitted by the January 30, 2019 deadline.¹²⁸ Experts, like Shep Melnick in his article “The Department of Education’s Proposed Sexual Harassment Rules: Looking Beyond the Rhetoric,” hypothesize that it will take the Department of Education many months both to thoughtfully read through the comments and consider making any changes.¹²⁹

¹²⁸ Melnick, R. Shep. “The Department of Education’s Proposed Sexual Harassment Rules: Looking beyond the Rhetoric.”

¹²⁹ Melnick, R. Shep. “The Department of Education’s Proposed Sexual Harassment Rules: Looking beyond the Rhetoric.”

Chapter 3: Methodology & Results

An overview of my survey methodology and its results.

Introduction

Chapter 2 of this thesis highlighted four changes proposed in the new guidance and its implications for the adjudication of student complaints of sexual harassment or assault under Title IX. The first proposed change is in the definition of sexual harassment from “unwelcome conduct of a sexual nature” to “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.”¹³⁰ This change narrows the definition meaning that fewer instances would be defined as sexual harassment. The second proposed change would diminish an institution’s responsibilities for investigating incidents that occur off-campus. In her proposed guidance, Secretary DeVos used three-lower court rulings to provide guidance indicating the types of instances institutions should and should not investigate. The proposed rules encourage them to use the standard of “whether a sexual harassment incident occurred within a recipient’s program or activity.”¹³¹ Third, the proposed guidance changes the meaning of an institution having ‘actual knowledge’ of an incident, which current guidance defines as “if a responsible employee knew, or should have known, or if an institution received notice in an indirect manner such as from a member of the community or social media.” The new guidance circumscribes the meaning of actual knowledge to “[n]otice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient...”¹³² The proposed rules

¹³⁰ Ali, Russlynn. “Dear Colleague Letter: Sexual Violence.”

DeVos, Betsy. “Notice of Proposed Rulemaking.”

¹³¹ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹³² Lhamon, Catherine E. “Questions and Answers on Title IX and Sexual Violence.”
DeVos, “Notice of Proposed Rulemaking,” p. 18.

encourage them to use the standard of “whether a sexual harassment incident occurred within a recipient’s program or activity.”¹³³ The final change discussed in chapter 2 is that of the standard of evidence that institutions use in the adjudication of cases. Under Obama, institutions were required to use the preponderance of evidence standard.¹³⁴ Under the proposed guidance, institutions would have discretion over their standard of proof including the opportunity to implement a higher standard.¹³⁵ A higher standard would require those who make claims of sexual harassment to provide more evidence when instances of sexual harassment are notorious for not having a lot of evidence.

Several scholars have warned about the harmful implications of these changes. Primarily, they have expressed concerns that the proposed guidelines are inequitable in their protections for both students who make claims of sexual assault and the accused.¹³⁶ Another concern is that some of the changes, such as the narrowing of the definitions of such sexual harassment and an institution having ‘actual knowledge’ may result in decreased reporting rates. Additionally, some of the components, such as an institution’s off-campus responsibilities and standard of evidence, allow institutional administrators to use their discretion on what instances they should investigate and if they want to increase the standard of evidence when adjudicating.

However, because the proposed guidelines are so new, there is a lack of literature on the impact of these changes altogether. There is also a lack of literature on how institutional administrators, those who will have to make sure their institutions are in compliance with Title IX while also guiding their students through the processes, foresee these changes impacting their

¹³³ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹³⁴ Lhamon, Catherine E, “Questions and Answers on Title IX and Sexual Violence,” p. 13.

¹³⁵ DeVos, “Notice of Proposed Rulemaking,” p. 61.

¹³⁶Yuen, Victoria, and Osub Ahmed. “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.”

Sable, Marjorie R., Fran Danis, Denise L. Mauzy, and Sarah K. Gallagher. “Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students.”

campuses. Because of this, it is important to know whether they agree with scholars' concerns about proposed guidance and the impact that they could have. It is also important to know what they plan to do about the areas that they will have discretion over. Since it is essential to have empirical evidence, I crafted a confidential survey that was sent to a population of 84 administrators/staff at 28 institutions with questions asking them how the changes in guidance discussed in Chapter 2 would affect their ability to achieve these goals.

Methodology

Population- Institution & Individual

Given my position as a student of Trinity College, I wanted to include both Trinity and similar institutions. I decided to include other members of Trinity College's conference, the New England Small College Athletic Conference (NESCAC), in an effort to include similarly situated small, elite, liberal arts colleges on the east coast. This conference includes 11 colleges and universities in five states. Additionally, since Ivy League institutions often set standards that the rest of the industry then follows, I decided to include the eight ivy league institutions that span seven states. Because all NESCAC and ivy league institutions are private, I then decided to include state schools to diversify the type of institution. I chose to include the flagship state school of each state that has a NESCAC or Ivy League institution because these typically have the largest population of students. Thus, my sample is made up of east coast, 4-year higher education institutions, including private liberal arts colleges, private universities, and public state universities.

Table 3.1 Institutional Break-Down of the Survey Population

| Institution type | Institution Name | State |
|-------------------------|-------------------------------------|--------------|
| NESCAC | Trinity College | CT |
| | Connecticut College | CT |
| | Wesleyan University | CT |
| | Amherst College | MA |
| | Williams College | MA |
| | Tufts College | MA |
| | Bates College | ME |
| | Colby College | ME |
| | Bowdoin College | ME |
| | Middlebury College | VT |
| | Hamilton College | NY |
| Ivy League | Princeton University | NJ |
| | Harvard College | MA |
| | Cornell University | NY |
| | Columbia University | NY |
| | Yale University | CT |
| | University of Pennsylvania | PA |
| | Dartmouth College | NH |
| | Brown University | RI |
| State School | University of MA- Amherst | MA |
| | University of CT- Storrs | CT |
| | University of Rhode Island | RI |
| | University of New Hampshire- Durham | NH |
| | University of Maine [Deputy] | ME |
| | University of Vermont | VT |
| | Penn State | PA |
| | SUNY Buffalo | NY |
| | Rutgers | NJ |

I selected participants at these institutions who would be the ones most likely to directly guide students through these processes and ensure that their institution is in compliance with Title IX

regulations. With this in mind, I decided to first include the Title IX Coordinator (or interim Title IX Coordinator or Deputy Title IX Coordinator) at each institution. I also included the position of the highest-level administrator in charge of students, most commonly the Dean, Vice President or Vice Provost of campus life, student affairs or of student life. Although these positions differ among institutions, the duties and responsibilities are comparable, and the Title IX Coordinator often reports directly to them. For the rest of this chapter, when discussing this population, I will reference them as “VPs/Deans”. Finally, I chose to include the director or interim director of the institution’s women, gender, sexuality, rape prevention and/or gender equity center. Although these too differ by name, they all act as student resources for Title IX matters on campus and advocate for students seeking to make claims. Going forward, I will use “Director” as the umbrella term encompassing all other similar job titles. These three positions at the 28 institutions made for a total of 84 individuals that were contacted and asked to participate in my study. The table below provides the demographic information of the participants.

| Table 3.2 Participants' Demographics | | |
|---|-------------------------------|--------------------------------|
| | Number of Participants | Percent of Participants |
| NESCAC | 5 | 33.33 |
| Ivy League | 0 | 0 |
| State School | 7 | 46.67 |
| Institution Not Provided | 3 | 20 |
| Title IX Coordinator/ Deputy Title IX Coordinator | 4 | 26.67 |
| VP/Dean of Student Life/ Campus Initiatives | 5 | 33.33 |
| Director of Women/ Gender/ Equity Center | 4 | 26.67 |
| Job Title Not Provided. | 2 | 13.33 |
| Male | 6 | 40 |
| Female | 9 | 60 |
| Transgender male | 0 | 0 |
| Transgender Female | 0 | 0 |
| I do not identify as female, male, transgender male or transgender female | 0 | 0 |
| 18-24 years old | 0 | 0 |
| 25-34 years old | 4 | 26.67 |
| 35-44 years old | 7 | 46.67 |
| 55-64 years old | 4 | 26.67 |
| 65-74 years old | 0 | 0 |
| 75 years or older | 0 | 0 |
| White | 12 | 80 |
| Hispanic or Latino | 0 | 0 |
| Black or African American | 3 | 20 |
| Native American or American Indian | 0 | 0 |
| Asian | 0 | 0 |
| Native Hawaiian or other Pacific Islander | 0 | 0 |
| Other | 0 | 0 |

As shown in the table, five participants (33.33%) work at NESCAC institutions, no participants work at Ivy League institutions, seven (46.67%) work at state institutions and three (20%) did not list their institution in their survey responses. Of the 15 participants, four (26.67%) are Title IX Coordinators/ Deputy Title IX Coordinators, five (33.33%) are VPs/Deans, four (26.67%) are Directors and two (13.33%) did not provide their position/ job title in their responses. Additionally, no participants are 18-24 years old nor 65 years or older. Rather, four participants (26.67%) are 25-34 years old, seven participants (46.67%) are 35-44 years old and four participants (26.67%) are 55-64 years old. Finally, 12 participants (80%) are white, three participants (20%) are Black or African American. None of the respondents are Hispanic or Latino, Native American or American Indian, Asian, Native Hawaiian or other Pacific Islander, or any other ethnicity.

Although I did not have enough responses to conduct statistical analysis, the results presented interesting findings. Although there was an overall consensus of disagreement and concern with the proposed guidelines indicating a preference for Obama-era guidelines, the level of disagreement and concern varied between job titles/positions. The positions that work most directly with students, Directors, had the greatest level of disagreement with the new guidance. The positions that work slightly less directly with students, VP/Deans, have a slightly less direct level of disagreement and Title IX Coordinators/ Deputy Title IX Coordinators which often work least directly with students, have the least level of disagreement with the proposed guidelines. This may indicate that the proposed guidelines were created with process in mind rather than the students it serves.

Limitations

Because the survey includes NESCAC, Ivy League and their respective flagship state schools, the results are only applicable to this group of institutions and cannot be applied nationally. More specifically, all of these institutions are in the northeast or a nearby state. Because of this, geographic, political or other factors may affect the responses and therefore make them not applicable to other geographic areas of the country or of the nation as a whole. Additionally, although responsibilities of these individuals across institutions are likely similar, their job titles are not consistent, and their responsibilities and duties may vary slightly and therefore could impact their responses. Finally, after contacting eighty-four individuals, I had a response rate of about 18% (N=15). As a result, I was not able to conduct a meaningful statistical analysis. The results for each question are presented below.

Survey Results by Proposed Change

Definition of Sexual Harassment

As mentioned earlier in this chapter, the proposed guidelines narrow the definition of sexual harassment from “unwelcome conduct of a sexual nature” to “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.”¹³⁷ This definition derives from *Davis v. Monroe County* (1999), a case heard by the Supreme Court that found that institutions can be held liable if they act with deliberate indifference to harassment that is so severe it affects an individual’s ability to enjoy educational opportunities. Increasing the threshold that students who make claims of sexual assault must ‘meet’ before their case is investigated when students seeking to make claims already are unlikely to trust their own judgment of what is ‘severe’ or ‘pervasive’ enough to qualify as sexual harassment may lead to decreased reporting rates.¹³⁸

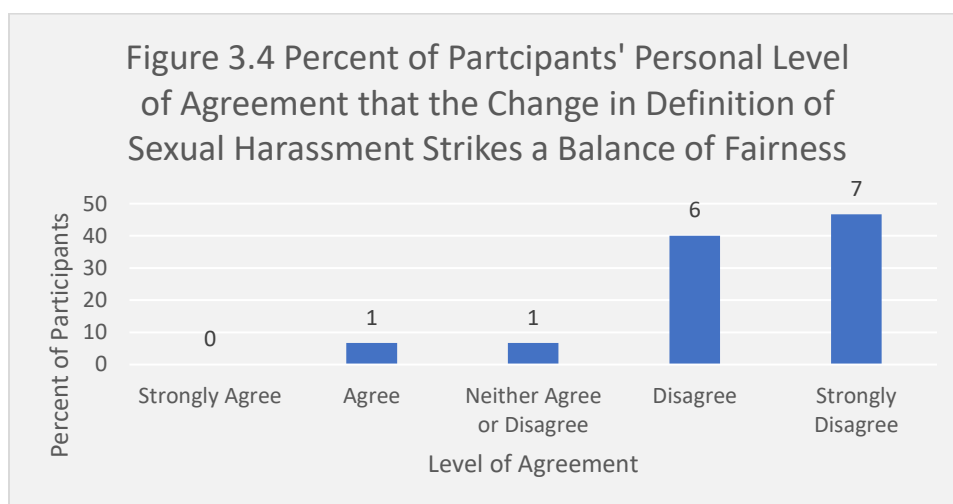
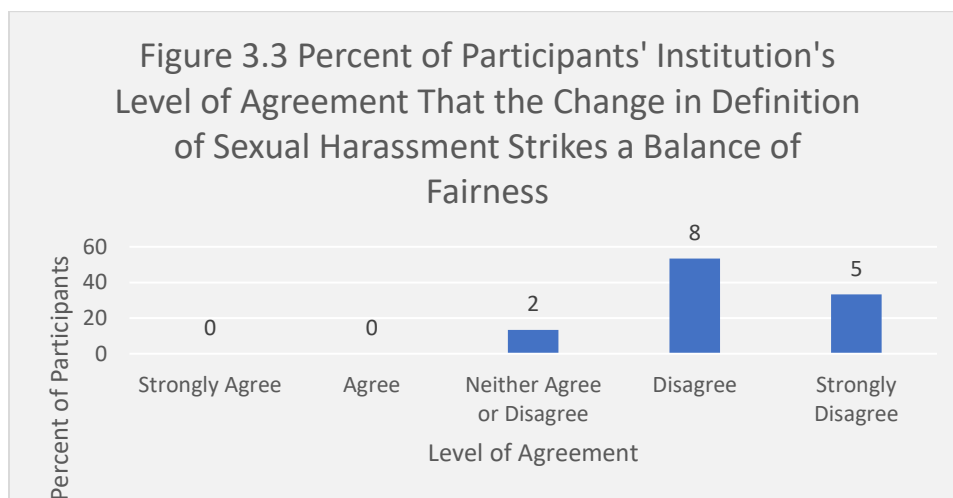
When asked whether their institution agrees that this change in definition is the appropriate definition to achieve a balance of fairness for both students who make claims of sexual assault and the accused, 13 out of 15 participants (86.67%) responded that their institution disagrees or strongly disagrees with this new definition. The same number of participants (13 out of 15) and percent of participants (86.67%) responded that as individuals, they also personally disagree or strongly disagree that this change in definition. They also disagree or strongly disagree that it achieves a balance of fairness for both students who make claims of sexual assault and the accused. Figures 3.3 and 3.4 below show these results. These results indicate that both institutions and institutional administrators agree that the Obama-era guidance’s definition

¹³⁷ Ali, Russlynn. “Dear Colleague Letter: Sexual Violence.”

DeVos, Betsy. “Notice of Proposed Rulemaking.”

¹³⁸ Yuen, Victoria, and Osub Ahmed. “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.”

of sexual harassment is a more appropriate balance of fairness for students seeking to make claims and the accused.



When broken down by job title and position, all of the VPs/Deans, Directors and those without a position listed in my sample said they disagree or strongly disagree that this change in definition strikes an appropriate balance of fairness for students who make claims of sexual assault and the accused. However, only 2/4 of Title IX Coordinators/Deputy Title IX Coordinators disagree or strongly disagree with this. These findings indicate that there may possibly be a relationship between job title/position and what is considered striking an appropriate balance of fairness in regard to the definition of sexual harassment. These results

also indicate that, comparatively, VPs/Deans and Directors may be more in-line with the Obama-era guidance’s definition of sexual harassment and idea of a fair balance for student who make claims of sexual assault and the accused. These results are shown below in table 3.5.

| | Title IX Coordinator/ Deputy | VP/Dean of Students/ Campus Life | Director of Women/Gender/Equity Center | Position not listed |
|-----------------------------------|------------------------------|-------------------------------------|---|---------------------|
| Percent Strongly Agree | 0 | 0 | 0 | 0 |
| Percent Agree | 25 (1) | 0 | 0 | 0 |
| Percent Neither Agree or Disagree | 25 (1) | 0 | 0 | 0 |
| Percent Disagree | 25 (1) | 80 (4) | 0 | 50 (1) |
| Percent Strongly Disagree | 25 (1) | 20 (1) | 100 (4) | 50 (1) |
| Total | 100 (4) | 100 (5) | 100 (4) | 100 (2) |

Note: the number in parenthesis is the number of individuals, rather than percent, that responded with each option.

Off-Campus Responsibilities

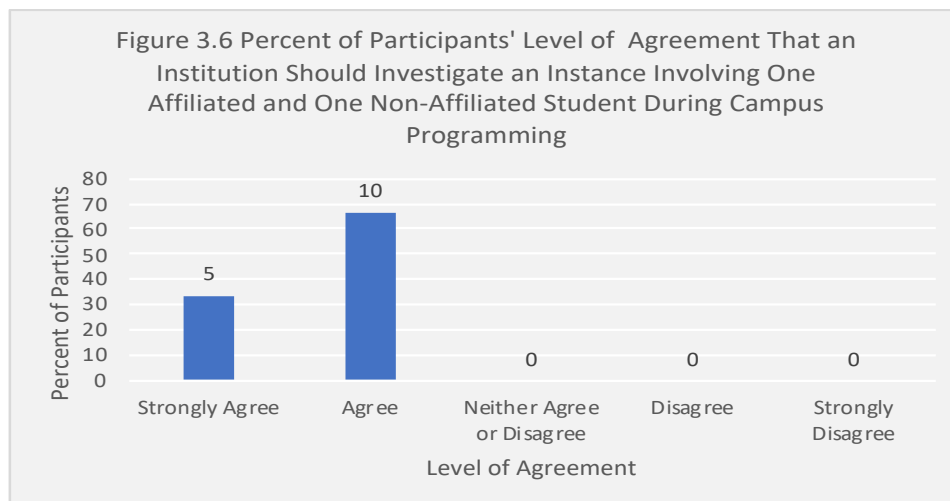
Chapter 2 considered how the proposed guidance encourages institutions to determine whether they should investigate an instance of sexual harassment by “[determining] whether a sexual harassment incident occurred within a recipient’s program or activity.”¹³⁹ One of the lower-court rulings Secretary DeVos uses as guidance is *Samuelson v. Oregon State University* (2018) which dismissed the plaintiff’s Title IX claim because it did not occur ‘under’ a ‘program or activity’ of her home institution at a location unaffiliated with the institution by an unaffiliated individual.¹⁴⁰ Similarly, DeVos uses *Doe v. Brown University* (2018) as guidance. This case found that the plaintiff did not have a Title IX claim because, despite the fact that the incident happened on a campus different from the student’s own home university, she did not “[avail] herself or

¹³⁹ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹⁴⁰ DeVos, “Notice of Proposed Rulemaking,” p. 25.

[attempt] to avail herself” in any of the institution’s educational programs.¹⁴¹ Instead, the plaintiff would have to file a complaint under the institution’s Code of Conduct.¹⁴²

Respondents in the survey were asked a series of questions that consider this issue of institutional responsibility to investigate alleged incidents of sexual harassment. Each of these questions in the series asked respondents to indicate their level of agreement or disagreement that an institution should investigate an alleged hypothetical incident where the details of the location, type of event, and the affiliation of the alleged victim and perpetrators were systematically varied. In the first question, respondents were asked whether they agree or disagree that their institution should investigate an instance where a student who attends their institution is sexually harassed by a student who attends another institution while attending a conference-sponsored basketball game between the two institutions. All 15 participants (100%) said that they strongly agreed or agreed. Figure 3.6 presents the results.

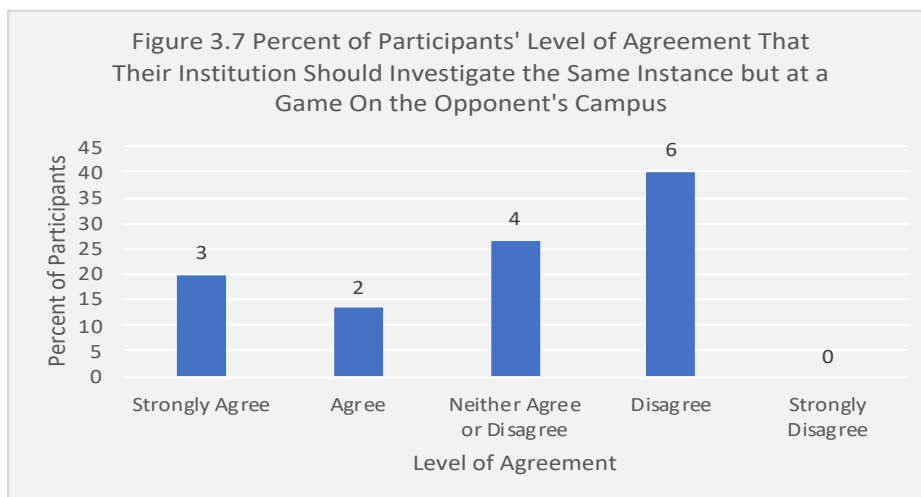


These results are consistent with the guidance provided by *Samuelson* and *Doe* because the instance is on campus and the students are availing themselves to campus programming.

¹⁴¹ DeVos, “Notice of Proposed Rulemaking,” p. 26.

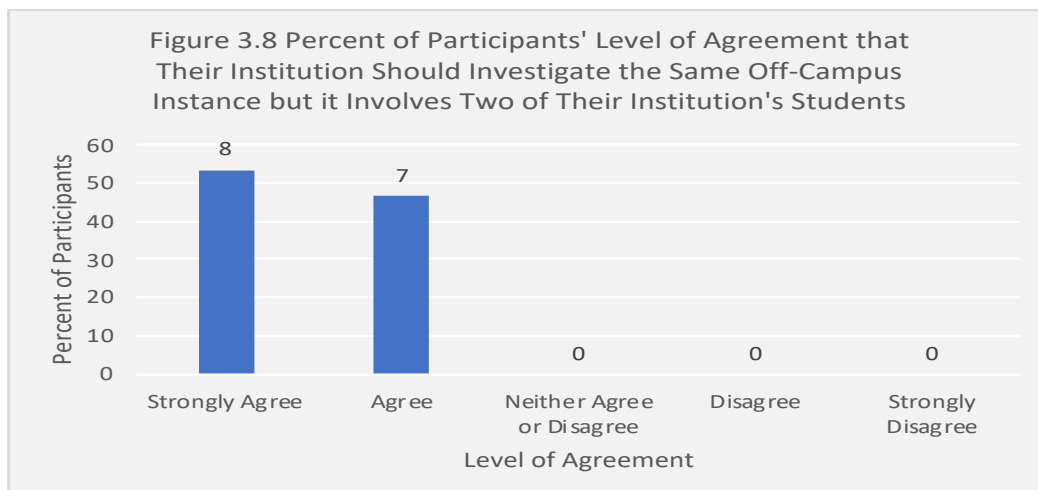
¹⁴² DeVos, “Notice of Proposed Rulemaking,” p. 26.

When asked about the same situation but when the conference-sponsored basketball game is on the opponent's campus, five participants (33.33%) strongly agree or agree, four (26.67%) neither agree or disagree and six participants (40%) disagree. Figure 3.7 shows these results.



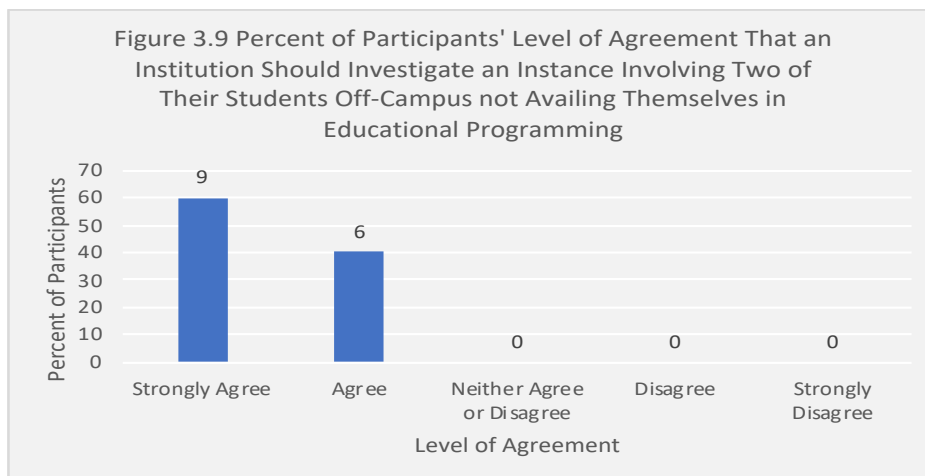
The difference between this survey question and something similar to the *Doe* case is that this question asks participants if the student who makes a claim's university should investigate. On the other hand, in *Doe*, the dropped Title IX claim was through the perpetrator's Title IX office. Yet, this survey question presents the issue of whether this game could be considered educational programming at both institutions even though it takes place on one campus and it is between both institutions. It presents one of the holes in the guidance that institutions that require further clarification in order to be useful to institutions.

Similarly, when asked whether their institution should investigate an instance involving a student who that attends their institution and is sexually harassed by another student who also attends their institution at a conference-sponsored basketball game between their institution and an opponent on the opponent's campus, 15 participants responded that they agree or strongly agree. Chart 3.8 below shows these results.



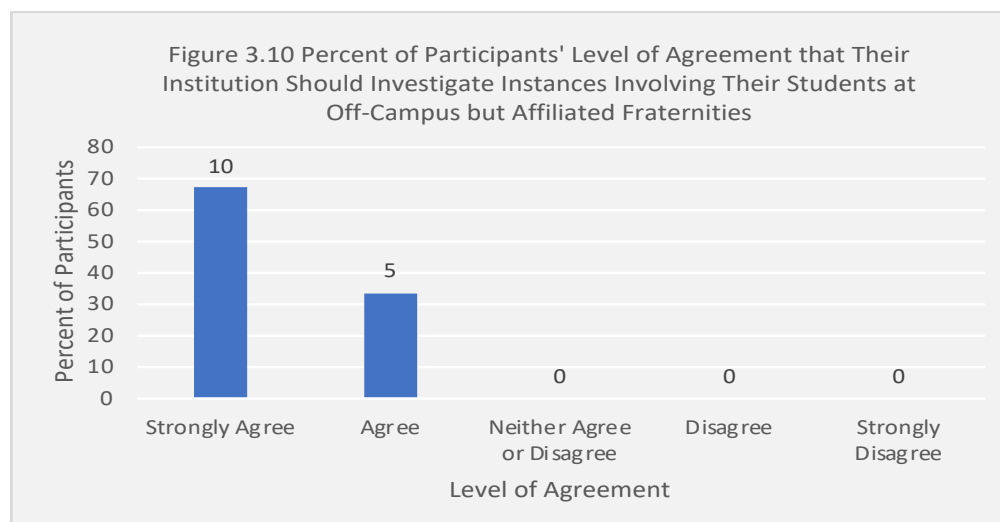
This survey question presents another scenario not directly guided by this caselaw because it was at a basketball game affiliated with the institution and involving two of its students but was not on campus.

However, when asked whether their institution should investigate an instance in which one student from their institution sexually harassed another student from their institution while visiting a mutual friend on another campus. In this instance, the students were not participating in any educational programming. Both *Samuelson* and *Doe* would argue that institutions do not have any obligation to investigate based on jurisprudence yet 15 participants (100%) responded that they strongly agreed or agreed that it is the right thing for an institution to do. Nine participants (60%) responded that they strongly agreed. Figure 3.9 shows these results.



These results may indicate a mismatch in priorities between institutional administrators who are more concerned with how many of their own students are involved in the scenario whereas the Department of Education is more concerned with the matter of if students are participating themselves in educational programming. Knowing this, it is unsurprising that so many institutions submitted comments during the notice-and-comment period.

The final ruling in the DeVos guidance is that of *Farmer v. Kansas State University* (2017) which held that a fraternity would be considered a program or activity of a university because it receives funding and support from a Greek affairs office. When asked whether they agree that their institution should investigate an instance of sexual harassment involving two university students that occurred at an off-campus but affiliated fraternity, all 15 respondents said that they either strongly agreed or agreed, findings consistent with *Farmer*. Figure 3.10 shows these results.



Although there is consistency between institutional administrators' inclinations and the caselaw provided by the Department of Education's proposed guidelines on what institutions should investigate when it comes to off-campus but affiliated fraternities as well as on-campus programming, there is disagreement about what institutions should investigate when instances happen off-campus and involve different numbers of students. The Department of Education is more concerned with whether or not the individuals were taking part in educational programming, which is under the Department of Education's purview, while institutional administrators are more concerned with protecting their students and holding them accountable. This became especially apparent when comparing the caselaw that Secretary DeVos proposed guidelines are based on and institutional administrator's perception of the types of instances their Title IX office should investigate. These inclinations are more in line with Obama-era guidance that sought nothing more than to protect students from a hostile learning environment. This current priority mismatch between institutional administrators and the Department of Education is not only concerning but also surprising because the proposed guidance is supposed to be influenced by meetings with stakeholders and those who oversee or guide students through these processes. These individuals are in the trenches and should be the most important and influential stakeholders.

Definition of Actual Knowledge

The Obama-era Title IX guidance defined an institution as having ‘actual knowledge’ of an instance of sexual harassment “if a responsible employee knew, or should have known, or if an institution received notice in an indirect manner such as from a member of the community or social media.”¹⁴³ As discussed in chapter 2, the proposed guidance would limit this definition to:

Notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient...¹⁴⁴

Furthermore, the proposed guidance explains that “the mere ability or obligation to report sexual harassment does not qualify an employee.”¹⁴⁵ Like that of the change in an institution’s off-campus responsibilities, the change in definition of ‘actual knowledge’ is also based in caselaw. This definition was applied in two Supreme Court cases, *Davis v. Monroe County Board of Education* (1999) and *Gebser v. Lago Vista Independent School District* (1998). However, similar to the proposed change to limit the definition of sexual harassment, scholars warn that this change may decrease reporting rates as well because students seeking to make claims would have fewer employees that they would be able to confide in that would have the ability to trigger a Title IX investigation.¹⁴⁶

When asked whether they agree with this change, 13 participants (86.67%) responded that they disagree or strongly disagree. Only one participant (6.67%) said they neither agreed nor disagreed with the new guidance and one participant (6.67%) said they strongly agreed with the new guidance.

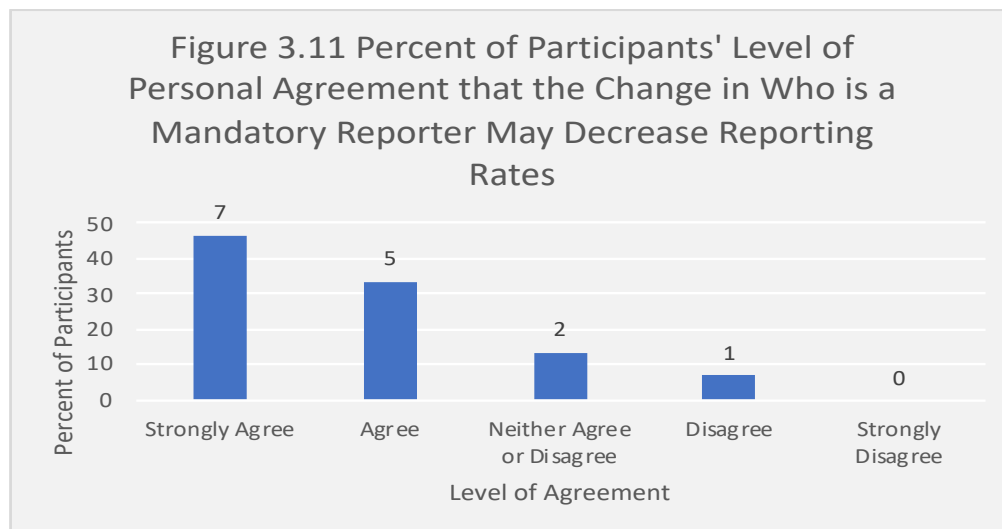
¹⁴³ Lhamon, Catherine E. “Questions and Answers on Title IX and Sexual Violence.”

¹⁴⁴ DeVos, “Notice of Proposed Rulemaking,” p. 18.

¹⁴⁵ DeVos, “Notice of Proposed Rulemaking,” p. 25.

¹⁴⁶ Yuen, Victoria, and Osub Ahmed, “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.”

However, when asked whether they agree with the concern that this change will decrease reporting rates among students who make claims of sexual assault, 12 participants (80%) responded that they strongly agree or agree, two participants (13.33%) responded that they neither agree or disagree and one participant (6.67%) responded that they disagree. These results are reflected in figure 3.11 below.



It is important to note that when broken down by job title/position, 5/5 (100%) of VP/Deans and 4/4 (100%) Directors agreed or strongly agreed while only 2/4 (50%) of Title IX Coordinators/Deputy Title IX Coordinators agreed or strongly agreed. 1/4 (25%) of Title IX Coordinators/Deputy Title IX Coordinators neither agree or disagree and 1/4 (25%) disagree that this change may decrease reporting rates. These responses may reflect the fact that this change likely does not affect Title IX Coordinators/Deputy Title IX Coordinators directly but may affect some VP/Deans if they are not a position to institute Title IX corrective measures. In addition, the change most likely affects Directors who typically guide and support students through Title IX processes but who do not themselves institute corrective measures. Table 3.12 shows a breakdown of these results by job title/position.

| | Title IX Coordinator/ Deputy | VP/Dean of Students/ Campus Life | Director of Women/Gender/Equity Center | Position not listed |
|------------------------------|------------------------------|-------------------------------------|---|---------------------|
| Strongly Agree | 50 (2) | 20 (1) | 100 (4) | 0 |
| Agree | 0 | 80 (4) | 0 | 50 (1) |
| Neither Agree or Disagree | 25 (1) | 0 | 0 | 50 (1) |
| Disagree | 25 (1) | 0 | 0 | 0 |
| Strongly Disagree | 0 | 0 | 0 | 0 |
| Total | 100 (4) | 100 (5) | 100 (4) | 100 (2) |

Note: the number in parenthesis is the number of individuals, rather than percent, that responded with each option.

Additionally, when broken down by participants' gender identification, the results show that 9/9 (100%) of those who identify as female indicated that they agreed or strongly agreed that this change may decrease reporting rates while only 3/6 (50%) of those who identify as male agree and 0/6 (0%) strongly agree. It is also important to note that 2/6 (33.33%) of male-identified participants responded that they neither agree or disagree and 1/6 (16.67%) of male-identified participants responded that they strongly disagree. These results indicate that there is a relationship between gender identity and level of agreement with the notion that this change in definition of an institution having 'actual knowledge' may decrease reporting rates. This relationship may be related to the fact that more women experience sexual harassment than men. These results are broken down in table 3.13.

| Table 3.13 Percent of Participants' Level of Personal Agreement that This Change May Decrease Reporting Rates By Gender Identification | | |
|---|-----------|-----------|
| | Male | Female |
| Strongly Agree | 0 | 77.78 (7) |
| Agree | 50 (3) | 22.22 (2) |
| Neither Agree or Disagree | 33.33 (2) | 0 |
| Disagree | 0 | 0 |
| Strongly Disagree | 16.67 (1) | 0 |
| Total | 100 (6) | 100 (9) |

147

Note: the number in parenthesis is the number of individuals, rather than percent, that responded with each option.

Standard of Evidence

Under the Obama-era guidance, institutions were required to use the preponderance of evidence standard in their proceedings. The proposed guidelines allow institutions to use the clear and convincing standard.¹⁴⁸ In her explanation, Secretary DeVos explains that she regards Title IX grievance procedures as being more closely aligned with civil administrative proceedings which relies upon the clear and convincing standard rather than civil litigation which uses the preponderance of evidence standard.¹⁴⁹ She also cites *Lee v. University of New Mexico* (2018), a case which found the preponderance of evidence standard to be inappropriate for Title IX claims because the result is too “permanent and far-reaching.”¹⁵⁰ Some scholars warn that the clear and convincing standard “stacks the process against the accuser and sets an unreasonably high bar for

¹⁴⁷ Note: Transgender male and transgender female were both listed as options as well as an option for those who do not identify with any of these options. Because no participants identified as any of these options, they were not included in this table.

¹⁴⁸ Lhamon, Catherine E, “Questions and Answers on Title IX and Sexual Violence,” p. 13.

DeVos, “Notice of Proposed Rulemaking,” p. 61.

¹⁴⁹ DeVos, “Notice of Proposed Rulemaking,” p. 60-62.

¹⁵⁰ DeVos, “Notice of Proposed Rulemaking,” p. 60-62.

evidence that is difficult to achieve in many sexual assault cases.” As a consequence, this proposed change may result in a decrease in reporting rates because students seeking to make claims will fear that they do not have enough evidence to reach this standard.¹⁵¹

When asked whether their institution agrees or disagrees with the criticism that the preponderance of evidence standard goes too far to protect students who make claims of sexual assault and does not go far enough to protect the accused, 13 participants (86.67%) responded that their institution disagrees or strongly disagrees with this criticism. When asked whether they personally agree or disagree with this criticism, 14 participants (93.33%) responded that they disagree or strongly disagree with this criticism possibly indicating that there is very little difference in the institutions and their administrators’ level of agreement with this criticism. Although only 13 of the 15 participants responded when asked which standard of proof their institution will use, 11 of the 13 participants (84.62%) responded that their institution will continue to use the preponderance of evidence standard no one responded that their institution will use the clear and convincing standard two (15.38%) responded that they were not sure what their institution had decided and no one responded that their institution planned to use a standard of proof not listed. These results may indicate that institutions are more committed to the higher-level Obama-era standard of proof because they believe it strikes a better balance of fairness for students who make claims of sexual assault and the accused.

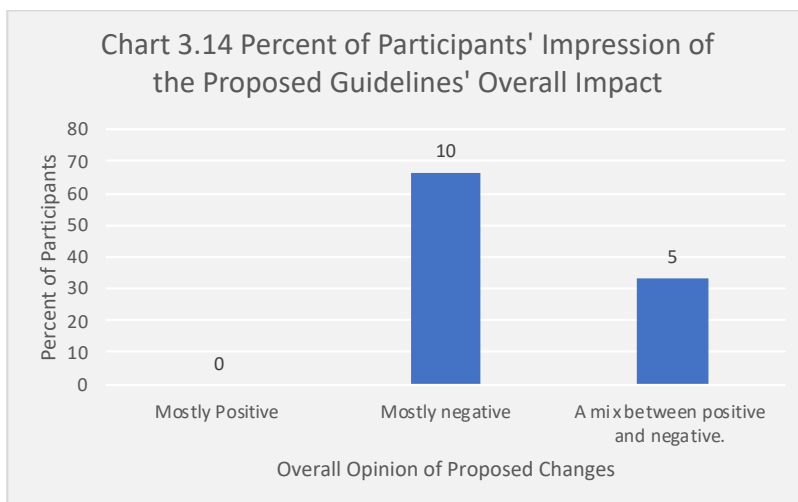
Conclusion

When asked whether the overall impact of the proposed guidelines will be mostly positive or negative, ten participants (66.667%) responded that they believe the impact of the proposed

¹⁵¹ Yuen, Victoria, and Osub Ahmed. “4 Ways Secretary DeVos’ Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault.”

Sable, Marjorie R., Fran Danis, Denise L. Mauzy, and Sarah K. Gallagher, “Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students” p. 159.

guidelines will be mostly negative while five participants (33.33%) responded that they believe the impact will be a mix between positive and negative. No participants responded that they foresee the overall impact of the proposed guidance being mostly positive. Chart 3.14 shows these results and table 3.15 breaks them down by job title/position.



| | Title IX Coordinator/ Deputy Title IX Coordinator | VP/Dean of Students/Campus Life | Director of Women/Gender/Equity Center | Position/ Job Title Not Listed. |
|-------------------------------------|---|---------------------------------|--|---------------------------------|
| Mostly Positive | 0 | 0 | 0 | 0 |
| Mostly Negative | 50 (2) | 60 (3) | 100 (4) | 50 (1) |
| A Mix Between Positive and Negative | 50 (2) | 40 (2) | 0 | 50 (1) |
| No Opinion | 0 | 0 | 0 | 0 |
| Total | 100 (4) | 100 (5) | 100 (4) | 100 (2) |

Note: the number in parenthesis is the number of individuals, rather than percent, that responded with each option.

Table 3.15 indicates that 4/4 (100%) of Directors find the guidelines to be mostly negative while only (3/5) 60% of VPs/Deans and 2/4 (50%) of Title IX Coordinators/Deputy Title IX Coordinators do. Likewise, 2/4 (40%) of VPs/Deans and 2/4 (50%) of Title IX Coordinators/Deputy Title IX Coordinators find the overall impact to be a mix between positive and negative. These results are consistent with the other results broken down by job title/ position. In all of these cases, Directors vehemently disagreed with criticisms of the proposed guidelines and any harmful implications they may have, VPs/Deans disagreed to a lesser degree, and Title IX Coordinators/Deputy Title IX Coordinators disagreed to an even lesser degree. Although Title IX

Coordinators/Deputy Title IX Coordinators work more closely with the process, Directors work more closely with the students in the trenches of the processes. Knowing this, these results may indicate that different administrators have different perceptions of the needs of students.

When asked what their thoughts are on whether the proposed guidelines are equitable for both the accused and those who make claims of sexual assault in an open-ended question, two of the 14 participants provided answers such as “mix based on who is protected more” indicating a level of equity. Six of the comments provided responses such as “the guidelines go too far to protect the accused and will likely chill reporting on college campuses;” “the guidelines go too far to protect the accused and will likely chill reporting on college campuses;” and “all parties should be treated equitably, but these proposed guidelines are not helpful in facilitating reporting and instigating cultural change.” These comments indicate concerns about a potential decrease in reporting rates. Finally, eight of the comments include sentiments of the guidelines going too far to protect the accused such as “we knew that there would be changes to the Obama-era guidance and some changes needed to be made. However, I believe that the proposed guidelines go a little too far” indicating that the that the guidelines go too far to protect the accused and the institution. The comments showed that the administrators were overall displeased with the proposed guidance. These comments are reflective of the results shown in chart 3.14 and table 3.15 on the overall impact of the guidelines and are likely reflective of the comments institutions submitted during the notice-and-comment period. Finally, they indicated that these four changes are some of the most impactful and will likely be harmful for their students.

There appears to be general consensus on concerns for the proposed narrowing in definition of sexual harassment, use of caselaw to decrease an institutions obligation to investigate off-campus instances, narrowing in definition of an institution having ‘actual knowledge’ and allowing

institutions to have discretion over which standard of proof they use. Results indicate that administrators expect that these proposed changes will decrease reporting rates and fail to strike a fair balance between rights for students seeking to make claims of sexual harassment and accused individuals. My survey results also indicate that there may be a connection between an institutional administrator's job title/position and their level of concern with the proposed guidelines. Directors appear to have the most concerns and disagreement with the proposed guidelines, VPs/Deans have slightly less, and Title IX Coordinators/Deputy Title IX Coordinators have the least. As previously mentioned, Directors work most directly with students often guiding them through Title IX processes and advocating for them while VPs/Deans hold the position that the Title IX Coordinators/Deputy Title IX Coordinators report to. Although they oversee the process in this sense, their other responsibilities involve working directly with students. Title IX Coordinators/Deputy Title IX Coordinators primarily oversee Title IX processes and often have other jobs in human resources or other departments. Because of this, there may be a relationship between the extent to which an institutional administrator works directly with students involved in sexual harassment and assault incidents and their level of concern and disagreement with the proposed guidelines. Although I did not have enough responses or participants' information to run an analysis on this connection, I believe it is one worth exploring because they are all involved in the process or oversee it at various stages, often guiding students through the process.

CONCLUSION

This thesis explored the history of Title IX, broke down the new proposed guidance with a focus on the four proposed changes that are likely to have the most harmful implications for students who make claims of sexual assault and the accused. My IRB-approved survey that includes questions about these four changes and about the implementation of the proposed new guidance in general and was sent to 84 administrators at 28 universities. Because the proposed guidance is so new, we do not yet know either how administrators expect the rules to impact their students or how committed they are to the Obama-era guidance upon which they now rely. The results of my survey indicate that institutional administrators may have preference for the Obama-era rather than Trump-era guidance. However, my survey results also indicate that there may be a relationship between job title/position and level of disagreement with the Trump-era guidance. Because the proposed guidance is so new, there is no definitive research on these relationships nor the overall impact of the proposed new guidance.

After sports, sexual harassment and sexual assault have become the next major area of implementation of Title IX. This has happened in conjunction with yearly women's marches and the #MeToo movement. The comments that Secretary DeVos and the Department of Education received are likely similar to the concerns expressed in my survey results. Going forward, it will be important see whether Secretary DeVos and the Department of Education understand and take seriously these concerns and then modify their proposed guidance in response.

APPENDIX

Appendix 1: 2011/2014 and 2018 Comparison Chart

A chart directly comparing the 2014/2011 and 2018 guidance on the definition of sexual harassment, reporting requirements, jurisdiction and standard of evidence as well as other key differences.

| 2011 or 2014 | Topic | 2018 |
|---|---|---|
| <p>“Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual violence is a form of sexual harassment prohibited by Title IX” (2011, Page 3).</p> | <p><u>Definition of Sexual Harassment</u></p> | <p>“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; or sexual assault as defined...” (2018, page 18).</p> |
| <p>“OCR deems a school to have notice of student-on-student sexual violence if a responsible employee knew, or in the exercise of reasonable care should have known, about the sexual violence” (2014).</p> <p>“The school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media. In some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents” (2014).</p> | <p><u>Reporting Requirements</u></p> | <p>“Paragraph (e)(6) defines “actual knowledge” as notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient...” (2018)</p> <p>“Paragraph (e)(6) also states that imputation of knowledge based solely on respondeat superior or constructive notice is insufficient to constitute actual knowledge, that the standard is not met when the only official of the recipient with actual knowledge is also the respondent, and that the mere ability or obligation to report sexual harassment does not</p> |

| | | |
|--|--|---|
| | | <p>qualify an employee, even if that employee is an official, as one who has authority to institute corrective measures on behalf of the recipient” (2018, page 18).</p> |
| <p>“Under Title IX, a school must process all complaints of sexual violence, regardless of where the conduct occurred, to determine whether the conduct occurred in the context of an educational program or activity or had continuing effects on campus or in an off-campus education program or activity” (2014, page 29).</p> <p>“In other words, if a school determines that the alleged misconduct took place in the context of an education program or activity of the school, the fact that the alleged misconduct took place off campus does not relieve the school of its obligation to investigate the complaint as it would investigate a complaint of sexual violence that occurred on campus” (2014, Page 29).</p> <p>“Even if the misconduct did not occur in the context of an education program or activity, a school must consider the effects of the off-campus misconduct when evaluating whether there is a hostile environment on campus or in an off-campus</p> | <p style="text-align: center;"><u>Jurisdiction</u></p> | <p>“In determining whether a sexual harassment incident occurred within a recipient’s program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored promoted or endorsed the vents or circumstances” (2018, page 25).</p> <p>Examples used as guidance: <i>-Farmer v. Kansas State Univ.</i>, (2017) held that fraternities are an “education program or activity” for the purpose of Title IX because they receive resources and oversight by the university <i>-instance where a female Providence College student was sexually assaulted by three Brown students on Brown’s campus and could only file a complaint under Brown’s Code of Conduct but not under Title IX because she “had not availed herself or attempted to avail herself of any of Brown’s educational programs and therefore could not have been</i></p> |

| | | |
|--|------------------------------------|---|
| <p>education program or activity because students often experience the continuing effects of off-campus sexual violence while at school or in an off-campus education program or activity” (2014, page 29).</p> <p>“once a school is on notice of off-campus sexual violence against a student, it must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct” (2014, page 29).</p> | | <p>denied those benefits” (2018, page 25).</p> <p>“The Department wishes to emphasize that when determining how to respond to sexual harassment, recipients have flexibility to employ age-appropriate methods, exercise common sense and good judgement, and take into account the needs of the parties involved” (2018, page 25).</p> |
| <p>“The evidentiary standard that must be used (preponderance of the evidence) (i.e., more likely than not that sexual violence occurred) in resolving a complaint” (2014, page 13).</p> | <p><u>Standard of Evidence</u></p> | <p>“The recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty” (2018, page 61).</p> |

| | | |
|---|---------------------|--|
| <p>-Signed by Assistant Secretary for Civil Rights and uses “OCR” to speak of self -19 pages (2011) and 46 pages (2014) -Does not mention cost-benefit analysis -Refers to court decisions far less -Did not partake in a notice-and-comment period</p> | <p><u>Other</u></p> | <p>-Signed by Secretary DeVos and uses “the Department” to speak of self -144 pages -Speaks significantly of cost-benefit analysis -Relies on court decisions -Notice-and-comment and has a section devoted to places the Department wants comment</p> |
|---|---------------------|--|

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