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Nancy Chi Cantalupo
Georgetown University Law Center, cantalun@law.georgetown.edu

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Nancy Chi Cantalupo
Assistant Dean for Clinical Programs
Georgetown University Law Center
cantalun@law.georgetown.edu

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How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us

Nancy Chi Cantalupo

Assistant Dean for Clinical Programs, Georgetown University Law Center,
Washington, DC

cantalun@law.georgetown.edu

Over the last decade or so, various legal schemes such as the statutes and court or agency enforcement of Title IX and the Clery Act have increasingly recognized that certain institutional responses perpetuate a cycle of nonreporting and violence. This paper draws upon comprehensive legal research conducted on how the law now regulates school responses to campus peer sexual violence to show that schools face much greater liability from failing to protect the rights of campus peer sexual violence survivors than of any other group of students, including alleged assailants. By encouraging their institutions to develop more victim-centered responses to campus peer sexual violence, advocates for women in higher education can respond to the current legal environment, properly confront this problem, and help their schools avoid liability.

An estimated 20–25% of undergraduate women are victims/survivors¹ of peer sexual violence (Benson, Gohm, & Gross, 2007, p. 348; Bohmer & Parrot, 1993, p. 6; Fisher, Cullen, & Turner, 2000, p. 10), but 90% or more do not report the violence (Fisher et al., 2000, p. 24). The main reason survivors do not report is that they think no one will believe them and that various authorities, especially legal and medical authorities, will be hostile (Bohmer & Parrot, 1993, pp. 13, 63; Fisher et al., 2000, pp. 23–24; Warshaw, 1988, p. 50). Studies on campus peer sexual violence suggest that college men say they

would rape if they could be assured of not getting caught (Bohmer & Parrot, p. 8; Warshaw, 1988, p. 97), that a small group of serial offenders account for an overwhelming majority of the violence (Lisak & Miller, 2002, pp. 76–80; Sampson, 2003, p. 11), and that the failure of institutions to treat such violence seriously may encourage perpetrators to continue perpetrating (Schwartz, DeKeseredy, Tait, & Alvi, 2001, p. 630). Thus, one can see a vicious cycle between nonreporting of campus peer sexual violence and the failure to prevent it. Perpetrators rape because they think they will not get caught or because they actually have not been caught, and, because survivors do not report the violence, perpetrators are not caught, continue to believe they will not get caught, and continue the violence.

Over the last decade or so, various legal schemes (including statutes and court or administrative enforcement of the statutes) that apply to campus peer sexual violence have increasingly recognized that certain institutional responses perpetuate this cycle of nonreporting and violence and that colleges and universities need to take a more victim-centered approach in responding to this violence. First, laws such as Title IX of the Educational Amendments of 1972 (“Title IX”), the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (“Clery”) (first passed in 1990 and amended to add the “Campus Sexual Assault Victim’s Bill of Rights” in 1992), and the Violence Against Women Act of 2000 (“VAWA”) have increasingly focused on campus peer sexual violence. Second, these legal schemes have improved legal protections for survivors against institutional mishandling, while school action or inaction affecting other students, including alleged perpetrators, has remained at a fairly low level of liability. Third, the schemes have responded to the nonreporting problem, particularly to indications that victims do not report as a result of chilling institutional responses, by attempting to regulate these responses.

Accordingly, this paper will draw upon comprehensive legal research I have conducted on how the law now regulates school responses to campus peer sexual violence, research that is reviewed in greater detail in my article “Campus Violence: Understanding the Extraordinary through the Ordinary,” published last June in the *Journal of College and University Law* (Cantalupo, 2009). It will review that research with the concerns of student affairs administrators in mind, as opposed to those of the *Journal of College and University Law*’s primary audience, members of the National Association of College and University Attorneys. It is

intended, in particular, to give the policymakers who are involved in designing their institutions' responses to campus peer sexual violence, but who are not necessarily lawyers, information about the legal environment so they can use it to inform their policymaking. This information demonstrates that institutions face much greater liability from failing to protect the rights of campus peer sexual violence survivors than of any other group of students, including alleged assailants.

Given the magnitude of the problem, it is critical that policymakers and advocates for women in higher education understand these relatively recent legal developments. The law makes it clear that many colleges and universities need to adjust their institutional responses to campus peer sexual violence to be more victim-centered, thereby encouraging reporting of the violence. Therefore, this article first reviews research delineating the underlying problem of campus peer sexual violence. Then it discusses the legislation, regulations, and case law that apply to campus peer sexual violence. Finally, it concludes with recommendations for how colleges and universities can move their institutional responses in a more victim-centered, reporting-facilitative direction.

Campus Peer Sexual Violence

The legal regulation of school responses to campus peer sexual violence responds to and takes place in the context of the dynamics of campus peer sexual violence. Therefore, it is important to begin with a review of the empirical studies that have examined the problem. Of the relatively few comprehensive studies that have been completed over the last couple of decades, the findings and conclusions are relatively consistent,² and they indicate that “[r]ape is the most common violent crime on American college campuses today” (Sampson, 2003, p. 1). Studies estimate that 20–25% of college women are victims of forced sex during their time in college (Bohmer & Parrot, 1993, p. 6; Benson et al., 2007, p. 348; Fisher et al., 2000, p. 10). As many as 15% of college men may also have been forced to have sex (Bohmer & Parrot, 1993, p. 6). Studies on college men indicate that 6–14.9% of them “report acts that meet legal definitions for rape or attempted rape” (Lisak & Miller, 2002, p. 73).

Studies indicate that college and university women are particularly vulnerable to sexual violence and that they often become victims of such

violence shockingly early in their time on campus. Most victims are between the ages of 15 and 24 (Bohmer & Parrot, 1993, p. 18), and “experience rape at rates four times higher than the assault rate of all women . . . College women are more at risk . . . than women the same age but not in college” (Sampson, 2003, p. 2). Sexual assaults most often happen during a victim’s first year in college, often during the first week they are on campus (Bohmer & Parrot, 1993, p. 26). In one study, 12.8% of completed rapes, 35% of attempted rapes, and 22.9% of threatened rapes took place on a date (Fisher et al., 2000, p. 17). Most perpetrators are known to the victim (Bohmer & Parrot, 1993, p. 26; Fisher et al., 2000, p. 17), including classmates and friends (70% of completed or attempted rapes) and boyfriends or ex-boyfriends (24.7% of completed rapes and 14.5% of attempted rapes) (Fisher et al., 2000, p. 19). Often the victim has been drinking or has been given alcohol (Sampson, 2003, p. 2).

As in the larger world, perpetrators are almost all men, and many may be repeat perpetrators. “One [1997] study found that 96 college men accounted for 187 rapes” (Sampson, 2003, p. 11), a finding corroborated by later research, including a study published in 2002. This study surveyed 1882 male university students and found that 6.4% self-reported acts qualifying as rape or attempted rape. Of this group, 63.3% reported committing repeat rapes averaging about six rapes apiece. These “undetected” (i.e., not arrested or prosecuted) rapists each committed an average of 14 additional acts of interpersonal violence (battery, physical, and/or sexual abuse of children, and sexual assault short of rape or attempted rape), so that 4% of the students in the study accounted for 28% of the violence, nearly 10 times that of nonrapists (1.4 acts of violence apiece) and 3.5 times that of single-act rapists (3.9 acts of violence apiece) (Lisak et al., pp. 76–80). A study in 1993 found that 35% of college men indicated some likelihood they would rape if they could be assured of getting away with it (Bohmer & Parrot, 1993, p. 8), and a 1986 study showed that 30% of men in general say they would commit rape and 50% would “force a woman into having sex” if they were not caught (Warshaw, 1988, p. 97).

Ninety percent or more of victims of sexual assault on college campuses do not report the assault (Fisher et al., 2000, p. 24). Fear of hostile treatment or disbelief by legal and medical authorities prevents 24.7% of college rape victims from reporting (Bohmer & Parrot, 1993, pp. 13, 63; Fisher et al., 2000, p. 24; Warshaw, 1988, p. 50), and studies on attitudes of law enforcement, judges, juries, and prosecutors indicate that

this fear is well-founded (Lisak & Miller, 2002, p. 79; Mindlin, Vickers, Harper, Lehman, Mangum, & Reardon, 2008, p. 8). Other factors include not thinking a crime had been committed (Fisher et al., 2000, p. 23), not thinking what had happened was serious enough to involve law enforcement (Fisher et al., 2000, p. 23), not wanting family or others to know (Fisher et al., 2000, p. 24), lack of proof (Fisher et al., 2000, p. 24), embarrassment from publicity (Bohmer & Parrot, 1993, p. 13; Warshaw, 1988, p. 50), lack of faith in or fear of court proceedings or police ability to apprehend the perpetrator (Bohmer & Parrot, 1993, pp. 13, 63), fear of retribution from the perpetrator (Bohmer & Parrot, 1993, pp. 13, 63), and belief that no one will believe them and nothing will happen to the perpetrator (Bohmer & Parrot, 1993, pp. 13, 63; Fisher et al., 2000, p. 23; Warshaw, 1988, p. 50). Not reporting, being disbelieved, and official mishandling can increase survivor trauma (Bohmer & Parrot, 1993, pp. 5, 198; Warshaw, 1988, p. 66). In contrast, both speaking with someone about the assault and reporting can be therapeutic (Bohmer & Parrot, 1993, p. 235) and a necessary step to recovery (Warshaw, 1988, p. 66).

The picture that these statistics paint is one of epidemic gender-based campus violence that overwhelmingly does not reach the light of day, with both the violence and the silence surrounding it having serious consequences. In addition, they suggest how the problem of sexual violence may be perpetuated, at least in part, on college campuses. First, one can see from the statistics a vicious cycle between the nonreporting of campus sexual violence and the failure to prevent it. Second, the ages of survivors and the timing of most campus sexual violence suggest that perpetrators may select victims who are particularly vulnerable and unlikely to have the resources at their disposal to report the violence. Third, clearly institutions and their responses to the violence play a part in the cycle of nonreporting and continued violence. On the survivor's side, research indicates that the main reason campus sexual violence survivors do not report is that they do not think anyone will believe them and that various authorities, especially legal and medical authorities, will be hostile. On the perpetrator's side, studies suggest that lack of "proper guardianship" in terms of the failure of institutions to address the campus peer sexual violence problem is a key and necessary element of creating the problem in the first place.

For example, a study by four sociologists and criminologists on sexual assault on college campuses in Canada explains that "the amount

and the location of crime are affected, if not caused, by three important factors: the presence of likely offenders, who are presumed to be motivated to commit the crimes; the absence of effective guardians; and the availability of suitable targets” (Schwartz et al., 2001, p. 625). This study indicates that on college campuses “motivated male offenders view women who drink and/or consume drugs as ‘suitable targets’; further, these views are largely a function of ties and social exchanges with male peers who perpetuate and legitimate sexual assault in college dating relationships, in combination with the use of alcohol by the men themselves” (Schwartz et al., 2001, p. 647). In fact, “[u]ndergraduate men who drank two or more times a week and who had friends who gave them peer support for both emotional and physical partner abuse were more than nine times as likely to report committing sexual abuse as men reporting none of these three characteristics” (Schwartz et al., 2001, p. 645). To complete the third prong of the formula, “college campuses too often are ‘effective-guardian-absent.’ Many campus administrators do not seriously punish men who abuse women sexually, even if they engage in extremely brutal behavior such as gang rape. Even criminal justice personnel often disregard acquaintance and/or date rapes, essentially telling men that their sexually aggressive behavior is acceptable” (Schwartz et al., 2001, p. 630). In this climate “male peer support can be regarded as a component of effective guardianship. When offenders receive either encouragement or no punishment from peers, administrators, faculty, and law enforcement officials, then effective guardianship is lacking. On the other hand, insofar as a man’s friends give no support for abuse, this absence of support may well be the beginning of effective guardianship.” (Schwartz et al., 2001, p. 646).

The Law Related to Campus Peer Sexual Violence

The consequences of this overwhelmingly unreported violence are massive, for surviving students, the campus community as a whole, and even perpetrating students. In light of the extent of the problem and the large and diverse interests of the populations impacted by it, the law has increasingly addressed campus peer sexual violence. Because education law primarily regulates the behavior of the school and here the school’s response is clearly very important, the applicable laws deal primarily with the institution’s treatment of both the victim/accusing student and the

perpetrator/accused student, and those students' rights to some particular treatment by the school. As the following review makes clear, while the laws dealing with accused/perpetrating students' rights are actually quite minimal and have not expanded much since their development in the 1960s and 1970s, the laws dealing with the rights of accusing/surviving students are more recent and continue to expand. Collectively, these laws have created an environment that is increasingly protective of victims' rights and supportive of victim-centered institutional responses to campus peer sexual violence.

Surviving Students' Rights: Increased Legal Concern

The rights of students who have survived campus peer sexual violence are primarily addressed by Title IX, Clery, and VAWA and these laws have increasingly focused on campus peer sexual violence. First, several of these laws have been amended to address this problem. For instance, campus grants to fund programs that focus on peer sexual violence were added to VAWA in its first reauthorization in 2000. Similarly, Clery, which originally focused on the disclosure of campus crime statistics, was amended in 1992 to add "The Campus Sexual Assault Victim's Bill of Rights" (CSAVBR). This amendment deals specifically with the creation and communication to students of institutional programs, policies, and procedures designed to prevent sexual violence and to respond to it properly once it occurs (20 USC § 1092 (f)(8) (2008)).

Second, provisions of both Clery and Title IX that were not necessarily created with campus peer sexual violence in mind have increasingly been applied to it. For instance, while Clery deals mainly with crime reporting, a private party may file a complaint with the Department of Education's regional offices ("DOE"), and the DOE can fine or withhold federal funding from colleges and universities that "flagrantly or intentionally" violate Clery or fail to remedy the violations (Security on Campus, n.d.). Four institutions have been fined to date for violations of the act, at least in part for failing to properly report peer sexual violence.

The largest fine involved a 2006 peer rape and murder at Eastern Michigan University ("EMU"). The university initially told the victim's family that her death involved "no foul play," then informed the family over 2 months later of the arrest of the student who has since been convicted of raping and murdering her (Menard, 2007; Williams, 2008).

EMU paid about \$3.8 million as a result of the case, including \$350,000 in Clery fines (Larcom, 2008; Schultz, 2007). The next largest fine (\$200,000) was levied against Salem International University ("SIU") for not including in their campus crime report five forcible sex offenses that had been reported (Loreng, 2001). Miami University of Ohio ("MOH") was fined \$27,500 for a combination of underreporting various crimes, including sex offenses, and other violations related to sexual violence (Susman & Sikora, 1997). Lastly, Mount St. Clare College ("MSCC") was fined \$15,000, in part for two rapes that were reported but not listed by the college (Leinwand, 2000).

The evolution of the application and enforcement of Title IX has also progressively included more cases regarding peer sexual violence. Title IX prohibits sexual harassment in schools as a form of sex discrimination (Office for Civil Rights, 2001). Peer sexual violence counts as hostile environment sexual harassment that is "so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" (Davis, 1999).

Under Title IX jurisprudence, schools may be held liable for peer sexual harassment in two ways: (1) through administrative enforcement by DOE's Office of Civil Rights ("OCR") and (2) through private suits. Schools agree to comply with Title IX in order to receive federal funds, and a school risks that federal funding if OCR investigates and finds a violation of Title IX (Office for Civil Rights, 2001, p. 3). Fortunately for schools, OCR must work with a school to achieve voluntary compliance before taking steps to terminate a school's funding (Office for Civil Rights, 2001, p. 15).

OCR enforcement generally takes place as a result of a complaint being filed regarding a school's response to a sexual harassment case, which causes OCR to undertake a fairly comprehensive investigation of that school's response system (Office for Civil Rights, 2001, p. 14). OCR cases are generally resolved through a "letter of finding" ("LOF") addressed to the school and written by OCR, which is sometimes accompanied by a "commitment to resolve" ("CTR") signed by the school (Hicks, ¶322). Schools may look to OCR's policy guidance to determine how to comply with OCR's requirements and make a complaint and investigation less likely (Office for Civil Rights, 2001, p. 14).

A surviving student might also file a lawsuit against a school, with the potential of winning a monetary award, either instead of or in addition to filing a complaint with OCR (Davis, 1999, p. 632). The

cases that are reported are typically those where the defendant school has tried to keep a case from being decided by a jury by filing a motion to dismiss the case or a summary judgment motion. Both kinds of motions are decided by a judge or judges. If a motion is decided in the defending school's favor, the case is finished and does not proceed to a jury. If a motion is decided in the surviving student's favor, the case may be decided and a monetary compensation awarded by a jury, or the parties may negotiate a settlement where the school generally pays the student some agreed-upon amount and the parties may agree to other terms.

One survey of peer harassment cases against schools from approximately 1992 until 2008³ shows a steady increase in individuals bringing cases before both OCR and courts.⁴ Moreover, since 1999, when *Davis v. Monroe County Board of Education* ("Davis") settled that plaintiffs could make claims under Title IX for peer sexual harassment (Davis, 1999, p. 632), one can see a shift from peer sexual harassment cases decided by OCR to cases taken to courts. This not only represents an increase in overall liability for schools but a trend toward the arguably more expensive version of such liability. Finally, of the 40 Title IX court cases considered for this paper,⁵ the surviving students prevailed in 24, while the schools only prevailed in 16.

Surviving Students' Rights: "Victim-centered" Responses to Encourage Reporting

The history and current approaches to the enforcement of Clery and Title IX also indicate that the laws relating to campus peer sexual violence are increasingly protective of victims' rights. Moreover, this concern with victims' rights is linked to how violations of those rights may be discouraging victims from reporting and not only not deterring the violence but actually encouraging it.

The Clery Act: No Cover-ups of Campus Crime. CSAVBR is a prime example of the linkages increasingly being made between protecting victims' rights, reporting and, ultimately, preventing campus crime. This amendment requires schools to publish policies that inform on-campus and off-campus communities of the school's sexual violence prevention programs and response procedures (20 USC § 1092 (f)(8)(B) (2008)).

Several of the cases mentioned above, which have resulted in fines to schools for violating Clery, have involved violations of CSAVBR or

general concerns about the institution's failure to assist victims in reporting and getting resources. In the SIU case, for instance, DOE indicated that SIU did not regularly provide counseling and other victim support services and that "several interviewees including former employees stated that students are actively discouraged from reporting crimes to law enforcement or seeking relief through the campus judicial system" and are "often met with threats, reprisals, or both" (Loreng, 2001). Furthermore, both the university's policies and evidence of its practice indicated that it would not make accommodations for new living and academic arrangements for victims following an assault and that survivors were inadequately informed of their rights to pursue disciplinary action against the assailant (Loreng, 2001). Similarly, MOH was found to have "failed to initiate and enforce appropriate procedures for notifying both parties of the outcome of any institutional disciplinary proceeding brought alleging a sex offense" (Carter, 2004b). Finally, MSCC was required to "agree . . . to add other alleged [sexual] assaults to [its] crime reports" (Leinwand, 2000).

Many of the cases not leading to fines under Clery also deal with sexual violence and have also resulted in important victim-centered enforcement designed to encourage reporting. For instance, an issue quickly arose under Clery regarding the CSAVBR provision "both the accuser and the accused shall be informed of the outcome of any campus disciplinary proceeding brought alleging a sexual assault" (20 USC § 1092 (f) (8)(B)(iv)(II) (2008)) and how this provision interacted with the Family Educational Rights and Privacy Act, which restricts disclosures by educational institutions of information from a student's educational record, including the results of student disciplinary proceedings (Rooker, 2003). Universities concerned about whether an accuser, once informed of a disciplinary procedure's outcome, could then re-disclose that information sought to resolve the question by requiring survivors to sign nondisclosure agreements before they were informed of the outcome of disciplinary proceedings (Gifford, 2008; Klinger, 2003).

Understandably, victims and victims' advocates objected to such measures because they compelled victims' silence in a way that felt re-victimizing (Dieringer, n.d.; UVA Victims of Rape, 2004). The DOE settled the question in response to a complaint, making clear that such compelled nondisclosure agreements are illegal under Clery: "Under the University's policy, a student who refused to execute an agreement would be barred from receiving judicial outcomes and sanctions information.

As a result, a key aim of the Clery Act—providing access to key information to be used by affected persons in their recovery process—is defeated” (Klinger, 2003). The DOE has recently confirmed this judgment, stating that “by requiring survivors of alleged sexual assaults to abide by a confidentiality policy that is inconsistent with the letter and spirit of the Clery Act,” the institution had violated Clery (Gifford, 2008).

The language of both of these letters indicates that Clery and its enforcement agents are concerned both with survivors’ rights and how greater protection of those rights will facilitate survivors’ abilities to report their cases. Cumulatively, enforcement of Clery demonstrates that both the law and the interpreters and enforcers of the law are as much if not more concerned with how colleges and universities treat survivors and with how that treatment facilitates or hinders prevention of campus crime, as they are with the underlying sexual violence.

Court Enforcement of Title IX: What Counts as “Deliberate Indifference”. Enforcement of Title IX by courts and OCR in peer sexual violence cases⁶ demonstrates similar concerns to those increasingly evident in the enforcement of Clery. Here, too, one sees greater concern with victims’ rights and recognition of how victim-centered institutional responses can encourage reporting and prevention.

As noted above, in *Davis v. Monroe County Board of Education*, the US Supreme Court held that plaintiffs could make claims under Title IX for peer sexual harassment. Since then, most courts have allowed students to sue a school for mishandling a peer harassment case if:

1. the school is a recipient of federal funding,
2. the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school,
3. the school had actual knowledge/notice of the harassment,
4. the school was deliberately indifferent to the harassment (S.S., 2008, p. 726).

So many schools receive federal funds of some kind that the first prong is generally not in controversy. In addition, most cases of peer sexual violence such as a sexual assault are accepted as being “severe, pervasive, and objectively offensive” enough “to deprive the plaintiff of access to the educational opportunities or benefits provided by the school” even if they happen only once (Derby, 2006; p. 444; S.S., 2008, p. 737).⁷

Therefore, most litigation focuses on the actual knowledge and deliberate indifference prongs. The deliberate indifference prong is the focus here because it deals with proper institutional responses to peer sexual harassment.

Courts have defined an institutional response as deliberately indifferent “when the defendant’s response to known discrimination is clearly unreasonable in light of the known circumstances, and when remedial action only follows after a lengthy and unjustified delay.” The deliberate indifference “must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it” (Hamden, 2008, pp. *20–21, quoting Davis, 1999, p. 645). With a few exceptions discussed at greater length below, schools are rarely held responsible for the sexual violence itself (Derby, 2006, pp. 445–446; Ray, 2000, p. 1170; S.S., 2008, p. 738). Instead, the focus is on the institutional response postviolence. As such, doing nothing at all is clearly unacceptable (Bashus, 2006, pp. *10–11; Bruning, 2007, pp. 915–916; Derby, 2006, pp. 447–448; E. Haven, 2006, pp. 63–65; James, 2008, p. *6; Jones, 2005, pp. 645–646; Martin, 2006, p. 974; Ray, 2000, p. 1170; S.G., 2008, p. *15–16; Theno, 2005, p. 1301).⁸ Schools must at least investigate claims of peer harassment (Bruning, 2007, pp. 915–916; Murrell, 1999; Oyster River, 1997, p. 481; Ross, 2007, p. 1357; S.S., 2008, p. 738; Vance, 2000, p. 259) and that investigation cannot involve merely accepting an accused student’s denial at face value and not engaging in any credibility determinations (S.S., 2008, p. 740). If their investigations indicate that harassment did occur, some kind of disciplinary action is likely required (Hamden, 2008, p. *5; Siewert, 2007, p. 954; S.S., 2008, p. 739; Vance, 2000, p. 262; Oyster River, 1997, p. 481). While it is acknowledged that victims have no right to demand any particular disciplinary or remedial action on the part of a school (Clark, 2001, p. 1374; Fitzgerald, 2007, p. 175; Hamden, 2008, p. *22; Kelly, 2003, p. *4), if the particular disciplinary action taken fails to protect the victim or stop the harassment, courts may fault the school for taking inadequate disciplinary action (Derby, 2006, p. 447; M., 2008, p. *28; Siewert, 2007, p. 954). Disciplining the harasser and the victim equally has been frowned upon by courts (Erskine, 2006, p. *35; Siewert, 2007, p. 954; Theno, 2005, pp. 1310–1311), and when schools are aware that a response method is not achieving the goal of stopping the harassment, they may not continue using that method alone and to no avail (Jones, 2005, p. 645; Martin, 2006, p. 974; Patterson, 2009, p. *32; S.S., 2008, p. 739; Vance, 2000,

p. 261). Finally, unjustified delay in responding can result in a school being viewed as deliberately indifferent (E. Haven, 2006, p. 49; Williams, 2007, p. 1289).

Courts are more likely to find in favor of survivors when schools discourage victims from reporting violence (Franklin, 1992, p. 64; Murrell, 1999, p. 1248; Oyster River, 1997, p. 479; Vance, 2000, p. 262). In addition, courts disapprove of school actions that minimize the violence, such as publicly characterizing the sexual assault on a plaintiff as “not legal rape” (Kelly, 2003, p. *3; Siewert, 2007, p. 954) or show a bias in favor of the accused student or against the accusing student (Brimfield; 2008, p. 823; Derby, 2006, p. 447; Patterson, 2009, p. *4; S.S., 2008, p. 740; Theno, 2005, pp. 1310–1311), as in a case where school administrators told a survivor that her assailant was “very bright, very intelligent, and ‘going places’” and resisted enforcing a judicial stay-away order (Erskine, 2006, pp. *33–34).

Clery’s CSAVBR provides that institutions must notify students of “options for, and available assistance in, changing academic and living situations after an alleged sexual assault incident, if so requested by the victim and if such changes are reasonably available” (20 USC § 1092 (f)(8)(B)(vii)). Title IX case law echoes this support for such “interim measures” to address survivors’ immediate needs, recognizing another way in which a victim-centered approach is linked to the prevention of peer sexual violence. Therefore, institutions will be liable for not taking steps to protect the victim from having to constantly confront her assailant while continuing with her education (Derby, 2006, p. 444; Erskine, 2006, pp. *33–34; Hamden, 2008, p. *17; Kelly, 2003, pp. *11–12; S.G., 2008, p. *10; S.S., 2008, pp. 742–743). For instance, in *Doe v. Hamden Bd. of Educ.*, the victim was raped during the summer off the grounds of her high school by another student. The court stated that “A reasonable jury could conclude that Garcia’s presence at school throughout the school year was harassing to Mary Doe because it exposed her to multiple encounters with him. Further encounters, of any sort, between a rape victim and her attacker could create an environment sufficiently hostile to deprive the victim of access to educational opportunities provided to her at school” (Hamden, 2008, pp. *16–17).

Interim measures are so important that, even when an institution does separate the students, *how* the school does so can reflect on whether its institutional response could be judged deliberately indifferent. For

instance, some courts have indicated that requiring a victim to change her housing, classes, or campus employment to avoid her assailant can be indicia of deliberate indifference. In *S.S.*, the plaintiff, a student assistant equipment manager for the football team, was assaulted by one of the players, and the court noted that the university's repeated suggestion to the plaintiff that she leave her job, whereas her rapist would remain on the team, could be considered evidence of deliberate indifference (*S.S.*, 2008, p. 740). Other courts have criticized institutions for separating students by moving the victim (*Erskine*, 2006, pp. *30–31; *James*, 2008, p. *6; *Oyster River*, 1997, p. 472; *Siewert*, 2007, p. 954; *Zamora*, 2006, p. 426). While there have been cases where an institution's decision to change the victim's school or living arrangements instead of the perpetrator's has been upheld (*KF's Father*, 2001; *Manfredi*, 2000), courts do not appear to question changing an accused student's arrangements, even while an investigation is still ongoing (*Clark*, 2001; *Gabrielle M.*, 2003; *Stahling*, 2008; *Wilson*, 2001).⁹

Institutions particularly risk liability when their failure to protect the survivor through separation and other interim measures results in her being further harassed or retaliated against by the assailant or third parties, thus further damaging the victim's health, well-being, and ability to enjoy the benefits of her education (*Bashus*, 2006, pp. *10–11; *Brimfield*, 2008, p. 823; *Derby*, 2006, pp. 444–445; *E. Haven*, 2006, pp. 59–60; *Erskine*, 2006, p. *39; *Hamden*, 2008, p. *17; *James*, 2008, p. *6; *Jones*, 2005, pp. 645–646; *M.*, 2008, p. *28; *Martin*, 2006, p. 974; *Patterson*, 2009, p. *33; *S.G.*, 2008, p. *10; *Theno*, 2005, pp. 1310–1311).¹⁰ In cases where the plaintiffs were successful, one student was harassed by her assailant's friends, who would drive by her and shout "slut" from their vehicle (*Derby*, 2006, pp. 444–445), and another was so repeatedly harassed by both the accused student and his friends that she became known "on campus as the 'rape girl'" and the ongoing trauma eventually led her to attempt suicide (*Erskine*, 2006, p. *22). Yet another was subjected to 5 weeks of constant harassment by classmates, also leading to a suicide attempt (*E. Haven*, 2006, p. 60).

In fact, courts have expressed concern that an institution's failure to respond properly to initial or repeated instances of harassment may encourage the harassers. In *Derby*, for instance, the court notes that the assailant who was not initially disciplined sexually assaulted a second student (*Derby*, 2006; pp. 447–448). In other cases with successful

plaintiffs, courts have not only drawn links between school inaction and future violence (Ray, 2000, p. 1168; Siewert, 2007, p. 954), but have noted when school officials actually agreed with the harassers or laughed at the harassment (Brimfield; 2008, p. 823; Patterson, 2009, p. *4; Theno, 2005, pp. 1310–1311). Indeed, many of the plaintiffs in these cases end up leaving their schools to avoid harassment and retaliation, and courts have treated this as evidence of deliberate indifference (Brimfield, 2008, p. 820; Bruning, 2007, pp. 910–911; Derby, 2006, p. 445; Hamden, 2008, p. *17; James, 2008, p. *6; Patterson, 2009, p. *12; S.G., 2008, p. *12; Siewert, 2007, p. 953; Theno, 2005, p. 1309; Vance, 2000, pp. 256–257).

Finally, institutions have faced the most devastating judgments where their actions actually facilitate or make women vulnerable to sexual violence. In both *Simpson v. Univ. of Colo. Boulder* and *Williams v. Bd. of Regents*, the plaintiffs were gang-raped by student athletes, Simpson as a part of a football player recruiting event that the coach knew had led to previous assaults (Simpson, 2007, pp. 1184–1185) and Williams by a student who was recruited and admitted to the university even though the coach, athletics director, and president knew that he had criminal and disciplinary problems, including sexually violent behavior (Williams, 2007, p. 1297). Simpson settled for \$2.5 million, her co-plaintiff got \$350,000, and 13 university officials were fired, whereas Williams' settlement was in the six-figure range (Rosenfeld, 2008, pp. 418–420).

OCR Enforcement of Title IX: Comprehensive, “Injunctive” Relief. Survivors may also look to the administrative remedies of OCR to protect their rights. OCR will not award monetary compensation to complainants, but it will direct schools to change policies, procedures, and other responses that do not comply with Title IX. Because it gives institutions an opportunity to comply with its directives before taking punitive measures, OCR's substantive standards for what a school must do to comply are more exacting. As a result, while this enforcement may be less likely to compensate the student survivors who complain, the relief and remedies OCR provides can still be powerful ways to change institutional behavior.

OCR's *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (“Revised Guidance”), along with its LOFs/CTRs, demonstrates how OCR can reach a broader range of school action and inaction than the Title IX case law does. First,

both the *Revised Guidance* and LOFs/CTRs demonstrate OCR's comprehensive approach to its enforcement and investigations. For instance, in several investigations where OCR did not find enough evidence to support a violation of Title IX based on the facts alleged in the complaint, it nevertheless found violations due to its comprehensive review of the institution's policies and procedures. Such violations include failing to appoint or communicate the roles of the Title IX coordinator(s) or other personnel involved in various parts of the harassment response system (Hibino, 1996; Palomino, 1991, 1992, 1994a, b), unclearly articulating policies and procedures such as timeframes, investigatory steps, the informal complaint process, recordkeeping requirements, and the range of remedies (Hibino, 1996, 1994; Kallem, 2004; Love, 2003; Palomino, 1991, 1994b; Scott, 2001;), and not following the school's own procedures (Scott, 2003).

More substantively, OCR has found the following institutional responses to be inconsistent with or in violation of Title IX's regulations in cases involving peer sexual violence:

- Failing entirely to provide policies and procedures that victims can use to complain about harassment or providing too many complicated, conflicting and burdensome complaint procedures (Hibino, 1994; Palomino, 1994a; Shelton, 1993).
- Failing to treat rape and sexual assault as a Title IX matter (Deering, 1996; Palomino, 1994a; Shelton, 1993).
- Failing to take any steps to respond to harassment or prevent harassment from recurring (Furr, 2007; Lewis, 1993).
- Failing to inform victims of their options for redress (Hibino, 1994; Palomino, 1994a).
- Actively discouraging victims from naming their harassers (Palomino, 1994a).
- Requiring victims to confront their harassers before filing a complaint (Hughes, 2008).
- Failing to address victims' safety concerns (Hibino, 1994; Palomino, 1994b).
- Unjustifiably delaying responses to and investigations of complaints (Furr, 2005; Hibino, 1994; Love, 2003; Palomino, 1994b).
- Deferring to criminal investigations rather than conducting an independent investigation by school officials (Hibino, 1994; Lewis, 1993).

- Inadequately investigating and/or tainting investigations through bias, lack of objectivity, or asking victims inappropriate and humiliating questions (Furr, 2005; Palomino, 1994a, b).
- Keeping incomplete files on investigations and not making credibility determinations regarding the victim's and harasser's stories (Palomino, 1991).
- Providing informal complaint processes that lack structure (Palomino, 1994a).
- Giving more procedural rights to the accused than to the accuser in a fact-finding hearing/proceeding (Jackson, 1995; Palomino, 1994b).
- Prohibiting victims from being accompanied by an attorney (Palomino, 1991).
- Placing additional evidentiary burdens on sexual assault victims (Hibino, 2003).
- Using a "clear and convincing evidence" instead of a "preponderance of the evidence" standard, as required by Title IX (Goldbecker, 2004; Jackson, 1995).
- Failing to discipline students for harassment (Hibino, 1994; Shelton, 1993).
- Giving overly lenient sanctions to harassers and not providing sanctions designed to end the harassment (Palomino, 1994a, b).
- Failing to notify victims of outcomes and sanctions imposed on harassers and disciplining victims for re-disclosing information about disciplinary sanctions imposed on harassers (Gallagher, 2005; Kallem, 2004; Palomino, 1991, 1994a).
- Not providing adequate training to designated employees (Palomino, 1994a; Hibino, 1994, 1995; Scott, 2001).

Both the *Revised Guidance* and the LOFs/CTRs surveyed here echo insights from the Title IX case law and the Clery Act. For example, once a school has notice of harassment, it must "take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again." Schools must respond to notice of harassment in some way "whether or not the student who was harassed makes a complaint or otherwise asks the school to take action," although schools should make every attempt not to compromise the victim's confidentiality (Office for Civil Rights, 2001, pp. 15–17).

Also like the case law, the *Revised Guidance* takes a “victim-centered” approach. It specifies that schools may need to take interim measures during the investigation of a complaint and that “[r]esponsive measures . . . should be designed to minimize, as much as possible, the burden on the student who was harassed.” Schools should “take steps to prevent any further harassment” and may “be responsible for taking steps to remedy the effects of the harassment,” especially if they delay responding or respond inappropriately to the initial harassment. Schools should remember to protect the victim, the complainant, and any witnesses from retaliation following a report (Office for Civil Rights, 2001, pp. 15–17). Finally, schools should establish “prompt and equitable grievance procedures” to investigate and resolve cases (Office for Civil Rights, 2001, pp. 19–21), including that accuser and accused must be given substantially equal procedural rights in fact-finding hearings or similar proceedings, including to an attorney or advocate if one is provided or allowed to either student. Also, such hearings or proceedings must use a “preponderance of the evidence” standard, as the closest standard of proof to an even playing field.

This approach is consistent with findings OCR has made in its investigations. In one case, OCR found that while the school had promptly investigated, responded, and disciplined a teacher for harassing a student, it had not attended to the student survivor’s emotional and educational needs (Turnbull, 2004). In another, OCR cited approvingly to the school’s immediate transfer of the alleged perpetrator out of the dormitory in which the victim also lived, as well as the steps it took to assist the survivor emotionally and academically (Turnbull, 2007).

Finally, several OCR cases have dealt with “prompt and equitable grievance procedures.” In a teacher–student harassment case, OCR required the school to change hearing procedures that allowed the professor but not the student to influence the composition of the fact-finding panel and to present evidence to the panel (Jackson, 1995). OCR has also required at least two schools to change their “clear and convincing evidence” to a “preponderance of the evidence” standard of proof (Goldbecker, 2004; Jackson, 1995). In another group of cases, OCR has required schools to change procedures where “[t]he focus of the entire process seems more on the accused than the accuser” (Kallem, 2004; Metroactive News and Issues, 1998) and the accused was given greater access to and opportunity to rebut evidence than were the accusers (Palomino, 1994a).

The Due Process Rights of the Accused

Given Title IX's and Clery's requirements, institutions' responses in these cases almost inevitably must involve the student accused of perpetrating peer sexual violence. The laws applicable to institutions' powers to discipline students have long recognized that those accused of misconduct in school have certain due process rights. Therefore, it is important to understand what the law requires in terms of an institution's treatment of an alleged perpetrator in order to get a full picture of proper and legal school responses to campus peer sexual violence. Fortunately for schools, the case law on how institutions must treat accused students allows schools to meet the requirements of Title IX and Clery without running afoul of accused students' due process rights.

Institutions' obligations to accused students depend on a variety of factors, including whether the school is private or public, what state laws apply,¹¹ and what kind of disciplinary action is contemplated. All accused students have some due process rights; the variation is in "what process is due" (Morrissey, 1972, p. 481).

Disciplinary action that could result in expulsion from a public institution carries the heaviest burden for the school. Although the Supreme Court has never decided a case involving expulsion from a public institution, in *Goss v. Lopez*, the court considered a 10-day suspension of a group of students from a public high school. Some of the students were involved in a series of demonstrations and protests that involved some destruction of school property, but some of the students suspended claimed to be innocent bystanders and were suspended without a hearing (Lopez, 1975, p. 570). The Court decided that the students had both property and liberty interests, and since "[t]he *Fourteenth Amendment* forbids the State to deprive any person of life, liberty, or property without due process of law," the students were entitled to due process consisting of "some kind of notice and [] some kind of hearing" (Lopez, 1975, p. 579).

The *Lopez* Court cited approvingly to *Dixon v. Alabama State Board of Education*, where the 5th Circuit Court of Appeals defined what was required for cases involving expulsion (Lopez, 1975, p. 576). *Dixon* involved a group of students who were expelled from the Alabama State College for Negroes for unspecified misconduct and without a hearing but after they had all participated in a sit-in at an all-white lunch counter in Montgomery (Dixon, 1961, p. 152). In its opinion, the 5th Circuit set forth the requirements for due process before a state institution can

expel a student, including notice of the charges, witnesses, and facts and a hearing, “[t]he nature of [which] should vary depending upon the circumstances of the particular case.” In the case of a charge of misconduct, the hearing must “give[] the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail” and the charged student an opportunity to present “his own defense against the charges and to produce either oral testimony or written affidavits of witnesses in his behalf” (Dixon, 1961, pp. 158–159).

Both *Lopez* and *Dixon* were careful to specify that these requirements fell short of “a full-dress judicial hearing, with the right to cross-examine witnesses. . . [which] might be detrimental to the college’s educational atmosphere and impractical to carry out” (Dixon, 1961, p. 159). In *Lopez*, the Court makes clear that it was not “construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident” (Lopez, 1975, p. 583).

Thus, even public institutions seeking to expel a student for misconduct are not required to provide the full panoply of due process rights that must be provided to a criminal defendant. For private institutions, the requirements are even less onerous. While courts have reviewed private institutions for expelling or suspending students in an arbitrary and capricious manner (Abbariao, 1977; Ahlum, 1993; Coveney, 1983; Rollins, 2001), most courts review private institutions disciplinary actions under “the well settled rule that the relations between a student and a private university are a matter of contract” (Dixon, 1961, p. 157). Therefore, private schools are mainly bound by their own policies and procedures regarding student discipline, which constitute the “contract” with the student (Fellheimer, 1994; Hernandez; 1999; Schaer, 2000; Trzop, 2004).

In a representative selection of cases where students have challenged expulsions,¹² courts have upheld expulsions for a wide range of student behaviors, including ones where reasonable people might disagree as to whether the underlying offense warranted expulsion. These include:

- students leaving false bomb threat notes in a school bathroom (A.B., 2006),
- “peeping” under women’s skirts at a university library (Cloud, 1983),

- smoking (Flint, 1975),
- participating in but withdrawing, prior to discovery, from a conspiracy to enter the high school with guns and shoot several students and school officials (Remer, 2002),
- “discipline problems” (which plaintiffs alleged were a pretext for retaliation against the student’s parents for objections they made to the school’s curriculum) (Gaston, 1998),
- drinking beer in the school parking lot (G.W., 2000),
- attempted possession of a controlled substance (Flaim, 2005),
- possession of marijuana (Keys, 2000),
- possession of a pellet gun (Rogers, 2001),
- brushing a teacher’s buttocks with the back of a hand on two occasions (Brown, 2007),
- Attacking and striking other students in the halls of the school (Linwood, 1972),
- Engaging in consensual sexual activity on school grounds (B.S., 2003),
- Possession of a gun in a college dormitory room (Trzop, 2004),
- Engaging in a series of misbehavior including slashing a teacher’s tires and selling illegal steroids (Hernandez, 1999),
- Shooting a classmate in the back with a BB gun (S.K., 2005), and
- Trying to keep two female students from entering their dormitory room, where the plaintiff was found with two other male students and the female students’ inebriated, unconscious, and half-naked roommate (Coveney, 1983).

Like with expulsion cases, courts have refused to use the reviewing process as an excuse to overturn school actions in peer sexual violence cases as well. Significant research on this point has discovered no cases where a court has overturned a school’s decision to sanction a student for peer sexual violence and awarded the student monetary compensation. In contrast, courts have rejected challenges to the admissibility of certain witnesses and evidence (Brands, 1987, p. 632; Cloud, 1983, p. 724; Schaer, 2000, p. 380), the right to know witnesses’ identities and to cross-examine them (B.S., 2003, p. 899; Coplin, 1995, p. 1383; Gomes, 2005, p. 23), and the rights to an attorney (Ahlum, 1993, p. 100; Coveney, 1983, p. 140), discovery (Gomes, 2005, p. 19), voir dire (Gomes, 2005, p. 32), and appeal (Gomes, 2005, p. 33). They have also allowed a victim to testify behind a screen (Cloud, 1983, p. 724; Gomes, 2005, p. 29), and, in

general, they consistently reiterate the distinction between disciplinary hearings and criminal or judicial proceedings (Brands, 1987, p. 632; Gomes, 2005, p. 17; Granowitz, 2003, p. 355; Ray, 1995, p. 712; Schaer, 2000, p. 381). Even where courts find procedural violations, they generally allow schools to fix the procedural violation rather than awarding monetary damages to the accused student (Fellheimer, 1994, p. 247; Marshall, 1980).

Moreover, these cases demonstrate that institutions may even take actions prior to notice and a hearing without running afoul of due process requirements. Indeed, *Lopez* itself acknowledges that it might be necessary for a school to act quickly and prior to notice and a hearing under certain circumstances: “Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable” (Lopez, 1975, pp. 582–583). Courts have relied on this language to allow institutions to take measures protecting accusers. For instance, several courts have made it clear that schools may protect accusers and witnesses by allowing them to submit witness statements instead of appearing at the hearing (B.S., 2003, p. 899; Coplin, 1995, p. 1383; Gomes, 2005, p. 23). In doing so, they have recognized that such measures protect students who report misconduct from retaliation (B.S., 2003, p. 901). In addition, in cases of peer sexual violence, courts have supported institutions taking immediate action and suspending or otherwise separating accused students prior to notice and a hearing (Brands, 1987, p. 632; Jensen, 1999, p. 1272; J.S., 2005, pp. 677–678).

Recommendations and Conclusion

An ongoing case at Ohio State University (“OSU”) resulting from allegations that one male student sexually assaulted two female students within weeks of each other illustrates to some extent the current legal climate related to campus peer sexual violence. The two alleged assaults took place in February of 2002, and in February of 2004 the survivor of the second sued the university, alleging violations of Title IX under the *Davis* line of cases discussed above. The university was granted summary judgment by the court in the university’s favor in

September 2006 (Ohio State Univ., 2006). Security on Campus filed a complaint alleging that the university had violated Clery's reporting provisions on March 29, 2004, and on December 20, 2006 DOE found the university in violation of Clery for underreporting, incomplete and untimely reporting, and failure to issue timely warnings of campus crime (Carter, 2004a; Jaros, 2006). Not even a month before the Clery complaint was resolved, a second complaint was filed, calling on OCR to direct the university to adopt a preponderance of the evidence standard in disciplinary proceedings (Security On Campus, 2006). The resolution of the OCR complaint has not been published and, presumably, is still ongoing.

The expense of responding to charges of legal violations comes from two sources. The first is incurred when the charges are made, whether through courts or administrative agencies, and the institution must spend money to defend its actions and cooperate with an investigation. The second comes if and when an institution loses or feels compelled to settle a case. Although it is undoubtedly more difficult to avoid the first kind of cost, the second is quite avoidable and the likelihood of winning or losing is a factor that smart lawyers and parties on both sides will consider before bringing a claim or crafting a defense strategy. And, of course, the best option for avoiding both kinds of costs is to act from the beginning in accordance with the law.

In the past, colleges and universities have been concerned about incurring both kinds of costs as a result of lawsuits by students accused of peer sexual violence who have been disciplined and feel they have been mistreated by the institution. The legal analysis above demonstrates that, while these students have the power to subject an institution to the first kind of cost listed above, the high unlikelihood of their winning a lawsuit means that they will not be successful in forcing schools to pay the second kind of cost. In addition, it gives any institution's attorney powerful arguments to dissuade the suit altogether.

In contrast, the OSU case shows that institutions are in a much less favorable position vis-à-vis survivors suing for mishandling of their campus peer sexual violence cases. Although the OSU student survivor did not prevail in her private suit under Title IX, and the Clery violations were not egregious enough to result in a fine, OSU has been litigating and/or cooperating in an investigation for 5 years now. Even aside from monetary damages, seven-figure settlements, or DOE fines, it is an expensive endeavor to pay the legal fees to

litigate a case and to pay staff to assist in and cooperate with an investigation.

Thus, there appears to be significant truth to the idea that statutes like Title IX and the Clery Act are giving colleges and universities incentives to pay attention to victims' rights and to encourage rather than discourage reporting (Rosenfeld, 2008, p. 421). It is clear that the best method for avoiding the many costs demonstrated by the OSU case is proper handling of campus peer sexual violence cases, and proper handling involves victim-centered responses that encourage reporting. Schools that seek to discourage reporting and do not adopt institutional responses that protect basic victims' rights do so at their own legal and budgetary peril. By encouraging their institutions to develop more victim-centered responses to campus peer sexual violence, advocates for women in higher education can respond to the current legal environment, properly confront the problem of campus peer sexual violence, and help their institutions avoid liability. Therefore, this paper concludes with some recommendations for schools and advocates about institutional responses to campus peer sexual violence that comport with the current victim-centered, report-encouraging legal climate.¹³

First and foremost, being victim-centered means listening carefully to victims/survivors, taking seriously what survivors say they want and need, addressing the significant barriers to helping survivors, and allocating the institutional resources to accomplish all of the goals. The vast majority of the reasons survivors give for not reporting demonstrates their lack of faith in the existing responses and their attempt to avoid the negative consequences that they believe will come of reporting. Because the barriers are serious and, even if they were not, survivors' perceptions of them make them serious, institutions need to put serious resources towards overcoming the barriers. This conclusion is heavily implied by the millions of dollars allocated to the campus grant program created by the Violence Against Women Act. Therefore, institutions should create and fully fund an office within the institution that can both assist survivors and assist the institution. This office can act as both an all-around resource to survivors, providing a safe and central place to report and to access the range of services survivors need, and an expert within the institution who can help it assess and change policies and procedures, train other staff, and make sure survivors' concerns are heard and addressed in decision-making circles.

Second and related to the above, many institutions need to change fundamentally the institutional processes that respond to campus peer sexual violence cases and to stop imitating the criminal justice system in crafting those processes. Those who have researched and worked on campus peer sexual violence cases and with survivors already have a good sense of what processes will encourage survivors to enter the system and meet their needs once they get there, and it is clear that the processes used by the criminal justice system do not meet the vast majority of survivor needs and do not encourage survivors to report. The current state of the law that applies to institutional responses to campus peer sexual violence reflects and responds to these lessons. In general, we have learned that school processes not only do not need to imitate the criminal justice system, but that doing so opens institutions up to greater liability. For these reasons, institutions are not only able but actually required to provide “interim measures” to meet a survivor’s needs prior to any disciplinary proceeding and to structure their disciplinary proceeding in a way that puts the accusing and accused students on an even procedural footing.

“Interim measures” refers to various steps that institutions can take to allow a survivor to stay in school following the violence, regardless of whether the survivor seeks redress through a campus disciplinary process or the civil or criminal justice systems, and even if those measures affect the accused student prior to or without that student being found responsible for perpetrating sexual violence. These measures include such methods as changing class schedules and living arrangements, issuing stay-away orders, and swiftly responding to any retaliation or further harassment that may be directed at a survivor after a report. Resistance to undertaking such measures prior to or in the absence of a disciplinary proceeding is inappropriate in that it proceeds from “innocent until proven guilty” concepts drawn from the criminal justice system. As the preceding analysis demonstrates, criminal law and procedure are largely inapplicable to campus peer violence, and the law that does apply, including Title IX, Clery, and court rulings on disciplining student misconduct, allows or requires institutions to take interim measures when survivors seek them.

Should a survivor wish to initiate disciplinary proceedings through the institution’s system, procedures can and should once again draw from the applicable law and not the world of criminal law and procedure. For this reason, accusing and accused students should be given the same

procedural rights and, generally, given as much ability to control their own cases as possible. Any “rights” given in a disciplinary system to either the accused or accusing student should be provided to the other student, and “preponderance of the evidence” should be the standard of proof used. Furthermore, each student should be provided with a trained advocate who can help the student access and use these “rights” and have vis-à-vis this advocate all the powers and rights a client would have with her attorney. This is very different from the criminal justice system, where victims of crimes are not parties to a case but are merely witnesses and therefore have fewer rights than the defendant and often do not have an advocate representing their interests unless they know to employ one at their own expense.

It is important to remember the reasons why the criminal justice system is not a good place from which to draw processes and procedures for campus peer sexual violence cases. Through the criminal justice system, the state has the power to levy harsh punishments like imprisonment and death that implicate fundamental constitutional and human rights like liberty. Criminal procedural rules such as the “beyond a reasonable doubt” standard of proof are used with this context in mind. In contrast, a college or university may at most expel a student and, even if that student cannot find another school that will admit him, U.S. law does not currently recognize a constitutional right to an education, especially not higher education (Rodriguez, 1973). Given the relative powers and rights involved, it makes sense that the systems look different and the law defines the relevant legal rights and obligations differently. Therefore, in order to be more victim-centered in general, institutions should get out of the criminal law mindset.

“De-criminalizing” procedures and becoming more victim-centered in general is about more than just avoiding liability, although that is a powerful incentive all on its own. The incidence of campus peer sexual violence is staggering and deeply upsetting, and our ultimate goal must be to reduce and eliminate the violence itself. Because it is clear that we need victims/survivors’ cooperation to break the cycle of nonreporting and violence, becoming more victim-centered in our institutional approaches and listening carefully to survivors is imperative even aside from what the law says. The fact that the law in this case is helping to achieve this overarching goal just provides those who want to stop the violence with another tool to achieve this vital objective.

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Endnotes

1. A note about language: I will use “victim” and “survivor” interchangeably to refer to people who claim they have been victims of sexual violence. Therefore, “victim” is not a term of art used to indicate a finding of responsibility for sexual violence. I may use “accuser” when discussing the role of the victim/survivor in a disciplinary proceeding. I will use “perpetrator” or “assailant” when someone accused of sexual violence has been found responsible or in discussions where it can be assumed the person perpetrated the sexual violence, such as statistical analyses. I will use “accused” or “alleged” to indicate when I am referring to those who have been charged but not found responsible for committing sexual violence. Finally, I will use female pronouns to refer to victims because the majority of victims are women, and male pronouns to refer to perpetrators and accused students because the majority of perpetrators and accused students are men. I use “sexual violence” instead of terms such as “sexual assault” or “rape” because in my view “sexual violence” is a broader, descriptive term that is, once again, not a term of art, and which I regard to include a wider range of actions that may not fit certain legal or readers’ definitions of “sexual assault” or “rape.” The term therefore includes “sexual assault” or “rape,” as well as other actions involving physical contact of a sexual nature that may not always fit everyone’s definition of “sexual assault” or “rape.” While I acknowledge that nonphysical actions can constitute violence, including those forms of violence is outside the scope of this paper.

Finally, I use “school” and “institution” to identify either K-12 schools or higher education institutions, although I use “college,” “university,” “campus,” or “higher education” to refer to

the latter category of schools. I use “school” most frequently when discussing Title IX, which does not generally distinguish between K-12 and higher education.

2. Although some of the studies that are cited here are somewhat old, they are included for two reasons. First, they are the most recent studies that have been completed on this topic. This is particularly true for the 2000 report, *The Sexual Victimization of College Women*, which is the last nation-wide, comprehensive study to be completed on the topic of sexual assault on college campuses. Second, the findings of the older studies are quite consistent with the most recent ones, including one from 2007, even when the studies have been conducted in different decades. This indicates that the findings of older studies are still valid in terms of what we see today.
3. This survey is taken from the Educator’s Guide (Hicks, 2008, app. IV), which contains one of the most comprehensive collections of sexual harassment cases and OCR LOFs/CTRs dating back to the mid-1980s.
4. LOFs/CTRs are generally only available to the general public if members file a Freedom of Information Act request. Court opinions, involving claims of peer sexual harassment are more accessible, but, most published court opinions deal with whether the court hearing the case will allow the claim to be decided by a jury or will dismiss it because it fails to reach a legal standard such as stating a claim covered by the law or presenting sufficient evidence to create a factual question a jury must decide. In general, defendant schools in Title IX cases want a case dismissed before it goes to a jury, since the jury can ultimately award monetary damages.
5. These cases only include cases where the harassment constituted sexual violence according to the definition in footnote 1 and where the court discussed and decided the issue of deliberate indifference.
6. The cases discussed here draw from case law involving both secondary schools and colleges and universities, since Title IX does not draw distinctions between these two kinds of institutions (Office for Civil Rights, 2001, p. 2).
7. Although *Ross v. Mercer University* found that a female student who was drugged and raped by a male student had not shown the discrimination she suffered to be severe, pervasive, or objectively

offensive, this case appears to be unusual. The court did find the school to have been deliberately indifferent (Ross, 2007, p. 1357).

8. *Rost v. Steamboat Springs RE-2 Sch. Dist.* (2008) appears to come to a different conclusion on this point, but appears to be an outlier case.
9. In *Wilson* (2001), the teacher physically segregated the perpetrator from the rest of the class, and the principal transferred the alleged perpetrator to another school; in *Gabrielle M.*, school officials moved the harasser to another class after the second incident; in *Clark*, both students were moved to separate classes after one touched the other's buttocks twice; and in *Staebling*, "the perpetrator was taken off the bus and ultimately sent to another school."
10. Here, two cases, *C.R.K. v. U.S.D. 260 Bd. of Educ.* (2001) and *Snethen v. Bd. of Public Educ.* (2008), go against the overwhelming weight of authority.
11. Although there is state law variation on the victim's side of things, too, state laws establishing claims for survivors are *in addition to* the federal legislative schemes discussed above. In contrast, for the accused, state law is central.
12. The cases discussed here were drawn mainly from 3–9 EDUCATION LAW § 9.09, the section on student discipline law from an education law treatise. They are not intended to be comprehensive, but merely to give a sense of the range of student misconduct cases in which courts have upheld expulsions.
13. These recommendations not only comport with the law, but also with the best practices that have been generated in this area by such entities as the Office on Violence Against Women ("OVW") in the Department of Justice, which selects recipients for and administers the Grants to Reduce Domestic Violence, Dating Violence, Sexual Assault and Stalking on Campus authorized by the Violence Against Women Act (OVW, 2009), criminologists and researchers who study campus peer sexual violence and school responses to it, college and university attorneys and experts on student disciplinary systems, and victim's rights attorneys and advocates. These best practices and the recommendations listed here are discussed in more detail in my *Journal of College and University Law* article (Cantalupo, 2009, pp. 665–673, 680–689).