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Recommended Citation
Naomi M. Mann, *Forging a Future Title IX* , *in* 103 Boston University Law Review Online 121 (2023).
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FORGING A FUTURE TITLE IX

NAOMI MANN*

Title IX is in transition. Fifty years after its passage, Title IX is at the center of multiple culture wars, notably those around the definition of sex[1] and the contours of due process[2] in schools. Since 2011, the federal Department of Education ("ED") has issued multiple guidance documents, containing widely divergent obligations for schools.[3] In the last decade, the meaning of Title IX has been highly contested, appearing sometimes more dependent on the administration in power than on the statute's text and purpose.[4] This pendulum swing has diverted attention away from Title IX's core goal: equal access to education based on sex.

Title IX's fiftieth birthday is an ideal moment to step back from the culture wars and reflect on what the future could, and should, hold for Title IX. How can we effectuate Title IX's promise of equal education under law? How do we marry the promise of a statute written fifty years ago with the reality of today,

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* Clinical Associate Professor of Law. Thanks to Renee Burbank, Nancy Chi Cantalupo, Rachel Camp, Tianna Gibbs, and Tammy Kuennen for their invaluable comments. Thank you to Alison Balian for incredible research assistance. A special thanks to Linda McClain for her partnership in the Symposium and to Julie Antonellis and Prasanna Rajasekaran of the Boston University Law Review for all of their hard work on the Symposium.

[1] *Compare* Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637 (June 22, 2021) (stating that the Department's enforcement authority on "sex discrimination" under Title IX extends to discrimination based on sexual orientation and discrimination based on gender identity per the Supreme Court's decision in *Bostock v. Clayton County*), *with* Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807, 842 (E.D. Tenn. 2022) (in which the Department was preliminarily "enjoined and restrained from implementing" the Notice of Interpretation against twenty states).

[2] Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivors' Interests and the* Mathews *Analysis*, 43 HARV. J.L. & GENDER 319, 333-34 (2020) ("Although 'due process' has become the battle cry of the respondents' rights movement, the content of that battle cry does not match the meaning of due process as determined by the courts." (footnotes omitted)); Naomi Mann, *Classrooms into Courtrooms*, 59 HOUS. L. REV. 363, 401-09 (2021) (detailing the due process distortion in the education context). Other scholars have noted that procedural due process is sometimes defined in a different manner in the Title IX education context. *See, e.g.*, Lesley Wexler, *2018 Symposium Lecture: #MeToo and Procedural Justice*, 22 RICH. PUB. INT. L. REV. 181, 182 (2019) (describing colloquial due process as "non-legal or colloquial invocation of due process" that attempts to root itself in notions of fairness).

[3] Mann, *supra* note 2, at 374-386 (detailing the shifting obligations from the Obama administration to the Trump administration).

[4] *Id.* at 367.

one in which definitions of sex and what constitutes discrimination have so radically changed? Additionally, how can a civil rights statute that tackles discrimination one identity at a time, here sex,[5] remedy the intersectional harms that are endemic within the educational system? In this essay, I focus on these questions through the lens of Title IX, sexual assault, and the obligations placed on post-secondary schools ("schools").

I. BACKGROUND

Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[6] Title IX applies to most educational institutions in the United States, as all public schools and most private schools receive some form of federal funding.[7] Sexual assault is covered by Title IX as it is a form of sex discrimination.[8]

The prevalence and harms of sexual assault in schools has been amply discussed and documented.[9] While the major studies on the prevalence of sexual assault in the post-secondary context have tended to focus solely on the axis of biological sex, studies are emerging which show higher rates and vulnerabilities

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[5] While the text of Title IX says "sex," per the decision in *Bostock*, the term "sex" should be read to include gender identity and sexual orientation. *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1754 (2020) (reading the term "sex" in Title VII to include gender identity and sexual orientation); Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637 (June 22, 2021). When talking about Title IX, I use the statutory language of "sex" but use it to be inclusive of gender identity and sexual orientation per *Bostock*.

[6] 20 U.S.C. § 1681(a).

[7] The term "receiving federal financial assistance" has been broadly interpreted and includes even the receipt of federal financial aid by students attending an educational institution. *See* Grove City Coll. v. Bell, 465 U.S. 555, 564 (1984) (Title IX "appears to encompass all forms of federal aid to education, direct or indirect" (quoting Grove City Coll. v. Bell, 687 F.2d 684, 691 (3d Cir. 1982))); Haffer v. Temple Univ., 688 F.2d 14, 17 (3d Cir. 1982) (finding that because the university "as a whole" received federal money, "its intercollegiate athletic department" was governed by Title IX).

[8] Nancy Chi Cantalupo, *Decriminalizing Campus Institutional Responses to Peer Sexual Violence*, 38 J. COLL. & U. L. 481, 491 (2012).

[9] DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT vii (Ass'n of Am. Univs. ed., 2020) ("The overall rate of nonconsensual sexual contact by physical force or inability to consent since the student enrolled at the school was 13.0 percent . . . ."); *see also* BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 10 (U.S. Dep't of Just. ed., 2000) (finding a sexual assault rate of 27.7 per 1,000 female students); CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY xii (U.S. Dep't of Just. ed., 2007) ("Of the [surveyed] women, 28.5% reported having experienced an attempted or completed sexual assault either before or since entering college.").

for individuals also holding other marginalized identities.[10] Sexual assault has serious deleterious consequences for affected students' educational experience and success, with impacts ranging from a drop in grades to reduced graduation rates.[11] These impacts are further affected by marginalization, with "greater impact on women and girls of color,[12] disabled women and girls, and LGBTQI+ students . . . due to bias and stereotypes that label them as blameworthy, less credible, and less deserving of protection."[13]

These long-term deleterious effects are coupled with underreporting[14] of sexual assault. Sexual assault has long been underreported in both the criminal and educational contexts, for reasons including doubts about survivors' credibility[15] and institutional betrayal. Institutional betrayal[16] is a dynamic wherein an institution (here a school), betrays an individual's (here the student's) trust in their role as a protector-institution by acting in ways that retraumatize the student, such as discouraging reporting, making reporting difficult, delaying adjudications and/or minimizing sexual assault accusations.[17] In this way, some schools have at times contradicted their duty to protect students, or at least their

[10] Mann, *supra* note 2, at 390-96 (detailing such studies); Naddia Cherre Palacios & Karla L. Aguilar, *An Empowerment-Based Model of Sexual Violence Intervention and Prevention on Campus*, in JESSICA C. HARRIS & CHRIS LINDER, INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS 194, 200 (Jessica C. Harris & Chris Linder eds., 2017) ("[S]tudent victims who identify as transgender, genderqueer, nonconforming, and questioning (TGNQ) report the highest rates of sexual violence and intimate partner violence, especially those belonging to racial minorities." (citation omitted)).

[11] KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 1-3 (2017).

[12] In using identity categories, I do not mean to essentialize any one of these identities or imply that everyone who is ascribed or self-identifies with any of these identities is the same. *See* Jessica C. Harris, *Centering Women of Color in the Discourse on Sexual Violence on College Campuses*, in INTERSECTIONS OF IDENTITY, *supra* note 10, at 46 (explaining use of the term "women of color," despite risk of essentializing, given the importance of the term as a way to build solidarity).

[13] Shiwali Patel, *Fulfilling Title IX's Promise Through the SAFER Act*, 103 B.U. L. REV. ONLINE 25, 27 (2023) (citing Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. & GENDER 16, 17, 24-29 (2018)).

[14] *See* FISHER ET AL., *supra* note 9 (finding that less than 5% of survivors of completed or attempted rapes were reported to law enforcement); *see also* CALLIE RENNISON, CRIMINAL VICTIMIZATION 2001: CHANGES 2000-01 WITH TRENDS 1993-2001 10 (U.S. Dep't of Just. ed., 2002) (illustrating the much lower reports of sexual assault in contrast to other crimes).

[15] DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS, 3-5 (Harper Wave ed., 2021) (detailing how the credibility complex in law and culture discounts survivors' credibility and inflates the accused's credibility).

[16] Central to institutional betrayal is the concept that a "trusted and powerful institutions . . . act[ed] in ways that visit[ed] harm upon those dependent on them for safety and well-being." Carly Parnitzke Smith & Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCH. 575, 575 (2014).

[17] Mann, *supra* note 2, at 375-76 (discussing caselaw, school policies, and survivor accounts that illustrated schools' inequitable treatment of Title IX complainants).

legal obligation to ensure an equal access to education. The effects of institutional betrayal or inaction are long-term: "Violence—and institutional indifference in its wake—changes the courses of survivors' lives, with educational and employment consequences following them far into the future."[18]

The legacy of institutional betrayal, coupled with societal and legal biases against believing those alleging sexual assault,[19] create a conundrum in which while schools have the obligation to address sex discrimination in their institutions, they lack knowledge about the full contours of the sexual assault problem in their schools as students are not reporting to them. As Title IX scholar Nancy Cantalupo has pointed out, schools are disincentivized from increasing reporting as they will then face reputational impacts and increase their liability for this intractable problem.[20] The incentives need to be realigned so that more students report to schools in order for schools to address sex discrimination as it is occurring on the ground.[21]

Realigning incentives to increase reporting is a central component of a reimagined Title IX given that schools play a critical role in students' ability to continue their education after a sexual assault. Indeed, schools are often the sole actor capable of providing the remedies that a student needs to continue in school. While a student can obtain a restraining order in civil court or make a criminal complaint, only the school can enable the student to move dorms, change classes, and obtain education-related accommodations such as extensions on assignments.[22] Schools are thus uniquely positioned to help survivors of sexual assault continue to access their education. Fulfilling this role is challenging for a number of reasons, including the infusion of rape exceptionalism and the due process distortion into current models of Title IX implementation.

II. Current State of Title IX Administrative Rules

In prior work, I have critiqued the 2020 Rule for using two problematic lenses for Title IX implementation: rape exceptionalism and the due process distortion.[23] Rape exceptionalism, a term coined by Michelle Anderson, refers to the practice of imposing more onerous requirements on individuals who allege

[18] Dana Bolger, *Gender Violence Costs: Schools' Financial Obligations Under Title IX*, 125 YALE L.J. 2106, 2118 (2016).

[19] TUERKHEIMER, *supra* note 15, at 3-5 (detailing how the credibility complex in law and culture discounts survivors' credibility and inflates the accused's credibility).

[20] Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 219 (2011) (detailing how "schools that are ignoring the problem have fewer reports and look more safe [sic], whereas the schools that encourage victim reporting have more reports and look less safe").

[21] *Id.*

[22] Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 640 (2018).

[23] *See id.; see also* Mann, *supra* note 2.

sexual assault than on individuals who allege other criminal offenses.[24] Rape exceptionalism reflects a long history of the legal system placing both higher and different burdens on women's allegations of sexual assault. These burdens have reflected the bias that those alleging sexual assault are inherently less credible,[25] and therefore the law should take additional steps and care to insure the veracity of the allegations.[26] Rape exceptionalism is inextricably linked to dynamics of marginalization and discrediting of women, notably women of color.[27] It has disproportionately and differentially impacted individuals holding marginalized identities, "essentialize[d] who is allowed to be a survivor . . . and replicate[d] patterns of thinking that sexual assault only counts for certain groups of women."[28]

Officials in the Trump administration's ED indicated that they credited rape exceptionalism and its call to question the credibility of survivors: In the words of Candice Jackson, then-Acting Assistant Secretary of OCR, "the accusations—90 percent of them—fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[29] These beliefs are directly reflected in the fact that the 2020 Rule places higher burdens on complainants in Title IX cases alleging sexual harassment (including sexual assault) than on complainants under other civil rights statutes enforced by ED,[30] including by requiring that the student be

[24] Mann, *supra* note 2, at 387.

[25] TUERKHEIMER, *supra* note 15, at 3-5 (detailing how the credibility complex in law and culture discounts survivors).

[26] Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1973-76, 1998 (2016) (detailing procedural exceptionalism, or the practice of requiring additional legal procedures, for those who allege sexual assault.).

[27] *See* Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 106 (1983); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 602 (1990) at 598-99; Jason A. Gillmer, *Base Wretches and Black Wenches: A Story of Sex and Race, Violence and Compassion, During Slavery Times*, 59 ALA. L. REV. 1501, 1532 n.221 (2008) ("There is not a single published appellate decision in the South in the years before the Civil War involving a white man being prosecuted for raping a black woman. *Cf.* George v. State, 37 Miss. 316, 317 (1859) (discussing whether it was a crime for a black man to rape a black woman and holding that it was not).").

[28] E-mail from Kelsey Scarlett, Boston Univ. Sch. of L., to Naomi M. Mann, Clinical Assoc. Professor of L., Boston Univ. Sch. of L. (Oct. 8, 2021, 16:35 EDT) (on file with author); *see also* Angela P. Harris, *supra* note 27, at 598-601 (describing history of Black women's vulnerability to rape and lack of legal protection from slavery to twentieth century).

[29] Erica L. Green & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html [https://perma.cc/343K-LXZ9].

[30] *Compare* 34 C.F.R. § 106.44(a) (Title IX 2020 rule requiring "actual knowledge" of harassment"), *with Race and National Origin Discrimination: Frequently Asked Questions*, OFF. FOR C.R., U.S. DEP'T OF EDUC. https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/race-origin.html

subjected to adversarial cross-examination at a live hearing during the grievance process.[31]

Courts have traditionally been concerned not to impose a level of procedural due process on schools that would interfere with their core educational function. In *Goss v. Lopez*, the sole Supreme Court case to address non-academic discipline in the educational context, the Court cautioned against the administrative burden that even truncated trial-like processes could cause for schools.[32] This concern was echoed in *Jaksa v. Regents of University of Michigan*, where the court asserted, "[w]hile a university cannot ignore its duty to treat its students fairly, neither is it required to transform its classrooms into courtrooms."[33]

However, under the procedural due process distortion, which started in opposition to the Obama administration's guidance documents[34] and gained traction during the Trump administration, advocates have argued for the full panoply of criminal law procedural due process rights to be applied in the context of an educational disciplinary proceeding involving sexual assault.[35] There is no question that school disciplinary processes should be fair, that all students rights should be respected, and that procedural due process rights do attach to *public* educational institutions.[36] However, the scale of due process rights due in a given context is tied to the nature and level of the deprivation. The maximum sanction a school can impose is that of expulsion. While this is certainly a serious consequence, it is qualitatively different than the potential sanction in the criminal context of a loss of liberty or life and therefore the rights that should attach are properly qualitatively different.[37] Those arguing for the due process distortion conflates the potential criminality of sexual assault with

[https://perma.cc/367P-Y3Q7] (last modified Jan. 31, 2023) (explaining that an educational institution has a responsibility to take action under Title VI "[w]hen [it] knows or reasonably should know of possible racial or national origin harassment").

[31] 34 C.F.R. § 106.45(b)(6)(i) (stating that postsecondary institutions "must provide for a live hearing" and "[s]uch cross-examination at the live hearing must be conducted directly, orally, and in real time").

[32] Goss v. Lopez, 419 U.S. 565, 583 (1975) ("Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness.").

[33] 597 F. Supp. 1245, 1250 (E.D. Mich. 1984), *aff'd*, 787 F.2d 590 (6th Cir. 1986).

[34] Mann, *supra* note 22, at 634-36.

[35] *Id.*

[36] *See* U.S. CONST. amends. V, XIV (providing that neither the state nor the federal government shall deprive any person "of life, liberty, or property, without due process of law"). The Fourteenth Amendment's due process clause applies only to state action, meaning that only state schools, and not private schools, are covered by its requirements. *See* Plummer v. Univ. of Hous., 860 F.3d 767, 773 (5th Cir. 2017) (explaining that "due process requires notice and some opportunity for hearing . . . at a tax-supported college" (quoting Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 158 (5th Cir. 1961))).

[37] Mann, *supra* note 22, at 667-68.

the need for criminal due process in the entirely different setting of a school disciplinary proceeding. Additionally, they argue for this level of due process protection solely for sexual assault cases, not other cases that could implicate criminal consequences or have reputational concerns, thus displaying a clear connection to the tenets of rape exceptionalism.[38]

The 2020 Rule imposed a quasi-criminal courtroom process for school disciplinary proceedings involving sexual assault. When a student makes a complaint of sexual assault to the school and an informal resolution does not occur, the school must utilize a grievance process that includes (but is not limited to) the following court-based procedures: a live hearing, live adversarial cross examination, assessment of inculpatory and exculpatory evidence, assessment of relevant evidence, and assessment of acceptable contours for cross-examination questions at the live hearing.[39] While the Biden Administration's Notice of Proposed Rulemaking (NPRM)[40] made the significant change of moving the live hearing process from mandatory to permissive,[41] it also proposed continuing a number of quasi-courtroom procedures for complaints of sexual assault where an informal resolution is not being utilized.[42]

III. IMAGINING THE FUTURE

Depending on the eventual contours of guidance from the Biden administration and subsequent administrations, schools have important and potentially limited choices regarding how they can organize and structure their

[38] Michelle Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1985-86, 98 (2016) (noting that those who advocate for increased due process protection "must make the case for why respondents in campus sexual assaults should enjoy uniquely favorable rights—or make the case for increased process rights for all students accused of misconduct—neither of which, so far, they have done").

[39] 34 C.F.R. § 106.45(b)(6)(i) (stating that postsecondary institutions "must provide for a live hearing" and "[s]uch cross-examination at the live hearing must be conducted directly, orally, and in real time"); § 106.45(b)(1)(ii) (explaining that the grievance process must "[r]equire an objective evaluation of . . . inculpatory and exculpatory evidence"); § 106.45(b)(6)(i) (explaining that at the live hearing, "[o]nly relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant").

[40] The NPRM sets out the draft of the new Title IX guidance for public comment per the Administrative Procedure Act (APA).

[41] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41502-03 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter 2022 NPRM] ("Instead, proposed § 106.36(g) would permit, but not require, a postsecondary institution to hold live hearings.").

[42] *See e.g.*, 2022 NPRM 41419 (regarding relevant evidence, including inculpatory and exculpatory evidence and privileges); *id.* at 41577 ("[Students] may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney . . . . ").

disciplinary proceedings when an allegation of sexual assault involving a student complainant or respondent is made, and the students do not opt for an informal resolution process, or an informal resolution process is not deemed appropriate by the school.[43] In those instances, based on the 2022 NPRM, schools will continue to be required to mimic or replicate some aspects of courtroom procedure, including evidence rules[44] and use of advocates.[45] Importantly, however, the 2022 NPRM does not make the use of a live hearing mandatory; rather, a live hearing is permissive.[46] Assuming this provision stays, schools should carefully consider how to design their Title IX procedures with the option of using a less litigious procedure in mind. While from a liability perspective it may tempting to only hire lawyers to conduct and monitor disciplinary proceedings, lawyers are not always the best method for simplifying procedures and reducing animosity. In addition, school conduct codes are typically aimed at adherence to community standards and creation of a learning community,[47] goals which often run counter to the punitive courtroom model. When designing and implementing their disciplinary proceedings, schools should prioritize their educational mission in light of their obligation to provide an equal access to education based on sex.

Schools should also consider how to best utilize the informal resolution process. Under the 2001 Guidance, and the Obama administration's 2011 Dear Colleague Letter, mediation was deemed inappropriate in the sexual assault context,[48] a position echoed by some advocates commenting on the 2020 NPRM.[49] The 2020 Rule introduced the concept of "informal resolution," including mediation, as a possibility for addressing complaints of sexual

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[43] 2022 NPRM 41574.

[44] *See e.g.*, 2022 NPRM 41419 (regarding relevant evidence, including inculpatory and exculpatory evidence and privileges).

[45] *See* 2022 NPRM 41577 ("[Students] may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney").

[46] *See* 2022 NPRM 41578 ("A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing.").

[47] Letter from Ted Mitchell, President, Am. Council on Educ., to Suzanne B. Goldberg, Acting Assistant Sec'y, Off. For C.R. 3 (June 10, 2021) [hereinafter ACE Letter], https://www.acenet.edu/Documents/Comments-ED-OCR-Title-IX-Hearing-061021.pdf [https://perma.cc/N6VB-BXUB] ("Campuses can best respond to allegations of sexual assault by using processes that are part of, or at least align with, their institutional Student Codes of Conduct. These Codes Do Not, As A First Priority, Seek to Punish." (emphasis omitted)).

[48] *See* OFF. FOR C.R., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 21 (2001); OFF. FOR C.R., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER FROM RUSSLYNN ALI 8 (Apr. 4, 2011).

[49] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30400 (May 19, 2020) (codified at 34 C.F.R. pt. 106).

assault.[50] The 2022 NPRM extends informal resolution even to instances where a formal complaint has not been filed.[51] The informal resolution process opens important space for the use of restorative and transformative justice approaches, ones not dominated by a quasi-criminal courtroom process. As outlined by Kelsey Scarlett and Lexi Weyrick, transformative justice has important potential to "create space for an intersectional analysis in place of current disciplinary processes."[52]

Given that identity and marginalization directly impact the rate and contours of sexual assault at schools,[53] schools must start to take a truly intersectional approach to Title IX. Traditionally, schools and ED have addressed the problem of sexual assault from an "identity-neutral and power-evasive perspective."[54] Dominant social narratives around sexual assault on college campuses tend to focus on the single axis of white female survivors, and schools have often structured their response and prevention efforts around the concerns and assumptions embedded in this dominant narrative. Schools have thus often developed messaging on Title IX that "rarely examine[s] race, class, or sexual orientation in relationship to sexual violence."[55] This messaging in turn signals to marginalized students that the school is not taking their full identities into account when addressing sexual assault on campus.

Although the 2022 NPRM does not address intersectionality explicitly, ED should develop incentives for schools to develop intersectional analyses and approaches to sexual assault on their campuses. At a minimum, ED could take power and identity explicitly into account when conducting an investigation or a compliance review. In their Resolution Agreements and Letters of Finding, ED should explicitly discuss and analyze how power and identity played a role in the allegations, including how the school responded after a complaint was made. This is essential for ED and schools to start capturing the range of discrimination covered by Title IX. Otherwise, as scholar Angela Onwuachi-Willig has argued,

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[50] *Id.* at 30054.

[51] 2022 NPRM 41574.

[52] Kelsey Scarlett & Lexi Weyrick, *Transforming the Focus: An Intersectional Lens in School Response to Sex Discrimination*, 57 CAL. W. L. REV. 391, 428 (2021).

[53] Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 HARV. J.L. GENDER 1, 79 (2019).

[54] Devon W. Carbado & Kimberlé W. Crenshaw, *An Intersectional Critique of Tiers of Scrutiny: Beyond "Either/Or" Approaches to Equal Protection*, 129 YALE L.J. 108, 128 (2019) (describing a "single-axis" framework as an approach to antidiscrimination law that requires choosing race or gender, but not both, and recognizing that "[a]dvocates and stakeholders within discursive communities . . . routinely reproduce precisely the 'single-axis' frameworks that privilege and foreground group members whose narratives of injustice fit the either/or parameters of equality claims"); *see* Jessica C. Harris & Chris Linder, *Preface* to INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS 42 (Jessica C. Harris & Chris Linder eds., 2017) ("[T]he unilateral focus on white women obscures other student populations' experiences with sexual violence.").

[55] INTERSECTIONS OF IDENTITY AND SEXUAL VIOLENCE ON CAMPUS 176 (Jessica C. Harris & Chris Linder eds., 2017).

"the unique form of racialized sexism that women of color face routinely gets marked as outside of the female experience" because "the realities of white women's lives . . . still define the female experience."[56]

Schools should also question their traditional models for sexual assault prevention and response. Schools are not required to utilize the traditional legal model of addressing discrimination one identity at a time, in carefully constructed silos. When a student holding multiple protected identities makes a complaint, the school should not require that student to carve up their protected identities and file different complaints for each one. For example, a student who is a woman of color who files a discrimination complaint should be able to make a joint Title IX and Title VI complaint, rather than two separate complaints. That same student should not be required to allege for each act of discrimination what identity she primarily determines was its cause. Rather, schools should develop systems that enable them to address discrimination based on multiple protected categories at the same time, one that reflect the realities of how discrimination occurs on the ground for their students.

As schools move forward, into a Title IX that is hopefully less turbulent, there are some exciting opportunities for ED, and for schools to be creative in fashioning their approach. In the next fifty years, we must inquire what Title IX could be, in addition to what it already is. Just as Title IX has opened up new spaces in education for women, in the next fifty years ED and schools must endeavor to enforce and protect an intersectional Title IX that protects all students from discrimination based on sex.

[56] Angela Onwuachi-Willig, *What About #UsToo?: The Invisibility of Race in the #MeToo Movement*, 128 YALE L.J. 105, 111-12, 118-19 (2018).