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## Dear Colleague: Title IX Coordinators and Inconsistent Compliance With the Laws Governing Campus Sexual Misconduct

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# DEAR COLLEAGUE: TITLE IX COORDINATORS AND INCONSISTENT COMPLIANCE WITH THE LAWS GOVERNING CAMPUS SEXUAL MISCONDUCT

Brian A. Pappas\*

## ABSTRACT

*Title IX Coordinators are tasked with effectuating Title IX compliance to ensure a safe campus while protecting the rights of survivors and alleged perpetrators. An epidemic of university sexual misconduct and widespread non-reporting provided the context for a 2011 Department of Education Office of Civil Rights Dear Colleague Letter redefining compliance. This article utilizes interviews conducted between 2011 and 2014 with 13 Title IX Coordinators from large institutions of higher education to provide a ground-level view of compliance in action. In the very best light, during this time university compliance with Title IX was highly inconsistent and largely ineffective. Title IX Coordinators depart from the archetype in order to create substantive justice for individuals in a framework they view as overly formalistic. They also depart to establish professional worth, to avoid negative publicity, and to effectuate managerial solutions that symbolize compliance. The results are Title IX processes that are less than consistent, reliable, and impartial, validating calls for increased procedural protections for victims and alleged perpetrators. Overall, the picture of university Title IX compliance is one motivated more by symbolic enforcement than true dedication to ensure a hostility-free campus.*

## I. INTRODUCTION

Sexual misconduct is an ongoing problem on university campuses, and universities are struggling to develop procedures to address it. There is an epidemic of peer sexual violence (one student sexually harassing another in a manner that includes physical conduct) occurring on campuses across the nation. For example, a survey of over 5,000 undergraduate women and over 1,000 undergraduate men at two large public universities found that 13.7 percent of undergraduate women reported at least one completed sexual assault since entering college and 6.1 percent of undergraduate men reported experiencing attempted or completed sexual assaults.<sup>1</sup> In this article, I will refer to the accused as the

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“alleged perpetrators” and those who have experienced sexual assault as “survivors.”<sup>2</sup> Drugs and alcohol surely contribute to many of these assaults, accentuating the problem as so many college students drink to excess.<sup>3</sup>

Universities were clearly put on notice about these problems, if they had not been before, by a “Dear Colleague” letter issued by the U.S. Department of Education in 2011 that required universities to take steps to address the problem or risk loss of federal funding.<sup>4</sup> Complaints of sexual misconduct on university campuses are addressed under the auspices of the Title IX Coordinator.<sup>5</sup>

Title IX Coordinators are a type of formal legal compliance office that was widely adopted in response to the Civil Rights Act of 1972.<sup>6</sup> Similar formal offices, particularly Equal Employment Opportunity (EEO) and Affirmative Action (AA) offices, have been widely studied.<sup>7</sup> These studies identify EEO/AA offices as a sort of “non-law” structure that is meant to interpret and enforce law inside a bureaucratic organization.<sup>8</sup> These studies of EEO/AA offices mainly compare these offices to a court-like ideal and, in light of this comparison, generally observe that these types of offices, although legally framed, tend toward more informality in practice.<sup>9</sup> Title IX Coordinators are just such a structure, and, like EEO/AA offices, operate somewhat more informally than the court-like ideal.

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very special thank you to my dissertation committee at the University of Kansas: Charles Epp, H. George Fredrickson, Steven Maynard-Moody, Rosemary O’Leary, Marilu Goodyear, and Robert Shelton. Any errors are mine alone. I conducted the interviews referenced in this work anonymously with the approval of, and under the procedures established by, the University of Kansas Institutional Review Board.

1. CHRISTOPHER P. KREBS ET AL., NAT’L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY, at vii, 5-5 (2007), <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>; David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73 (2002).

2. This article uses the term “survivors” throughout as it represents self-determination and strength instead of the more commonplace usage of victim that implies weakness and powerlessness. The term “victim” is retained in its original form in quotations. When discussing Title IX processes, often the term “complainant” is used.

3. William DeJong, *The Impact of Alcohol on Campus Life*, in RESTORATIVE JUSTICE ON THE COLLEGE CAMPUS: PROMOTING STUDENT GROWTH AND RESPONSIBILITY, AND REAWAKENING THE SPIRIT OF CAMPUS COMMUNITY 100, 104 (David R. Karp & Thom Allena eds., 2004).

4. Letter from Department of Education, Office for Civil Rights to Colleague, 12 (Apr. 4, 2011) available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter Dear Colleague Letter].

<sup>5</sup> 20 U.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 106.8.

6. 20 U.S.C. §§ 1681 et seq., and its implementing regulations, 34 C.F.R. Part 106.1.

7. See generally Frank Dobbin & Erin L. Kelly, *How to Stop Harassment: Professional Construction of Legal Compliance in Organizations*, 112 AM. J. SOC. 1203 (2007); Lauren B. Edelman, *Legal Environments and Organizational Governance: The Expansion of Due Process in the Work Place*, 95 AM. J. SOC. 1401 (1990) [hereinafter Edelman, *Legal Environments and Organizational Governance*]; Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. SOC. 1531 (1992) [hereinafter Edelman, *Legal Ambiguity and Symbolic Structures*]; Lauren B. Edelman, Gwendolyn Leachman & Doug McAdam, *On Law, Organizations, and Social Movements*, 6 ANN. REV. L. SOC. SCI. 653 (2010) [hereinafter Edelman, *On Law, Organizations, and Social Movements*]; Lauren B. Edelman, Linda H. Krieger, Scott R. Elison, Catherine R. Albiston & Virginia Mellema, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, 117 AM. J. SOC. 888 (2011) [hereinafter Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*].

8. See generally Edelman, *Legal Environments and Organizational Governance*, supra note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, supra note 7.

9. See Edelman, *Legal Environments and Organizational Governance*, supra note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, supra note 7; Edelman, *On Law, Organizations, and Social Movements*, supra note 7; Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, supra note 7.

In examining campus sexual misconduct, my data consist of 2011-2014 interviews of thirteen Title IX Coordinators from institutions of higher education nation-wide. The research methods consisted of open-ended interviews, content analysis of these interviews, and the analysis of documents relating to Title IX. The participants were from every region of the country. Participants were primarily from large doctoral degree granting public and private research institutions, but several master's level institutions were also included.<sup>10</sup>

The study provides a ground-level view of compliance in action. In the very best light, university compliance with Title IX was highly inconsistent and largely ineffective during this time. Title IX Coordinators depart from the formal, legal model in order to create substantive justice for individuals in a framework they view as overly formalistic. They also depart to establish professional worth, to avoid negative publicity, and to effectuate managerial solutions that symbolize compliance. The results are Title IX processes that are less than consistent, reliable, and impartial, validating calls for increased procedural protections for victims and alleged perpetrators. Overall, the picture of university Title IX compliance is one motivated more by symbolic enforcement than true dedication to ensure a hostility-free campus.

Part I of this article describes the pervasive problem of campus sexual misconduct. Part II is a review of the legal context that provides the backdrop for Title IX compliance work. In Part III, Title IX models and processes are described, followed by evidence that Title IX Coordinators are both inconsistently adhering to and departing from the archetype. Explanations motivating the departures are explored in Part IV. The article concludes by recommending that Title IX Coordinators create more meaningful professional networks in order to do more than symbolically address campus sexual misconduct. From the perspective of both survivors and alleged perpetrators, Title IX compliance is neither effective nor equitable.

## II. THE PROBLEM OF SEXUAL MISCONDUCT ON CAMPUS

Sexual misconduct among fellow students and professors is a very serious problem and universities face a dilemma in how to deal with it. There is an epidemic of peer sexual violence on campuses across the nation. With studies ranging from the mid-1980s to 2015, the effort to combat campus peer sexual violence is in its fourth decade.<sup>11</sup> A 2015 study of twenty-seven institutions of higher education found “[o]ne-third (33.1[percent]) of senior females . . . report being a victim of nonconsensual sexual contact at least once” during

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10. The sensitive nature of the topic restricted the sample size. As the numbers interviewed grew, the stories and commentary became repetitive. While it is possible that the twenty-seven officials who agreed to be interviewed were somehow systematically different from others who declined, I suspect that they were more typical than unique. The participants, while relatively small in number, do not appear to be systematically skewed in any obvious ways. These interviews provide insight into the nature of Title IX compliance between 2011 and 2014.

11. Nancy Chi Cantalupo, “Decriminalizing” *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481, 484 (2012).

their time in college.<sup>12</sup> Approximately half of these were victims of nonconsensual penetration involving one of the four tactics (physical or threat of physical force; incapacitation; coercion; and absence of affirmative consent).<sup>13</sup>

Research shows that a small number of repeat perpetrators commit the vast majority of sexual violence, requiring mechanisms for identifying and stopping these repeat offenders.<sup>14</sup> A 2002 study surveyed 1,882 male university students and found that 4 percent of the study's subjects accounted for 28 percent of the violence, a rate ten times greater than that of non-rapists.<sup>15</sup> Fraternity men have been identified as more likely to perpetrate sexual crimes than non-fraternity men.<sup>16</sup> A 1996 study found male student-athletes made up 3.3 percent of the population at Division I institutions, but represented 19 percent of the alleged sexual assault or domestic violence perpetrators in judicial affairs records.<sup>17</sup> High profile cases of sexual violence by athletes persist, including the rape allegations against Heisman Trophy-winning quarterback Jameis Winston,<sup>18</sup> the delay, and ultimate expulsion of University of Michigan Kicker Brendan Gibbons,<sup>19</sup> and the 2011 suicide of University of Missouri Swimmer Sasha Menu Courey, sixteen months after an uninvestigated allegation of rape by a football player.<sup>20</sup>

Evidence indicates sexual misconduct is widely underreported. A 2007 survey indicated that only 16 percent of physically forced survivors and 8 percent of incapacitated sexual assault survivors contacted a survivor's, crisis, or health care center after the incident.<sup>21</sup> Only 2 percent of incapacitated survivors and 13 percent of physically forced survivors report the incident to law enforcement.<sup>22</sup> Other studies estimate that ninety percent or more of survivors of campus sexual assault do not report the incident.<sup>23</sup> A 2015 study of twenty-seven institutions of higher education found "a relatively small percentage (e.g., 28[percent] or less) of even the most serious incidents are reported."<sup>24</sup>

Evidence indicates non-reporting occurs due to a fear of reprisal and a belief the process will not work or not be fair. In a 2001 survey of graduate students, 21 percent of those experiencing harassment reported the behavior, 30 percent experienced retaliation

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12. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT xiv (Sept. 21, 2015), available at <http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%20on%20AAU%20Campus%20Climate%20Survey.pdf>.

13. *Id.*

14. Lisak & Miller, *supra* note 1, at 78.

15. *Id.* at 80.

16. KREBS, *supra* note 1, at 2-11.

17. Todd W. Crosset et al., *Male Student-Athletes and Violence Against Women: A Survey of Campus Judicial Affairs Offices*, 2 J. VIOLENCE AGAINST WOMEN 163, 171-73 (1996).

18. Michael McCann, *Don't Stay in School*, SPORTS ILLUSTRATED, Oct. 20, 2014, at 13.

19. Matt Slovin & Adam Rubenfire, *Former Kicker Brendan Gibbons Permanently Separated from University for Sexual Misconduct*, THE MICH. DAILY (Jan. 28, 2014), <https://www.michigandaily.com/sports/former-kicker-brendan-gibbons-expelled-sexual-misconduct>.

20. Tom Farrey & Nicole Noren, *Mizzou did not Pursue Alleged Assault*, ESPN.COM (Mar. 1, 2014), [http://espn.go.com/espn/otl/story/\\_id/10323102/university-missouri-officials-did-not-pursue-rape-case-lines-investigation-finds](http://espn.go.com/espn/otl/story/_id/10323102/university-missouri-officials-did-not-pursue-rape-case-lines-investigation-finds).

21. KREBS, *supra* note 1, at xvii.

22. *Id.*

23. BONNIE FISHER, FRANCIS T. CULLEN & MICHAEL G. TURNER, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN: RESEARCH REPORT, 21-26 (2000), available at <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

24. CANTOR ET AL., *supra* note 12, at iv.

after reporting, and 58 percent believed the reporting process and complaint handling could be improved.<sup>25</sup> According to the 2015 study, more than 50 percent of victims of serious incidents do not report because they do not consider it “serious enough.”<sup>26</sup>

The problem especially occurs within relationships (romantic as well as hierarchical), making it more difficult for survivors to come forward. Most perpetrators of rape or attempted rape are known to the survivor, because they are often classmates and friends (70 percent of completed rapes) and boyfriends or ex-boyfriends (23.7 percent of completed rapes and 14.5 percent of attempted rapes).<sup>27</sup> Employee-to-student and faculty-to-student sexual misconduct are also campus problems that implicate Title IX. Employee misconduct more generally is an ongoing problem as indicated by the Jerry Sandusky child sexual abuse scandal and scandals at Syracuse University, University of Texas, the University of Arkansas, and many other examples.<sup>28</sup> The decentralized environment, the focus on academic pursuits, and the hierarchical intellectual environment allow harassing behaviors to go unchecked in academic institutions.<sup>29</sup>

In part, the breadth of the problem is a product of the university context itself, requiring that institutions take action to remediate the effects of sexual misconduct. In a 2014 survey of more than 300 schools commissioned by Senator Claire McCaskill, more than 40 percent of U.S. colleges and universities conducted no investigations of sexual assault allegations over the past five years.<sup>30</sup> Further, the survey found that only 16 percent of schools conduct “climate surveys” to determine the prevalence of sexual assault on campus, and only about half of colleges have a hotline that survivors can call to report a sexual assault.<sup>31</sup> Nearly 73 percent of schools do not have protocols for how campus authorities and local law enforcement should work together on cases.<sup>32</sup>

Employee perceptions of organizational tolerance to sexual harassment are significantly related to the frequency of sexual harassment incidents and the effectiveness in combating the problem.<sup>33</sup> Organizationally, studies reveal that where a choice of sanctions for harassment is available, it is common for the least stringent to be selected, such as a

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25. ACADEMIC INCIVILITY AND THE GRADUATE/PROFESSIONAL STUDENT EXPERIENCE: SUMMARY OF SPRING 2011 SURVEY OF UMN-TC GRADUATE AND PROFESSIONAL STUDENTS 5 (2011), available at [http://www.sos.umn.edu/assets/pdf/Survey%20Summary%202011%20\(revised%208-12-11\).pdf](http://www.sos.umn.edu/assets/pdf/Survey%20Summary%202011%20(revised%208-12-11).pdf).

26. CANTOR ET AL., *supra* note 12, at iv.

27. FISHER, CULLEN & TURNER, *supra* note 23, at 19.

28. Christian Dennie, *Post Penn State: Protecting Against Sexual Harassment and Misconduct in Athletics*, 75 TEX. B.J. 828, 828-830 (2012); Diane Heckman, *Title IX and Sexual Harassment Claims Involving Educational Athletic Department Employees and Student-Athletes in the Twenty-First Century*, 8 VA. SPORTS & ENT. L.J. 223 (2009).

29. Robert J. Tepper & Craig G. White, *Workplace Harassment in the Academic Environment*, 56 ST. LOUIS U. L.J. 81, 83 (2011).

30. Mary Beth Marklein & Deirdre Shesgreen, *Colleges Ignoring Sexual Assault, Senator Charges*, USA TODAY (July 9, 2014), <http://www.usatoday.com/story/news/nation/2014/07/09/claire-mccaskill-college-sexual-assault-report/12400401/>.

31. *Id.*

32. *Id.*

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

formal or informal warning without further action.<sup>34</sup> Such responses indicate a deflection of organizational responsibility and may indicate a “climate of tolerance.”<sup>35</sup>

In sum, Title IX Coordinators face a context in which there is a lot of sexual misconduct by students and university employees, repeat offenders cause a lot of the problems, misconduct most frequently occurs within romantic and other relationships involving power dynamics, and survivors are very hesitant to come forward. It is important to have processes in place that facilitate rather than discourage individuals to make complaints. It is also important to have processes that fairly adjudicate responsibility for misconduct. Finally, it is important to have mechanisms for ensuring that university leaders know about significant problems and to develop ways to address them.

### III. THE LEGAL CONTEXT FOR CAMPUS SEXUAL MISCONDUCT

The legal environment puts pressure on universities to address the problem of sexual misconduct through the lens of individual complaints.<sup>36</sup> The Department of Education’s Office of Civil Rights (OCR) is tasked with enforcing Title IX of the Educational Amendments of 1972.<sup>37</sup> Title IX promotes equity in academic and athletic programs, prohibits hostile environments on the basis of sex, prohibits sexual harassment and sexual violence, and directs universities to protect complainants against retaliation and to remedy the effects of other gender-based forms of discrimination.<sup>38</sup> Congress adopted Title IX in order to effectuate a complaint-driven remedy, rather than authorize a federal enforcement agency (like the National Labor Relations Board) to oversee and direct broad reforms in the regulated sector.<sup>39</sup> Originally codified in the Title IX implementing regulations, federal funding recipients are required to “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX], including any investigation of any complaint communicated to such recipient alleging its noncompliance with [Title IX] or alleging any actions which would be prohibited by [Title IX].”<sup>40</sup> In response to Title IX, universities created Title IX compliance officers and organizational mechanisms for addressing individual complaints of sexual harassment and gender inequities. Over thirty-years after Title IX’s implementation, this role is now known as a Title IX Coordinator.

According to the Association for Title IX Administrators (ATIXA), there are 25,000 individuals who assure Title IX compliance in schools, colleges, and universities across

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34. Denise Salin, *Organizational Responses to Workplace Harassment: An Exploratory Study*, 38 PERS. REV. 26 (2007).

35. Paula McDonald, *Workplace Sexual Harassment 30 Years on: A Review of the Literature*, 14 INT’L J. MGMT. REVS. 1, 9 (2012).

36. Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 614-15 (2016) (“I observe here that, thus far, we have been thinking of campus sexual assault as a private and individualized criminal or quasi-criminal wrong in which campus authorities become involved because of the need to resolve disputes between and among students.”).

37. 20 U.S.C. § 1681 (2006 & Supp. V 2011).

38. *Id.*

39. SEAN FARHANG, *THE LITIGATION STATE: PUBLIC AND PRIVATE LAWSUITS IN THE UNITED STATES* (2010).

40. 34 C.F.R. § 106.8 (a) (1972).

the country.<sup>41</sup> This means coordinating investigations, providing information and consultation to potential complainants, and receiving formal notice of complaints. Title IX Coordinators or their staff schedule, coordinate, or oversee grievance hearings, conduct investigations, make findings of violations of Title IX, notify parties of decisions, and provide information about the right and procedure of appeal. They also train staff, maintain records, ensure that timelines and procedures are followed, and provide ongoing training, consultation, and technical assistance. Title IX Coordinators are authorized to conduct a formal and defined process in order to determine whether there has been a violation of the law. All educational institutions are bound by their own policies and procedures, by constitutional due-process mandates, state contract and civil rights law, federal education laws, and the oversight of the Department of Education Office of Civil Rights. “Dear Colleague” Letters, issued through OCR, specify and clarify the requirements of Title IX. While these “Dear Colleague” letters lack the force of law, courts pay them great attention.<sup>42</sup> The legal standards for compliance by universities remained unclear until OCR issued a “Dear Colleague” letter on April 4, 2011.<sup>43</sup>

The Dear Colleague Letter issued on April 4, 2011, dramatically shifted the interpretation of Title IX enforcement by prescribing the knowledge<sup>44</sup> and evidentiary standards<sup>45</sup> for handling sexual misconduct disputes and by requiring universities to address student-to-student sexual misconduct whether on or off campus.<sup>46</sup> The letter also provides guidance on what constitutes fair procedures, including discouraging schools from allowing the parties to question or cross-examine one another, giving institutions discretion to determine whether to permit parties to have counsel (provided both sides are treated equally), and mandating that both parties have the right to invoke an appeal process.<sup>47</sup> The letter also requires educational training for employees,<sup>48</sup> implementation of preventative education programs, and provision of comprehensive survivor resources.<sup>49</sup> Finally, the

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41. Ass’n of Title IX Admin., *About ATIXA and Title IX*, ATIXA, <https://atixa.org/about/> (last visited Jan. 26, 2016).

42. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 104 S.Ct. 2778, 2782 (1984), (directing courts to defer to administrative interpretations of their authorizing legislation except when those interpretations contravene the law).

43. Dear Colleague Letter, *supra* note 4, at 11.

44. *Id.* at 4 (A university must take action “[i]f a school knows or reasonably should know about student-on-student harassment that creates a hostile environment.” This interpretation represented a sharp departure from the “actual knowledge and deliberate indifference” standard for private lawsuits for monetary damages. Schools can no longer avoid knowledge of sexual harassment and it is much easier to show that responsible university employees knew or should have known of the misconduct).

45. *Id.* at 11 (requiring the use of a preponderance-of-the evidence standard, noting that “[t]he ‘clear and convincing’ standard . . . currently used by some schools, is a higher [and improper] standard of proof”).

46. *Id.* at 4 (dramatically increasing the scope of cases for which Title IX Coordinators are responsible, “[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school’s education program or activity” and “[i]f a student files a complaint with the school, regardless of where the conduct occurred, the school must process the complaint in accordance with its established procedures”).

47. Dear Colleague Letter, *supra* note 4, at 12.

48. *Id.*, at 4, 12 (requiring training for employees likely to witness or receive reports of sexual misconduct and declaring that in sexual violence cases the fact-finder and the decision-maker should have adequate training or knowledge regarding sexual violence).

49. *Id.* at 14.



2011 Dear Colleague Letter affirms the requirement that universities are required to employ a Title IX Coordinator and clarifies that Title IX coordinators should not have other job responsibilities that may create a conflict of interest.<sup>50</sup>

OCR released a Q&A document in 2014 to further provide clarification on what constitutes compliance with Title IX. Title VII,<sup>51</sup> the 2013 reauthorization of VAWA (Pub. L. 113-4),<sup>52</sup> the Clery Act,<sup>53</sup> FERPA,<sup>54</sup> due process rights,<sup>55</sup> and administrative law all add additional legal requirements. Further, survivors may enforce their rights via private action initiated against their schools.<sup>56</sup>

In concert with the new law, federal administrators made it clear that preventing and handling campus sexual assaults must be a university priority. In January 2014, President Obama pledged to develop a coordinated federal response to combat campus sexual assault.<sup>57</sup> President Obama created a White House Task Force on Protecting Students From

50. *Id.* at 7 (noting that “serving as the Title IX coordinator and a disciplinary hearing board member or general counsel may create a conflict of interest”).

51. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(2006) (prohibiting employers from discriminating in the terms and conditions of employment based upon “race, color, religion, sex, or national origin”).

52. The 2013 reauthorization of the Violence Against Women Act (VAWA, Pub. L. 113-4) specifically included the Campus Sexual Violence Elimination Act in Section 303 (Grants to Combat Violent Crimes on Campuses) and Section 304 (Campus Sexual Violence, Domestic Violence, Dating Violence, and Stalking Education and Prevention). Originally signed into law in 1994 as Title IV, sec. 40001-40703 of the Violent Crime Control and Law Enforcement Act, the Violence Against Women Act (VAWA) provided \$1.6 billion toward investigation and prosecution of violent crimes against women, imposed automatic and mandatory restitution on those convicted, and allowed civil redress in cases prosecutors chose to leave unprosecuted. Reauthorized by Congress initially in 2000 and 2005, the Act also established an Office on Violence Against Women (OVAW) within the Department of Justice. OVAW administers grant programs to reduce domestic violence, dating violence, sexual assault, and stalking on campus. In 2014, federal regulations were issued (34 CFR Part 668) clarifying the 2013 VAWA reauthorization. Specifically, they require institutions to maintain statistics (including numbers of unfounded crime reports), to educate incoming students and new employees, to engage in ongoing awareness campaigns, to describe disciplinary proceedings in detail, to detail a list of possible sanctions, and to indicate the range of protective measures the institution may offer.

53. The Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery Act”) is a federal statute that requires all colleges and universities that participate in federal financial aid programs to keep and disclose information about crime on and near their respective campuses. 20 U.S.C. § 1092(f). Schools must publish policies designed to prevent sexual violence and respond to it once it occurs, 20 U.S.C. § 1092 (f)(8)(A)(2008)), that include specific information about: 1) reporting (20 U.S.C. § 1092 (f)(8)(B)(iii)(2008)); 2) the survivor’s right to notify law enforcement and receive school assistance in doing so (20 U.S.C. § 1092 (f)(8)(B)(v)(2008)); 3) instructions to survivors as how to preserve evidence of sexual violence (20 U.S.C. § 1092 (f)(8)(B)(iii)(2008)); 4) information about options and assistance for changing living and educational arrangement (20 USC §1092 (f)(8)(B)(vii)(2008)); and 5) disciplinary procedures that explicitly treat accuser and accused equally in terms of having others present at hearings and to know disciplinary outcomes (20 U.S.C. § 1092 (f)(8)(B)(iv)(2008)).

54. The Family Educational Rights and Privacy Act (FERPA) (20 U.S.C. § 1232g; 34 CFR Part 99) protects against the unauthorized disclosure of confidential student education records. It grants parents of minor-aged students and students 18 and older the right to access educational records, to challenge the records’ contents, and to have control over disclosure of personally identifiable information in the records. Applying to all schools receiving federal funds, Congress has modified FERPA nine times, most significantly with the passage of the Clery Act.

55. U.S. CONST. amend. V (stating “[n]o person shall be held . . . nor shall be deprived of life, liberty, or property, without due process of law”); U.S. CONST. amend. IV, §1 (binding the states to the same language).

56. *Davis v. Monroe Cnty. Bd. of Educ.*, 119 S. Ct. 1661, 1666 (1999) (holding a private damages action for sexual harassment may proceed on Title IX grounds only where the funding recipient acts with deliberate indifference to known acts of harassment and the harassment is “so severe, pervasive, and objectively offensive that it effectively bars the survivor’s access to an educational opportunity or benefit”).

57. Libby Sander, *Obama Promises Government Wide Scrutiny of Campus-Rape Issue*, CHRON. HIGHER

Sexual Assault, designed to provide colleges with information on best practices, ensure compliance with legal obligations, increase the transparency of federal enforcement, increase the public's awareness of individual colleges' compliance with the law, and facilitate coordination among federal agencies.<sup>58</sup> The White House Task Force (WHTF) issued its first report, *Not Alone*, in April 2014, and created a website, [notalone.gov](http://notalone.gov), to provide resources for schools and students.<sup>59</sup> The task force report recommends campus climate surveys,<sup>60</sup> actively engaging with men, and actively creating campus bystander programs to change campus cultures.<sup>61</sup> The report also recommends giving survivors more control over the process by ensuring a place to go for confidential advice and support.<sup>62</sup> Finally, it recommends training for officials in how to address the trauma that attends sexual assault.<sup>63</sup>

Since OCR began tracking sexual misconduct Title IX complaints in 2009, the number of complaints has risen exponentially, from 11 cases in 2009 to 33 cases in April of 2014.<sup>64</sup> As of November 1, 2014, more than eighty colleges were under federal investigation for possible violations of Title IX.<sup>65</sup> Despite this trend, an analysis of Title IX complaints filed with the Department of Education from 2003 to 2013 found that fewer than one in ten led to a formal agreement to change campus policies.<sup>66</sup> As of October 17, 2016, there are 279 open federal Title IX investigations underway.<sup>67</sup>

Increased attention to sexual misconduct has also led to a proliferation of complaints and lawsuits. In January of 2013, student Andrea Pino, two other students, an alumna, and a former administrator made a federal complaint against the University of North Carolina at Chapel Hill accusing the university of negligently handling its responses to rape.<sup>68</sup> Students elsewhere filed similar complaints against universities like Amherst, Berkeley, Dartmouth, Occidental, Swarthmore, and Vanderbilt.<sup>69</sup> In 2014, the University of Connecticut announced it would pay nearly \$1.3 million to settle a federal lawsuit filed by five current and former female undergraduate students claiming the university had mishandled their sexual assault complaints.<sup>70</sup> In January 2016, Florida State agreed to pay \$950,000 to settle

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EDUC., Jan. 31, 2014.

58. *Id.*

59. THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE (2014), available at [http://www.whitehouse.gov/sites/default/files/docs/report\\_0.pdf](http://www.whitehouse.gov/sites/default/files/docs/report_0.pdf).

60. *Id.* at 8.

61. *Id.* at 2.

62. *Id.* at 17.

63. *Id.* at 3-4.

64. Jonah Newman & Libby Sander, *A Promise Unfulfilled*, CHRON. OF HIGHER EDUC., May 9, 2014, at A24.

65. Max Lewontin, *Final Federal Rules on Sexual Violence Emphasize Training*, CHRON. HIGHER EDUC., Oct. 31, 2014, at A4.

66. Newman & Sander, *supra* note 64.

67. *Campus Sexual Assault Under Investigation*, CHRONICLE FOR HIGHER EDUCATION, <http://projects.chronicle.com/titleix/> (last visited Oct. 17, 2016) (listing 279 open federal investigations).

68. Libby Sander, *Anti-Rape Activist*, CHRON. HIGHER EDUC., Dec. 13, 2013, at A20.

69. *Id.*

70. Monica Vendituoli, *UConn Will Pay \$1.3-Million to Settle 5 Women's Sexual-Assault Lawsuit*, CHRON. HIGHER EDUC., Aug. 1, 2014, at A4.

a federal lawsuit with a former student who brought an accusation against quarterback Jameis Winston.<sup>71</sup>

Students accused of sexual misconduct are also filing complaints. Daniel Kopin, a former student at Brown University, sent a letter to the U.S. Education Department's Office for Civil Rights, sharing his side of a sexual encounter that resulted in his suspension.<sup>72</sup> In June 2013, Peter Yu sued Vassar College, arguing that the college denied him due process throughout the sexual misconduct disciplinary process and had discriminated against him because of his sex.<sup>73</sup> Specifically, Yu claimed officials did not properly advise him of grievance policies and did not allow him legal representation at the disciplinary hearing.<sup>74</sup> Similar complaints were filed against St. Joseph's University in July 2013, and a federal lawsuit was filed against Xavier University in August 2013, claiming that the university conducted a fundamentally unfair hearing.<sup>75</sup> These three lawsuits all share several common allegations: campus officials withheld key evidence in hearings, they were hasty to rush to judgment, and a general presumption of guilt prevailed.<sup>76</sup> In 2015, Middlebury College, the University of Southern California, and UC-San Diego were all ordered to reinstate expelled students.<sup>77</sup> Nearly fifty lawsuits by accused students are in process, an increase from roughly twelve in 2013.<sup>78</sup> In sum, young men are as unhappy with the outcome of college investigations as their accusers, and both sides often find the process unfair.<sup>79</sup>

Attorneys representing both survivors and the accused report they are seeing an uptick in cases. Brett Sokolow, president of the National Center for Higher Education Risk Management (which also oversees ATIXA, the Association of Title IX Administrators) notes receiving nearly sixty calls from accused students and their parents, of which he is now representing roughly a dozen.<sup>80</sup> Another attorney, Andrew Miltenberg, reported receiving fifteen calls each month in 2014.<sup>81</sup>

In a June 2016 report issued by the American Association of University Professors (AAUP), incorrect OCR interpretation and overzealous administrative implementation were described as the cause of undue restrictions on teaching, research, speech, academic freedom, and due process.<sup>82</sup> The AAUP argued that both the university response

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71. Rachel Axon, *Florida State Agrees to Pay Winston Accuser \$950,000 to Settle Suit*, USA TODAY, (January 25, 2016), <http://www.usatoday.com/story/sports/ncaaf/2016/01/25/florida-state-settles-title-ix-lawsuit-erica-kinsman-jameis-winston/79299304/> (last visited Feb 15, 2016).

72. Libby Sander, *Opening New Front in Campus-Rape Debate, Brown Student Tells Education Dept. His Side*, CHRON. HIGHER EDUC. (June 12, 2014), <http://chronicle.com/article/Opening-New-Front-in/147047>.

73. Libby Sander, *3 Students, Accused of Sexual Misconduct, Sue their Colleges*, CHRON. HIGHER EDUC., Sept. 30, 2013, at A14.

74. *Id.*

75. *Id.*

76. *Id.*

77. Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, (Jan. 4, 2016), <http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights>.

78. *Id.*

79. Robin Wilson, *On New Front in Rape Debate, Student Tells Education Department His Side*, CHRON. HIGHER EDUC., June 20, 2014, at A11.

80. Robin Wilson, *Presumed Guilty*, CHRON. HIGHER EDUC., Sept. 5, 2014, at A38.

81. *Id.*

82. *The History, Uses, and Abuses of Title IX*, American Association of University Professors, June, 2016

and the criminal justice system serve “neither survivors nor alleged perpetrators with any notable degree of fairness.”<sup>83</sup> The core due process arguments advanced include 1) a lack of a hearing with 2) the right to confrontation and cross examination, and 3) incorrect use of the preponderance of evidence standard of proof.<sup>84</sup>

An additional criticism against current Title IX enforcement is that the “Dear Colleague” Letters are not merely interpretive, but instead promulgate new rules and requirements in violation of the Administrative Procedure Act.<sup>85</sup> Considered interpretive rules, the “Dear Colleague” letters are defined by the Supreme Court as those “issued by an agency to advise the public of the agency’s construction of the statutes and rules it administers” that otherwise “do not have the force and effect of law.”<sup>86</sup> Despite lacking the force of law, courts pay them great attention.<sup>87</sup> Recent letters from Oklahoma Senator James Lankford to the U.S. Department of Education challenges the legitimacy of recent “Dear Colleague” letters by arguing they create substantive changes and require the use of APA rulemaking procedures.<sup>88</sup>

Title IX Coordinators currently address campus sexual misconduct in an uncertain, legalized environment characterized by growing complaints, liability pressure, and legalized directives from the Department of Education’s OCR. With the election of Donald Trump, federal oversight of how colleges and universities handle sexual assault will likely subside or disappear.<sup>89</sup> The Republican Platform notes that sexual assault should be “investigated by civil authorities and prosecuted in a courtroom, not a faculty lounge.”<sup>90</sup> Despite facing less enforcement from the federal government, universities and colleges will likely still follow the letter and spirit of Title IX as Title IX and the accompanying regulations will still be obligatory.<sup>91</sup>

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(Describing the use of role playing exercises in a Deviance in U.S. Society course and other content that could trigger victims at 82-85; Mandating reporting requirements in sexual harassment research activities at 85; describing freedom of speech issues with anonymous technology apps and student publications at 86-87), <https://www.aaup.org/file/TitleIXreport.pdf> (last visited Sept. 29, 2016)[hereinafter AAUP]

83. *Id.* at 58.

84. *Id.*

85. Letter from James Lankford, Chairman, Subcommittee on Regulatory Affairs and Federal Management, to John B. King, Jr., Acting Secretary, U.S. Department of Education (Jan. 7, 2016) (citing Administrative Procedure Act (APA), Pub. L. No. 79–404, 60 Stat. 237 §553 (1946)).

86. *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1204 (2015).

87. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 104 S. Ct. 2778, 2782 (1984) (directing courts to defer to administrative interpretations of their authorizing legislation except when those interpretations contravene the law).

88. Letter from James Lankford, Chairman, Subcommittee on Regulatory Affairs and Federal Management, to John B. King, Jr., Acting Secretary, U.S. Department of Education (Jan. 7, 2016); Letter from James Lankford, Chairman, Subcommittee on Regulatory Affairs and Federal Management, to John B. King, Jr., Acting Secretary, U.S. Department of Education (Mar. 4, 2016).

89. Robin Wilson, *Trump Administration May Back Away from Title IX, but Campuses Won’t*, CHRONICLE OF HIGHER EDUCATION (Nov. 11, 2016), <http://www.chronicle.com/article/Trump-Administration-May-Back/238382?elqTrackId=ffbf39ad426d40b9a0c8bc988b4af3c5&elq=1a834a475d714e53817f10d78bfa4245&elqaid=11452&elqat=1&elqCampaignId=4477>.

90. Jake New, *Campus Sexual Assault in a Trump Era*, INSIDE HIGHER ED (Nov. 10, 2016), <https://www.insidehighered.com/news/2016/11/10/trump-and-gop-likely-try-scale-back-title-ix-enforcement-sexual-assault>.

91. Wilson, *supra* note 89.

## IV. TITLE IX MODELS AND PROCESSES

The archetypal Title IX Coordinator's legal authority includes the power to investigate, make recommendations, and enforce both the law and university rules. Under the ATIXA Statement of Ethics and Title IX Coordinator Competencies, the coordinator must "consult[] with relevant policy-making bodies and senior personnel for the purpose of advising, clarifying and identifying necessary action to eliminate sex and/or gender-based discrimination in all educational programs and activities."<sup>92</sup> Further, the model Coordinator must have the "[a]bility to recommend and/or effect changes to policies, to revise practices and to implement equitable procedures across many departments."<sup>93</sup> Additionally, the archetypal Coordinator is expected "to manage a caseload of civil rights grievances to a prompt, effective and equitable remedy."<sup>94</sup> When issuing investigative reports, the report should include an assessment of credibility, the weight of the evidence, and conclusions and findings.<sup>95</sup>

The archetypal Title IX Coordinator has the authority to enforce Title IX and to investigate, determine violations, issue recommendations, and make interim accommodations. The authority is founded on law and law-based policy. As a result, the Title IX Coordinator archetype operates a formal office for handling disputes that in many respects is similar to a police investigator or prosecutor. Like the police investigator or a prosecutor, the Title IX Coordinator archetype uses a formal process designed to identify, via formal investigation, whether the facts indicate compliance with Title IX law. First, this section describes the formal processes utilized by Title IX Coordinators, including the Hearing, Investigation, and Hybrid models. Next, the section describes how Title IX Coordinators adhere to the archetype. Finally, the section describes Title IX Coordinators departing from the standard model.

A. *Title IX "Hearing" Model*

The Association for Student Conduct Administration identifies "Hearing" and "Investigation" models for resolving allegations of sexual misconduct.<sup>96</sup> In the Hearing Model, an investigation takes place prior to a hearing to determine whether there is enough information to substantiate a complaint, to provide separation between the investigation and adjudication functions, and to allow a trained professional to complete the fact-finding work for the hearing body.<sup>97</sup> The Title IX Coordinator in a Hearing Model may act as an

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92. ASSOCIATION FOR TITLE IX ADMINISTRATORS, STATEMENT OF ETHICS AND TITLE IX COORDINATOR COMPETENCIES 5 (2012), <https://www.atixa.org/documents/ATIXA%20StatementofEthics.TitleIXCoordinatorCompetencies.doc>.

93. *Id.* at 6.

94. *Id.*

95. Belinda Guthrie, *ATIXA Tip of the Week*, ATIXA TIP OF THE WEEK NEWSLETTER (Jan. 9, 2014), [https://www.atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Tip-of-the-Week-01\\_09\\_14.pdf](https://www.atixa.org/wordpress/wp-content/uploads/2012/01/ATIXA-Tip-of-the-Week-01_09_14.pdf).

96. ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 15-16 (2014), <http://www.myacpa.org/sites/default/files/ASCA%202014%20Gold%20Standard%20Report.pdf>.

97. *Id.* at 15.

investigator and present his or her findings of fact to the hearing body.<sup>98</sup> Additionally, the Title IX Coordinator may act as an advisor to the hearing body regarding correct procedures, as logistical support to coordinate schedules, and as a complainant initiating complaints on behalf of the college.<sup>99</sup> The hearing body may be administrative and involve only one adjudicator or a combined panel of at least three members comprising faculty, staff, or students.<sup>100</sup> The key aspect of the hearing model is that the panel or administrator, not the Title IX Coordinator, makes the initial determination.

As an example, Pennsylvania State University follows a Hearing Model for resolving allegations of sexual misconduct.<sup>101</sup> Each case is assigned to a case manager, who investigates to determine if the information acquired reasonably supports a Code of Conduct violation and then recommends charges and sanctions.<sup>102</sup> If the alleged perpetrator contests the charges, the matter is forwarded to a hearing after which either side may appeal.<sup>103</sup> Likewise, Harvard Law School's process previously utilized a traditional hearing model in which the Title IX investigation determines whether there is enough information to proceed to a hearing.<sup>104</sup> The Harvard Law School procedures have been updated to mirror the investigation model adopted by the broader university and are in force on an interim basis, but not without dispute.<sup>105</sup> Last October 28, members of the Harvard Law School Faculty signed a letter objecting to the policy and procedures enacted by Harvard in July of 2014.<sup>106</sup> They argue the procedures "lack the most basic elements of fairness and due process," most notably the lack of an adversarial hearing.<sup>107</sup> The absence of an adversarial hearing is one of the key features of the Investigation Model.

#### B. Title IX Investigation Model

Under an Investigation Model, a complaint is assigned to an investigator who interviews the victim and determines interim actions or remedies.<sup>108</sup> The alleged perpetrator is

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98. *Id.*

99. *Id.*

100. *Id.*

101. OFFICE OF STUDENT CONDUCT, CODE OF CONDUCT & STUDENT CONDUCT PROCEDURES (University of Pennsylvania ed, 2016), available at <http://studentaffairs.psu.edu/conduct/Procedures.shtml>.

102. *Id.* at 20.

103. *Id.* at 21-22.

104. *HLS Sexual Harassment Resources and Procedures for Students*, HARVARD LAW SCHOOL (Dec. 18, 2014), <http://hls.harvard.edu/content/uploads/2015/07/HLSTitleIXProcedures150629.pdf>.

105. *Title IX Information*, HARVARD LAW SCHOOL, <http://hls.harvard.edu/about/title-ix-information/> (last visited April 1, 2015), includes both sets of procedures. Under the heading "HLS Students and Faculty" the website notes "HLS has amended its Guidelines Related to Sexual Harassment on an interim basis to align them with the new University policy." A link leads to the interim policy conforming to the investigation model used by the broader university. Further down the page, under the heading "HLS Students," the website states, "the following procedures for complaints against students have been adopted by the HLS faculty, and have been submitted to the U.S. Department of Education for review." A link to the HLS Sexual Harassment Resources and Procedures includes the opportunity for an adversarial hearing after an investigation determines there is enough evidence to proceed.

106. *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>.

107. *Id.*

108. ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, *supra* note 96, at 16.

then informed of the complaint and both sides have the opportunity to meet with the investigator and provide information regarding the complaint.<sup>109</sup> Witnesses may be interviewed and the investigator drafts a summary of the information, which both victim and alleged perpetrator may review.<sup>110</sup> An investigation report is created and forwarded to an adjudicator to issue findings and sanctions.<sup>111</sup> At Pennsylvania State University, both hearing and investigation options are available. An “Investigative Model” follows the same process as the Hearing Model, only the investigator’s findings are forwarded to a Title IX Decision Panel that reviews the information and makes a decision without utilizing a hearing.<sup>112</sup> Appeals are available under either model, but only on grounds of stated procedures not being followed; the existence of new, unavailable evidence; and unfair sanctions outside of the normal ranges.<sup>113</sup> As illustrated by Pennsylvania State’s procedures, the main difference between the Investigation and Hearing models is the right to have a hearing. In both circumstances the investigator issues a report with factual findings and conclusions.

### C. Title IX Hybrid Model

A third approach is to use a “Hybrid” of hearing and investigation models, and this is the approach recommended by ATIXA’s Model Investigation Process. The Hybrid Model uses an approach in which the investigator makes a determination, but the accused is entitled to a hearing if they reject the findings in whole or in part.<sup>114</sup> This is the approach utilized for students at the University of Kansas.<sup>115</sup>

For nearly every University included in this study, the standard model is a hybrid in which the investigator makes interim findings that may then be appealed to a hearing overseen by an administrator or a panel. It is not always easy to discern the difference between a hybrid model and the hearing model, especially because the difference rests on whether the investigative report includes formal outcomes and whether the hearing is the first determination or an appeal. Regardless of the model, Title IX Coordinators act similar to a police investigator or a prosecutor. The next section describes the Title IX process from complaint through appeal along with the standard derivations for the Hybrid model most commonly observed in this study.

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109. *Id.*

110. *Id.*

111. *Id.*

112. OFFICE OF STUDENT CONDUCT, *supra* note 101, at 23-24.

113. *Id.* at 31.

114. ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 40 (2013) [hereinafter MODEL INVESTIGATION PROCESS], available at <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

115. *Discrimination Complaint Resolution Process, Investigation Procedures*, UNIVERSITY OF KANSAS (2015), <http://policy.ku.edu/IOA/discrimination-complaint-resolution#Procedure>.

D. *Title IX Processes*

University sexual misconduct policies, per Title IX requirements, define and prohibit sexual misconduct and specify Title IX complaint procedures. These policies describe where complaints may be made, and they often require different campus groups (faculty, staff, students, etc.) to use specific offices for making reports.<sup>116</sup> Common to all institutions studied, a complaint may be brought directly to the University's Title IX Coordinator or to any deputy coordinators. Complaint procedures typically indicate which community members are required to report, including supervisors, managers, and any employees designated as mandatory reporters.<sup>117</sup> For individuals who do not want to make a report, but want to speak with someone confidentially, some processes recommend that complainants should take their complaints to university counseling services or (less frequently) the university ombuds office.<sup>118</sup>

After a complaint is received, grievance procedures are used for carrying out the investigation and resolution of the complaint. Complaints are initially investigated under the oversight of the university's Title IX Coordinator. The ATIXA 2013 Training Manual describes a Model Investigation Process that places the Title IX Coordinator archetype as the centralized receptacle for complaints and also the locus of complaint handling, whether formal or informal.<sup>119</sup> The Model requires the Coordinator or his or her investigator to conduct an immediate initial investigation to determine if there is reasonable cause to charge the accused individual, meet with the complainant to finalize the complaint, and prepare the notice of charges.<sup>120</sup>

Interim measures, such as changes to class or housing assignments for students or work assignments for employees, may be taken to promote safety.<sup>121</sup> These changes depend on a variety of factors, including but not limited to the severity of the alleged misconduct.<sup>122</sup> Most policies provide for confidentiality to the extent allowed by law,<sup>123</sup> prohibit retaliation,<sup>124</sup> and allow the institution to investigate incidents of which it has become aware without a formal complaint.<sup>125</sup> Institutions typically will conduct an investigation and proceed with further adjudication on the basis of that information, even without the cooperation of the individuals involved.<sup>126</sup>

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116. ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, *supra* note 96, at 25.

117. *Id.*

118. *See, e.g.*, OFFICE OF THE PRESIDENT, *University Policy on Relationship Violence & Sexual Misconduct*, MICHIGAN STATE UNIVERSITY 18 (2015), [https://www.hr.msu.edu/documents/uwidepolproc/RVSM\\_Policy.htm](https://www.hr.msu.edu/documents/uwidepolproc/RVSM_Policy.htm)

119. MODEL INVESTIGATION PROCESS, *supra* note 114, at 39.

120. *Id.*

121. *Id.* at 46.

122. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), in ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 281, 293 (2013), available at <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

123. *See, e.g.*, OFFICE OF THE PRESIDENT, *supra* note 118, at 14.

124. *See, e.g., id.* at 21.

125. *See, e.g., id.* at 25.

126. *See, e.g., id.* at 14.



Every sexual misconduct complaint should be investigated without exception.<sup>127</sup> There is a preference for official complaints. Where survivors are reluctant to make formal complaints or seek to withdraw a formal complaint, Title IX Coordinators should honor that request but try “to persuade (not coerce) the alleged victim to reconsider.”<sup>128</sup>

*E. Notice*

After finalizing the complaint and the notice of charges, the Title IX Coordinators or their staff will then “[c]ommence a thorough, reliable and impartial investigation by developing a strategic investigation plan, including a witness list, evidence list, intended timeframe, and order of interviews for all witnesses and the accused individual, who may be given notice prior to or at the time of the interview.”<sup>129</sup> Brett Sokolow describes notice as one area in which this investigation model provides an advantage over a hearing model. In a hearing model, a complaint is received and then the accused is promptly given notice of the complaint. Sokolow notes:

[The accused] then have time to fabricate a story and find friends to swear to it before they respond. This does not allow notice to be strategic. It should be. In an investigation model, we often interview the accused person last. We don’t want any party to taint the witness pool by playing on loyalties. It is not just the parties who lie to us, but their partisans as well. Getting statements from witnesses in advance of interviewing the accused student minimizes the potential for coordination of stories, and also gives us the ability to share conflicting accounts with the accused person once we have collected them.<sup>130</sup>

ATIXA’s Investigation Protocol Checklist notes that in some circumstances it may be best to notify the accused immediately after receiving a formal complaint, but in others “interviewing witnesses and accumulating evidence first may be the best practice.”<sup>131</sup> The checklist recommends that investigators “[s]trategize notifying the accused student of the complaint” by “[o]nly inform[ing] the accused student of the purpose of the meeting in advance if doing so will support your strategy, or if asked.”<sup>132</sup> Specifically the checklist notes:

Sometimes, unanticipated interviews can be unfair. In other cases, unanticipated interviews could be an important advantage. They should be used with discretion. If your goal is to build rapport and trust with the accused student, unanticipated interviews may undermine

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127. W. Scott Lewis, et al., NCHERM 10<sup>TH</sup> ANNIVERSARY WHITE PAPER (2010), in ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 139 (2013), available at <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

128. ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 53-54 (2013) [hereinafter INVESTIGATION PROTOCOL CHECKLIST], available at <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

129. MODEL INVESTIGATION PROCESS, *supra* note 114, at 39.

130. Brett A. Sokolow, CIVIL RIGHTS INVESTIGATION MODEL, in ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 58, 64 (2013), <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

131. INVESTIGATION PROTOCOL CHECKLIST, *supra* note 128, at 55.

132. *Id.*

that. Unanticipated interviews can be used when appropriate for interviewing witnesses, or for follow-ups with the complainant to test veracity or accuracy of descriptions.<sup>133</sup>

Notice is thus a strategic tool the Title IX investigator archetype has as they proceed with an investigation.

#### F. *Informal Avenues*

Grievance processes may specify that the Title IX Coordinator, at his or her discretion, may meet with both sides (if they both agree) in an attempt to resolve the issue.<sup>134</sup> There must be appropriate involvement by university personnel, for example, a trained counselor, mediator, or a teacher or administrator.<sup>135</sup> Participants must be notified that at any time they can end the informal process and begin a formal complaint process.<sup>136</sup> Even with voluntary agreement of both sides, mediation is not appropriate for use in resolving complaints of sexual violence, and grievance procedures should state that mediation will not be used for such complaints.<sup>137</sup>

#### G. *Investigation*

In terms of investigation techniques, Daniel Swinton notes that the goals of questioning the parties and any witnesses goes beyond “learn[ing] the truth of what happened” to also include learning background information, establishing a timeline, understanding each party’s perceptions, gathering sufficient information to determine facts and their relative importance, trying to determine what happened, ascertaining appropriate remedies, and learning whether there are other, related events requiring investigation.<sup>138</sup> OCR’s 2014 Q&A document (2014) notes that “[i]n all cases, a school’s Title IX investigation must be adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence.”<sup>139</sup>

Without unreasonable delay, the Title IX investigation must be completed, and the Title IX Coordinator will make a finding of a policy violation if the preponderance of the evidence supports such a finding.<sup>140</sup> ATIXA’s Investigation Tips suggests the investigator “[s]tate a conclusion resulting from [the] investigation, if possible.”<sup>141</sup> According to ATIXA Advisory Board member Belinda Guthrie, “[t]he investigation report is one of the most important aspects of your Title IX investigation.”<sup>142</sup> A comprehensive investigative

133. *Id.*

134. Dear Colleague Letter, *supra* note 4, at 8.

135. *Id.*

136. *Id.*

137. *Id.*

138. Daniel C. Swinton, *When Investigating a Case of Sexual Harassment, What are the Main Goals of Questioning the Parties and Any Witnesses?*, ATIXA TIP OF THE WEEK, Aug. 15, 2013, (on file with author).

139. ASSISTANT SECRETARY FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 25 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

140. MODEL INVESTIGATION PROCESS, *supra* note 114, at 39.

141. ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS, INVESTIGATION TIPS 51 (2013), <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

142. Guthrie, *supra* note 95.

report should summarize the nature of the complaint, the investigation, interviews with the parties and relevant witnesses, information collected, a timeline of events, and the investigator's assessment of credibility, the weight of the evidence and conclusions and findings.<sup>143</sup> The 2013 ATIXA Training Manual recommends the investigator's statement of findings (1) "List the evidence and what it shows;" (2) "Assess credibility;" (3) "Make a determination as to whether the evidence (facts, opinions, circumstances) establishes a violation of policy is more likely than not to have occurred;" and (4) "Cite concretely the reasons for this conclusion in a written report."<sup>144</sup>

#### H. Post-Investigation

Following the investigation, Title IX Coordinators may take multiple different routes. Most Title IX Coordinators interviewed for this study had the authority to make determinations of Title IX violations and to make recommendations regarding potential sanctions. These recommendations go to either an administrator tasked with reviewing and confirming the Title IX Coordinator's report and issuing sanctions,<sup>145</sup> or to a hearing board or panel reviewing the Title IX Coordinator's report and issuing appropriate sanctions.<sup>146</sup> Where the administrator reviews the Title IX Coordinator's recommendations and determines sanctions, often the respondent has the ability to appeal the result to a hearing board or panel.<sup>147</sup> Or, where the Title IX Coordinator's recommendations trigger a hearing to determine whether a violation of Title IX occurred and to issue any resulting sanction, that determination can often be appealed to an administrator.<sup>148</sup> In some situations, responsibilities are divided as a panel or board determines the existence of fault and then an administrator or the Title IX Coordinator determines the appropriate sanctions.<sup>149</sup>

These findings are then presented to the accused, who may accept the findings in total, accept the findings in part, or reject all findings.<sup>150</sup> Finally, the Title IX Coordinator or their staff shares the findings and updates the complainant on the status and outcome of

143. *Id.*

144. INVESTIGATION PROTOCOL CHECKLIST, *supra* note 128, at 57.

145. *Discrimination Complaint Handling and Resolution Process: Resolution*, UNIVERSITY OF KANSAS (2015), <https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures#resolution> ("the Title IX Coordinator will provide a written report of the investigation findings and recommendations to the appropriate administrators within the University, who will determine the appropriate action to be taken in light of the investigation findings and recommendations").

146. OFFICE OF THE PRESIDENT, *University Policy on Relationship Violence & Sexual Misconduct: Appendix H, Student Conduct Review Panel Procedures*, MICHIGAN STATE UNIVERSITY 1 (2015) [hereinafter *Appendix H, Student Conduct Review Panel Procedures*], [https://www.hr.msu.edu/documents/uwidopolproc/AppH\\_DisciplinaryProcess.pdf](https://www.hr.msu.edu/documents/uwidopolproc/AppH_DisciplinaryProcess.pdf).

147. *Discrimination Complaint Handling and Resolution Process: Disciplinary Action and Appeals*, UNIVERSITY OF KANSAS (2015), <https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures#disciplinary> ("A student may request a hearing in accordance with the Code of Student Rights and Responsibilities.").

148. OFFICE OF STUDENT CONDUCT *supra* note 101 ("Cases resulting in sanctions of Suspension to Expulsion after a hearing may be appealed to the Student Conduct Appeals Officer by the respondent within five (5) business days of receiving official notification of the results of the hearing. Such appeals shall be in writing and shall be delivered to the Senior Director or his designee.").

149. UNIVERSITY OF MICHIGAN, DRAFT: STUDENT SEXUAL MISCONDUCT POLICY- REVISED POLICY 23 (2015), [https://drive.google.com/file/d/0B7xw\\_aoh8oKzUWxtYjZpX1FiVIU/view?usp=sharing](https://drive.google.com/file/d/0B7xw_aoh8oKzUWxtYjZpX1FiVIU/view?usp=sharing).

150. MODEL INVESTIGATION PROCESS, *supra* note 114, at 39.

the investigation.<sup>151</sup> If the accused accepts the finding of a policy violation, “[a student conduct office for students, or an administrative or human resources office for faculty or staff] will impose appropriate sanctions for the violation, after consultation with the Title IX Coordinator.”<sup>152</sup>

If the accused rejects the findings (in whole or in part), it is typical in universities using a hybrid model described to offer a hearing to determine whether it was more likely or not that the accused individual is in violation. The findings of the investigation will be admitted at the hearing, and the investigator may give evidence, but neither is binding on the deciders of fact.<sup>153</sup>

If the complaint goes to a hearing, a panel or board comprised of students, faculty, and staff will seek to establish (depending on the processes used above): (1) whether or not there is a violation of Title IX or university policy; (2) what is the appropriate sanction for the violation; or (3) whether the Title IX Coordinator’s or the administrator’s findings or sanctions were in error.<sup>154</sup> Often, the Title IX Coordinator in such situations assumes the role of the complainant, and the survivor is allowed to decide whether or how much she or he will cooperate in the process (as co-complainant, witness, or not participating at all).<sup>155</sup> In some situations observed in this study, the Title IX Coordinator serves no role, or serves as an impartial witness in the conduct hearing, testifying about the results of the investigation.<sup>156</sup>

There is significant ambiguity regarding whether the Title IX Coordinator’s role is to make a judgment as if he or she were a judge, or a charge as if they were a prosecutor or grand jury.<sup>157</sup> The 2011 Dear Colleague Letter prescribes a preponderance of the evidence burden of proof, requiring the alleged conduct to be more likely than not to have occurred.<sup>158</sup> In some situations, the standard used during a hearing is whether the Title IX Coordinator’s judgment was arbitrary or capricious, meaning it was without reasonable basis in fact.<sup>159</sup> This deferential standard of review used in the review of discretionary administrative decisions generally upholds a Title IX Coordinator’s determination and indicates that the “hearing” is really an appeal from a judgment. Using different standards at different stages is met with conflicting or ambiguous OCR guidance. On one hand, OCR

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151. *Id.*

152. *Id.*

153. *Id.* at 40.

154. ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, *supra* note 96, at 15.

155. ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS 79 (2013), <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc> (“At some colleges, the college presents the complaint against the accused, and the alleged victim is merely a witness . . . . Many victims find it empowering to be more than witnesses at the hearing, and colleges should not take away that important healing opportunity.”).

156. *See infra* notes 198, 244, and accompanying text.

157. Dear Colleague Letter, *supra* note 4, at 11.

158. *Id.*

159. Appendix H, *Student Conduct Review Panel Procedures*, *supra* note 146, at 2 (“The written challenge must allege that the OIE finding was arbitrary and capricious or resulted from procedural error. A finding is arbitrary and capricious when the application of the policy has no reasonable basis in fact.”).

requires that universities use a preponderance-of-the-evidence standard for all proceedings.<sup>160</sup> On the other hand, OCR also provides universities with the “flexibility to determine the type of review it will apply to appeals.”<sup>161</sup> The OCR guidance states the type of review used on appeal shall be applied uniformly regardless of which side files the appeal.<sup>162</sup>

Much of the ambiguity in the Title IX Coordinator’s role corresponds to uncertainty in what constitutes compliance. The 2011 Dear Colleague Letter requires that Title IX Coordinators not have job responsibilities that create a conflict of interest (such as a disciplinary hearing board member or general counsel).<sup>163</sup> This prescription resulted in efforts to more clearly separate investigative and adjudicatory functions. Motivated by liability concerns, at least one major education insurer recommends universities handling student-perpetrated sexual assault to not place conclusions in the investigators report, as these conclusions may be seen as a judgment that is not within the authority of investigators to make.<sup>164</sup> As a result, a minority of Title IX Coordinators in this study were limited to investigating and determining whether sufficient evidence (or probable cause) existed to trigger a hearing to determine Title IX violations and punishment.

The investigative/adjudicatory division of roles is not a requirement of Title IX or OCR, and Title IX Coordinators at many institutions make “judgments” regarding outcomes despite either conducting or directing the investigation. The OCR Q&A provides that the Title IX Coordinator does not necessarily have to be the person who conducts the investigation.<sup>165</sup> If the Title IX Coordinator does conduct the investigation, there must not be a conflict of interest.<sup>166</sup> Specific examples of a conflict of interest include where the Title IX Coordinator is also the Athletic Director, Dean of Students, or “serves on the judicial/hearing board or to whom an appeal might be made.”<sup>167</sup> This conflict of interest definition suggests that Title IX does not bar the Coordinator from making the initial determination of guilt or innocence, as long as they do not oversee the appeal.

Further, an investigation is broadly defined by OCR as including the investigation, any hearing, the decision-making process used to determine if the conduct occurred, and what subsequent actions will be taken.<sup>168</sup> While this “investigation” must include the equal opportunity for both parties to present witnesses and other evidence, the OCR Q&A document states that “Title IX does not necessarily require a hearing[,]” but there may be additional “legal rights or requirements under the U.S. Constitution, the Clery Act, or other federal, state, or local laws.”<sup>169</sup>

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160. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 26.

161. *Id.* at 37.

162. *Id.*

163. Dear Colleague Letter, *supra* note 4, at 7.

164. ALYSSA KEEHAN, SENIOR RISK COUNSEL, UNITED EDUCATORS POWERPOINT PRESENTATION: AN OVERVIEW OF UE’S STUDENT SEX ASSAULT CLAIMS (2012).

165. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 25.

166. *Id.*

167. *Id.* at 12.

168. *Id.* at 24-25.

169. *Id.* at 25, n.28.

If a hearing is provided, OCR does not require universities to allow cross-examination of either side or their witnesses.<sup>170</sup> If schools allow for cross-examination of witnesses, both sides must have equal opportunity to do so.<sup>171</sup> During a hearing on alleged sexual violence, OCR “strongly discourages a school from allowing the parties to personally question or cross-examine each other” as it “may perpetuate a hostile environment.”<sup>172</sup> OCR prohibits “[q]uestioning about the complainant’s sexual history with anyone other than the alleged perpetrator” and notes, “the mere fact of a current or previous consensual dating or sexual relationship . . . does not itself imply consent or preclude . . . sexual violence.”<sup>173</sup> The Office of Civil Rights does not require that schools allow parties to include their lawyers in this process, but if they do permit legal representation, both sides must have the same opportunity and their counsel shall be equally constrained or allowed to participate.<sup>174</sup> The ATIXA 2013 Training Manual, Statement of Rights, indicates that survivors and accused students have “[t]he right to have the university compel the presence of student, faculty and staff witnesses, and the opportunity [if desired] to ask questions, directly or indirectly, of witnesses [including the accused student], and the right to challenge documentary evidence.”<sup>175</sup>

These prescriptions indicate that a Title IX Coordinator’s investigation providing opportunity for the presentation of witnesses and evidence, without an adversarial hearing providing for confrontation of those witnesses, satisfies Title IX requirements of what constitutes a fair and balanced process.

Additionally, there is no requirement that universities provide an appeal, but “[i]f the school provides for an appeal, it must do so equally for both parties.”<sup>176</sup> OCR recommends universities use an appeals process “where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially disproportionate to the findings.”<sup>177</sup> OCR leaves the design of the appeals process to the university “as long as the entire grievance process, including any appeals, provides prompt and equitable resolutions of sexual violence complaints, and the school takes steps to protect the complainant in the educational setting during the process.”<sup>178</sup> According to the ATIXA Model, the appealing party must demonstrate either (1) a procedural or substantive error significantly impacted the hearing’s outcome; (2) there is new evidence, unavailable during the original hearing or investigation, that could substantially impact either the finding or sanction; or (3) sanctions were disproportionate to the severity

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170. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 31.

171. *Id.*

172. *Id.*

173. *Id.*

174. Dear Colleague Letter, *supra* note 4, at 12; ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 26.

175. ASSOCIATION FOR TITLE IX ADMINISTRATORS, THE 2013 ATIXA CAMPUS TITLE IX COORDINATOR AND ADMINISTRATOR TRAINING & CERTIFICATION COURSE MATERIALS, STATEMENT OF RIGHTS 47, 49 (2013), available at <https://www.atixa.org/wordpress/wp-content/uploads/2013/09/Title-IX-Coordinator-Certification-Course-Materials.doc>.

176. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 26.

177. *Id.* at 37.

178. *Id.*

of the violation.<sup>179</sup> The decision of the appeals committee or officer is final.<sup>180</sup> Following the process, a prompt and effective remedy must be instituted to “end the discrimination, prevent its recurrence and address its effects.”<sup>181</sup>

While OCR and Title IX do not confer the right to an adversarial hearing, or an appeal, the 2014 Q&A document further clarifies the interplay between due process and Title IX:

The rights established under Title IX must be interpreted consistently with any federally guaranteed due process rights. Procedures that ensure the Title IX rights of the complainant, while at the same time according any federally guaranteed due process to both parties involved, will lead to sound and supportable decisions. Of course, a school should ensure that steps to accord any due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.<sup>182</sup>

The ambiguity regarding the Title IX Coordinators’ role in the process is evidence of the informality that creeps into an ostensibly formal process within a bureaucratic organization. The 2011 Dear Colleague Letter<sup>183</sup> and 2014 Q&A document<sup>184</sup> provide evidence of the legalizing and formalizing pressures experienced by Title IX Coordinators.

Outside of the University’s process, complaints may be filed under Title IX with the U.S. Department of Education’s Office for Civil Rights (OCR).<sup>185</sup> The OCR process requires that the complaint must be filed with OCR within 180 days of the date of the alleged discrimination.<sup>186</sup> If the complaint is also processed through the university’s grievance process, an OCR complaint must be filed within 60 days of the last act of the institutional grievance process.<sup>187</sup> OCR will wait for the conclusion of the institutional process prior to commencing its own investigation.<sup>188</sup> Once a complaint letter is received, an investigation is conducted to determine if there has been a violation of Title IX.<sup>189</sup> If so, OCR will attempt to obtain voluntary compliance and negotiate remedies.<sup>190</sup> Enforcement action, such as court action by the Department of Justice before an Administrative Law judge to determine federal funding, may be initiated if OCR is unable to obtain voluntary compliance.<sup>191</sup> Such action has never been taken.<sup>192</sup> Individuals can file a claim in court and do

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179. MODEL INVESTIGATION PROCESS, *supra* note 1144, at 41.

180. *Id.* at 42.

181. *Id.* at 37.

182. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 13.

183. Dear Colleague Letter, *supra* note 4.

184. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139.

185. OFFICE FOR CIVIL RIGHTS, OCR COMPLAINT PROCESSING PROCEDURES, U.S. DEPARTMENT OF EDUCATION 1, available at <http://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> (last visited Feb. 11, 2016).

186. *Id.*

187. *Id.* at 4.

188. *Id.*

189. *Id.* at 1.

190. OFFICE FOR CIVIL RIGHTS, OCR COMPLAINT PROCESSING PROCEDURES, U.S. DEPARTMENT OF EDUCATION at 2-3.

191. *Id.* at 3.

192. See, e.g., Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. PUB. INTEGRITY (Feb. 25, 2000), <http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0>.

not need to first file a complaint with OCR.<sup>193</sup> If court action is commenced, OCR will not continue to pursue the complaint.<sup>194</sup>

The process described above is modeled on a police-prosecutor model in which an investigator investigates and determines the existence of violations of law and policy and makes a recommendation as to the appropriate sanction. The archetypal Title IX process often includes the ability to accept the findings or to seek a hearing, followed by a potential appeal to an upper level administrator. In sum, Title IX Coordinators are an essentially *legal* compliance office within a university. They are charged by university administrations with enforcing the university's legal obligations regarding illegal discrimination and sexual misconduct among students and employees. In carrying out these responsibilities, Coordinators oversee a law-like process of investigation and adjudication. As is typical of organizational compliance officers, there is likely to be a considerable degree of slippage for the requirements of the formal law. Nonetheless, the basic point is that the Coordinator's duties are modeled on the formal legal process. The next section describes how Title IX Coordinators between 2011 and 2014 evidenced adherence and departure from the formal archetype.

## V. ADHERENCE TO AND DEPARTURE FROM THE ARCHETYPE

Title IX Coordinators adhering to the archetype use a formal process in which they enforce mandatory reporting requirements and compel certain individuals' participation, conduct at least an initial investigation of every complaint, and issue an investigative report. Coordinators adhering to the archetype are consistent in their policy for providing notice to respondents and for ensuring appropriate hearing protocols are followed. These departures from the archetypal model often do not meet standards of legal compliance or risk exposing the university community to further sexual misconduct. Title IX Coordinators who adhere or depart from the archetype do so along a spectrum from complete adherence to complete departure.

### A. *Enforcement of Mandatory Reporting and Participation Requirements*

#### 1. Adherence

Title IX Coordinators who adhere to the archetype enforce mandatory reporting requirements to notify the Title IX office of any suspected sexual improprieties. For example, a Coordinator described mandatory reporters as “[a]nybody with any information [including an Ombuds], on anything associated with discrimination [or] sexual misconduct [or required by law] it’s required that they report it.”<sup>195</sup> Title IX Coordinators described these reporting requirements as necessary for an effective institutional response:

If [a complainant] start[s] at the police department, [the police] have a connection and work very closely with us to make sure we get the information we need once that person makes

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193. Office for Civil Rights, *Questions and Answers on OCR's Complaint Process*, U.S. DEPARTMENT OF EDUCATION, <http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html> (last visited Feb. 11, 2016).

194. OFFICE FOR CIVIL RIGHTS, *supra* note 1854 at 1-2.

195. T4A8:28-30



contact with them...[and the] dean of students does the same [for the police]. So we have a very good collaborative working relationship that all of us at some point will be notified of a concern so that we can all do what we need to do to resolve it.<sup>196</sup>

There is an expectation that all complaints, even those made at other offices, will funnel to the Title IX Coordinator.<sup>197</sup> Title IX Coordinators often expect even non-mandatory reporters to encourage official reporting. For example:

We've got a student counseling center where there are psychologists. One of the things they do is encourage them to bring it forward to my office for official processing so that . . . I don't know what they tell them, but I assume they tell them [to] "protect other women as well."<sup>198</sup>

Multiple Title IX Coordinators, adhering to the archetype, described the complainant's participation in a hearing as voluntary: "[The Complainant and Respondent] have the opportunity to appear. It is not a requirement, but if [the complainant] doesn't come, and we don't have any other way of getting the evidence in, that case might fall apart."<sup>199</sup>

Survivors are never required to participate, but witnesses and other individuals may be compelled to provide information. Policies requiring participation are often used by Title IX Coordinators to gain cooperation, as indicated by a Coordinator:

We have in our policy that failure to cooperate with an investigation can [result in] disciplinary action. And that is in there for people who either falsify information[or] flat out refuse to cooperate with an investigation . . . .So if someone [has] information, [and] I know they have information, [and] they refuse to cooperate or come in and don't provide full cooperation and I [can] prove [it], then you're going to be disciplined for it. In other words . . . this is a responsibility. . . . to make sure the process works. So if you're not going to be part of the process, then we're going to have to deal with that. I don't want to have to deal with the discipline, I just want . . . you cooperating and giving me the information and giving me true and accurate information. Then you're done. I'm giving you the word that no one is going to know what you told me until and unless it is subpoenaed. I rarely [have that happen as] . . . most attorneys . . . want to do their own depositions and everything. . . . We're going to protect your information, but you're going to give me that information. If you don't give me the information, and you're just refusing to do that, I'm going to discipline you because you're not going to put a spoke in the wheel of this process.<sup>200</sup>

Another Coordinator echoed, "if a person is named in any way in an investigation, yes, they are required to participate in the process . . ."<sup>201</sup> Where an attorney advises their client not to share information, Coordinators do their best to gain their cooperation. Coordinators adhering to the archetype do not need to allow attorneys to be present for interviews as long as the policy is consistent for both respondent and complainant. Thus, ". . . the attorney was basically told 'this person either cooperates in the investigation or I go

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196. T13A10:12-18

197. E.g., "[The Ombuds Office] pretty consistently will refer any complaints that they get that are about discrimination or harassment to us." T3A7:20-21

198. T12A6:8-11

199. T9A12:31-35

200. T10A12:1-22.

201. T13A8:10-11

on the basis of what I have. My advice is allow your client to talk to me. Oh, by the way, you're not entitled to be in the interview."<sup>202</sup>

## 2. Departure

Title IX Coordinators frequently depart from the archetype's formality by relaxing the formality of reporting requirements. Specifically, departure occurs when Coordinators do not ask for specific information about a complaint, do not require other offices to have the Title IX Coordinator's permission before handling complaints, or do not have or enforce a policy requiring others to report incidents. For example, one Coordinator described their relationship with the Ombuds by saying, "I think it's a close relationship and [the Ombuds] will call and say 'can I run something by you without any identifying information,' and then they'll go back to their visitors and share information."<sup>203</sup>

Another Coordinator likewise indicated a less stringent reporting arrangement with informal offices:

[Other offices] may not have the teeth that we have, but it's critical for students to have that first place to go. Students don't sign up to be infused in the formalized process of a grievance structure, that's not why they're here. They're here to study and to learn and to have the greatest four years of their life, so it's important to have those touch points that can redirect them if they need to be redirected.<sup>204</sup>

Coordinators also depart from the archetype by not documenting visitors' statements:

We have a complaint form, but . . . I am loathe to require that they complete it until we talk. And . . . I'm also loathe to tape record, because it changes the tenor of a meeting when you put that thing between the two of you, and [on that point] the general counsel and I [disagree].<sup>205</sup>

In sum, while many Title IX Coordinators enforce mandatory reporting requirements, others depart from the archetype by relaxing the requirements relating to reporting.

## B. *Consistent Practice of Providing Notice to Respondents & Explaining Process to Both Sides*

### 1. Adherence

Title IX Coordinators adhering to the archetype use clearly defined formal processes to allow survivors and alleged perpetrators to know what to expect.

The more formal the more you have a very, very clearly defined investigative process, the more you've figured out exactly what your intro to anybody you meet with is about confidentiality, outcomes, what you will be able to share, what you won't, the more you set all that up and have frankly a very legally sound final written report on the back end, the more I think people at least know what to expect when they come to your office and that it's not

202. T2B15:7-10

203. T8A8:43-45

204. T10A13:39-44

205. T12A6:37-42

going to be all over the board. I do think, so in that sense having a very clearly defined formal process resulting in a formal report at the end does set you up for less legal challenges, less procedural challenges, etc., on the back end. Which, frankly, all goes to your reputation of the office on the campus. It all comes back to that.<sup>206</sup>

The Coordinator continued:

If we're interviewing the complainant at that point we let them basically tell their story, but we make sure it's done in the context of they have full notice of what to expect, because it is true that once we know who the respondent is and what happened, we're going to have to move forward. . . I think [notice is] very critical to being fair to the complainant who often doesn't want to tell their story, doesn't want to be brought into a length[y] process, so we make sure they know what they're getting into before they talk to us. I actually think it goes to our credibility on campus. It would be hard to do this job if you didn't. . . I think that's what builds the trust.<sup>207</sup>

This is echoed by another Title IX Coordinator:

[W]e've got a checklist that we use that covers all of this, and that checklist, we go through the process with them, we make sure that they understand that if it is a sexual assault or a rape that they have the option to pursue both the administrative process and the criminal process. We explain to them the difference, which is a big thing. I think that's probably been the biggest area that we've made some difference in terms of the educational knowledge of our students and faculty, but if you're raped you can, there is a university process that can do things on campus that the police, the criminal prosecution can't do. . . . [W]e tell them the names of all the resources that there are [available, including counseling]. . . . We talk to them about our complaint resolution process, what it looks like. Make sure that they understand what their rights are. . . . We have a [similar] checklist that we go through with the respondent.<sup>208</sup>

Coordinators who follow the archetype always provide notice to the respondent after receiving the initial complaint. The following Coordinators described a norm of talking to the respondent within a few days of receiving the complaint:

Usually [I discuss the situation with the respondent] within the first few days of getting the complaint in. [I'm not gathering information ahead of that] . . . what we typically do is we talk to the complainant and respondent first, we give them both the opportunity to get whatever documentary evidence they think we should look at, and we also tell them "please let us know what other witnesses we need to talk to."<sup>209</sup>

Some Coordinators even go line by line through the complaint with the Respondent:

Once we get [confirmation that the written complaint we sent is correct] back [from the complainant] we talk with the alleged offender and we go through the same thing. "Here's my name, this is what we do, we've received a complaint." We usually send it to them in writing, they make an appointment to come see us. And then we talk about it. "Here's what we have, let's go point by point," and we get their response. If they respond in a way with evidence [that indicates] "yeah, I said it," . . . That ends the investigation. If they're defending

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206. T1B13:3-15

207. T1A9:20-34.

208. T9A9:27-44

209. T9A12:7-13

it and we need to have more information to determine whether or not it's more reasonable or not to think the probably did it or didn't do it, we then ask them for witnesses to talk with and then we have our witness list.<sup>210</sup>

Coordinators described the reasons for treating the complainant and respondent equally:

[[Respondents] want to have their day and they want to be heard and you've got to treat them respectfully, you can't just go in the door and say "you did this," no, you've got to give people the respect and listen to them and work through that.<sup>211</sup>

I think that respondents deserve the same kind of, I think it helps keep everybody safer if we were able to give notice to a respondent or share the outcome in the same way we do with a complainant.<sup>212</sup>

Another Coordinator described waiting to provide notice:

[Respondents] often feel ambushed, and sometimes we do ambush them because we frequently ask questions that we already know the answers to and how they answer the question is important. We may already know the facts, but they don't know that we know that, so when we confront them with conflicting information they get pissed off because we ambushed them, . . . in many instances, . . . people who are not accustomed to having their authority challenged.<sup>213</sup>

The impact of this tactic is further described by the same Coordinator:

Well, people file complaints on us. They allege that they were mistreated in the investigation. They allege that we were biased. They allege that we spoke to them harshly. They allege that we harassed them, all kinds of things. . . . And then sometimes, short of that, they'll complain to our bosses that an investigation was unfair or that we individually spoke to them harshly or something was unfair . . . [b]ecause we ask them questions that make them uncomfortable.<sup>214</sup>

Coordinators described needing the complainant to make a direct report in order to appropriately provide respondents with notice, as indicated by a Coordinator who observed:

It saves a step. If I get [a complaint] through a third person I have to go back to the [alleged victim] and say "we got this complaint, talk to me." We have to then make them comfortable to do that before I can even get out the gate to go and talk to the alleged offender. When we don't do it that way and you put yourself in this predicament [where I am calling a respondent to say] "you know what, we got a complaint by somebody" [and they will respond] "Oh really, who?" [and all I can say is] "I can't really tell you that right now." [They will want to know] "Well, what did they say I did?" [Respondents] don't have to answer any questions because I'm basically violating your due process [rights].<sup>215</sup>

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210. T10A8:21-30

211. T6A14:44-46

212. T8A14:43-15:1

213. T7B8:22-33

214. T7B4:32-34; 7:22-24

215. T10A7:5-13

Coordinators providing notice frequently select the timing of that notice on a case-by-case basis. For example, a Coordinator described typically interviewing the respondent immediately after the complainant:

So I usually, not always, but usually interview the alleged harasser or discriminator next. Give them a copy of the policy, explain to them that we are impartial and have not reached any conclusions, but this person has come forward and made a complaint about you. We want to get your side of the story. I try not to give away too much at first because I really would like to hear what they had to say before I drill down to the nuts and bolts of “here’s what she said you did.” I get there eventually, but I start with “tell me how it is you came to know X. What happened on such and such or when you all were at such and such restaurant or this event” or something like that and get them to sort of ramble.<sup>216</sup>

## 2. Departure

Alternatively, many Coordinators depart in the other direction by failing to consistently provide notice to respondents in an effort to gain better information and serve organizational interests in compliance. For example:

We typically start with the complainant. Then we allow that person to tell their story, identify any evidence and witnesses. We will then interview their witnesses. . . . And then we’ll go through the same process with the respondent.<sup>217</sup>

Coordinators also described ambushing respondents by speaking with the respondent last:

[Respondents] often feel ambushed, and sometimes we do ambush them because we frequently ask questions that we already know the answers to and how they answer the question is important. We may already know the facts, but they don’t know that we know that, so when we confront them with conflicting information they get pissed off because we ambushed them, . . . in many instances, . . . people who are not accustomed to having their authority challenged.<sup>218</sup>

Other Coordinators described why and when they will not immediately notify the respondent:

Sometimes, I will immediately notify the respondent that there is a complaint. Sometimes, I don’t immediately notify the respondent. Sometimes, I talk to some of the persons who may have witnessed what took place before I approach the respondent. We certainly won’t take any action until the respondent receives notification of the complaint. Sometimes, getting information from other witnesses helps to inform how we approach the respondent. So, and I know some investigators say we need to notify the respondent early on in this process, let them know that they have a complaint, and then we start talking to the witnesses. I do that sometimes, sometimes I don’t. Because sometimes gathering that information helps me in terms of how I approach the respondent to get some truthful answers . . . . If I have enough information then maybe I can know what questions to ask to make sure I get the right, the truthful response.<sup>219</sup>

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216. T12A8:31-39

217. T2A11:16-26

218. T7B8:22-33 (Quote is used in 2 places, see note 204)

219. T13A10:27-40

As a result, often Coordinators relax their commitment to formality in order to encourage people to share information and cooperate. For example:

Often they [give] us . . . resistance at first, but through careful conversation with them and offering the resources we have on campus and trying to work with them . . . one of the first conversations we have is “what outcome are you looking for? What do you want to see happen here?” So that they get to play a role and have some control about how we proceed. It’s through that gentle process that we often can [convince them to] go forward. I don’t think it’s because the students have heard of [our reputation], I think it’s more that we sort of have to coax them along.<sup>220</sup>

In sum, Title IX Coordinators were frequently observed to depart from the archetype by failing to consistently provide notice to respondents.

C. *Initially Investigate Every Complaint, Ensure Documentation, Issue an Investigative Report*

1. Adherence

Title IX Coordinators who adhere to the archetype use a police/prosecutor model in which every complaint, without exception, must receive an initial investigation to determine if further steps are needed. This initial investigation begins within the initial interview as Coordinators question the complainants to determine whether further action is needed. For example:

Then if [the visitor] starts to ramble I will then say “let’s get back on track, why are you here? What happened to make you come here.” And then they will explain “well, I was not selected to go to a conference that I’ve always gone to, and this person, I heard it was because of the color of my skin or I believe it was.”[I will then ask]“okay, why do you believe it was?” And during that time I ask “give me specific evidence that it is on the basis of your race, or give me specific evidence that you’re being sexually harassed.” We really try to make sure we’re in the world of [compliance]. As a result of that, either I can tell right then or there or the person will admit “I really don’t think it’s discrimination, I’m just not being treated well.” Then we know it’s not the [compliance] world. If they say “it’s because my counterpart is a white female, she did the same thing I did, but she’s being treated better, she was being treated better in this regard, this regard, this regard” then we could say “it looks like there’s enough to at least do an investigation to prove or not prove your case.” Then I explain to them the investigation process.<sup>221</sup>

In most instances observed in this study, the investigation culminates with Title IX Coordinators’ reports. The reports include a recommendation regarding guilt and also potential sanctions. In some situations, the report goes to a panel or to an administrator who makes the ultimate determination regarding guilt and sanctions. As one Coordinator described this process, “. . . [A] final report is drafted for my review or for my boss’s review if I’m doing the investigation, and then recommendations are sent out with the findings.”<sup>222</sup>

220. T1B8:4-13

221. T10A7:36-8:7

222. T10A8:45-9:2

In other situations, the Title IX Coordinator's report determines whether there is a Title IX violation, and a panel or administrator determines the appropriate sanctions. A Coordinator described that situation, "for students, the hearing board determines [punishment]. . . . Again, it's all about consistency. We just want to make sure for certain violations we're consistent in terms of how we implement those."<sup>223</sup>

Alternatively, the Title IX Coordinator's report serves as an indictment, stating probable cause to proceed with charges, with the case then proceeding to a more formal hearing. For example:

. . . [S]o what we wind up doing is writing a summary of the investigation and providing findings of fact to the student conduct office with a recommendation, and it's only a recommendation, as to whether further proceedings are warranted or not. And then that office decides whether they will engage their disciplinary proceedings or not. But we do an initial set of findings, of fact, without a conclusion as to whether a policy has been violated or not. [We become the investigative arm of the student conduct office] but we work together because we basically attend the same interviews and we produce a memo. They're actually free to disregard it, but that doesn't usually happen.<sup>224</sup>

## 2. Departure

Many coordinators use informal mechanisms in order to serve organizational interests in preventing litigation. Such approaches contravene the requirements of investigating, documenting, and reporting. One Coordinator, for example, stated "what I do is not advocate, I look at the interests of the university as a whole, so we want to get issues resolved, taken care of, redressed at the lowest level possible."<sup>225</sup> Another, describing a change in university policy regarding Title IX, echoed:

I had previously been advised not to go near that by [the general counsel's] office. We had a change of president here who didn't like all the investigative reports we were turning out because whenever we had findings of discrimination or sexual harassment, those reports, they always become attachment A to the lawsuit against the institution. Now I've been given the green light to sort of identify cases that maybe can reach an informal resolution without having to go through a full investigation. Now that informal resolution sometimes also means can we bump somebody out of the institution on the base of which you already know without having to go through a full investigation. That's usually what that means, because we're not looking to coerce anybody, [but just] give them an opportunity to resign.<sup>226</sup>

S/he continued:

Especially if we discover early on that there is serious evidence of serious misconduct, [the administration] may not want us to go to a full report because maybe they're going to negotiate a departure of somebody, and it will not be necessary to produce a full blown report. That happens and that's why it's necessary to be in touch with supervisors and the like.<sup>227</sup>

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223. T13A15:24-29

224. T7A7:3-17

225. T4A15:22-24

226. T7A12:34-13:7

227. T7A3:42-4:3

Many Coordinators described examples of their use of informal mechanisms. In one situation, an apology was unsuccessful but was seen as a means of resolving the issue:

[And now the instructor became] determined that he was also going to sue [the] students for defamation of character. [Everyone] got lawyers. All of this could have been avoided had he said “I’m Sorry,” [but I couldn’t make that happen].<sup>228</sup>

In addition to using informal mechanisms, Coordinators described not utilizing formal process tools such as an intake form or recording the conversation, to the dismay of the general counsel:

We have a complaint form, but . . . I am loathe to require that they complete it until we talk. And . . . I’m also loathe to tape record, because it changes the tenor of a meeting when you put that thing between the two of you, and[on that point] the general counsel and I [disagree].<sup>229</sup>

The same Coordinator described why it is important not to require the complainant to complete an intake form:

I was trained differently. If you have a potential victim, you don’t know their state. You make the process as easy for them as you can without cheating. Still, I do it for the other side too. I interviewed the young man or whoever it is, I take notes, we assume that they’re telling the truth until we hear otherwise. The same kind of thing. I just was not trained that way. . . People like doing that. They really enjoy the process and it’s very cathartic for them and all that. Or they’re just sort of Type A kind of people who like that sort of [formality, they] want this to be [an] official thing. That’s fine! But we don’t ever require it.<sup>230</sup>

Coordinators also depart from the archetype to avoid the formal requirement of investigating and reporting within sixty days. For example, a Coordinator expressed “sometimes the handling of some [cases] takes longer than others, so you try to handle them within 60 days or less, and I don’t look at the 60 days, I just want to handle them.”<sup>231</sup> Many Coordinators indicated an incorrect understanding of the time limitations to complete an investigation and issue findings: “[W]e allow ourselves now 120 days to complete all of this. So it’s 90 days for the investigation, 30 days for the report.”<sup>232</sup>

Title IX Coordinators who conform to the archetype use a formal investigative procedure that begins with mandatory reporting, continues with formal investigative techniques that mirror those of police and prosecutor, and concludes with an investigative report that is similar to an indictment (along with recommendations for resolution of the complaint). Title IX Coordinators departing from the archetype prefer informal resolution, and relax the investigative procedures.

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228. T11B7:8-13

229. T12A6:37-42 (Quote is relevant in two places, *see also* note 195)

230. T12B7:42-8:14

231. T4A15:18-20

232. T2B10:17-19



D. *Maintain the Role's Impartiality*

1. Adherence

If the Title IX Coordinator does conduct the investigation, OCR requires taking steps to guard against a conflict of interest in this role.<sup>233</sup> Specific examples of a conflict of interests include where the Title IX Coordinator is also the Athletic Director, Dean of Students, or “serves on the judicial/hearing board or to whom an appeal might be made.”<sup>234</sup> This conflict of interest definition suggests that Title IX does not bar the Coordinator from making the initial determination of guilt or innocence, as long as they do not oversee the appeal. In many instances observed in this study, the Title IX Coordinator does not personally investigate, but it is done by a staff member in the Title IX compliance or other office in order to provide some separation between the investigative and adjudicatory functions.

Title IX Coordinators who follow the archetypal model do, however, advocate for the goals of law and policy:

So we try to blend this sense of reasonableness, some sense of advocacy for right, for the policy, with protection and due process for the alleged perpetrator, [the] alleged defender. You have to have all that in front of you in making a decision. That's why I say it's not a pure advocacy role, because a pure advocacy role is different. And that's not what we do. We have that at the university, [but] that's not my role.<sup>235</sup>

Often Title IX Coordinators following the archetypal model must navigate others' differing assumptions about their role:

[There is an] immediate conclusion that [the process is] going to be a heavy-handed, legalistic process and that all [I am] interested in [doing] is protecting the university . . . and so people don't have a lot of trust coming into [the] process. This may be the first time they've had this experience, they've never had to visit [my] office before or have reason to enquire about [my] office. Then they find out [I am] a lawyer and that adds a dimension to it “oh my gosh . . .” I think it's also the culture of an office and the culture [that I] try to create is to reassure both parties and witnesses that [I am] objective and [I am] not pre-judging, and that takes a lot of work to get people to understand.<sup>236</sup>

Another Coordinator noted:

I think some people perceive us as being an arm of the regent or an arm of the administration, and I don't think that's a fair perception at all. I think we are [here] to promote and enforce Title IX on the campus, but I think some people see us as we're just keeping the campus safe from lawsuits.<sup>237</sup>

Coordinators who adhere to the archetype see their office as an impartial mechanism for investigating and preventing sexual misconduct, not necessarily to provide options or maintain confidential communications. For example, a Coordinator says he tells visitors:

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233. ASSISTANT SECRETARY FOR CIVIL RIGHTS, *supra* note 139, at 25.

234. *Id.* at 12.

235. T10A3:38-43

236. T2B19:1-13

237. T1A16:12-16

I do an investigation based upon the information you give me. My role is not to talk and give you options. Unless there is nothing in your conversation to suggest that you're being subjected to discrimination, and it is just bad behavior that you don't like and it doesn't rise to the level of protected activity, of course I won't do anything. But, for students who come in and say "I've been sexually harassed in the last month, but I don't want you to say anything," I stop them and say "I can't. This isn't the place for you."<sup>238</sup>

Title IX Coordinators following the archetype did indicate communicating with university counsel and administrators about complaints:

I work really closely with university counsel. We pretty much review all our final reports with them. They're aware of all of our cases, obviously, because it could have liability implications for the university, but I don't ever feel like they're trying to impose upon us any sort of outcome.<sup>239</sup>

## 2. Departure

Title IX Coordinators departing from the archetype indicate a partiality for one side or the other, and described institutional norms that damaged the impartiality of Title IX efforts. For example,

I'm not handling informal . . . people who come to me and they don't want me to go for the jugular, so to speak, I don't deal with them as much. . . . I try to tell them "Ombuds is the soft touch, they'll try to communicate and mediate and work it out, but when you come to me, that means you want the hammer on the nail."<sup>240</sup>

Another Coordinator echoed the sentiment by saying, "I'm trying to get them to understand the seriousness [of their offense]. I really don't try to nail people to the wall unless they really are being jerks about it."<sup>241</sup>

One Coordinator noted "end[ing] up in more of an advocacy role than I should be" by "help[ing] [the parents] make an appointments [to gather medical evidence] . . . I recommended a local psychologist and I did some things that probably were advocacy, but what do you do when they're in your office and everybody's weeping and dad's ready to punch someone out and put a hole in the wall?"<sup>242</sup>

Other Coordinators expressed frustration at what they saw as efforts to avoid institutional liability in ways that benefited the alleged perpetrator. For example:

[T]he point that was also negative and very frustrating to me was that this student conduct board makes a recommendation to [the vice president], who issues a decision. Then that decision can be appealed by either party to the president. So what happened was . . . the [VP] took twenty days to review it [and we were mid semester]. I believe he was dragging his feet on purpose to let the [respondent] finish the semester. Close to the end of the semester he concurred with the panel, [and then there is an appeal to the president]. The president went on a vacation, and did not leave it with somebody else to handle. So this guy got to finish the semester, go back home to another state and enroll in another university without

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238. T10A9:42-10:2.

239. T1A6:9-13

240. T11A4:39-44

241. T11A16:19-20

242. T12B6:33-39

ever having a record on his transcript that he had any issues. It was too late to notify them. He was already in another place and taking classes when [the] decision [was made]. . . . When we asked the registrar [if we can inform the other school] she said she didn't know. When they took him he was a student in good standing. I honestly believe that the VP and president conspired to kill time to allow him to do that. I really do. Because the students only have [so many] days from an event to file a student conduct report, but that vice president took twenty days to make a decision. Is that fair?<sup>243</sup>

Coordinators who depart from the archetype often assume multiple roles in the investigative and adjudicative process. One Coordinator expressed concern about acting as a witness in hearings: “. . . how am I supposed to be fair and thorough and impartial when I'm called by one side and not another [to testify]. . . . I feel funny about that.”<sup>244</sup> Another Coordinator described playing a role past the investigation and recommendation phase, “[after the recommendation] [w]e become witnesses at the student conduct hearing. . . . I've testified at our conduct hearing, but I haven't been cross-examined by anyone.”<sup>245</sup> Coordinators also described hearing about Title IX Coordinators holding a dual role in the legal counsel's office.<sup>246</sup>

In sum, Title IX Coordinators often struggle to maintain the impartiality of the role by assuming multiple roles in the process, and by advocating for individuals instead of correct application of law and policy.

#### *E. Utilize the Correct Standard of Proof*

##### *1. Adherence*

Title IX Coordinators who adhere to the archetype use the correct “preponderance of the evidence” standard of proof, not the more stringent “beyond a reasonable doubt” or “clear and convincing” standards. Title IX Coordinators described attempting to educate campus members regarding the correct standard. Thus,

I deal with a lot of deans and they try to tell me what the law is all the time, and how I need to do my investigations all the time, and I always have to bring them back to “everything you see on TV on Law and Order and on CSI, I get that, but that's a criminal investigation, and that's not what we're doing here. It's a civil rights or civil investigation, and using the word civil means that we're going to build relationships and we're going to be civil to each other and figure out what happened. I am not trying to nail anybody to the wall, I'm not calling the police unless I uncover some criminal activity, but we need to look at this a little bit different.” I don't use proof beyond a reasonable doubt, I'm about preponderance of evidence. Now [on] the faculty side, they want me to use clear and convincing, which I refuse to do because for me, clear and convincing weights it in the professor's favor. It's not a balance.<sup>247</sup>

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243. T12B6:5-6:30

244. T12B5:26-27

245. T9A12:26-39

246. T11A11:4-22

247. T11A4:1-14

## 2. Departure

Other Coordinators do not seem to understand or ensure the use of the proper legal standard for guilt. For example, a Coordinator described a hearing in which the wrong standard was used:

The investigat[ion] found that the policy was violated more likely than not, [and] recommended a hearing. . . . [A]n adjudicator [is appointed], . . . the victim's very anxious, does not want to go forward, does not like the process, just wants it to be over, feels the process is being drawn out . . . and in the end the adjudicator finds the respondent not responsible. . . . The adjudicator failed to understand the [appropriate] standard.<sup>248</sup>

Title IX Coordinators adhering to the archetype use a formal process in which they enforce mandatory reporting requirements and compel certain individuals' participation, conduct at least an initial investigation of every complaint, and issue an investigative report. Title IX Coordinators who depart from the archetype use or prefer more informal mechanisms for resolving sexual misconduct. They relax the standards of the formal role in ways that endanger the community and expose the institution to legal risk. The next section describes four explanations motivating non-compliance.

## VI. THREE EXPLANATIONS MOTIVATING NON-COMPLIANCE

Title IX Coordinators are tasked with effectuating Title IX compliance to ensure a safe campus while protecting the rights of survivors and alleged perpetrators. From an outside perspective, this seems to be a straight-line exercise in managing a formal investigation process and educating the campus to understand the rules. In reality, compliance with Title IX, as evidenced by interviews with Title IX Coordinators between 2011 and 2014, is inconsistent at best. Departures from the archetype occur primarily to address the needs of survivors or alleged perpetrators, out of frustration with the inefficiencies of excessive formalism, and to address the organization's interest in resolving disputes and avoiding liability. Overall, the picture of university Title IX compliance is one motivated more by symbolic enforcement. Each of these motivating factors is now described in turn.

### A. *To Create Substantive Justice for Individuals*

Theories of street-level bureaucracy specifically focus on how individuals on the front lines of administration play active roles in this process of bureaucratic politics, and how their discretionary decisions shape the enforcement of rules and laws.<sup>249</sup> As Maynard-Moody and Musheno note, "street-level work is ambiguous and marked by conflicting signs, leaving the worker to determine how to respond."<sup>250</sup> As illustrated by the below examples, "the needs and character of [the individuals served] (as defined by the [Title IX Coordinator]) and the demands of rules, procedures, and policies (as understood by the [Title IX Coordinator]) exist in unresolvable tension."<sup>251</sup>

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248. T8B7:15-32

249. See generally MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1983); STEVEN MAYNARD-MOODY & MICHAEL MUSHENO, COPS, TEACHERS, COUNSELORS: STORIES FROM THE FRONT LINES OF PUBLIC SERVICE (2003).

250. See generally MAYNARD-MOODY & MUSHENO, *supra* note 249.

251. *Id.*

How Title IX Coordinators respond to a need to produce substantive justice may be best understood through the lens of street-level bureaucracy theory. This theory posits that individuals on the front lines of administration vary in the extent to which they enforce the rules and laws assigned to them, and that they do so specifically in order to produce outcomes in individual cases that seem to them more just and appropriate than the outcome demanded by strict application of the rules.<sup>252</sup> Title IX Coordinators must navigate the unresolvable tension between the demands of rules, procedures, and policies and the needs and character of the individuals served. In navigating these tensions, they sometimes depart from the strict requirement of the rules so as to protect a vulnerable individual from further harm, or to protect other people from harm by a serial abuser. Sometimes, at least in the view of Title IX Coordinators, the goal of producing justice seems to require departure from the rules.

### 1. Prosecutorial Discretion

First, very much like a street-level bureaucrat, Coordinators noted having discretion, much like a prosecutor, and engaging in informal conversations that contravene the requirements of the formal role. For example:

There are times, depending on the facts they provide, because clearly, if this is something that smells like sexual harassment, we're going to investigate, but if it's feeling like "well, someone is telling some off-color jokes, they seem to be targeting, they're just kind of that equal-opportunity tell a bad joke" . . . . And it's one of those situations like that, then we can either talk with the supervisor, we can say "you know what, we've caught wind of . . . you need to get that person under control." I don't have to tell them a name. And there are times when I will say "I'm not going to share the name with you at this point, I don't think that's as important as it is you stepping in and dealing with what's going on here." Then I'll ask "are you aware of this?" Some will say "I wasn't aware of this, but I'll take care of it."<sup>253</sup>

Another Coordinator described the discretion to avoid formal processes:

A lot of times we'll work [with] a complainant to say "your case is right on the line." Some are so egregious that we have to do a formal [investigation], but there are a lot of cases that are kind of right in the middle and then we'll try to give the complainant some say. "Do you want to go through the formal process which is going to be lengthy and difficult or would you just as soon try to solve this informally, which will be much more quickly handled, but it's not likely going to result in a policy violation?"<sup>254</sup>

### 2. Individualized Justice

Second, Title IX Coordinators who do not follow the archetype do so out of a desire to serve and address the needs of survivors or alleged perpetrators. Often that means giving priority to providing voice to visitors over learning relevant information about misconduct. Coordinators often described feeling very moved by individuals' stories:

But usually my first meeting is lots of real thick wrinkles right above my eyebrows because I do a lot of empathetic looking and face-making. I don't mean that I don't feel, I do feel,

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252. See generally LIPSKY, *supra* note 238; MAYNARD-MOODY & MUSHENO, *supra* note 249.

253. T2A14:21-34

254. T1B19:17-24

but I just try to let them feel safe and secure in telling their story and I listen and write and ask questions where I feel I need to. Then when they sort of wind down and I'm not good at letting people stop, keeping people brief. I'm very not good at that at all. I believe they need to get it out.<sup>255</sup>

Another Coordinator noted the same phenomenon:

I am the complaint department. People hear that I'm here or what I do, what they think I do, and they immediately say "oh, I've got a problem, I need to go talk to her." So I try to explain to them "my job is to ensure that your rights haven't been trampled on, understand what it is you want out of your complaint, and/or direct you to the right person to hear your complaint." Sometimes people come and talk to me and it has nothing to do with what I do.<sup>256</sup>

Title IX Coordinators who depart from the archetype often described using informal means of resolution to help survivors. For example:

[I]f we've got an especially fragile complainant, let's say, rather than proceeding through our formal, full investigative process, we might figure out a way to handle it informally. We have a couple of options in terms of handling it informally. Typically, . . . we sit down with the respondent; we explain how they've impacted the complainant; we hear their side of the story; but we're not making findings; we're really trying to educate the respondent on how their behavior was coming across and making sure they understand that the behavior has to stop.<sup>257</sup>

Further, Some Title IX Coordinators depart from the archetype because they see the formal process as too confrontational and thus harmful to survivors. For example:

You don't know how it's burdened my heart. I often see them right after, the day after. They're traumatized. They cry. . . . They [are often] furious . . . Furious. Said that everyone over there was incompetent, unfeeling . . . our process is so victim unfriendly.<sup>258</sup>

The same Coordinator continued:

[T]he part that makes [it] really difficult is that the . . . conduct hearing is very formal [and] the victim is expected to mount her own defense. She must call her own witnesses. She must question her own witnesses. She must answer questions from the panel. . . . It's very problematic, and I will tell you . . . [the conduct panel gives the complainant] X number of days to get their documentation in while [a complainant may be] grieving over the loss of her virginity and feeling frightened for her physical safety and all these things are going on. The dad [is] trying to help get the paperwork together and gather the names of the witnesses and get witness statements. There's all these requirements. . . . Here, we don't even make you fill out a form. You come in, we take notes. . . . I struggled when you said positive outcome because there's not a young woman that's been through this process that has not said to me "the process was worse [than what happened to me]." It is re-victimization. The one that went [to the next step] said "I don't want money, I just don't want another girl to have to go through this."<sup>259</sup>

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255. T12A7:22-28

256. T11A4:19-25

257. T1A10:9-19

258. T12B5:8-9; 7:32-33, 19-20

259. T12B3:8-11; 7:33-39; 3:39-43

Another Coordinator described using informal mechanisms to help alleged perpetrators. One cited an example in which there was an investigation, evidence of clear misconduct, but with an end result where “the [respondent] wrote a letter of apology and it was accepted.”<sup>260</sup> The Coordinator continued:

The [respondent] wanted to write the letter, so the alleged victim, if you will, the complainant agreed. I think [the respondent understood] needing to do something. It was definitely needing to do something. It was definitely needing to do something. After all, there was this report somewhere about [the person], y'know? [A realization that] “oh my gosh, I’ve got to do something to show that I’m not like this by any stretch of the imagination.” [The same person] has actually come in and conducted a workshop [for us] because I recommended him . . . That occurred, but it didn’t mean I was going to throw away the baby with the bathwater.<sup>261</sup>

### 3. Excessive Formalism

Third, many Title IX Coordinators depart from the archetype due to what they see as excessive formalism. Many Coordinators described a preference for informal procedures as better for the individuals involved. One Coordinator noted preferring situations where everyone wins: “I like win/win. I just do. I prefer win/win situations. I think there always should be dignity in the process.”<sup>262</sup> Coordinators often expressed strong dissatisfaction with the formal process. For example, “when they first come [in], I just dread it. Because I know [the formal process is] coming. I just think ‘oh my God, how can I do this to this person?’”<sup>263</sup> Another Coordinator concurred:

I think once you’re into a process such as a Title IX process, it’s so formal at that particular point, and the requirements are so different that it’s hard to maintain that sense of safety and security of why you came to university. . . . I really try to make it as non-intrusive as I can when we’re doing complaints with students. That’s not what they really signed up for, so we try to get through them quicker than the employees, let’s get in there, let’s find out the facts and get out so that they can finish their studies.<sup>264</sup>

Nowhere is frustration with excessive formalism more evident than in growing limits on the Title IX Coordinator’s authority to make judgments and recommendations. In order to more clearly separate the investigation and adjudication functions, many universities now prohibit Coordinators from making recommendations about or determining whether or not there was a violation of university policy. Coordinators expressed frustration at this lack of authority and the requirement of additional formal hearings. For example:

[W]hat we used to do, and we still do with employees, is that this office had the authority to make the decision about whether or not the policy had been violated. In the wake of the Dear

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260. T4B5:4

261. T4B5:6-21

262. T11B11:43-44

263. T12B8:17-18

264. T10A14:3-10

Colleague letter, our attorneys had decided that we can't make that decision [or even a recommendation]. We can only decide if it's worthy of a hearing. . . . [I]t's insulting. . . . [It goes] in front of a hearing panel [of students and faculty], who ironically can't serve on those panels until they've had two hours of training on Title IX from me, [and I've had] . . . years of training.<sup>265</sup>

As a result, many Coordinators use less formal processes than what is required by Title IX out of frustration with what they see as excessive formalism. For example, a Coordinator noted:

I've had a real trouble dovetailing my process with the [formal office] because they are very rigid, very process-driven, to the point of dotting the I's and crossing the T's. . . . You know what I'm saying? And it's primarily staff with young, ambitious professionals who are really more interested in making a name for themselves [than in] cur[ing] students, in my personal opinion.<sup>266</sup>

Overall Title IX Coordinators act as street level bureaucrats by utilizing their discretion to provide individualized justice in the name of avoiding what they see as excessive formalism.

*B. To Establish Professional Worth by Protecting the Institution from Unwanted Publicity*

A second reason for departure from the archetype is that Title IX Coordinators seek to establish professional worth with the institution. As indicated above, this often comes at the expense of the best interests of students.<sup>267</sup> Dobbin's book, *Inventing Equal Opportunity*, illustrates how personnel administrators used demands for equal opportunity to expand the reach and influence of their professions.<sup>268</sup> With liability and the legal requirements of Title IX acting as the driving force, Title IX Coordinators must navigate the often conflicting interests expressed by university legal counsel, administrators, students, and activists. For example:

Every time anybody says anything that just is remotely connected to some sort of Title IX issue, [administrators had] all read the Dear Colleague letter, but they didn't really know what we were doing before. . . . [and] it just put everyone in a tizzy and it's sort of been interesting politically because . . . you can feel a political tug there where they really want to be in charge of it. Kind of . . . because it's a new and scary frontier and that's a career maker if you're 35[years old] and have your PhD and you're looking to move up in the organization . . . they call me about the slightest thing that any young woman says. Any little thing, "We just thought we should refer this [to] you."<sup>269</sup>

Many Title IX Coordinators described early settlement options as beneficial to the organization: "[Our process] has a remediation piece built into it as well, so that prior to

265. T12B3:3-8, 20-22

266. T12B4:31-5:4, 3:37-38

267. See *supra* note 267 and accompanying text.

268. See generally FRANK DOBBIN, *INVENTING EQUAL OPPORTUNITY* (2009).

269. T12A11:22-32



even going into the full-fledged investigation, there's an opportunity to resolve it at a preliminary stage."<sup>270</sup> Another Coordinator described a similar situation:

So in the particular instance . . . [there was touching but] the [respondent] said "I may have done that, but I in no way intended it to mean that." After questioning both parties, I saw where we could resolve the matter through mediation. The matter was very positively resolved, resulting in a beautiful card being sent to me by the alleged perpetrator.<sup>271</sup>

Another Coordinator described reporting to the president and other administrators: "everything and anything that could be a potential embarrassment to the institution, that could be a headline tomorrow morning. I don't want them being blindsided by anything. It's what any good subordinate does for [their] boss."<sup>272</sup> Protecting the institution from liability is seen by many Coordinators as a way of establishing professional worth.

One Coordinator described their efforts to get in front of students, but was told "sexual violence and sexual harassment [are] too negative, [and you] [cannot] be part of . . . orientation because that would just scare people away."<sup>273</sup> Thus, a Coordinator described needing to act quickly to respond to pushback against implementing mandatory training:

When you start seeing patterns and trends, you want to nip that crap in the bud and address it, so that it doesn't become a volcano that just explodes all over everyplace. This campus was extremely reactive. When I suggested, as an example, that we do sexual harassment training for everyone, make it mandatory, including students, . . . I was told that "if we did that, that I would get more sexual harassment complaints. Why on earth would I want to do that?"<sup>274</sup>

In many instances observed in this study, organizational interests in avoiding publicity and a desire to develop professional worth drove Title IX Coordinators to depart from the archetype.

### C. *Legal Endogeneity: Effectuating Managerial Solutions To Symbolize Compliance*

Title IX Coordinators depart from the archetype as a larger framework of symbolic efforts to evidence compliance that in reality do not achieve the underlying aims of the law. This is evidenced by Title IX Coordinators' statements regarding the legalization of the process, by evidence that universities under Department of Education audit only temporarily increase their reporting of sexual assault, and by the complicated maze of sexual misconduct policies and procedures.

A third rationale for the departure from the archetype is the theory of legal endogeneity, or the process by which organizations define the parameters of legal compliance. Studies identify EEO/AA offices, similar to Title IX offices, as a sort of "non-law" structure that is meant to interpret and enforce law inside a bureaucratic organization.<sup>275</sup> There

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270. T11A3:29-31

271. T4B1:37-2:5

272. T7A4:4-8

273. T9A5:1-3

274. T11A9:28-35

275. See generally Edelman, *Legal Environments and Organizational Governance*, *supra* note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7.

is a large amount of neo-institutional literature on how these “non-law” offices and processes inside bureaucratic organizations develop.<sup>276</sup> Recent scholarship has increasingly observed that organizational “responses” to external law so greatly shape what is meant by “compliance” that we should think of organizations as “constructing” their legal environment.<sup>277</sup> That is to say, courts have come to accept organizations’ internal EEO/AA policies and procedures as what the law requires.<sup>278</sup> In this way institutionalized organizational structure influences judicial views of compliance with the law.<sup>279</sup> Effectively formal organizational dispute systems create non-law mechanisms (grievance procedures, non-discrimination policies) of avoiding liability.<sup>280</sup> In effect, the law is endogenously created by outside organizations the law is meant to regulate.

Although these internal offices are a type of “non-law” alternative, observers have long noted that they come under pressure to mimic the formal processes of law.<sup>281</sup> Although Edelman has long argued that this mimicry is often akin to empty symbolism,<sup>282</sup> she has acknowledged that the managerial structures representing compliance often are quite legal (i.e. formal) in nature, and look superficially like legal institutions (policies and rules resemble legal rules, grievance procedures look like judicial proceedings, etc.). The more an organizational process mimics the formality of a legal process, the greater the likelihood that the process will receive deference and legitimacy by the courts.<sup>283</sup>

In effect, a third rationale for the departure from the archetype is legal endogeneity, or the process by which organizations define the parameters of legal compliance, creating the structures and policies that evidence legal compliance but only mimic them and preference managerial interests over achieving the underlying aims of the law.<sup>284</sup> This is evidenced first by the many Coordinators who spoke out about the excessive formalism of revised campus policies.

Many Coordinators argued against the legalization, claiming it contravenes the underlying aims of Title IX. For example:

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276. See generally Dobbin & Kelly, *supra* note 7; Edelman, *Legal Environments and Organizational Governance*, *supra* note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7; Lauren B. Edelman, Christopher Uggen & Howard S. Erlanger, *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. SOC. 406 (1999); Edelman, *On Law, Organizations, and Social Movements*, *supra* note 7; Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, *supra* note 7.

277. Edelman, Uggen & Erlanger, *supra* note 276; Edelman, *On Law, Organizations, and Social Movements*, *supra* note 7; Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, *supra* note 7.

278. Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7, at 1546 (“The courts also reinforce the institutionalization of EEO/AA structures when they treat those structures as evidence of good faith.”).

279. See generally Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, *supra* note 7.

280. *Id.*

281. See generally Edelman, *Legal Environments and Organizational Governance*, *supra* note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7.

282. See generally Edelman, *Legal Environments and Organizational Governance*, *supra* note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7.

283. See generally Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, *supra* note 7.

284. Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7, at 1544 (“[C]reation of formal structures can minimize law’s intrusion on managerial prerogatives since they do not commit organizations to a particular type or degree of compliance.”).

General Counsel said that they have a due process right to an adjudicated hearing. Don't know if that's true or not. In every other way and in every other situation, we are allowed to make decisions and recommendations. If they're harassed by an employee, if they're harassed by a third party, all of those scenarios, we conclude, we make decisions, we make recommendations for action. But it's in this situation, and I think it's a power thing. We went from a two page, non-discrimination policy for all protected groups for students to . . . we have drafted now a ten page . . . sexual harassment policy for students, and we're carving that out of the non-harassment policy that's more general for all the other protected classes. And it's procedure and . . . the good part is it has definitions in it too, which are consistent with the Dear Colleague letter like consent, those kinds of things. We have just legalized this thing to death, and it is not what OCR meant, in my opinion. . . . ATIXA just did a webinar and it says "recommendations: do not let the Title IX office make the decision. Put it in front of an adjudicator." It's very problematic . . .<sup>285</sup>

Another Coordinator likewise expressed frustration at passing the liability around instead of addressing the real issues:

I think [we are] passing the liability around. . . . [we are] doing an investigation, getting all of this information to do nothing with [it] but pass it on to someone else who is going to make the decision. Ultimately I don't know that it's going to prevent anything. Anybody who doesn't agree with the outcome will just go to the person who did the investigation and say either it was flawed or the person making the recommendation was wrong. So having one office that's going to be on the hook for [an external complaint] for the investigation and [another for the] recommendation . . . I don't know how that solves anything? . . . [They will say] "[o]kay, we'll sue you both!"<sup>286</sup>

Second, the symbolism of legal endogeneity is evidenced by complicated grievance procedures that are difficult for anyone to follow and understand, not to mention undergraduates experiencing sexual misconduct or facing misconduct allegations. For example, the University of Kansas Sexual Harassment and Sexual Violence Policy<sup>287</sup> is a document of over eight thousand words that links to a Student Non-Academic Conduct Procedures Policy of over five thousand words.<sup>288</sup> The Michigan State University Policy on Relationship Violence and Sexual Misconduct<sup>289</sup> is nearly fourteen thousand words and contains nine appendixes.<sup>290</sup> By comparison the Penn State University website describing Title IX Procedures is under two thousand words, but links to the Code of Conduct and Student Conduct Procedures<sup>291</sup> document of nearly ten thousand words, nearly two thousand of which are devoted to sexual misconduct across multiple sections.<sup>292</sup> Notably, the Penn

285. T12B3:27-32

286. T10B12:26-43

287. *Institutional Opportunity & Access Procedure, Sexual Harassment and Sexual Violence*, UNIVERSITY OF KANSAS, <https://policy.ku.edu/IOA/sexual-harassment-sexual-violence-procedures>.

288. Policy Library, *Student Affairs Procedure, Student Non-Academic Conduct Procedures*, UNIVERSITY OF KANSAS (July 8, 2015), <http://policy.ku.edu/student-affairs/non-academic-student-conduct> (last updated September 1, 2015).

289. OFFICE OF THE PRESIDENT, *supra* note 118.

290. *Id.* (Appendix H, describing the student conduct hearing procedures, is nearly three thousand words).

291. OFFICE OF STUDENT CONDUCT *supra* note 101.

292. *Id.*

State provides for both a hearing and investigative model, contributing to a lack of clarity.<sup>293</sup> Complicated grievance policies may provide for certainty and predictability, but may be of little use to victims and alleged perpetrators when they are difficult to understand and follow.

Third, the symbolism of legal endogeneity is evidenced by the high numbers of Office of Civil Rights investigations underway and evidence indicating widespread underreporting. Grievance process and policy changes may demonstrate concern for remediating sexual misconduct, but ongoing investigations indicate they are not effective in stemming the tide of investigation. Even five years past the release of the 2011 Dear Colleague Letter,<sup>294</sup> and a sea change in policy, and process changes, The Chronicle for Higher Education still lists 279 open federal investigations.<sup>295</sup> Recent empirical scholarship indicates universities undercount incidents of sexual assault.<sup>296</sup> According to University of Kansas Law Professor Corey Yung, universities only offer a more accurate portrayal of campus sexual assault during Department of Education audits.<sup>297</sup> Yung also demonstrates that audits have “no long-term effect on the reported levels of sexual assault, as those crime rates returned to previous levels after an audit was completed.”<sup>298</sup> With the lack of clarity surrounding Title IX compliance, and a culture of underreporting, students seeking a campus free from sexual hostility are wise to attend a university under investigation. Indeed, OCR guidance may be the best way for universities to ensure accurate reporting and gain the support and oversight necessary for attempting meaningful change. It remains to be seen the extent to which enforcement will wane under a Trump Administration.

Departures from the legal archetype occur primarily to address the needs of survivors or alleged perpetrators, out of frustration with the inefficiencies of excessive formalism, and to address the organization’s interest in resolving disputes and avoiding liability. Overall, the picture of university Title IX compliance is one motivated more by symbolic enforcement than true dedication to ensure fair, equitable processes and a hostility-free campus.

## VII. CONCLUSION

Title IX Coordinators continue to struggle to comply with the competing goals of institutional efficiency and legal compliance, all while attempting to create a hostility-free educational environment. In the aftermath of the 2011 Dear Colleague Letter, compliance with Title IX remains, at best, inconsistent.<sup>299</sup> Evidence indicates Title IX Coordinators between 2011 and 2014 did not consistently comply with requirements requiring mandatory reporting, did not consistently provide notice to respondents, and often departed from

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293. *Id.*

294. Dear Colleague Letter, *supra* note 4.

295. *Title IX Sexual Assault Investigation Tracker*, CHRONICLE FOR HIGHER EDUCATION, available at <http://projects.chronicle.com/titleix/> (last visited Oct. 17, 2016) (listing 279 open federal investigations).

296. See generally Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCHOL. PUB. POL’Y & L. 1 (2015).

297. *Id.* at 1 (describing an increase in reports of sexual assault of approximately 44% during audit periods).

298. *Id.* at 5 (noting previous levels of reporting returned even in instances when fines were issued for non-compliance).

299. Dear Colleague Letter, *supra* note 4.

the investigation, documentation, and reporting requirements. These departures evidence a desire to achieve justice for individuals, to avoid the excessive formalism of renewed compliance efforts, and to establish professional worth by protecting the institution from negative publicity. With an ever increasing number of OCR investigations, and questions regarding the extent to which enforcement will wane under President Donald Trump, Title IX Compliance is far from an exact science. Fundamentally, there is evidence of symbolic legal endogeneity in which structures designed to achieve compliance are instead illusory and ineffective.

Contrary to the image of managerial control over this internal institutionalization of law,<sup>300</sup> Charles Epp suggests that under pressure from liability, bureaucratic organizations are often drawn far along the path toward legal formality.<sup>301</sup> Epp's theory of Legalized Accountability demonstrates how activists and administrators can use legal liability and the publicity generated by lawsuits to create innovative solutions and hold organizations accountable to the law.<sup>302</sup> As a result, lawsuits become an enforcement mechanism that pressures organizational managers to adopt law-like policies and procedures that are more formalized and extensive than they initially preferred.<sup>303</sup>

Instead of the empty symbolism of legal endogeneity, the story of campus sexual misconduct needs to be reframed to one of legalized accountability. In order to change the culture of campus sexual misconduct compliance, the first step is the continued professionalization of the Title IX compliance field. Title IX Coordinators interviewed often expressed ambivalence or negative perceptions of the Association for Title IX Administrators (ATIXA) as a professional association. One Coordinator stated:

[T]here is a group called ATIXA, which I'm sure if you've done some research you've heard about that. There are really no requirements for anyone [to] be a certified Title IX coordinator, and so I really haven't bought into that program. Primarily I think I probably have as much experience as some of the people that are doing the certifying.<sup>304</sup>

Much of this may be due to the fact that ATIXA was developed and exists as a project of the National Center for Higher Education Risk Management (NCHERM), creating the perception of a financial conflict of interests.<sup>305</sup> NCHERM is a law and consulting practice that provides consulting and risk management services for universities and colleges.<sup>306</sup> NCHERM's partners are all lawyers with significant experience in higher education, but not one has ever served as a Title IX Coordinator.<sup>307</sup> Brett Sokolow holds a

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300. See Edelman, *Legal Environments and Organizational Governance*, *supra* note 7; Edelman, *Legal Ambiguity and Symbolic Structures*, *supra* note 7; Edelman, *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures*, *supra* note 7.

301. CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS, AND THE CREATION OF THE LEGALISTIC STATE 219 (2009).

302. See generally EPP, *supra* note 301.

303. *Id.* at 218-19.

304. T9A3:20-24

305. *Welcome to The NCHERM Group, LLC*, THE NCHERM GROUP, <https://www.ncher.org/> (last visited November 17, 2014).

306. *Mission & Story*, THE NCHERM GROUP, <https://www.ncher.org/ncher/about/the-ncher-story/> (last visited Feb. 17, 2016).

307. *The NCHERM Group: Best Practices for Campus Health and Safety*, THE NCHERM GROUP, <https://www.ncher.org/consultants/> (last visited Feb. 17, 2016).

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dual role as the Executive Director of ATIXA and the President and CEO of NCHERM.<sup>308</sup> ATIXA provides model policies and guidance that are developed specifically by the members of NCHERM, who are then available to provide consulting services to institutions of higher education.<sup>309</sup> While ATIXA provides considerable practical advice to the Title IX compliance field, it would serve the Title IX Coordinator field well for Title IX Coordinators to either make the association their own, or to create their own association. By taking an active role in the development of the field, Title IX professionals can work to avoid the inconsistent compliance with Title IX that characterizes the years following the 2011 Dear Colleague Letter.

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308. *Brett A. Sokolow, J.D.: President & CEO*, THE NCHERM GROUP, <https://www.ncherm.org/consultants/brett-sokolow/> (last visited Feb. 17, 2016).

309. *On-Site Consultation: Workshops*, THE NCHERM GROUP, <https://www.ncherm.org/services/consultation/on-site-workshops/#CSM> (last visited Feb. 17, 2016).