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Transformation Requires Transparency: Critical Policy Reforms To Advance Campus Sexual Violence Response

ABSTRACT. This Feature discusses the lack of transparency in campus adjudication of gender violence reports. It examines the harms caused by this procedural opacity to both accusing and accused students alike, including pervasive mistrust in the system and decreased reporting rates. The piece catalogues many of the criticisms raised by advocates from all sides surrounding the fairness of campus investigations and sanctioning, and addresses allegations of discriminatory treatment against minority communities. I argue that stakeholders will be unable to address these important concerns – and thus fully vindicate the equality principles central to Title IX – without a strong, federal requirement for increased transparency on campuses. I offer a proposal for what this mandate should be comprised of, including methods for ensuring that student privacy is protected.

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INTRODUCTION

The current debate surrounding campus adjudication of gender violence has painted a picture of two warring factions: in one corner are the feminists battling for greater awareness of sexual violence and campus processes that center on victims' needs, and in the other are critics who argue schools have overcorrected to the point of discriminating against accused students. The present discourse suggests that students who are making accusations of gender violence and students against whom such allegations are made have mutually exclusive interests. But there is an area where all students share a common interest: ensuring fair and transparent campus disciplinary processes.

As a result of tremendous national attention over the past few years to sexual and dating violence in schools, initiatives to improve school disciplinary policies have emerged across the country at both the school and governmental levels. Sexual and dating violence occurs on college campuses with disturbing frequency: one in five female students report being sexually assaulted during college;[1] nineteen percent of transgender and gender-nonconforming students report having experienced sexual assault or misconduct;[2] and college-aged women are the group most likely to experience dating violence.[3] Thus far, efforts to confront this violence have focused on prevention and response, both of which are critical elements of addressing epidemic levels of violence and inadequate institutional responses.[4] But the experiences of student survivors who attempt to report to their schools, of advocates pushing for improved policies, and of critics who argue that accused students have been wronged in the process show us that new policies will only be cosmetic unless these reform

1. *See* Sofi Sinozich & Lynn Langton, *Rape and Sexual Assault Victimization Among College-Aged Females, 1995-2013*, U.S. DEP'T JUST. (Dec. 2014), http://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf [http://perma.cc/LY4U-TV6A].

2. *See* David Cantor et. al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, WESTAT (2015), http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf [http://perma.cc/7MJX-MJEA]; *see also* Hayley Munguia, *Transgender Students Are Particularly Vulnerable to Campus Sexual Assault*, FIVETHIRTYEIGHT (Sept. 22, 2015), http://fivethirtyeight.com/datalab/transgender-students-are-particularly-vulnerable-to-campus-sexual-assault [http://perma.cc/BMY9-XL2U] (describing how transgender students are especially vulnerable to sexual assault on campuses).

3. *See* Bureau of Justice Statistics, *Violence by Intimates: Analysis of Data on Crimes by Current or Former Spouses, Boyfriends, and Girlfriends*, U.S. DEP'T JUST. (Mar. 1998), http://bjs.gov/content/pub/pdf/vi.pdf [http://perma.cc/GFZ8-B965].

4. Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015), http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77 [http://perma.cc/6HUP-G2DP].

efforts include rigorous transparency requirements. A fair campus process benefits both accused and accusing students; however, as I will show, it is impossible to assess and ensure the fairness of these systems without transparency requirements.

This Feature argues that there is a troubling lack of transparency and accountability in the processes colleges and universities use to address campus sexual and dating violence. This opacity creates a culture of impunity for campus officials entrusted with ensuring the safety of students and further stokes critiques from those who argue for more robust rights for accused students. I discuss a number of concrete ways in which the current lack of transparency regarding college disciplinary processes creates challenges for both accused and accusing students. Both groups argue that these processes lead to unfair investigations and discrimination against particular populations. However, these difficulties are not intractable; federal legislation can require transparency to better serve all students. In this Feature, I draw on a recent New York State law mandating increased campus transparency as a promising example, which could be improved upon and implemented nationwide. This law requires colleges and universities to release aggregate, anonymized data regarding the adjudication of campus gender violence reports while also addressing the issue of student privacy, and it should serve as a template for a more comprehensive transparency mandate at the national level.

Concern over how colleges and universities handle gender violence complaints has reached a fever pitch. Students who have experienced sexual and dating violence on campus are condemning school disciplinary responses as unfair and ineffective, and student activist groups—like No Red Tape[5] and the Carry That Weight Campaign,[6] which I helped found at Columbia University—have gained visibility and momentum in their efforts to change campus policies and culture.[7] At the same time, students accused of rape have

5. No Red Tape is a student activist group fighting rape culture at Columbia University. It was founded after a group of survivors of sexual assault began meeting to discuss their experiences with sexual assault at the school in 2014. *See No Red Tape*, FACEBOOK http://www.facebook.com/NoRedTapeCU [http://perma.cc/CX3G-C8YR].

6. Carry That Weight is a national, student-led campaign that emerged to organize student activists in solidarity with Emma Sulkowicz's highly publicized performance art piece "Carry That Weight," in which she carried a mattress around Columbia's campus as long as her rapist also attended the University. *See* CARRY THAT WEIGHT, http://www.carryingtheweighttogether.com [http://perma.cc/KK3U-824H].

7. Jason Felch, *Obama Urges Strong Stand Against Sexual Assaults*, L.A. TIMES (Jan. 22, 2014), http://www.latimes.com/local/lanow/la-me-ln-obama-college-sexual-assault-20140122-story.html [http://perma.cc/7PCQ-R349]; Richard Pérez-Peña, *College Groups Connect To Fight Sexual Assault*, N.Y. TIMES (Mar. 19, 2013), http://www.nytimes.com/2013/03/20/education/activists-at-colleges-network-to-fight-sexual-assault.html [http://perma

also levied concerns about the fairness of campus procedures; these concerns are surprisingly similar to those raised by survivors.[8] Both groups have complained about the length of investigations, the protocol for submitting evidence or calling witnesses, the fairness of sanctions, and the partiality of adjudicators.[9] Some accused students are even filing Title IX suits alleging that their schools persecuted male students.[10] Elected officials are scrambling to propose competing bills addressing perceived deficits in campus procedures.[11] Meanwhile, law professors at elite universities are slamming policies they see as unfair to accused parties.[12] The only thing that anyone appears to agree on is this: whatever schools are doing now, they are getting it wrong.

This is an important moment for those invested in the safety of students and the fairness of campus policies to pause and consider the basis for these arguments. Whether groups are advocating for harsher penalties for perpetrators or increased procedural protections, the remarkable opacity of campus disciplinary processes means that all of these claims currently lack a demonstrable empirical basis. Few, if any, stakeholders have access to the information that would be necessary to make substantive and quantitatively significant evaluations of campus responses to gender violence reports.

I. PROCEDURAL OPACITY HAS HARMFUL CONSEQUENCES

The current lack of transparency has a clear, direct impact on the credibility of campus disciplinary processes. In the eyes of both accused and accusing

.cc/QZK5-XLE3]; Vanessa Grigoriadis, *Meet the College Women Who Are Starting a Revolution Against Campus Sexual Assault*, CUT (Sept. 21, 2014), http://nymag.com/thecut/2014/09/emma-sulkowicz-campus-sexual-assault-activism.html [http://perma.cc/RK83-PZE5].

8. *See, e.g.*, *infra* Section II.A.

9. Sara Ganim & Nelli Black, *An Imperfect Process: How Campuses Deal with Sexual Assault*, CNN (Dec. 21, 2015), http://www.cnn.com/2015/11/22/us/campus-sexual-assault-tribunals [http://perma.cc/Y2MQ-A5U3]; Tyler Kingkade, *Students Accused of Sexual Assault Say Schools Don't Interview Their Witnesses*, HUFFPOST C. (July 23, 2015), http://www.huffingtonpost.com/entry/college-sexual-assault-witnesses_us_55afdef5e4b0a9b948535a4e [http://perma.cc/G5C5-C2CC].

10. Max Kutner, *The Other Side of the College Sexual Assault Crisis*, NEWSWEEK (Dec. 10, 2015), http://www.newsweek.com/2015/12/18/other-side-sexual-assault-crisis-403285.html [http://perma.cc/8H49-LJXY].

11. Andrew Morse et al., *State Legislative Developments on Campus Sexual Violence: Issues in the Context of Safety*, NASPA (2015) http://www.naspa.org/images/uploads/main/ECS_NASPA_BRIEF_DOWNLOAD3.pdf [http://perma.cc/KDJ9-UB6C].

12. *See, e.g.*, Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html [http://perma.cc/9VCD-HNN3].

students, the policies that schools follow—or claim to follow—when responding to a report of sexual or dating violence are shrouded in secrecy and vigorously guarded from public exposure. Students report that the lack of clarity often continues even during the process of an investigation. This kind of secrecy is harmful to all students. It creates a culture of impunity for campus officials, who are free to make mistakes without facing consequences. These mistakes—whether the results of deliberate attempts to cover up reports, subconscious biases, or lack of training and expertise—can have devastating consequences for students on either side of an investigation. Secrecy stokes mistrust of the process and intensifies suspicions of administrative abuses, which in turn discourages students from coming forward to report and seek the help they need after experiencing rape or abuse on campus. And lastly, whether the ultimate ruling is in favor of the accusing or accused student, this lack of transparency and trust delegitimizes the outcomes of all cases.

Only about half of all students surveyed recently at twenty-seven colleges and universities across the United States believed it very or extremely likely that a fair investigation would occur after a report of sexual assault or misconduct. This number was markedly lower for the groups most likely to be victimized, namely female and transgender or gender-nonconforming students.[13] Of students who experienced non-consensual sexual penetration and chose not to report, about a third indicated this was because they "did not think anything would be done about it."[14] This lack of confidence is exacerbated, if not caused by, the extreme lack of transparency on most campuses. Schools cannot expect students, or their parents or attorneys, to trust a system that is so deliberately opaque and plagued by stories of negligence and bias. The current dearth of information creates distrust from all sides and invites critiques that campus processes are arbitrary and unfair.

Though we lack comprehensive or quantitative information regarding the outcomes of school disciplinary processes, there is abundant qualitative and anecdotal evidence that schools are enforcing neither their own policy requirements or stated ethical standards,[15] nor those required by the U.S.

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13. *See* Cantor, *supra* note 2, at xxii.

14. *See id.* at xxi.

15. Jessica Li, *In Lawsuit, Former Cornell Student Alleges Rights Violated in Sexual Misconduct Investigation*, DAILY PRINCETONIAN (Mar. 21, 2015), http://dailyprincetonian.com/news/2015/03/in-lawsuit-male-cornell-student-alleges-rights-violated-in-sexual-misconduct-investigation [http://perma.cc/DP99-WKH4]; Ashe Schow, *University Accused of Racism in Campus Sexual Assault Lawsuit*, WASH. EXAMINER (Jan. 6, 2016), http://www.washingtonexaminer.com/article/2579741 [http://perma.cc/48UB-4E2X]; Tyler Kingkade, *Bard College Now Facing 3 Federal Complaints over Sexual Assault*, HUFFINGTON POST (Jan. 19, 2016), http://www.huffingtonpost.com/entry/bard-college-under-investigation-title-ix_us_5696d

Department of Education (DOE), Title IX, and/or state laws. This lack of enforcement by schools is evidenced by the remarkably high number of schools under investigation for violating these policies and the increasingly frequent findings of noncompliance in these investigations.[16] As a survivor of sexual assault on campus and a student activist at Columbia University, I saw firsthand the disturbing disconnect between Columbia's publicly stated policies and values and the way school officials actually handled complaints of sexual and dating violence.[17] As a result, I worked with a group of twenty-

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2c1e4boce4964233500 [http://perma.cc/WP2T-B2ZE]; Sy Mukherjee, *Students Allege Four Major Universities Violated Federal Sexual Assault Policy*, THINKPROGRESS (May 23, 2013), http://thinkprogress.org/health/2013/05/23/2055771/students-allege-four-major-universities-violated-federal-sexual-assault-policy [http://perma.cc/H3GA-AAAJ].

16. *See, e.g.*, *Investigations*, CHRON. HIGHER EDUC., http://projects.chronicle.com/titleix/cases [http://perma.cc/KQC7-5DRA] (listing Title IX investigations across the country); Press Release, U.S. Dep't Educ., Princeton University Found in Violation of Title IX, Reaches Agreement with U.S. Education Department To Address, Prevent Sexual Assault and Harassment of Students (Nov. 5, 2014), http://www.ed.gov/news/press-releases/princeton-university-found-violation-title-ix-reaches-agreement-us-education-department-address-prevent-sexual-assault-and-harassment-students [http://perma.cc/2M4E-NYHB]; Tyler Kingkade, *UVA Violated Title IX, Had 'Mixed Record' on Assault Cases, Federal Investigation Finds*, HUFFINGTON POST (Sept. 21, 2015), http://www.huffingtonpost.com/entry/uva-federal-investigation_us_55e97f6ce4b002d5c075aaa7 [http://perma.cc/RW4R-SAMV]; Jake New, *When the Victim Is Male*, INSIDE HIGHER ED (Dec. 12, 2014), http://www.insidehighered.com/news/2014/12/12/smu-found-violation-title-ix-after-not-investigating-male-students-claim-sexual [http://perma.cc/HJX7-G7AY].

17. The University publicly asserts zero tolerance for gender violence on campus; however, the actions of school officials in a majority of cases that I was personally involved with through the peer support group I ran, or became familiar with through writing a Title IX complaint, demonstrated a departure from those commitments. In multiple cases, the University flouted its own policies, including those regarding the process for interviewing witnesses; protocols for documenting information obtained in the investigation process, the length of cases; the role of legal advisers; and access to academic, housing, and safety accommodations. Additionally, the University regularly allowed students found to have committed acts of gender violence to remain a part of the University community and failed to protect survivors from retaliation and continued exposure to their rapists and abusers on campus. Of the dozens of cases we tracked, we documented zero expulsions. *See "Accessible, Prompt, and Equitable"? An Examination of Sexual Assault at Columbia*, BWOG (Jan. 23, 2014, 1:00 PM), http://bwog.com/2014/01/23/accessible-prompt-and-equitable-an-examination-of-sexual-assault-at-columbia [http://perma.cc/69TL-2D8X]; *Gender-Based Misconduct Policy for Students*, COLUM. U., http://sexualrespect.columbia.edu/gender-based-misconduct-policy-students [http://perma.cc/8SPK-D83M] ("Columbia University, Barnard College, and Teachers College are committed to fostering an environment that is free from gender-based discrimination and harassment, including sexual assault and all other forms of gender-based misconduct. The University recognizes its responsibility to increase awareness of such misconduct, prevent its occurrence, support victims, deal fairly and firmly with offenders, and diligently investigate reports of misconduct. In addressing issues of gender-based misconduct, all members of the University must come together to respect and care for

seven other students to write and file a Title IX complaint against the school in April 2014, outlining dozens of cases in which we argued that the school allowed violent perpetrators (including serial rapists) to remain on campus;[18] discriminated against LGBTQ survivors in particular;[19] forced survivors to take mental health leaves, instead of addressing their rape reports; failed to provide critical resources and protection for students; retaliated against students who attempted to report; and otherwise violated the school's own policies as well as federal laws in handling reports of sexual and dating violence.[20] In my national advocacy work, I see heated, personal, high-stakes debates playing out about the fairness of college adjudication systems. There is no question as to whether the campus disciplinary procedures are working appropriately – they are not. The questions that remain unanswered are: to whom and in what ways are they unfair, and how can we address these concerns? As it currently stands, we lack sufficient quantitative data necessary to conclusively answer any of these questions and effect critical reforms.

Stories like mine have become disturbingly commonplace: the anecdotal evidence that schools are failing to appropriately handle reports of sexual and dating violence on campus is plentiful. However, if the goal is to hold schools to higher standards for their prevention and response policies, anecdotal examples are insufficient. Students and parents need more than anecdotal evidence to evaluate how individual schools are doing; victims and accused students need more to ensure their cases are being treated fairly; advocates and policymakers need more to design effective solutions and hold schools accountable. Data, where available, is an essential tool for evaluating an individual school's response to sexual violence on its campus.

However, the data currently available is collected largely in the aggregate rather than at the individual campus level and lacks critical metrics, such as the length of investigations or the number of students sanctioned for misconduct. This reduces the data's usefulness in designing campus-specific reforms. For example, the Jeanne Clery Act, passed in 1990, requires all colleges and universities to release annual security reports tallying the number of crimes

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one another in a manner consistent with our deeply held academic and community values."); Abigail Golden, *Is Columbia University Mishandling LGBT Rape Cases*, DAILY BEAST (Apr. 30, 2014, 2:35 PM), http://www.thedailybeast.com/articles/2014/04/30/is-columbia-university-mishandling-lgbt-rape-cases.html [http://perma.cc/FF7D-8K78].

18. *See* BWOG, *supra* note 17.

19. Golden, *supra* note 17.

20. *See* Peter Jacobs, *23 Columbia Students File Landmark Sexual Assault Complaint*, BUS. INSIDER (Apr. 24, 2014, 5:21 PM), http://www.businessinsider.com/columbia-students-file-landmark-sexual-assult-complaint-2014-4 [http://perma.cc/97GF-A9R9].

reported on or near campus.[21] But schools are not required to release any information about how these reports are ultimately addressed or any aggregate information regarding the identity of the parties involved, such as whether the majority of perpetrators are students. The Clery Act scheme is woefully insufficient.

Other data sources provide some insights but also fail to provide important campus-specific information. U.S. Senator Claire McCaskill recently commissioned a report to assess how colleges and universities report, investigate, and adjudicate sexual violence reports. The survey, which was completed by 440 four-year colleges and universities, was released on July 9, 2014.[22] It provides some quantitative insight into the current practices and attitudes of campus administrators. The report points out that, even though federal law requires that any school made aware of a student allegation of sexual assault on its campus must take affirmative steps to investigate that claim, more than "40% of schools in the national sample have not conducted a single investigation in the past five years . . . [and] 20% of the nation's largest private institutions conducted fewer investigations than the number of incidents they reported," with multiple institutions reporting as many as seven times more incidents of sexual violence than they have investigated.[23]

Another analysis found that, even when reports were investigated and perpetrators found responsible for sexual assault, less than one-third of students were expelled. Approximately forty-seven percent of students found responsible for sexual assault were given suspensions and then allowed to return to campus, at least seventeen percent received educational sanctions, and thirteen percent were placed on probation.[24]

These reports provide valuable big-picture data illustrating the scope and dimensions of the many flaws in campus disciplinary procedures, but they fail to provide the campus-specific information that would allow for meaningful comparisons and inform ongoing policy improvements. This Feature calls for that to change.

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21. 20 U.S.C. § 1092(f) (2012).

22. *Sexual Violence on Campus: How Too Many Institutions of Higher Education Are Failing To Protect Students*, STAFF SENATE SUBCOMMITTEE ON FIN. & CONTRACTING OVERSIGHT (July 9, 2014), http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf [http://perma.cc/PLK8-QLQK].

23. *Id.* at 1.

24. *See* Kingkade, *supra* note 4.

II. PROCEDURAL OPACITY PREVENTS US FROM ANSWERING CRITICAL QUESTIONS

A. Are Campuses Investigating and Sanctioning Cases Fairly?

Both those who allege sexual assault as well as those accused characterize college disciplinary procedures as subjecting students to unfair and inappropriate processes for investigating, adjudicating, and sanctioning incidences of sexual assault. Students also criticize their schools for violating both existing laws and their own campus policies.[25]

In fact, at least 174 colleges and universities are currently under investigation for violating Title IX in sexual and dating violence cases,[26] hundreds more are facing public criticism and student protest,[27] and many students have brought lawsuits against colleges claiming unfair and biased adjudication of sexual assault and harassment claims.[28]

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25. For example, at the University of California, Davis, activists petitioned to have a male student expelled after he was found responsible for committing multiple counts of sexual harassment, assault, and abuse against a fellow student. *See* Concerned Students of the Univ. of Cal., Davis, *Expel Rapists*, CHANGE, http://www.change.org/p/ralph-hexter-adela-de-la-torre-linda-katehi-expel-rapists [http://perma.cc/F8QJ-YL3S]. According to the survivor, schools officials put her through a lengthy and traumatic investigation process that far exceeded the time limits outlined in U.C. Davis's own sexual misconduct policy, as well as federal law, and diverged significantly from the procedure laid out in U.C. Davis's policy. *See id.*; *see also* Office of the Provost and Exec. Vice Chancellor, *UC Davis Policy and Procedure Manual: Sexual Harassment and Sexual Violence*, U.C. DAVIS (Sept. 30, 2015), http://manuals.ucdavis.edu/PPM/400/400-20.pdf [http://perma.cc/K9FE-34EK]. Her allegations of sexual assault were substantiated at multiple levels during the investigation, and the hearing officer recommended dismissal for her attacker at the conclusion of a formal hearing process. However, this outcome was overturned with no explanation by a vice chancellor, a decision that ultimately allowed her assailant to stay on campus. *See* Concerned Students of the Univ. of Cal., Davis, *supra*. The school's website on sexual violence proclaims that "[o]ne of UC Davis' highest priorities is the safety of its students and all members of its community." *See* Sexual Violence Prevention and Response, U.C. DAVIS, http://sexualviolence.ucdavis.edu [http://perma.cc/6VK3-RXA5]. But students argue that this case demonstrates a disconnect between the school's stated values and protocols and its actions.

26. *See* CHRON. HIGHER EDUC., *supra* note 16.

27. *See, e.g.*, Tara Culp-Ressler, *Columbia Student's Mattress Protest Has Sparked a National Movement*, THINK PROGRESS (Oct. 29, 2014, 8:57 AM), http://thinkprogress.org/health/2014/10/29/3585773/college-students-solidarity-rape-victims [http://perma.cc/AS5Y-ECF4].

28. Tyler Kingkade, *USF Student Who Deleted Emails About His Sexual Assault Charge Latest To Lose in Title IX Lawsuit*, HUFFPOST C. (July 14, 2015), http://www.huffingtonpost.com/entry/accused-students-title-ix_us_55a40642e4b0a47ac15d02b8 [http://perma.cc/PP88-8DHJ].

Many survivors of sexual violence and their advocates argue that schools are biased in favor of protecting the reputation of the school. As a result, survivors contend, schools sweep sexual violence allegations under the rug and hand down lenient sanctions for perpetrators.[29] After a campus newspaper published a lengthy article detailing slow, poorly handled investigations of campus sexual assault that left survivors without critical resources and perpetrators sanctioned with little more than a slap on the wrist,[30] a group of students at Columbia University circulated a petition calling on the school to release aggregate, anonymized data on the outcomes of reported gender violence cases.[31] After nearly a year of protest, Columbia released a report in 2014, which revealed, among other things, that investigations consistently took longer than the sixty days allowed by both federal guidance[32] and Columbia's own policy,[33] and indicated that the school had expelled zero students found to have committed sexual assault that year.[34] At Amherst College, too, student protesters successfully pushed the school to release data regarding the adjudication of campus sexual assault. The college released a report covering a

29. For example, an investigation by *The New York Times* that examined police and court records and interviewed crime witnesses found that Tallahassee law enforcement and state officials have "on numerous occasions soft-pedaled allegations of wrongdoing by Seminoles football players," including allegations of sexual assault, allowing players to escape serious consequences. Mike McIntire & Walt Bogdanich, *At Florida State, Football Clouds Justice*, N.Y. TIMES (Oct. 10, 2014), http://www.nytimes.com/2014/10/12/us/florida-state-football-casts-shadow-over-tallahassee-justice.html [http://perma.cc/AWL8-PBG2].

30. *See* Anna Bahr, *"Accessible, Prompt, and Equitable"? An Examination of Sexual Assault at Columbia*, BWOG (Jan.23, 2014, 1:00 PM), http://bwog.com/2014/01/23/accessible-prompt-and-equitable-an-examination-of-sexual-assault-at-columbia [http://perma.cc/9N8V-6EDU].

31. *See* Tyler Kingkade, *Columbia University To Release Campus Sexual Assault Data in Response to Student Campaign*, HUFFINGTON POST (Jan. 29 2014, 6:59 PM), http://www.huffingtonpost.com/2014/01/29/columbia-sexual-assault-cases_n_4687323.html [http://perma.cc/WJ2A-T5FT].

32. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP'T EDUC. 12-13 (Apr. 4, 2011), http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [http://perma.cc/P3WJ-DMH9].

33. *Columbia University Gender-Based Misconduct Prevention and Response*, COLUM. U. (Sept. 23, 2014), http://sexualrespect.columbia.edu/files/sexualrespect/content/Report.pdf [http://perma.cc/5W7J-U2WP]. Columbia's report detailed the total number of cases and provided some limited information on their outcomes. The report revealed that in 2013-14, the average sexual assault investigation lasted ninety-one days, with several investigations stretching over months, over summer vacations, and across multiple semesters – despite the fact that both the University's own policy and federal guidance state clearly that the process should take no more than sixty days.

34. *See* COLUM. U., *supra* note 33, at 11-12.

three-year period (2009-2011)[35] showing that, in multiple instances, students who committed laptop theft were punished more severely than those who committed rape and sexual assault,[36] and that not a single student found responsible for sexual assault was expelled.[37] Student activists, angered by these reports, organized demonstrations condemning the college's lenience.[38] And currently, student activists at Gustavus Adolphus College are protesting and petitioning the school to release aggregate sanctioning data after a survivor alleged publicly that the school sanctioned her rapist by requiring him to write a 500-word reflective essay.[39] These examples illustrate the claims being made at schools across the country regarding the length, fairness, and transparency of investigations and sanctioning.

The severity and consistency of sanctions in sexual and dating violence cases is a hotly contested issue, and student activists at Columbia and Amherst are not the only ones concerned. Accused students and their lawyers increasingly claim schools have swung too far in the other direction and are flouting procedural protections and over-penalizing students.[40] A growing

35. Amherst College released aggregate information on the results of all honor code student disciplinary violations up until 2008, at which point it stopped releasing such data for three years. Student activists protested aggressively and were successful in getting the school to release its data for the academic years 2009-11. Dean of Student's Office, *Students Found Responsible for Infractions of the Honor Code, Calendar Year 2009*, AMHERST C., http://acvoice.files.wordpress.com/2014/08/2009-case-summaries.pdf [http://perma.cc/JF53-3S6V]; Dean of Student's Office, *Students Found Responsible for Infractions of the Honor Code, Calendar Year 2010*, AMHERST C., http://acvoice.files.wordpress.com/2014/08/2010-case-summaries.pdf [http://perma.cc/8A9W-VW7U]; Dean of Student's Office, *Students Found Responsible for Infractions of the Honor Code, Calendar Year 2011*, AMHERST C., http://acvoice.files.wordpress.com/2014/08/2011-case-summaries.pdf [http://perma.cc/XC9E-C9MW].

36. *See Amherst College Refuses To Release Sexual Misconduct Data*, AC VOICE (Aug. 13, 2014) http://acvoice.com/2014/08/13/amherst-college-refuses-to-release-sexual-misconduct-data [http://perma.cc/M7TA-9YAT].

37. *See* Ethan Corey, *Students Protest Lenient Sexual Misconduct Sanctions*, AMHERST STUDENT (May 1, 2013), http://amherststudent.amherst.edu/?q=article/2013/05/01/students-protest-lenient-sexual-misconduct-sanctions [http://perma.cc/V7HK-ZH6S].

38. *Id.*

39. Caleb Diehl, *500-Word Essay Assigned as Punishment for Sexual Assault at Gustavus College*, USA TODAY (Mar. 11, 2016, 1:02 PM), http://college.usatoday.com/2016/03/11/500-word-essay-assigned-as-punishment-for-sexual-assault-at-gustavus-college [http://perma.cc/UMJ4-NYXL].

40. *See, e.g.*, *'Accused Is Guilty': Campus Rape Tribunals Punish Without Proof, Critics Say*, FOX NEWS (June 20, 2015), http://www.foxnews.com/us/2015/06/20/accused-is-guilty-campus-rape-tribunals-punish-without-proof-say-critics [http://perma.cc/A5PP-SYYX].

number of accused students have filed lawsuits[41] under Title IX, alleging gender discrimination and unfairly aggressive and biased adjudication of sexual assault and harassment claims.[42] The complaints in these lawsuits often include concerns similar to those raised by survivors and their advocates around the length of investigations and the clarity and fairness of the investigation process, with a notable exception: these students argue the sanctions being handed down are too harsh, rather than too lenient.[43] The advocacy organization Boys and Men in Education estimates that at least ninety men have filed such lawsuits against their schools in recent years, and their website lambasts campus processes where young men have "found themselves hustled through a vague and misshapen adjudication process with slipshod checks and balances."[44]

Janet Halley, a Harvard Law professor who has participated in both advocatory and adjudicatory roles in Harvard University's sexual misconduct processes, has written publicly about her concerns with the treatment of accused students in campus disciplinary proceedings. Halley alleges that she has witnessed "witch hunt" conditions on campus, in which school officials are caving to the demands of overzealous, single-minded feminist activists by unfairly punishing male students and depriving them of access to education.[45] I believe these claims to be far from the truth based on my work with student survivors and activists across the country who have described a pervasive

41. For example, in 2014 a male student from the University of Colorado Boulder, who was accused of and found responsible for committing sexual assault against a female student and was subsequently suspended, filed a civil suit against his university. The text of the complaint reads:

> CU Boulder has created an environment in which an accused male student is effectively denied fundamental due process by being prosecuted through the conduct process under the cloud of a presumption of guilt. Such a one-sided process deprived John Doe, as a male student, of education opportunities at CU Boulder on the basis of his sex.

Complaint at 33-34, Doe v. Univ. of Colo., Boulder, No. 1:14-cv-03027-RM-MEH (D. Colo. Nov. 21, 2014).

42. A growing number of male students are filing gender discrimination suits under Title IX after being accused of and found responsible for sexual assault in campus disciplinary proceedings, including at Vassar College, Occidental College, Columbia University, and Reed College. *See* Jake New, *Suits from the Accused*, INSIDE HIGHER ED (May 1, 2015), http://www.insidehighered.com/news/2015/05/01/students-accused-sexual-assault-struggle-win-gender-bias-lawsuits [http://perma.cc/9Q3Z-344X].

43. Ganim & Black, *supra* note 9.

44. *Database: Due Process Lawsuits Against Colleges and Universities*, BOYS & MEN EDUC. http://boysmeneducation.com/lawsuits-database [http://perma.cc/2SGQ-NAYN].

45. Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 106 (2015).

institutional reluctance to take any action against perpetrators of violence, let alone remove them from campus. But each of these students and advocates is speaking from their own anecdotal perspective, and I from mine. Without greater access to information on the outcomes of campus investigations, none of us have the empirical information necessary to demonstrate our own claims or refute the others'.

We cannot evaluate the veracity of allegations on either side or develop an equitable standard for responding to sexual assault without a clear body of evidence that permits comparison between the severity of sanctions applied to different individuals on the same campus, or between the average severity of sanctions applied to students at one school and those applied to students at another. When schools refuse to disclose this information, especially on an issue as controversial as sanctions, student suspicion that schools deliberately cover up lenient or excessive responses to sexual violence intensifies and student distrust is exacerbated. Stakeholders are unable to evaluate whether a school is improving its policies; students who are party to a reported case are not able to assess whether they are being treated fairly; and prospective students and their families are unable to compare a college's handling of these cases to that of other colleges.[46] Greater transparency in these processes is an essential step towards evaluating the current approaches to campus investigations and sanctioning, and ensuring their fairness in the future.

B. Are Campuses Discriminating Against Specific Communities?

Concerns about fairness are particularly pronounced for certain communities: as both accused and accusing parties in campus cases have noted, the procedural opacity that currently shrouds the campus adjudication system may also be concealing discriminatory treatment of particular populations.[47] For example, there are concerns that campus adjudication processes may

46. In order to determine whether male students are being treated unfairly during sexual assault investigations because of their gender, one would need to know, among other things, whether female students accused of sexual assault were experiencing less aggressive investigations, fewer findings of responsibility, or more lenient sanctions than their male peers accused of similar policy violations. I have not found any data to make such comparisons.

47. *See* Tyler Kingkade & Jon Strauss, *Columbia Students Say University Made Missteps in Multiple Sexual Assault Cases*, HUFFINGTON POST (June 15, 2015, 12:01 PM), http://www.huffingtonpost.com/2015/06/15/columbia-sexual-assault_n_7531666.html [http://perma.cc/T67P-32F8]; Tovia Smith, *Some Accused of Sexual Assault on Campus Say System Works Against Them*, NPR (Sept. 3, 2014, 1:12 PM), http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them [http://perma.cc/8A9B-VYA7].

discriminate against students based on their gender identity, sexual orientation, or race.

The DOE has issued guidance to colleges and universities to make clear that Title IX protections apply to all students, regardless of their gender identity or sexual orientation.[48] However, many students who identify as lesbian, gay, bisexual, transgender, or queer (LGBTQ) report that their school officials fail to appropriately respond to reports of sexual violence and harassment made by LGBTQ students and are more likely to mishandle these complaints or dismiss them altogether.

Princess Harmony-Jazmyne Rodriguez, for example, was a student at Temple University when she reported experiencing sexual harassment and assault in 2014. According to her reports, her school allowed a hostile environment to exist when university officials failed to respond appropriately to the rape, violence, and harassment she experienced (including harassment based on her gender nonconformity), allowed harassment and stalking to continue without intervening, refused to provide her with accommodations

48. Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP'T EDUC. (Apr. 29, 2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [http://perma.cc/AJ4P-W7ZB]. The Guidance explains:

> Title IX protects all students at recipient institutions from sex discrimination, including sexual violence. Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins . . . . A school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved. Title IX protects all students from sexual violence, regardless of the sex of the alleged perpetrator or complainant, including when they are members of the same sex. A school must investigate and resolve allegations of sexual violence involving parties of the same sex using the same procedures and standards that it uses in all complaints involving sexual violence. Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender (LGBT) youth report high rates of sexual harassment and sexual violence. A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.

Id. at 5-6.

and resources, and discriminated against her as a transgender woman.[49] While the text of this Title IX complaint is not publicly available, the complainant has commented that she filed a Title IX complaint because the campus administrators tasked with investigating her case "were not equipped to deal with trans survivors" and that they failed to address her complaints and safety concerns because of her gender identity. As she reports, one administrator told her that providing her with assistance would have been "the same as helping a male and [they] could not do that."[50] From Columbia to Tufts to Dartmouth, LGBTQ students at many schools have reported experiencing similar discriminatory mistreatment.[51]

Though the experiences of these survivors detailed in press reports provide credible evidence that these schools have failed to appropriately respond to transgender or gay and lesbian students who experienced sexual violence, there is no information available to compare the treatment of these survivors with the respective treatment of cisgender or heterosexual students making similar reports, or to assess whether this kind of discriminatory treatment may be occurring on a larger scale.

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49. *See* Ryan Kasley, *Trans Temple Student Files Federal Complaint*, PHILA. GAY NEWS (Dec. 18, 2014), http://www.epgn.com/news/local/8284-trans-temple-student-files-federal-complaint [http://perma.cc/W4MN-7NJQ].

50. Princess Harmony-Jazmyne Rodriguez, *Perseverance Conquers: An Open Letter*, FEMINIST WIRE (Sept. 10, 2014), http://www.thefeministwire.com/2014/09/perseverance-conquers-open-letter [http://perma.cc/P6UW-K2L6].

51. Complainants in the 2014 Title IX complaint against Columbia alleged discrimination against LGBTQ students who attempted to file reports of sexual assault and failure to provide necessary accommodations to LGBTQ survivors. *See* Abigail Golden, *Is Columbia University Mishandling LGBT Rape Cases?*, DAILY BEAST (Apr. 30, 2014, 2:35 PM), http://www.thedailybeast.com/articles/2014/04/30/is-columbia-university-mishandling-lgbt-rape-cases.html [http://perma.cc/7262-2FDS]. One year later, one gay and one transgender student at Columbia described negative experiences when trying to report cases of sexual assault. Both of these cases were dismissed by the school; the transgender student reported being misgendered regularly and denied access to accommodations due to their gender identity, and the gay male student reported being asked by the campus investigator whether he was raped "doggy style." *See* Tyler Kingkade & Jon Strauss, *Columbia Students Say University Made Missteps in Multiple Sexual Assault Cases*, HUFFINGTON POST (June 15, 2015, 12:01 PM), http://www.huffingtonpost.com/2015/06/15/columbia-sexual-assault_n_7531666.html [http://perma.cc/WJD6-NRB9]. Additionally, students at Dartmouth and Tufts who identify as transgender or gender nonconforming explain that many LGBTQ students have experienced or fear experiencing discrimination and mistreatment: "One reason why same-sex and trans assaults go unreported, according to multiple students, is that many LGBT survivors fear not being taken seriously because of stereotypes about their gender identity or sexual orientation." Tyler Kingkade, *LGBT Students Face More Sexual Harassment and Assault, and More Trouble Reporting It*, HUFFINGTON POST (July 14, 2015, 8:05 PM), http://www.huffingtonpost.com/entry/lgbt-students-sexual-assault_us_55a332dfe4b0ecec71bc5e6a [http://perma.cc/QCL7-G6ML].

Another concern is whether accused students who belong to racial or ethnic minority groups are receiving unfair treatment in campus disciplinary processes. In recent months, advocates for racial justice have organized and spoken out publicly to call attention to the bias and brutality that people of color, and African Americans in particular, experience within the United States' legal system.[52] The record of our criminal legal system is replete with evidence that people of color are subjected to biased treatment: from a lengthy and ever-growing list of black people killed by police officers;[53] the staggering racial disparities of who is arrested, prosecuted, and convicted of crimes;[54] marked differences in the severity of sentences imposed on defendants of different races;[55] to numerous examples throughout history of black men wrongfully incarcerated after accusations of raping white women.[56] To vindicate the educational equity interests at the heart of Title IX, it is imperative that policymakers ensure these failures are not replicated in campus disciplinary procedures.

Professor Halley of Harvard Law School notes specifically in her writing that she has witnessed a disturbing number of frequent and unfairly addressed reports being made against male students of color.[57] At the University of Findlay in Ohio, for example, two black male students are suing their school

52. *See, e.g.*, *The Rise of the #BlackLivesMatter Movement*, SOCIALIST WORKER (Jan. 13 2015), http://socialistworker.org/2015/01/13/the-rise-of-blacklivesmatter [http://perma.cc/8AN9-8MVX].

53. As of November 24, 2015, American police have killed 1,027 people: 6.2 black people for every million black residents of the United States, compared to 2.57 per million for white victims. *See The Counted: People Killed by Police in the US*, GUARDIAN (Nov. 24, 2015), http://www.theguardian.com/us-news/ng-interactive/2015/jun/01/the-counted-police-killings-us-database [http://perma.cc/X922-SK6V].

54. Black Americans, although only thirteen percent of the overall U.S. population, constitute forty percent of the incarcerated population. Black Americans, Latinos, and Native Americans combined make up more than sixty percent of the people behind bars in the United States. *United States Profile*, PRISON POL'Y INST., http://www.prisonpolicy.org/profiles/US.html [http://perma.cc/3QHR-DY2G].

55. *Report on the Continuing Impact of* United States v. Booker *on Federal Sentencing: Part E Demographic Differences in Sentencing*, U.S. SENT'G COMMISSION 2 (2012), http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/booker-reports/2012-booker/Part_E.pdf [http://perma.cc/2VTH-PYR8] ("Sentences of similarly situated Black male offenders were 19.5 percent longer than those of similarly situated White male offenders....").

56. *See* Emma Gray, *The History of Using White Female Sexuality To Justify Racist Violence*, HUFFPOST WOMEN (June 19, 2015, 1:59 PM), http://www.huffingtonpost.com/2015/06/18/white-female-sexuality-and-racist-violence-a-history_n_7613048.html [http://perma.cc/QH82-HBRM].

57. *Id.* at 106-08.

after being expelled for sexual assault. Their complaint alleges that they were mistreated and persecuted because of their race, noting that the school failed to follow its standard policies for investigating sexual assault and expelled them just two days after the report against them was filed. They also allege that, to their knowledge, "the only other students expelled from the university for sexual assault were other African-Americans, each accused by white women."[58] These concerns regarding disproportionately aggressive adjudication of reports made against students of racial and ethnic minorities threaten the educational equity principles at the very heart of Title IX and thus merit close examination.

Efforts to ensure that schools take reports of rape and abuse more seriously must not excuse or facilitate racial bias in campus disciplinary procedures. Unfortunately, the status quo at most colleges and universities makes it impossible to understand the injustices that advocates believe may be occurring on campuses. There is little to no quantitative data available at the campus or governmental levels that would allow any assessment of racial patterns in the frequency of reports, outcomes of investigations, severity of sanctions imposed, or success of appeals filed. In order to effectively protect the rights of all students to access their education free from gender violence, racism, and other forms of discrimination, schools must be held accountable for tracking and releasing data on the demographics of complainants and respondents and the outcomes of cases.

The bottom line is this: we simply do not know the truth. Which of these claims, if any, are accurate? Are schools failing to provide transgender students with access to reporting options and accommodations that they provide to cisgender students? Are they treating accused African American men more harshly than those of other races? Are they more frequently dismissing reports raised by students of color than by students who are white? Without access to more comprehensive data, these claims cannot be evaluated and the extent to which schools are engaging in discriminatory treatment of particular groups cannot be assessed or addressed.

III. SOLUTION: A ROBUST LEGISLATIVE MANDATE FOR INCREASED TRANSPARENCY

When campuses refuse to release anonymous data regarding their disciplinary processes, their decision impedes efforts to address the prevalence of sexual violence and its impact on many students. Both accusing and accused students in active cases are denied access to information from which to compare the outcomes of similar allegations. This stymies any attempt to parse

58. Schow, *supra* note 15.

out differential treatment or discrimination against either party. Further, there is no body of evidence at the national level that would allow for comparisons between campuses, to evaluate, for example, how Columbia treated a rape finding compared to Brown or Oregon State. This kind of comparison would be useful to prospective students and their families who are considering where to enroll in college and is critical for policymakers who are responsible for ensuring student safety. And with the current dearth of data, we cannot evaluate whether schools are actually adhering to their own policies, their stated community values, or a number of existing legislative mandates unless schools are required to release more information about how they handle reports of gender violence.

In order to craft effective, forward-looking solutions to the sexual assault crisis, it is essential that schools prioritize the issue of transparency in campus disciplinary procedures. I recommend federal legislative action to address this. Every college and university should be required by federal law to publicly release anonymized data regarding the outcomes of sexual misconduct reports, including demographic information regarding the parties to complaints. This mandate should include a mechanism by which the DOE can monitor and enforce compliance with this requirement. I advise that these measures be passed through federal law rather than addressed in campus policies because a national requirement will help ensure consistency in data aggregation and reporting that will allow for comparisons to be made between campuses. Furthermore, schools' poor track records in handling reports of sexual violence and their demonstrated unwillingness to follow their own policies[59] illustrate that schools cannot be relied upon to implement and adhere to their own transparency requirements; decisive action on the part of lawmakers is required.

Policymakers at every level need to improve the existing systems for addressing campus sexual assault and increase trust in those systems. The DOE has used increased transparency mandates as a means to improve the quality of and public confidence in educational institutions and related entities across a variety of issues, which provides a useful model for a transparency directive. For example, recent debates over the accreditation process for for-profit colleges led the DOE to mandate a series of measures designed to increase the data available to the public regarding the accreditation process and individual school outcomes across student performance indicators.[60] In a press release

59. Li, *supra* note 15; Kingkade, *supra* note 15; Mukherjee, *supra* note 15.

60. *See Department of Education Advances Transparency Agenda for Accreditation*, U.S. DEP'T EDUC. (Nov. 6, 2015), http://www.ed.gov/news/press-releases/department-education-advances-transparency-agenda-accreditation [http://perma.cc/8MVQ-HCMJ].

published on its website, the Department explained: "By publishing key student outcome measures for each institution alongside its accreditor, we hope to indicate the performance of all colleges and universities in each accreditor's institutional portfolio relevant to those measures."[61] According to the DOE, requiring the release of aggregate data regarding student demographics and performance outcomes will help ensure accreditors are held accountable for employing fair practices and individual schools are held accountable for providing quality educational experiences for their students. In response to federal complaints that public schools discriminate against African American students by punishing them more frequently and more harshly than white students, DOE has also required schools to collect data on student disciplinary cases, including the sanctions imposed, the school official responsible for imposing the sanctions, and demographic information on the students involved. These schools have also been required to report this data annually to the DOE and evaluate it themselves in an effort to ensure that "the [school] District is implementing its student discipline policies, practices and procedures in a non-discriminatory manner."[62] These same lessons can be applied to improving the quality of and confidence in educational institutions' handling of gender violence reports on campus.

Notably, the DOE's Office for Civil Rights has only recently made public the list of schools under investigation for violating Title IX and has also started to publish the findings at the conclusion of an investigation.[63] These are important steps towards greater transparency at the national level and should be replicated at the campus level.

While schools are now required to implement prevention programs and adopt more comprehensive response policies, there are few, if any, legislative mandates requiring schools to evaluate or release information about how they actually handle reports of sexual violence in practice. Lawmakers and governmental agencies may—and should—continue to advance new laws and guidelines to help address the urgent concerns of students. But without clear and enforceable requirements for transparency and accountability, these changes are doomed to be little more than cosmetic. To protect all students, legislation is needed that includes clear, comprehensive, and public

61. *Id.*

62. *See, e.g., Voluntary Resolution Agreement, No. 05-12-5001*, MINNEAPOLIS PUB. SCHS. 15-18 (Nov. 11, 2014), http://www2.ed.gov/documents/press-releases/minneapolis-agreement.pdf [http://perma.cc/5NPJ-GW5H].

63. *See U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T EDUC. (May 1, 2014), http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations [http://perma.cc/XMK8-7MFV].

requirements for more transparent campus processes. In order to design an effective, equitable solution, policymakers should address several key factors in developing a legislative mandate.

A. Any Solutions Must Address Privacy Concerns

Important privacy considerations must be squarely addressed in developing a legislative transparency mandate. Survivors and accused students alike have expressed fears that the data released could potentially include enough information to identify them. Advocates for survivors have expressed concern that releasing this kind of data might deter reporting, if survivors worry that their private information might be released.[64]

A strong transparency mandate will require schools to take precautions against releasing any individually identifying information. Existing federal laws are already in place to ensure that students' personal information is protected, and new transparency requirements should be designed to be compatible with these policies. The Family Education Rights and Privacy Act (FERPA) governs the privacy rights of students regarding their educational record; it guarantees student protections from the release of their educational records and gives them the right to have control over the disclosure of personally identifiable information from the records.[65] Importantly, FERPA explicitly states that these privacy rights do not apply when a student is found by the official school process to have committed sexual assault.[66] While it would certainly be unethical to release any identifying information about an accused party if the allegations had not been substantiated, schools are, in fact, permitted to release identifying information after a student is found responsible for sexual misconduct. These considerations should inform the development of privacy protections within a transparency mandate.

Thus, to respect the privacy rights of all students involved, schools must take careful precautions to remove individually identifying information from their reports. The U.S. Department of Health and Human Services has compiled expert guidance on the process of de-identifying information for public releases related to individual health records.[67] A similar DOE initiative

64. Colleen Flaherty, *Confidentiality Concerns*, INSIDE HIGHER ED (Sept. 30, 2014), http://www.insidehighered.com/news/2014/09/30/both-complainants-and-respondents-sexual-assault-cases-question-privacy-policies [http://perma.cc/33C3-49H5].

65. 20 U.S.C. §§ 1232(b)(1), (b)(3) (2012).

66. *Id.* § 1232(b)(6)(B).

67. *Guidance Regarding Methods for De-Identification of Protected Health Information in Accordance with the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule*, U.S.

would be useful to ensure that schools can most effectively increase transparency without jeopardizing the individual privacy rights of students.

Additionally, policymakers must ensure that new laws are drafted with a careful eye towards enshrining legislative standards that balance the important needs for both privacy and transparency. Smaller schools will need to be particularly careful when determining how to release this data. The recently released reports of the American Association of Universities' Campus Climate Survey, in which twenty-eight schools surveyed their student bodies about sexual and dating violence on campuses and publicly released the results, could provide a useful example.[68] In order to ensure that the publicly released information did not include any identifiable information about student respondents, report authors and individual schools consulted with statisticians and social scientists to develop an appropriate protocol.[69] While the details of this protocol are not publicly available, a similar process could be used for releasing aggregate data on each campus's disciplinary process in a manner that protects individual privacy.

B. Models Provide Guidance Opportunities

There has been movement towards strengthening transparency requirements in several key legislative arenas.[70] Recently passed New York

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DEP'T HEALTH & HUM. SERVICES, http://www.hhs.gov/ocr/privacy/hipaa/understanding/coveredentities/De-identification/guidance.html [http://perma.cc/UZ2S-32UQ].

68. *See* Cantor, *supra* note 2.

69. For example, the University of Pennsylvania included this explanation in its report releasing the American Association of Universities results: "Results were reviewed to ensure an acceptable risk of disclosure, including suppression of demographic characteristics and other potentially identifying information in situations in which cell sizes are small." David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: The University of Pennsylvania*, WESTAT 108 (Sept. 21, 2015), http://www.upenn.edu/ir/surveys/AAU/Report%20and%20Tables%200n%20AAU%20Campus%20Climate%20Survey.pdf [http://perma.cc/ZL2G-2AVB]. Additionally, Cornell University's report had a similar provision, and noted for its readers that data that had been suppressed for confidentiality reasons was indicated in the tables with an "s." David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct: Cornell University*, WESTAT 9 (Sept. 18, 2015), http://share.cornell.edu/files/2015/09/cornell-aau-final-report-16gygg8.pdf [http://perma.cc/2BEX-RKRJ].

70. This movement has been largely driven by youth activist groups. *See, e.g.*, Teo Armus, *State Sexual Assault Law Will Require Columbia To Release Sanctioning Data, Create Panel for Hearing Appeals*, COLUM. SPECTATOR (July 10, 2015), http://columbiaspectator.com/news/2015/07/10/state-sexual-assault-law-will-require-columbia-release-sanctioning-data-create-panel [http://perma.cc/D5EF-Z4DT]; Alyssa Peterson, *Campus Policy Guide*, KNOW YOUR IX, http://knowyourix.org/campus-policy-guide [http://perma.cc/4WTY-6U5H].

Senate Bill S5965—dubbed the "Enough Is Enough" Bill—illustrates that mandating increased transparency in the campus gender violence context is a feasible project.[71] Among other things, this law requires every college and university in the state to release to the State Education Department aggregate data about reports of domestic violence, dating violence, stalking, or sexual assault.[72] This includes the total number of reports received, open and closed investigations, outcomes of such investigations, and penalties imposed on perpetrators.[73] Though this data only captures some of the information necessary for a comprehensive legislative solution to the numerous problems I have detailed in this Feature (notably, it does not capture any demographic data or specify how or when the data will be made public), it provides a promising example of a serious effort to mandate increased transparency.

Legislation recently proposed at the federal level has also attempted to address transparency concerns, but falls short of providing sufficiently robust information. The Campus Accountability and Safety Act, introduced by Senator Claire McCaskill of Missouri, Senator Kirsten Gillibrand of New York, and Senator Richard Blumenthal of Connecticut, would require schools to annually release data regarding the number of reports filed, the number of cases opened, and limited information regarding the outcome of investigations, including the findings and sanctions imposed. However, the proposal fails to account for the number of cases handled through an alternative process to a formal investigation, such as an informal resolution; the time taken to resolve cases; whether any appeal was filed and its outcome; or the identity of decision makers or composition of hearing panels. The bill does require that the information be released publicly in the school's annual Clery report, and it responds to concerns about protecting individual privacy by clearly stating that the information released "shall not identify victims of crimes or persons accused of crimes."[74]

C. Transparency: The Specifics

An effective legislative mandate that schools publish anonymized data on the adjudication process for reports of gender-based violence each year would help to address the troubling lack of transparency and ultimately improve disciplinary outcomes. This data should be comprised of several pieces.

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71. N.Y. EDUC. LAW § 6449 (McKinney 2015) (effective July 7, 2016).

72. *Id.*

73. *Id.*

74. Campus Accountability and Safety Act, S. 590, 114th Cong. § 2 (2015).

1. *Information Regarding the Investigation and Sanctioning of Cases*

This data would allow stakeholders to evaluate whether schools are promptly adjudicating reports, evaluate the severity of sanctions handed down, and otherwise understand how each school addresses gender violence reports. It would also allow for comparisons between similar cases heard at a single school, or between cases heard at different schools, to watch for differential treatment and consistency. It should include:

(a) The number of reports filed;

(b) The type of process used to resolve each report (i.e., informal resolution or formal investigation);

(c) The number of investigations opened;

(d) The policy violation(s) alleged;

(e) The determination made;

(f) The sanctions imposed;

(g) Any changes made to the determinations or sanctions as a result of an appeal;

(h) The length of each case;

(i) The names of the decision makers responsible for findings, sanctioning, and appeals.

2. *Demographic Information on the Involved Parties*

This information will provide a body of data that will help stakeholders determine whether particular groups are being targeted or given preferential treatment. Such demographic information is already collected and released in other areas of higher education policy to ensure fairness and equal treatment. For example, schools release racial demographic information about their student body, and this is used to understand the achievements and barriers to academic success for minority groups.[75] Careful steps should be taken in this section in particular to avoid releasing any individually identifying information. It should include information regarding:

(a) The type of party against which the allegation was made (i.e., student, faculty member, fraternity);

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75. *See, e.g.*, Young M. Kim, *Minorities in Higher Education*, AM. COUNCIL EDUC. (Oct. 2011), http://diversity.ucsc.edu/resources/images/ace_report.pdf [http://perma.cc/74DR-32HH].

(b) The racial identity of the parties involved;

(c) The gender identity of the parties involved.

3. Information Regarding Interim Measures and the Long-Term Outcomes for Students Who Filed Reports of Gender Violence

Other authors in this Symposium have detailed the severe impacts that experiencing gender violence can have on a student's long-term success and noted the structural and economic barriers that can preclude students from receiving the resources they need to continue their education. In order to more comprehensively evaluate the extent of these issues and each school's efforts to meet their obligations under Title IX, transparency requirements should also include information about the academic consequences of reporting incidents of gender violence and the provision of interim measures. Some schools are already releasing some of this data willingly; for example, the University of Michigan included information about interim measures in its 2013-2014 Student Sexual Misconduct Annual Report.[76] This information should include:

(a) The number and type of interim measures provided to complainants;

(b) The total number of reporting students who experienced any of the following after experiencing gender violence:

(i) withdrawal from a class,

(ii) being put on academic probation,

(iii) taking a medical or voluntary leave of absence, or

(iv) transferring schools or otherwise withdrawing completely.

Additionally, an effective legislative solution will include mechanisms to monitor compliance, the funding to implement such mechanisms, and substantive consequences for schools found in noncompliance. The startling and ever-climbing number of schools currently under investigation for Title IX violations—161 schools as of January 2016[77]—shows colleges and universities have demonstrated a comfort with violating existing rules and regulations. Further, a startling number of schools have shown a disregard for other

76. *See University of Michigan Student Sexual Misconduct Annual Report July 2013 - June 2014*, U. MICH. 4-6 (Nov. 24, 2014), http://hr.umich.edu/sites/default/files/student-sexual-misconduct-annual-report-2014.pdf [http://perma.cc/V32M-YSLZ].

77. Katherine Mangan, *As Federal Sex-Assault Investigations Multiply, Resolutions Remain Elusive*, CHRON. HIGHER EDUC. (Jan. 10, 2016), http://chronicle.com/article/a/234858?cid=T9NEWS [http://perma.cc/3YL3-Y68D].

transparency issues in higher education policy. For example, a number of colleges and universities have routinely falsified admissions data in response to federal inquiries and have faced few, if any, consequences as a result. In 2013, at least six top colleges and universities admitted to falsifying multiple years' worth of information sent to the DOE, their own accrediting agencies, and *U.S. News*.[78] Clearly, any new reporting and transparency requirements will require proactive enforcement to ensure their effectiveness.

Requiring the release of this data will help ensure that students, parents, and policymakers understand how the adjudication process in a given school operates in practice. It will also provide the information necessary for stakeholders to evaluate whether the school officials' actions are consistent with their own written policies, existing laws and guidance from governmental bodies, and the ethical standards of individual stakeholders like parents of students or faculty members.

CONCLUSION

Clearly, the current methods of investigating and adjudicating sexual and dating violence on college campuses are not working. Accused and accusing students alike lack confidence in the processes and feel discriminated against by their outcomes. Though claims of unfair treatment abound on both sides, there is little to no empirical evidence to evaluate these claims, nor is there sufficient data to inform policy reforms. This highlights the need for legislation that requires such information to be released. The availability of such information would help identify systemic policy issues and ensure fair treatment of all parties. Experience demonstrates that without robust and carefully constructed requirements for transparency and accountability, schools can continue violating the law and their own policies with impunity. This harms both survivors of violence and accused students. In order to more fully vindicate the educational equity promised by Title IX, it is essential that policymakers advance legislative solutions immediately requiring increased transparency from schools. The safety of students depends on it.

78. Jon Marcus, *In New Age of College Transparency, Who's Checking the Facts?*, HECHINGER REP. (Mar. 20, 2013), http://hechingerreport.org/in-new-age-of-college-transparency-whos-checking-the-facts [http://perma.cc/7UXR-2EBH].





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