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# A Review of Department of Education Programs: Transgender Issues, Racial Quotas in School Discipline, and Campus Sexual Assault Mandates

Race & Sex Working Group

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This paper was the work of multiple authors. No assumption should be made that any or all of the views expressed are held by any individual author. In addition, the views expressed are those of the authors in their personal capacities and not in their official/professional capacities.

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## Executive Summary

Perhaps nowhere in the regulatory field have government efforts gone as far astray from the letter and intent of the law as they have in the arena of race and sex discrimination in education. Laws passed in the 1960s and '70s to protect individuals from invidious discrimination based on race, color, national origin, sex, or religion have over the years been reinterpreted through regulations to expand prohibited actions far beyond actual discriminatory behavior to include any action that might lead to different outcomes for racial minorities and women in school assignments, university admissions, sports funding and, most recently, disciplinary procedures in public schools, colleges, and universities. In addition, the Education Department has even attempted to prohibit schools from restricting locker rooms and bathrooms based on sex instead of the more fluid definition of gender identity.

Two civil rights provisions in particular have been subject to this kind of expansive enforcement through regulation: Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Act Amendments. Title VI provides, in short, that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” Title IX declares, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”; however, the Act goes on to cite several exceptions, including a specific prohibition against “require[ing] any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist. . . .” The laws seem straightforward and commendable, insuring that individuals receive equal treatment and opportunity without regard to race or sex — characteristics, which have, until recently in the case of sex, been regarded as immutable.

However, as the three sections of this paper demonstrate, these provisions have now been stretched beyond recognition through a series of memoranda and guidance issued by the Department of Education (DoEd) regarding their enforcement. For example, DoEd issued a guideline to schools to allow students to use locker room and bathroom facilities based on their gender-identity instead of their biological sex. DoEd has also pressured schools to change disciplinary procedures so that minority students not be disciplined at higher levels than white students, in effect imposing racial quotas in suspensions. Lastly, we examine how DoEd has compelled colleges and universities to change their adjudicatory process for alleged sexual assaults. Now is an opportune time to determine how we can restore the original intent of Title VI and Title IX, and stop federal agencies from engaging in coercive pressure on schools and universities to promote social engineering on race and sex.

This paper details several areas where a single federal administrative agency has replaced the legitimate function of the legislature to define discrimination based on race, color, national origin, sex, and religion. While the Constitution gives the executive branch the authority to implement the law, it does not grant it authority to redefine, expand beyond recognition, or upend the laws passed

by Congress. In the three areas outlined here, the remedy is a simple one: rescind the guidances on access to intimate facilities based on gender identity, school discipline, and campus sex mandates. But these actions alone are insufficient. A careful analysis of all existing regulations under Title VI and Title IX, including a review of relevant court decisions, should be undertaken to determine which regulations can and should be modified or rescinded to comport with both the law and common sense.

## I. Transgender Guidance

*On February 22, 2017, the new Administration, as one of its first acts in the area of education policy, issued a new Dear Colleague Letter on the subject of transgenderism. The new Dear Colleague Letter rescinds the Dear Colleague Letter of May 13, 2016 as well as an earlier letter from a mid-level Department of Education staff member, both of which are discussed below. The stated reason for the rescission was “to further and more completely consider the legal issues involved.” On March 6, 2017, as a result of the earlier Dear Colleague Letter’s rescission, the Supreme Court vacated the judgment in Gloucester County School District v. G.G., which is also referred to below, and remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of the February 22, 2017 guidance document. The following material was written before either of these events. Because both the outcome of the Gloucester County case and the ultimate resolution of the transgender issue are still in doubt, this paper’s contributors include the material.*

The right to be different is what freedom is all about. Freedom-loving Americans should therefore stoutly resist government efforts to force conventional notions of masculinity or femininity on private citizens.

But there is not much of that going on these days. Instead, we are getting something that Americans should resist at least as forcefully: Bureaucratic directives that create legal obligations out of thin air.

One such directive is the Department of Education’s transgender locker room policy, which the Supreme Court will soon be examining. The case — *Gloucester County School District v. G.G.* — is just one of several cases relating to that policy pending in federal courts around the country.

*Gloucester County* concerns an anatomically female student, referred to in the litigation as “G.G.,” who psychologically identifies as a boy and wants to use the boys’ restrooms, locker room, and showers. In 2015, a mid-level DoEd staff member informed the largely rural Virginia school district that it must comply with G.G.’s wishes if it wants to keep its federal funding. That staff member’s instruction was followed up with an official “Dear Colleague Letter,” issued jointly by DoEd and the Department of Justice on May 13, 2016, laying out the same view in greater detail. The letter was addressed to all federally funded schools and universities across the nation.

This *should be* one of the easier cases to come before the Court. A longstanding American custom holds that communal restrooms, locker rooms, and showers should be separated by sex. Up until very recently, nearly everyone understood sex to be a biological concept and anatomy to be its primary indicator.

The custom was not established by law. In theory, the owners of communal facilities could choose some other determinant — like the newly-popular concept of “gender identity” or even astrological sign — if that was what they wanted. But, while no doubt a few under-the-radar exceptions to the rule occurred, few facilities openly departed from the general custom.

DoEd is now uprooting this custom and replacing it with a one-size-fits-all mandate. According to the “Dear Colleague Letter” of May 13, 2016, henceforth, federally funded schools must separate students based on gender identity rather than actual sex in assigning intimate facilities. Put more clearly, anatomically intact males must be permitted to use the restrooms, locker rooms, and showers for females if they say they identify psychologically as females (and vice versa). The policy applies to athletic teams also, although the letter’s language is more vague when it discusses athletics.

DoEd’s argument is that it is simply interpreting a regulation issued pursuant to Title IX of the Education Amendments of 1972. It further argues that pursuant to a Supreme Court case called *Auer v. Robbins*, courts are legally obligated to defer to its interpretation of that rule. But neither Title IX nor the regulation at issue mandates putting anatomical boys in girls’ showers. Indeed, the 92nd Congress, which passed Title IX in 1972, and President Gerald Ford, who signed the regulation into law in 1975, would be astonished at this “interpretation.”

Title IX bans sex discrimination only. There appears to be no near-in-time examples where “sex” or “discrimination” was used as DoEd now demands.

To the contrary, for decades, the terms “gender” and “gender identity” have been used, especially in the LGBT community, to contrast with “sex.” While “sex” is an anatomical and biological concept, when the term “gender” is used, it is thought to be a state of mind. A “transsexual” has undergone a “sex-change operation,” while a “transgender” simply shares habits and traits with the opposite sex, while retaining the body of the sex he or she was born with.

One of the original transgender activists, Virginia Prince, an anatomical male who dressed and lived as a woman, put it this way in 1969: “I, at least, know the difference between sex and gender, and have simply elected to change the latter and not the former. If a word is necessary, I should be termed ‘transgenderal.’”<sup>1</sup>

Thus, even in the unlikely event that Members of the 92nd Congress thought about the concept of gender identity in 1972, Title IX’s proper interpretation would be the same: It is about sex, not gender identity.<sup>2</sup>

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<sup>1</sup> Virginia Prince, *Change of Sex or Gender*, 10 *Transvestia* 53, 60 (1969), quoted in Richard Elkins & Dave King, *The Transgender Phenomenon* 82 (2006).

<sup>2</sup> Note that even if the 92<sup>nd</sup> Congress meant what we now call “gender identity” instead of sex, it would not justify the DoEd’s policy that transgender individuals must be grouped with the sex they identify with rather than their anatomical sex. A ban on discrimination on the basis of gender identity would prevent federally-funded schools and universities from treating anatomical males who identify as females from being treated differently than anatomical males who identify as males. DoEd is not prohibiting discrimination on the basis of gender identity, but rather insisting on it.

The regulation that DoEd cites as the basis of its argument does not help its argument at all, because it does not require anything. It states that schools *may* maintain “separate toilet, locker room, and shower facilities on the basis of sex,” so long as they are comparable. This is a permissive dispensation, not a mandate. The Supreme Court had earlier held that separate is inherently unequal in the context of race.<sup>3</sup> With sex, the regulation clarifies that, separate intimate facilities are a reasonable privacy and safety protection and thus permissible.

Prior to the “Dear Colleague Letter,” were federally funded schools and universities *permitted* to assign intimate facilities on the basis of gender identity instead of sex? Yes, of course. There was nothing to prevent it. They could have done it on the basis of Student Number or the first letter of the student’s surname. They chose not to.

Whether one believes DoEd’s policy should be the law is not the point. It is not the law, and this is a nation of laws. Congress may pass such a law if it finds it desirable. But in the absence of Congressional action, DoEd cannot unilaterally impose its will.

It is not at all clear, however, that DoEd’s approach is good policy even if it were the law. Trying to help a transgender student is often a delicate matter. The transgender policy makes the job harder by tying the hands of teachers and principals. Sometimes, in a local school principal’s judgment, the best solution may be exactly what DoEd purports to require: Let him use the intimate facilities assigned to his “preferred sex.” Sometimes the students who must share these facilities with him do not mind.

But in other cases, the affected students will feel their privacy or sense of security has been violated. Their feelings matter, too. Hence, sometimes the best thing may be to keep him with the members of his sex rather than his gender. In still other cases, the right solution may be to allow him to single-user facilities, as happened in G.G., or to faculty facilities. Indeed, some transgender students may prefer such an approach. *Every case is different.*

The difficulties are compounded by the fact with precious few exceptions, one’s sex is either male or female. On the other hand, gender turns out to be a complex subject. In the UCLA’s National Transgender Discrimination Survey, 31% of transgender respondents identified either strongly or somewhat with a “Third Gender.” Similarly, 38% identified with “Two Spirit” — presumably meaning that at times they identify as female and at other times they identify as male.

It is impossible to predict with certainty what the Supreme Court will do with the *Gloucester County* case. It is entirely possible the Court will hold that DoEd’s policy inaccurately states the law. But it is also possible that the case will get bogged down in questions concerning the proper level of deference to administrative agencies in the interpretation of their own regulations under *Auer v. Robbins*. The incoming Administration should therefore strongly consider simply withdrawing the lawless “Dear Colleague Letter” of May 13, 2016.

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<sup>3</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954).

Note that the transgender locker room policy is not a left/right issue. Organizations as far left as the Women’s Liberation Front and as far right as the Eagle Forum Education and Legal Defense Fund have filed friend-of-the-court briefs urging the Court to intervene on behalf of the school district. Rather, this is about the rule of law. Can government agencies “interpret” the law to be whatever they want it to be? Or are they obliged to enforce it as written and agreed to by our elected representatives?

The rule of law is about preventing those in positions of authority from exercising arbitrary power. At one time or another, it protects us all, certainly very much including transgender persons. No doubt, the rule of law has been taking it on the chin lately. But if we stand idly by as it is further battered, we will all miss it when it’s gone.

## II. Racial Quotas in School Discipline

The Department of Education is telling schools to discriminate based on race.

In January of 2014, DoEd issued a guidance to the nation’s schools. That guidance insists that a school can be guilty of violating Title VI of the Civil Rights Act solely due to “neutral,” “evenhanded” application of discipline rules that leads to “significant adverse effects” on blacks compared to whites.<sup>4</sup> This adverse effect of nondiscriminatory discipline is said to be an impermissible “disparate impact” on minority students.

The guidance goes so far as to claim that “substantial racial disparities” in school suspension rates across the country were the product of intentional discrimination (racism) by schools, not just “disparate impact,” since there is no evidence of “more frequent” misbehavior by minority students.<sup>5</sup> This assertion, citing academics like Russell Skiba,<sup>6</sup> is at odds with the Seventh Circuit Court of Appeals’ ruling that local disparities do not show racism when they do not exceed these national disparities.<sup>7</sup>

For years, the courts have recognized that schools are not guilty of discrimination merely because black students get suspended from school at a higher rate than white students, since the higher rate

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<sup>4</sup> See *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, Jan. 8, 2014, pp. 11-12.; see also Joshua Dunn, *Disparate distortions: Obama administration doublespeak undermines school discipline*, Jan. 8, 2014, [goo.gl/znszGD](http://goo.gl/znszGD).

<sup>5</sup> *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, Jan. 8, 2014, pg. 4.

<sup>6</sup> *Id.*, citing R.J. Skiba, et al, *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 Urban Rev. 317 (2002).

<sup>7</sup> *People Who Care v. Rockford Bd. of Educ.*, *School Dist. No. 205*, 111 F.3d 528, 538 (7<sup>th</sup> Cir. 1997) (court’s conclusion that the higher black suspension rate was not the product of racism was reinforced by the fact that “the disparity in minority and white referrals is smaller in the Rockford school district than in the nation as a whole.”); compare Russell J. Skiba, et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. Sch. L. Rev. 1071, 1105-08 (2009) (attacking the *People Who Care* decision for upholding “race neutral academic judgments,” and being part of a “colorblind” jurisprudence, without specifically mentioning its rejection of racial quotas in school discipline).

may just reflect higher rates of misbehavior.<sup>8</sup> For example, blacks are more likely than whites to be poor,<sup>9</sup> and suffer from family breakdown,<sup>10</sup> and these characteristics are correlated with higher rates of misbehavior.<sup>11</sup> As one federal appeals court observed, “disparity does not, by itself, constitute discrimination.”<sup>12</sup> And still another noted, “Racial disciplinary quotas violate equity” by “either systematically overpunishing the innocent or systematically underpunishing the guilty,” and thus violate the requirement that “discipline be administered without regard to race or ethnicity.”<sup>13</sup>

Putting aside constitutionality, it is questionable whether DoEd has any statutory authority to impose “disparate impact” rules on schools. The Supreme Court has ruled that disparate impact is not the basis for a lawsuit under Title VI, only “intentional” discrimination is.<sup>14</sup> DoEd claims that while the Title VI statute itself does not reach disparate impact, *regulations* under it can and do (an idea that the *Sandoval* decision described as “strange” in footnote 6 of its opinion).<sup>15</sup>

DoEd states that even if the only reason a school punishes more black students for unauthorized “use of electronic devices” is because black students actually “are engaging in the use of electronic devices at a higher rate than students of other races,” it can still be liable for disparate impact. *See Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline, Jan. 8, 2014, pp. 11-12.* This expands the disparate impact concept to racial quotas, which is way beyond what most courts would permit, even under statutes that permit disparate impact claims, such as the workplace discrimination statute, Title 7 of the Civil Rights Act.<sup>16</sup>

Thus, the percentage of black students disciplined should be compared not to the black percentage of the student body, but to the percentage of those students whose behavior potentially qualified them for discipline. It is the pool of *qualified* people that matters, not that general population, when

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<sup>8</sup> See, e.g., *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 332 (4th Cir. 2001) (en banc) (although “statistics show that of the 13,206 students disciplined from 1996–98, sixty-six percent were African–American,” this “disparity does not, by itself, constitute discrimination,” and provides “no evidence” that the school district “targets African–American students for discipline.”); *Coalition to Save Our Children v. State Board of Education*, 90 F.3d 752, 775 (3d Cir. 1996)(rejecting the “assumption ‘that “undiscipline” or misbehavior is a randomly distributed characteristic among racial groups”); *Tasby v. Estes*, 643 F.2d 1103 (5th Cir. 1981).

<sup>9</sup> U.S. Bureau of the Census, Table 1: Income and Earnings Summary Measures by Selected Characteristics: 2013 and 2014 (white non-Hispanic median income of \$60,256, compared to black median income of \$35,398), <http://www2.census.gov/programs-surveys/demo/tables/p60/252/table1.pdf>.

<sup>10</sup> National Vital Statistics Report, *Births: Final Data for 2014*, pg. 41, Table 15 (Dec. 23, 2015) (70.4% of black infants in 2014 were born out of wedlock, compared to 29.2% of non-Hispanic whites, 52.9% of Hispanics, and 16.4% of Asians), [https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64\\_12.pdf](https://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_12.pdf).

<sup>11</sup> See Rachel Dinkes, et al., *Indicators of School Crime and Safety: 2007* (2007), pg. 26 (serious “discipline problems” were much higher in schools with many poor kids than in schools with few kids in “poverty”; frequent “verbal abuse of teachers” occurred at nearly five times the rate), <http://nces.ed.gov/pubs2008/2008021.pdf>; Tom Loveless, *The 2017 Brown Center Report on American Education: How Well Are American Students Learning?*, Brookings Institution, at 30-31 (“black students are also more likely to come from family backgrounds associated with school behavior problems...children ages 12–17 that come from single-parent families are at least twice as likely to be suspended as children from two-parent families.”), [goo.gl/7MavML](http://goo.gl/7MavML).

<sup>12</sup> *Belk v. Charlotte-Mecklenburg Board of Education*, 269 F.3d 305, 332 (4th Cir. 2001).

<sup>13</sup> *People Who Care v. Rockford Bd. of Educ., School Dist. No. 205*, 111 F.3d 528, 538 (7th Cir. 1997).

<sup>14</sup> *Alexander v. Sandoval*, 532 U.S. 275 (2001).

<sup>15</sup> See *id.* at 286 n.6.

<sup>16</sup> 42 U.S.C. 2000e-2.



making this comparison. The proper comparison is between those students “selected” for discipline and those who are in some sense “qualified” for discipline by virtue of their behavior. As the Supreme Court has noted in the employment context, “if the percentage of selected applicants who are nonwhite is not significantly less than the percentage of qualified applicants who are nonwhite, the employer’s selection mechanism probably does not operate with a disparate impact on minorities.”<sup>17</sup> To make this comparison, important non-racial factors such as a student’s socio-economic status and home environment should first be taken into account before concluding a racial disparity is meaningful.<sup>18</sup>

Perhaps tacitly recognizing this weakness, DoEd does occasionally in its guidance focus on specific *aspects* of discipline that might be more amenable to a legal challenge. For example, it suggests that harsh zero-tolerance rules have a “disparate impact” on minority students,<sup>19</sup> a point made more explicitly by attorney general Eric Holder.<sup>20</sup> He took aim at “zero-tolerance school discipline practices that, while well-intentioned and aimed at promoting school safety, affect black males at a rate three times higher than their white peers.” But Holder’s assumption (that nondiscretionary discipline increases the ratio of suspended blacks to suspended whites) was wrong. As expert James P. Scanlan notes, harsh “discipline policies tend to yield smaller racial differences in discipline rates than more lenient ones.” The “Department of Education’s own report shows that relative racial” differences in discipline rates “are larger in districts with zero tolerance policies than those without such policies,” such as Los Angeles and Denver.<sup>21</sup> Getting rid of zero-tolerance usually reduces suspensions of white offenders even more than of black offenders. That is why, as Walter Olson notes, “zero-tolerance policies were adopted in the first place in part as a defense for administrators against disparate-impact charges.”<sup>22</sup> Yet, as Scanlan notes, President Barack Obama’s administration pressured various school districts into curbing zero-tolerance policies, under the mistaken assumption that this would reduce their “racial disparities” in suspensions.

The guidance also discusses the subjectivity of certain offenses, and speculates that this could result in them being enforced more harshly against blacks. But that is not usually the case. A federal appeals court noted that subjectivity is not the reason blacks are suspended at higher rates than whites. Indeed, blacks are suspended at even higher rates for “very objective” offenses than

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<sup>17</sup> *Ward's Cove Packing Co., Inc. v. Atonio*, 490 U.S. 642, 652 (1989).

<sup>18</sup> See *Caridad v. Metro-North Commuter R.R. Co.*, 191 F.3d 283, 292-93 (2d Cir. 1999) (disparate-impact analysis “controlled for various factors that one would expect to be relevant to the likelihood of disciplinary action,” such as “age” and “union vs. management status”).

<sup>19</sup> See *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, Jan. 8, 2014, p. 19.

<sup>20</sup> *Eric Holder: Systemic, Subtle Racism Is Much More Damaging Than High-Profile Rants*, Huffington Post, May 17, 2014, [goo.gl/QUdZSP](http://goo.gl/QUdZSP).

<sup>21</sup> James Scanlan, *Viewpoint: Racial Differences in School Discipline Rates*, The Recorder, June 22, 2012, [goo.gl/94Mipx](http://goo.gl/94Mipx).

<sup>22</sup> See Walter Olson, *DoJ: school discipline must follow disparate-impact standards*, Overlawyered, Jan. 10, 2014, [goo.gl/8aky5p](http://goo.gl/8aky5p).

“subjective” ones.<sup>23</sup> This finding belies the claims of academics like Russell Skiba, cited by DoEd,<sup>24</sup> who claims that blacks are more likely to be sent to the principal’s office for “subjective” offenses, while whites are more likely to be sent for “objective” offenses. Skiba reached this dubious conclusion by arbitrarily labeling vague offenses as “objective” when they were often committed by whites (such as “obscene language”), and objectively harmful offenses as “subjective” when they were committed heavily by blacks (such as “threats”).<sup>25</sup>

Even if there are racial disparities in suspension rates, a court would not find “disparate impact” if the school policy has a “substantial legitimate educational justification.”<sup>26</sup> Curbs on suspensions of students who routinely disrupt class or violate important school rules harm, not help, black students, who are often victims of violence perpetrated by students of their own race. As Professor Joshua Kinsler found, “in public schools with discipline problems, it hurts those innocent African American children academically to keep disruptive students in the classroom,” and “cutting out-of-school suspensions in those schools *widens* the black-white academic achievement gap.”<sup>27</sup> Although rules against “disrupting classes” are to some extent “subjective,” this is simply unavoidable; they serve “important disciplinary criteria,” so they cannot be banned in the name of racial balancing.<sup>28</sup>

As education writer Joanne Jacobs notes, “The federal push for “no-disparate-impact” disciplinary policies — linking suspension and expulsion rates to race and ethnicity — is unpopular with the public and teachers, the [2015 Education Next] poll found.”<sup>29</sup> As Education Next notes, “*A majority of people oppose the federal government’s new policy on school discipline.* More than 50% disagree with the mandate that schools must not expel or suspend black and Hispanic students at higher rates than other students. Just 21% back the idea.”<sup>30</sup> Even the teachers’ unions are split on the Title VI racial school discipline guidance, with both the American Federation of Teachers and the National School Boards Association opposing it.<sup>31</sup>

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<sup>23</sup> *Coalition to Save Our Children v. State Bd. of Educ. of State of Del.*, 90 F.3d 752, 775 (3d Cir. 1996) (“statistical data demonstrate a comparable or greater racial disproportion for those offenses for which [state] law mandates suspension, which [plaintiff’s expert] called “very objective” offenses, than for those offenses he viewed as less objective.”).

<sup>24</sup> See *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline*, Jan. 8, 2014, pg. 4.

<sup>25</sup> Russell J. Skiba, et al., *African American Disproportionality in School Discipline: The Divide Between Best Evidence and Legal Remedy*, 54 N.Y.L. Sch. L. Rev. 1071, 1089 (2009), citing *The Color of Discipline*, 34 Urban Rev. 317 (2002). “Obscene language” is a much vaguer category than “threats.” Compare *Reno v. ACLU*, 521 U.S. 844 (1997) (rule against “obscene or indecent” messages was too vague to be criminally punishable) with *Virginia v. Black*, 538 U.S. 343 (2003) (ban on threats is valid).

<sup>26</sup> See *Elston v. Talladega Cnty Bd. of Educ.*, 997 F.2d 1394, 1412-1413 (11th Cir. 1993).

<sup>27</sup> Kinsler, *School Discipline: A Source or Salve for the Racial Achievement Gap?*, 54 Int’l Econ. Rev. 355 (2013); see also Andrew J. Coulson, *Zero Tolerance: Causes, Consequences, and Alternatives*, Cato Institute, Dec. 12, 2012, [goo.gl/mlp89f](http://goo.gl/mlp89f) (Senate testimony quoting Kinsler).

<sup>28</sup> *People Who Care v. Rockford Bd. of Educ.*, 111 F.3d 528, 538 (7th Cir. 1997).

<sup>29</sup> Joanne Jacobs, *Support slips for Core, other reforms*, JoanneJacobs.com, Aug. 19, 2015, [goo.gl/uAEVhi](http://goo.gl/uAEVhi).

<sup>30</sup> Michael B. Henderson, Paul E. Peterson & Martin West, *The 2015 EdNext Poll on School Reform*, in 16 Education Next 9, 17 (2016), [goo.gl/wYrgjc](http://goo.gl/wYrgjc).

<sup>31</sup> See Alyson Klein, *House Republicans Question Obama Administration’s Discipline Guidance*, Education Week, Feb. 14, 2014, [goo.gl/fQMBKD](http://goo.gl/fQMBKD).

In a piece titled “Federal Racial Discipline Quotas Create Chaos In St. Paul Schools,” Katherine Kersten describes how Saint Paul Superintendent Valeria Silva’s policies to reduce minority suspension rates to the level of white students created chaos and violence in a large urban school district. As she notes,<sup>32</sup> Silva’s

policies, initiated in 2010, launched the St. Paul schools on a downward spiral of chaos and violence. In December 2015, Ramsey County attorney John Choi labeled the situation “a public health crisis.” In 2015, assaults on teachers in St. Paul schools reported to his office tripled compared to 2014, and were up 36 percent over the previous four-year average. On Silva’s watch, the city’s high schools have become menacing places where gangs of out-of-control teens prowl the halls, and “classroom invasions” by students settling private disputes are commonplace. Tumultuous brawls are a fact of life. Today, fights that “might have been between two individuals” can grow into “melees involving up to 40 or 50 people,” according to Steve Linders, a St. Paul police spokesman. Roving packs often attack individuals, and police have had to use chemical irritants to break up what they call “riots.” Teachers fear for their safety. In the last school year, a vicious student assault landed one in the hospital with a traumatic brain injury. Another was punched repeatedly in the chest, while another required staples for a head wound.

. . . . The discipline policies that gave rise to this chaos sprang from Silva’s embrace of “racial equity” ideology. In St. Paul, as across the nation, black students as a group are referred for discipline at higher rates than their peers. Silva made eliminating this racial gap a top priority. In Silva’s view, the gap is caused by teachers’ racial bias and cultural insensitivity, not by higher rates of misconduct by black students. She mandated “white privilege” training for all district personnel, eliminated “continual willful disobedience” as a suspendable offense, and shifted many special education students with behavior problems — students who are disproportionately black — to mainstream classrooms. Now unruly kids just chat with a “behavior specialist” or are shifted to another classroom to act up again. . . .

[T]he federal government is now imposing Silva-style “racial equity” discipline policies on school districts around the country under a “disparate impact” interpretation of civil rights law.

This “disparate impact” approach is bad policy and bad law. It pushes school districts to discipline students with an eye on racial numbers, either abandoning valid procedures, or applying them so that some students are not disciplined, and others are, because of race. Those who will be most hurt are fellow students (often themselves poor and minority students) and their teachers, who are now likely to be confronted with threatening and disruptive students. This is inconsistent with the underlying federal statute, Title VI, which prohibits differential treatment based on race, and only that.

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<sup>32</sup> See Kersten, *Federal Racial Discipline Quotas Create Chaos In St. Paul Schools*, The Federalist, July 29, 2016, [goo.gl/GU3DuJ](http://goo.gl/GU3DuJ).

This disparate-impact approach, then, should not be used at all. DoEd should clarify this, by issuing new, formal regulations clarifying that Title VI does not ban disparate impact. Congress should also ban disparate-impact rules. Alternatively, DoEd could clarify the limited reach of its disparate impact regulations by providing as follows: (1) A disparity only matters if it results from something in the school’s disciplinary process, not the mere fact that more students in one racial group misbehave; (2) the school need only point to a legitimate interest served by the policy, not a life-or-death “necessity” or “substantial” need; (3) the school need only point to evidence that it furthers that interest, not meet a formal burden of proof on that issue; and (4) plaintiff’s suggestion of an alternative approach to serving that interest is not sufficient to demonstrate a violation of the law.<sup>33</sup>

### III. Campus Sexual Assault Mandates

The President Barack Obama Education Department created, and the President Donald Trump Administration has inherited, a regime of federally directed regulation of almost all accusations of sexual assault on campuses and often beyond — along with a broad range of other, entirely lawful activities classified by universities as “sexual misconduct.” In one of his many statements supporting this regime, President Obama explained that “[w]e’re here to talk today about an issue that is a priority for me, and that’s ending campus sexual assault.”<sup>34</sup>

But as former Vice President Joe Biden has tacitly admitted, by claiming in January 2017 that the percentage of college women victimized by sexual assault is “the same” today as it was in 1995,<sup>35</sup> the mandates imposed on thousands of universities from 2011 through 2017 in the form of “guidance” as to the supposed requirements of Title IX apparently have not reduced the incidence of campus sexual assault at all. Indeed, these mandates may have indirectly made the problem worse in various ways including, channeling victims away from law enforcement so that offenders avoid prison.<sup>36</sup>

In the name of protecting college women from sexual violence, the Education Department’s Office for Civil Rights (OCR) effectively ordered more than 7,000 higher education institutions — all those that receive federal money — to investigate and adjudicate all allegations by their students of sexual assault and harassment, whether or not reported to or acted on by police. OCR also required schools

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<sup>33</sup> See *Smith v. City of Jackson*, 544 U.S. 228, 240-42 (2005) (institution need only show that its policy was one “reasonable” way of furthering a “legitimate goal,” and not that no alternative policy would have worked as well); *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657, 660 (1989) (institution bears only burden of “production,” not “persuasion”, in justifying its rule; the person alleging discrimination must show that the disparity was the institution’s “fault” in the sense of being caused by its decision-making process, rather than being caused by external factors, such as a “dearth” of “qualified” minority applicants).

<sup>34</sup> “Remarks by the President at ‘It’s on Us’ Campaign Rollout,” September 19, 2014, <https://www.whitehouse.gov/the-press-office/2014/09/19/remarks-president-its-us-campaign-rollout>.

<sup>35</sup> <http://www.chronicle.com/blogs/ticker/in-letter-to-college-presidents-biden-urges-continued-fight-against-sexual-assault/116335>.

<sup>36</sup> See, e.g., Adam Goldstein, “Rape Is a Crime, Treat It as Such” (opinion), *Room for Debate* (blog), *New York Times*, March 12, 2013, <http://www.nytimes.com/roomfordebate/2013/03/12/why-should-colleges-judge-rape-accusations/rape-is-a-crime-treat-it-as-such> (“[The] best case scenario” of a university’s disciplinary process is that a rapist is expelled and out “walking the streets,” which is also “the worst case outcome of the criminal justice process”).

to use federally prescribed procedures — all of which increase the likelihood of guilty findings — to determine whether accused students are guilty (often called “responsible”) or innocent. The financial costs of this regime to the universities alone probably approach or exceed \$1 billion per year, plus many millions more in taxpayer dollars to pay OCR’s enforcement staff and in legal costs to families of accused students.<sup>37</sup>

For an especially telling picture of how the OCR-driven campus sex regime works, consider a case at Amherst College, in Massachusetts.<sup>38</sup> Fearful, as most colleges are, of being attacked by OCR for any perceived hesitation to expel accused males regardless of the evidence, Amherst expelled a male student based on a female student’s claim in October 2013 that he had forced her to perform oral sex — more than 20 months before. The reality, as he was later able to prove, was that *she* had assaulted (or at least seduced) *him*, by performing oral sex when he was intoxicated to a state of near unconsciousness in her room.

A few hours after their encounter, and after the female student had summoned a second male student for another sexual encounter, she had regrets. Her first sexual encounter that night had been her roommate’s boyfriend, and that became socially awkward for her. She began telling people that the boyfriend had assaulted her. Later, she joined a group of campus rape activists. Many months after that, she formally accused her victim of victimizing her. Amherst’s investigation was pathetic. The woman’s testimony was incoherent and bizarre. And the hearing — before a panel of three extreme feminist ideologues — was grossly unfair. After being expelled, the now-former male student hired a lawyer who asked around and easily found a wealth of text-messages that had been exchanged by the student’s accuser with other students, in which she admitted that, in reality, she had assaulted (or at least seduced) him. But when he sought readmission based on this evidence, Amherst said the case was closed.<sup>39</sup>

The Obama Administration’s energetic lawmaking in this realm began in earnest after the President, seeking to recover politically from congressional Democrats’ disastrous defeat in the 2010 elections, decided on a series of aggressive executive actions designed to fire up his most passionate supporters.<sup>40</sup> These included self-proclaimed feminists, who had for decades been spreading the myth that the nation’s universities were in the grip of a “rape culture” characterized by hostility or

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<sup>37</sup> For the sake of brevity, this paper does not explore at any length the Obama Administration’s role in imposing “harassment” rules on universities that serve mainly to punish students and faculty alike for speech (“verbal conduct”) that others claim to be “unwelcome” — even, in the Administration’s words, if an “objectively reasonable person of the same gender in the same situation” would *not* find the speech offensive. See <https://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>; <https://www.thefire.org/cases/departments-of-education-and-justice-national-requirement-for-unconstitutional-speech-codes/>; Samantha Harris and Greg Lukianoff, “Executive Branch Overreach and the Accelerating Threats to Due Process and Free Speech on Campus,” in *Liberty’s Nemesis: The Unchecked Expansion of the State*, ed. Dean Reuter and John Yoo (New York: Encounter Books, 2016).

<sup>38</sup> The facts are laid out in KC Johnson and Stuart Taylor, Jr., *The Campus Rape Frenzy: The Attack on Due Process at America’s Universities* (Encounter Books 2017).

<sup>39</sup> *Id.* 8.

<sup>40</sup> *Id.* 33-36.



indifference to victims. While it's undisputed that rape is and long has been a serious problem both on and off campus, this "rape culture" myth was and is unsupported by serious evidence.<sup>41</sup>

In fact, the number of assaults had plunged between 1997 and 2011, according to the best Justice Department statistics, which also showed that young women on college campuses were in less danger of being victimized by sexual violence than young women who did not go to college.<sup>42</sup>

Notwithstanding the federal statistics, the Obama Administration launched a campaign — led by the President and Vice President and driven by Obama appointees at OCR — to change campus disciplinary rules in ways designed to expel or suspend many more accused males.

The opening salvo was the now-famous April 4, 2011 "Dear Colleague Letter"<sup>43</sup> that OCR sent to more than 7,000 schools that receive federal funds. First, the letter ordered schools to lower the standard of proof in such (noncriminal) cases to a "preponderance" of the evidence, meaning a 50.01 percent probability of guilt — almost a tossup, especially given the prevalence of she-said-he-said cases without dispositive evidence. Many schools had previously required "clear and convincing" evidence, which is roughly similar to a 75 percent probability of guilt.<sup>44</sup> Second, the letter ordered universities to allow sexual assault accusers to appeal not-guilty findings, thereby exposing accused students to a form of legalized double jeopardy. (No such requirement exists for other disciplinary offenses.) Third, the letter told schools to speed up investigations, which critics said made it difficult for accused students to mount a defense. Fourth, it ordered schools to impose "interim" punishments, based on unproven and uninvestigated allegations, to prevent accused students from coming into contact with their accusers. Fifth, and perhaps most important, the "Dear Colleague Letter" strongly discouraged campus authorities from allowing cross-examination

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<sup>41</sup> See, e.g., *id.* 67-84.

<sup>42</sup> *Id.* 55-56; Sinozich and Langton, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>.

<sup>43</sup> U.S. Dept of Education, Office for Civil Rights, Dear Colleague Letter on Sexual Violence (April 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (hereinafter "DCL").

<sup>44</sup> See, e.g., Hans Bader, *Education Dept Unlawfully Changes Burden of Proof in College Sexual Harassment Cases*, College Insurrection, Sept. 12, 2002, <https://goo.gl/ixx9Fb>; Susan Kruth, *Princeton Adopts 'Preponderance' Standard, Reaches Agreement with Department of Education*, The Torch (FIRE), Nov. 10, 2014, <https://www.thefire.org/princeton-adopts-preponderance-standard-reaches-agreement-department-education/>.

"Courts, universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of 'clear and convincing' evidence." James M. Picozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 Yale L. J. 2132, 2159 n. 17 (1987). The Education Department's [reasoning](#) for imposing a low "preponderance" standard on school disciplinary proceedings was that this "[is the standard of proof established](#)" for lawsuits brought in federal court. Therefore, it [claimed](#), preponderance must also be "[the appropriate standard](#) for" schools to use in "investigating allegations of sexual harassment or violence." But in civil suits, that standard applies to whether the *school* violated Title IX by behaving inappropriately, not whether *students* or staff engaged in harassment. Students cannot violate Title IX; only schools can be sued under Title IX, not individuals. See, e.g., [Smith v. Metropolitan School District](#) (1997). Federal courts have held that there is no violation of the civil rights laws merely because harassment occurs, as long as the institution investigates in good faith in response to the allegation of harassment. Cf. [Swenson v. Potter](#), 271 F.3d 1184, 1196 (9th Cir. 2001), quoting [Harris v. L & L Wings](#), 132 F.3d 978, 984 (4th Cir. 1997); [Harris v. L & L Wings](#), 132 F.3d 978, 984 (4th Cir. 1997); [Knabe v. Boury Corporation](#), 114 F.3d 407 (3rd Cir. 1997).

of accusers. Critics called this an especially crippling blow to fairness because it deprived accused students of what the Supreme Court has called “beyond any doubt the greatest legal engine ever invented for the discovery of truth.”<sup>45</sup> Three years later, in 2014, the Education Department even suggested that allowing cross-examination of an accuser might — all by itself — violate Title IX and thus risk a huge financial penalty.<sup>46</sup>

Each of the changes increased the chances of a guilty finding. So did the Administration’s pattern of effectively portraying as soft on rapists — by publicly announcing that they were under investigation — schools that OCR considered insufficiently pro-accuser.<sup>47</sup> All this amounted to a de facto presumption that accused students are guilty — unless proven innocent by overwhelming evidence — and, even proof of innocence has sometimes been ignored by colleges.<sup>48</sup>

Aggravating the impact on accused students of the OCR-mandated procedures is that many universities have weakened due process protections even more than the OCR explicitly required, in part to win favor with OCR, and campus rape activists, and in part for ideological reasons. Many if not most universities, for example, bar accused students’ lawyers (if any) from participating in campus proceedings; deny accused students timely access to the specific allegations and evidence to be used against them, and even to exculpatory evidence in the university’s hands; limit their ability to call witnesses to testify; deny them any right to an impartial panel or decisionmaker; and put their fates in the hands of a single campus sex bureaucrat (or a few) who are under great pressure from OCR to find accused students guilty.<sup>49</sup>

At the same time, universities’ definitions of sexual assault have “stretched enormously, in ways that would have been unimaginable just a few years ago,” in the words of Harvard Law professors Jacob Gerson and Jeannie Suk Gerson. “Indeed, the concept of sexual misconduct has grown to include most voluntary and willing sexual conduct. . . Under President Obama, the Department of Education’s interpretations of those laws have greatly expanded the control exercised by the federal government over sexual conduct.”<sup>50</sup>

President Obama and others justified the Administration’s actions by advancing the stunning claim that 1 in 5 college women is sexually assaulted while enrolled.<sup>51</sup> In fact, the best Justice Department statistics suggest that fewer than 1 in 100 are raped and about 3 in 100 suffer some other form of sexual assault — still far too many, but an order of magnitude less than 1 in 5.<sup>52</sup> The several surveys

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<sup>45</sup> See, e.g., *Lilly v. Virginia*, 527 U.S. 116, 124 (1999).

<sup>46</sup> *Questions and Answers on Title IX and Sexual Violence* (Washington, D.C.: U.S. Dept. of Education, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; *Campus Rape Frenzy* 36-40, 203.

<sup>47</sup> *Id.* 195.

<sup>48</sup> See, e.g., *id.* 158-161.

<sup>49</sup> *Id. passim.*

<sup>50</sup> <http://www.chronicle.com/article/The-College-Sex-Bureaucracy/238805>.

<sup>51</sup> See, e.g., Office of the Press Secretary, The White House, “Remarks by the President at ‘It’s On Us’ Campaign Rollout” (press release), September 19, 2014, <https://www.whitehouse.gov/the-press-office/2014/09/19/remarks-president-its-us-campaign-rollout>; DCL at 2.

<sup>52</sup> Sinozich and Langton, *Special Report: Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, <https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf>; see *Campus Rape Frenzy* 43-46.

that have advanced the 1-in-5 claim have been highly misleading. They have avoided asking respondents directly whether they had been sexually assaulted, because few would say yes. They have inflated the number of alleged “sexual assaults” by counting a wide range of lawful and commonplace behaviors as rape or sexual assault, and by assuming that every accusation by a survey respondent is true. They have also had very low response rates that probably skewed the results by inflating the number of supposed sexual assaults even more.<sup>53</sup>

Similarly misleading, as noted above, have been the efforts by the Administration and many others to create the impression that the number of campus rapes has grown alarmingly and that campuses are especially dangerous places for young women, as Senator Kirsten Gillibrand (D-CT) has asserted.<sup>54</sup>

Accusers’ rights groups and inaccurate media coverage have intensified pressure to find guilty as many accused students as possible. And thousands of universities so fear ruinous reputations or imposition of large financial penalties that only one, Oklahoma Wesleyan University, has dared challenge OCR in court, in *Doe v. Lhamon*. The case is pending.<sup>55</sup>

The Obama policies went far beyond federal rules first laid down in the 1990s interpreting Title IX to require that colleges take unspecified (but usually quite modest) steps to adjudicate sexual assault allegations involving their own students.

Critics claim that these rules were misguided even in their infancy, since colleges and universities lack the tools and expertise to investigate serious crimes. They cannot legally require witnesses to testify. They cannot subpoena photographic, electronic, or other evidence. They have no training in use of scientific evidence. They operate in deep secrecy, required by federal privacy law. Many of the professors and campus officials who adjudicate campus sexual assault claims are “trained” to believe accusers and disbelieve accused students, and barely feign impartiality. And the intellectual environment on gender issues at most campuses is so pro-accuser that due process is widely seen as an obstacle to fairness.<sup>56</sup> As a result, estimated in a recent study by UCLA professor John Villasenor, in today’s campus sexual assault tribunals, an innocent student has as much as a 1-in-3 chance of being found guilty.<sup>57</sup>

Critics say that the OCR’s approach imposed incalculable human costs on thousands of people, including scores, probably hundreds, of innocent, wrongly accused students whose lives have been ruined, or at best severely damaged, and their families. The consequences include destroyed reputations, inability to get into another college, severe depression, post-traumatic stress disorder,

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<sup>53</sup> *Id.* 46-53.

<sup>54</sup> *Id.* 55; “Kirsten Gillibrand: ‘We Will Not Allow These Crimes to Be Swept under the Rug Any Longer,’” *Time*, May 15, 2014, <http://time.com/100144/kirsten-gillibrand-campus-sexual-assault/>.

<sup>55</sup> *Id.* 252; FIRE, “Complaint in ‘*Doe v. Lhamon*,’” <https://www.thefire.org/complaint-doe-v-lhamon>.

<sup>56</sup> *E.g.*, *Campus Rape Frenzy* 168-169.

<sup>57</sup> John Villasenor, “A probabilistic framework for modeling false Title IX ‘convictions’ under the preponderance of evidence standard,” *Law, Probability & Risk* (2016), <https://academic.oup.com/lpr/article/15/4/223/2549058/A-probabilistic-framework-for-modelling-false>.



and even, in a few cases, suicide or attempted suicide.<sup>58</sup> More than 150 students who say they were wrongly accused have sued their schools for violating their constitutional or contractual rights; many have had success in the courts.<sup>59</sup> And although most courts have held that private universities are not bound by the Constitution, Professor Jed Rubenfeld, of Yale Law School, has argued that private colleges are liable for due process violations when “the government has induced [them] to engage in conduct that would be unconstitutional if state actors engaged in that conduct directly.”<sup>60</sup>

The financial costs are also huge, if difficult to measure, apart from OCR’s \$107 million budget, much of which goes to campus sex investigators.<sup>61</sup> One careful estimate, which appears to err on the low side, is that universities spend well over \$700 million a year on administrators whose main jobs are to police students’ sexual activities. The arithmetic: Some 7,000 schools have at least one part-time or full-time, and often many full-time, “Title IX Coordinators,” required by OCR, whose main job nowadays is to regulate campus sex; OCR tells schools that they “must have the full support of your institution.”<sup>62</sup> Plus outside investigators, campus police, sex counselors, and the time spent by faculty and administrators adjudicating cases. Plus, costly student surveys and more.<sup>63</sup>

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<sup>58</sup> See, e.g., Hans Bader, *OCR’s Liberal Bent Pushes Schools to Expel Innocent Students Accused of Sexual Assault*, CNS News, Sept. 15, 2015 (“see the examples given [here](#), [here](#), [here](#), [here](#), [here](#), [here](#), and [here](#) at *Minding the Campus*”), <http://www.cnsnews.com/commentary/hans-bader/ocrs-liberal-bent-pushes-schools-expel-innocent-students-accused-sexual>; Blake Neff, *Brown University Railroaded Student Accused Of Rape*, Judge Rules, Daily Caller, Sept. 29, 2016, <http://dailycaller.com/2016/09/29/brown-university-railroaded-student-accused-of-rape-judge-rules/> (discussing *Doe v. Brown University*, Findings of Fact and Conclusions of Law, Sept. 28, 2016, D.R.I. Civil Action No. 16-017), <https://kcjohnson.files.wordpress.com/2013/08/brown-ii-decision.pdf>; Greg Piper, *Federal judge validates due-process lawsuit against Brandeis by student accused of rape*, The College Fix, April 1, 2016, <http://www.thecollegefix.com/post/26855/> (discussing *Doe v. Brandeis Univ.*, D. Mass. Civil Action No. 15-11557, Memorandum & Order, March 31, 2016, <https://kcjohnson.files.wordpress.com/2013/08/brandeis-decision.pdf>); *Campus Rape Frenzy passim*; <http://www.nationalreview.com/article/446681/thomas-klocke-suicide-texas-university-student-commits-suicide-after-being-accused>.

<sup>59</sup> E.g., *Campus Rape Frenzy 168-169, passim*. [http://www.abajournal.com/news/article/advocacy\\_group\\_says\\_title\\_ix\\_lawsuits\\_from\\_young\\_men\\_are\\_on\\_the\\_rise/?utm\\_source=maestro&utm\\_medium=email&utm\\_campaign=weekly\\_email](http://www.abajournal.com/news/article/advocacy_group_says_title_ix_lawsuits_from_young_men_are_on_the_rise/?utm_source=maestro&utm_medium=email&utm_campaign=weekly_email).

<sup>60</sup> Jed Rubenfeld, *Privatization, State Action, and Title IX: Do Campus Sexual Assault Hearings Violate Due Process?* Yale Law School, Public Law Research Paper No. 588 (Oct. 2016) 20, [https://papers.ssrn.com/sol3/papers2.cfm?abstract\\_id=2857153](https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=2857153).

<sup>61</sup> <https://www2.ed.gov/about/overview/budget/budget17/justifications/z-ocr.pdf>.

<sup>62</sup> See, e.g., U.S. Dept of Education, Office for Civil Rights, Dear Colleague Letter on Title IX Coordinators, by Catherine E. Lhamon, Assistant Secretary of Education for Civil Rights (April 24, 2015), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf/>.

(“I write to remind you that all school districts, colleges, and universities receiving Federal financial assistance must designate at least one employee to coordinate their efforts to comply with and carry out their responsibilities under Title IX. . . . These designated employees are generally referred to as Title IX coordinators. . . . To be effective, a Title IX coordinator must have the full support of your institution. It is therefore critical that all institutions provide their Title IX coordinators with the appropriate authority and support necessary for them to carry out their duties and use their expertise to help their institutions comply with Title IX.”)

<sup>63</sup> Professor John Banzhaf, of the George Washington University Law School, estimated that “if each administrator devoted only 50% of his or her time to complaints about sexual assault — especially since little effort is required at this point [to] assure compliance with the primary and original purpose of Title IX which was to equalize athletic opportunities — and each cost only \$200,000 in salary, benefits, support staff, etc., the cost of this alone in student tuition dollars would be about \$700 million a year.” This does not include the time and resources

Many schools have large staffs of what can be termed “sex bureaucrats,” whom they hired in response to another Obama Administration “Dear Colleague Letter” issued in April 2015. This one stressed that all universities receiving federal money must designate “Title IX Coordinators” to police alleged sexual misconduct. Harvard University alone, which is a fraction of the size of many large universities, has some 50 Title IX coordinators and staffers and six more staffers in the Office of Sexual Assault Prevention and Response; they, in turn, regulate 33 proctors and tutors living in undergraduate houses.<sup>64</sup> Tiny Swarthmore, with some 1,500 students, has at least six sex bureaucrats.<sup>65</sup>

In addition, there are the costs imposed on schools (as well as taxpayers) by OCR’s more than 300<sup>66</sup> “Title IX investigations,” each of them stretching out for years. There are the additional costs imposed by the many lawsuits against universities both by student accusers who say they were mistreated and by the more than 150 accused students who say they were railroaded, including large settlement payments.<sup>67</sup>

As commentator and law professor Glenn Harlan Reynolds summarized the campus mindset, “If there’s a ‘campus rape crisis,’ that means that we need new rules, bigger budgets, and expanded power and self-importance for all involved, with the added advantage of letting you call your political opponents (or anyone who threatens funding) ‘pro rape.’ If we focus on the truth, however — rapidly declining rape rates already, without any particular ‘crisis’ programs in place — then voters, taxpayers, and university trustees will probably decide to invest resources elsewhere. So for politicians and activists, a phony crisis beats no crisis.”<sup>68</sup>

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devoted to Title IX problems by others at the university, including campus police, deans, faculty and others on disciplinary panels. Nor does it include the large costs of conducting sexual assault surveys or the ubiquitous — and largely ineffective — campus rape programs. <https://www.prlog.org/12610894-kill-campus-rape-rule-says-house-freedom-caucus-report.html/>.

<sup>64</sup> *Campus Rape Frenzy* 206 and sources cited therein.

<sup>65</sup> *Id.* 160-161.

<sup>66</sup> <http://projects.chronicle.com/titleix/>.

<sup>67</sup> *Campus Rape Frenzy* 95. Banzhaf reported that “according to a Risk Research Bulletin put out by insurance company United Educators (UE), student-on-student sexual assaults — which UE termed ‘a perfect storm’ of ‘alcohol, mental health, and sexual violence’ — cost its members more than \$36 million in losses from 2006-2010.” Banzhaf added: “Since the UE represents only about 1,200 educational institutions — including independent schools and public school districts, as well as colleges and universities — and because, according to many reports, the number of complaints and campus proceedings exploded only after that time period, it is likely that the sum of losses at all colleges and universities to date is much higher and will continue to grow.”

<sup>68</sup> Glenn Harlan Reynolds, “The Great Campus Rape Hoax,” *USA Today*, December 15, 2014, <http://www.usatoday.com/story/opinion/2014/12/14/campus-rape-uva-crisis-rolling-stone-politicscolumn/20397277/>. Reynolds has also pointed out: “Higher education . . . is one of the Democratic Party’s biggest sources of support: Financial (according to Open Secrets, [4 of the top 10 organizations](#) furnishing donors to the Obama 2016 campaign were universities: The University of California was #1, ahead of Google, and the others were Harvard, Stanford and Columbia), [ideological](#) (faculties lean far-left and the lefty faculty members tend to be much more outspoken, on average, than the conservative or libertarian faculty), and grassroots, with students, faculty and administrators serving as foot-soldiers (sometimes with [university funding](#)) for Democratic candidates and causes. And as Case Western University law professor George Dent notes, “Most state colleges and universities now serve as [political action committees](#) for the left, and their political spending dwarfs that of all other PACs.”

Has the degrading of due process and fairness for accused males made campuses safer for women? Not, as indicated in the second paragraph of this section, if one takes literally the words of the January 5 open letter to universities by former Vice President Biden, that the percentage of college women victimized by sexual assault is “the same” now as it was in 1995.<sup>69</sup>

Still, a powerful coalition led by campus rape activists, Democratic politicians, especially in blue states, some Republicans, many university officials and professors, dozens of women’s groups (such as the National Women’s Law Center and the American Association of University Women), the K-12 teachers unions, and others are ready to mount passionate opposition to any effort to reverse these policies, which they contend are necessary to protect campus sexual assault victims.<sup>70</sup>

On the other side, a few members of Congress have objected to the OCR’s campus sex mandates. Republican Senators Lamar Alexander of Tennessee, chairman of the Senate Education Committee and a former Secretary of Education, and James Lankford of Oklahoma accused OCR officials of usurping Congress’ power to make laws.<sup>71</sup> The Trump victory, propelled in part by voters’ anger at federal meddling in private lives and at politically correct academics, may prompt more members of Congress to question federal oversight of campus sex.

Indeed, the 2016 Republican Party Platform stated that sexual assault “must be promptly investigated by civil authorities and prosecuted in a courtroom, not a faculty lounge. Questions of guilt or innocence must be decided by a judge and jury, with guilt determined beyond a reasonable doubt. Those convicted of sexual assault should be punished to the full extent of the law. The Obama Administration’s distortion of Title IX to micromanage the way colleges and universities deal with allegations of abuse contravenes our country’s legal traditions and must be halted before it further muddles this complex issue and prevents the proper authorities from investigating and prosecuting sexual assault effectively with due process.”<sup>72</sup>

In addition, some groups with strong establishment credentials — including the American College of Trial Lawyers<sup>73</sup> and the American Bar Association’s Task Force on College Due Process Rights and Victims<sup>74</sup> — have found very serious fault with these campus sex assault mandates. Even more trenchant in their criticisms have been the Foundation for Individual Rights in Education (FIRE), the nation’s foremost campus civil liberties group;<sup>75</sup> Families Advocating for Campus Equality

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<sup>69</sup> <http://www.chronicle.com/blogs/ticker/in-letter-to-college-presidents-biden-urges-continued-fight-against-sexual-assault/116335>.

<sup>70</sup> [https://nwlc.org/wp-content/uploads/2016/07/2016.7.13-Title-IX-Support-Sign-On-Letter.final\\_.pdf/](https://nwlc.org/wp-content/uploads/2016/07/2016.7.13-Title-IX-Support-Sign-On-Letter.final_.pdf/).

<sup>71</sup> *Campus Rape Panic* 39, 191, 195, 274, 275.

<sup>72</sup> <https://www.gop.com/platform/renewing-american-values/>.

<sup>73</sup> American College of Trial Lawyers (ACTL), White Paper on Campus Sexual Assault Investigations, March 2017, at p. 11, (various provisions of ACTL’s paper are paraphrased or summarized unless otherwise indicated) <https://www.actl.com/library/press-release-2017-new-standards-campus-sexual-assault-investigations-provide-fairness-all> (“Under the current system, everyone loses.”).

<sup>74</sup> [http://www.americanbar.org/groups/criminal\\_justice/committees/campus.html](http://www.americanbar.org/groups/criminal_justice/committees/campus.html).

<sup>75</sup> See, e.g., [https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/01/23092433/fire-letter-to-pres\\_dt.pdf/](https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2017/01/23092433/fire-letter-to-pres_dt.pdf/); <http://www.stuarttaylorjr.com/wp-content/uploads/2017/05/FIRE-Letter-to-Candice-Jackson-4-26-17.pdf>.

(FACE), an impressive organization of families of students who say they were falsely accused;<sup>76</sup> Stop Abusive and Violent Environments (SAVE),<sup>77</sup> which works for “evidence-based solutions to end sexual assault and domestic violence,” and which has prepared a detailed critique of the Obama Administration’s regulation of campus sex<sup>78</sup> and proposed remedial federal legislation;<sup>79</sup> scores of prominent law professors — many of them politically progressive<sup>80</sup> — including 28 from Harvard,<sup>81</sup> 16 from the University of Pennsylvania,<sup>82</sup> and many others;<sup>83</sup> and a growing number of judges around the country, as illustrated by the eleven decisions cited in this footnote.<sup>84</sup> Educational leaders

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<sup>76</sup> See <https://www.facecampusequality.org/>; see also <http://www.stuarttaylorjr.com/wp-content/uploads/2017/05/WE-CAN-DO-BETTER-POSITION-PAPER-FINAL.pdf/>; <http://www.stuarttaylorjr.com/wp-content/uploads/2017/05/FACE-DUE-PROCESS-RECOMMENDATIONS-FINAL.pdf/>; <http://www.stuarttaylorjr.com/wp-content/uploads/2017/05/ALEXANDER-TESTIMONY-Senate-HELP-SUBMITTED-7-28-2015.pdf>.

<sup>77</sup> <http://www.saveservices.org/>.

<sup>78</sup> <http://www.saveservices.org/wp-content/uploads/Six-Year-Experiment-in-Campus-Jurisprudence.pdf>.

<sup>79</sup> <http://www.stuarttaylorjr.com/wp-content/uploads/2017/05/CEFTA-2.26.2017.pdf>.

<sup>80</sup> See, e.g., Jacob Gerson and Jennie Suk, *The Sex Bureaucracy*, 104 California Law Review Issue 4 (2016); Gertner, *supra*.

<sup>81</sup> See <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

<sup>82</sup> [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=.350791812f58](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=.350791812f58).

<sup>83</sup> See, e.g., (more than 20) “Law Professors’ Open Letter regarding Campus Free Speech and Sexual Assault,” *Wall Street Journal*, May 16, 2016, <http://online.wsj.com/public/resources/documents/Law-Professor-Open-Letter-May-16-2016.pdf>; see Jacob Gershman, “Dershowitz and Other Professors Decry ‘Pervasive and Severe Infringement’ of Student Rights,” *Law Blog*, *Wall Street Journal*, May 18, 2016; <http://blogs.wsj.com/law/2016/05/18/dershowitz-and-other-professors-decry-pervasive-and-severe-infringement-of-studentrights/>; (National Association of Scholars President) Peter Wood, “Letter to Members of Congress: Rein in the DoED’s Office for Civil Rights,” March 4, 2015, [https://www.nas.org/articles/letter\\_to\\_senators\\_dont\\_expand\\_the\\_does\\_office\\_for\\_civil\\_rights](https://www.nas.org/articles/letter_to_senators_dont_expand_the_does_office_for_civil_rights).

<sup>84</sup> See, e.g., Families Advocating for Campus Equality, “Campus Sexual Misconduct: We Can Do Better”: “[C]ourts across the United States are beginning to agree that DCL-mandated disciplinary procedures lead to biased and often predetermined results. A few of the more egregious examples:

- Federal District Judge Mark Mastroianni, of Massachusetts, refused to dismiss an expelled student’s Title IX discrimination claims, finding Amherst acted with “deliberate indifference” when it refused to investigate and ignored evidence supporting the student’s claim that he was in reality the victim. *Doe v. Amherst College*, Civil Action No. 15-30097-MGM(Feb. 27, 2017) (blacked-out-drunk male student given oral sex by his girlfriend’s roommate who later accused him of rape; text messages the accuser sent later that evening revealed she knew he was too intoxicated to lie for her).
- Federal District Judge William E. Smith, of Rhode Island, allowed an accused student’s Title IX claim to proceed based on allegations that Brown had banned him from campus without an investigation or hearing, refused him access to evidence and prevented him from defending himself. *Doe v Brown*, C.A. No. 1:15-cv-00144-S-LDA (D. R.I., Feb. 22, 2016).
- A New York appellate court reversed a lower court dismissal of an accused student’s claim against the State University of New York and criticized the school’s reliance on weak hearsay evidence. *Haug v State University of New York*, No. 522632, (State of New York, Appellate Division, Third Judicial Dept., Apr. 6, 2017).
- Federal District Judge T.S. Ellis III, of the Eastern District of Virginia, granted an accused student summary judgment, finding the school’s “accumulation of mistakes” violated the student’s liberty interest by ‘plainly

have also been critical as when Janet Napolitano, president of the University of California system, claimed that “OCR investigations often take years to complete, leaving institutions under a cloud of suspicion and in limbo regarding the legal sufficiency of their policies and practices.”<sup>85</sup>

Some of these critics, including FACE and (implicitly) FIRE, have called for the Trump Administration to revoke some or all of the Obama OCR’s campus sex commands. That could be done with a stroke (or a few strokes) of the pen, since OCR did not (for the most part) conduct the notice-and-comment rulemaking proceedings necessary to make Obama-era guidance into binding federal regulations.

But revoking these commands, by itself, would leave in force at most schools the troublesome procedures discussed above and would leave in place the thousands of campus sex bureaucrats — not to mention the campus culture of presuming the guilt of the accused. And while courts have

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call[ing] into question plaintiffs “good name, reputation, honor, or integrity.” *Doe v. Rectors and Visitors of George Mason University*, 149 F.Supp. 3d 602, 613-14 (E.D. Va. 2016) (quotation omitted).

\*Federal District Judge Dennis Saylor, of Massachusetts, criticized Brandeis’ failure to provide an accused student “a variety of procedural protections . . . many of which, in the criminal context, are the most basic and fundamental components of due process of law.” *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 603 (D. Mass. 2016).

- Federal District Judge Norman K. Moon, of the Western District of Virginia, found there was potential gender bias because the Title IX officer had opined “sexual assault occurs whenever a woman has consensual sex with a man and regrets it because she had internal reservations.” *Doe v. Washington & Lee University*, No. 6:14-cv-00052, 2015 WL 4647996 at \*10 (W.D. Va. Aug. 5, 2015).

- The U.S. Court of Appeals for the Second Circuit found an accused student had sufficiently pled anti-male gender bias based on “pro-female, anti-male bias . . . adopted to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students’ charges of sexual assaults by male students.” *Doe v. Columbia Univ.*, 831 F.3d 46, 56 (2d Cir. 2016) (Leval, J.).

- Judge Joel Wohlfeil, of the County of San Diego Superior Court, found San Diego State University’s disciplinary process “enough to shock the Court’s conscience.” *John Doe v. Rivera (SDSU)*, No: 37-2015-00029558-CU-WM-CTL (San Diego County Sup. Court, Feb. 1, 2017 Minute Order)(emphasis added).

\* Judge Timothy Fall, of the Yolo County Superior Court, found that due process had “completely been obliterated” by UC Davis. *John Doe. v. Donald Dudley, Director of Student Judicial Affairs, et al.*, No. PT 15-1253 (Yolo County Sup. Court, Sept. 22, 2015).

- A California Court of Appeals found the University of Southern California had violated the student’s due process rights by not giving him a chance to defend himself. *John Doe v University of Southern California*, 246 Cal. App. 4th 221 (2016).

- Judge John D. Molloy, of the Riverside County (California) Superior Court, granted a student’s stay of his expulsion and criticized LaSierra University administrators for seeking to expel the student without a hearing, identifying witnesses or disclosing evidence. *John Doe v Marnie Straine, Interim Title IX Coordinator, et al.*, Case Case No. RIC 1606115 (Riverside County Sup. Court, July 15, 2016) (Student was denied “factual basis of the charges against him,” “access[to] any evidence,” and “opportunity to appear directly before the decision-making panel to rebut the evidence presented against him.”)

<sup>85</sup> Janet Napolitano. “Only Yes Means Yes: An Essay on University Policies Regarding Sexual Violence and Sexual Assault,” 33 *Yale Law and Policy Review* 396-397 (2014), <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1684&context=yldr>.

increasingly upheld lawsuits by accused students against their schools, it seems likely that not much will change unless the Trump Administration or Congress or both are proactive in forcing change.

Congress seems unlikely to act. If the Trump Administration decides to act forcefully, as critics including FACE have urged, its options would include conducting a notice-and-comment rulemaking process that includes (1) gathering the wealth of evidence that many colleges and universities have been violating Title IX by discriminating systematically against accused persons — almost all of them male — in campus discipline for alleged sexual misconduct; and (2) specifying procedures that must be used to protect due process rights in any and all campus disciplinary proceedings that involve sex or gender.

Those procedures could include rights to notice of the allegations and a fair hearing before an impartial and independent panel; to have panel members instructed that an accused is presumed innocent until proven guilty by clear and convincing evidence; to be given timely notice of all allegations, the investigator's report and all exculpatory evidence before the hearing; to have ample time to prepare a defense; to active representation by a lawyer; to have the lawyer or another representative cross-examine all witnesses, including the accuser; to call witnesses; and to a meaningful appeal of any adverse finding.

The Administration could also cut OCR's budget to limit its ability to regulate campus sex. And, of course, it could encourage colleges to work more closely with police and prosecutors and to channel sexual assault accusations into the criminal justice system.