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Implementing A Uniform Burden of Proof for Title IX Coordinators During the Investigation Stage: An Objective and Efficient Approach to Title IX

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NOTES

IMPLEMENTING A UNIFORM BURDEN OF PROOF FOR TITLE IX COORDINATORS DURING THE INVESTIGATION STAGE: AN OBJECTIVE AND EFFICIENT APPROACH TO TITLE IX

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INTRODUCTION

Imagine it is 1972. Congress just enacted Title IX of the Education Amendments, and it is signed into law by President Nixon.[1] For the first time in United States history, legislators recognize sex discrimination as a pervasive issue in educational environments. The law is enacted with the purpose of ending sex discrimination in college sports; for the first few years, that is the only purpose Title IX serves.[2]

Gradually, Title IX expands into the realm of sexual and interpersonal violence on college campuses. Yet despite the law's expansion, compliance with Title IX is neglected.[3] No entity actively monitors schools' compliance, and for decades navigating the complexities of filing a Title IX complaint proves difficult for even the brightest student.[4] For many years, the survivors of sexual and interpersonal violence go unnoticed.

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[1] *This Day In History June 23, 1972 Title IX Enacted*, HISTORY (Nov. 16, 2009), https://www.history.com/this-day-in-history/title-ix-enacted.

[2] *Id.*

[3] *See* THE HUNTING GROUND (Chain Camera Pictures 2015) (documentary depicting the retaliation and harassment sexual assault victims face on college campuses as they fight for justice).

[4] *Id.*

In 2006, Megan Wright, a freshman at Dominican College, reported being gang raped on her college campus.[5] Despite informing school authorities about the attack and getting a rape kit, her college refused to investigate, so Megan dropped out of college and subsequently took her own life.[6] In 2007, Annie Clark, a freshman at the University of North Carolina at Chapel Hill was raped within the first few weeks of school.[7] When she reported the assault to university officials, the school neither investigated nor responded to the report.[8] In 2012, Erica Kinsman had to wait twenty-four months for a conduct hearing while her rapist continued to play Florida State University football, all while his DNA matched her rape kit.[9] These women are just three of the thousands of survivors of sexual and interpersonal violence on college campuses over the past few decades who were ignored by their schools.[10]

It is now 2020. Every college and university in the country which receives federal funds is required by law to appoint a Title IX Coordinator to investigate all Title IX claims.[11] Colleges and universities are also required to conduct an investigation within a reasonable timeframe.[12] Since 2011, the Department of Education Office for Civil Rights ("OCR") has opened 502 investigations into college and university potential mishandling of Title IX claims of sexual assault.[13]

In the forty-eight years since its enactment, Title IX has grown into a powerful tool to combat sexual assault on college campuses. Despite this growth, there is still room for improvement. Over the past few years, colleges and universities in New York State have seen an increase in lawsuits filed by students against colleges and universities for improper expulsion

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[5] Cynthia McFadden, *Many Campus Assault Victims Stay Quiet, or Fail To Get Help*, ABC NEWS (Aug. 16, 2010), https://abcnews.go.com/Nightline/college-campus-assaults-constant-threat/story?id=11410988.

[6] *Id.*

[7] THE HUNTING GROUND, *supra* note 3.

[8] *Id.*

[9] *Id.*

[10] *See* CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 2-1 (Dec. 2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf.

[11] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT, 1–2 (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [hereinafter Q&A].

[12] *Id.* at 3.

[13] *Title IX: Tracking Sexual Assault Investigations*, CHRONICLE OF HIGHER EDUCATION, https://projects.chronicle.com/titleix/ (last visited Jan. 17, 2020).

under Title IX.[14] University disciplinary board determinations are sometimes overturned by appellate courts and perpetrators are reinstated as students on college campuses.

This Note will argue the recent uptick in lawsuits filed by students against colleges and universities in New York State for improper expulsion due to a Title IX violation is largely attributable to errors during the investigation stage of Title IX claims. Today, there is little to no data on the steps Title IX Coordinators are taking when investigating a Title IX claim. Moreover, there is no uniform burden of proof that Title IX Coordinators must satisfy before passing their investigatory findings on to an adjudication board. Therefore, Title IX Coordinators—tasked with the job of being objective fact finders—may be arbitrarily passing investigations on to an adjudication stage without properly and uniformly investigating the claims. Many disciplinary board determinations are not being overturned for improper application of the correct burden of proof during adjudication, but rather for errors throughout the investigatory and procedural processes. The establishment of a uniform burden of proof at the outset of a Title IX investigation will require Title IX Coordinators to remain objective while efficiently using campus resources to investigate viable claims.

Part I of this Note outlines the historical context of Title IX Coordinators and the integral role Title IX Coordinators play in the investigation and adjudication of Title IX claims. Part II of this Note identifies how courts differ when evaluating private and public college and university disciplinary determinations and ultimately concludes that a uniform burden of proof during the investigation stage would benefit both public and private colleges and universities. Part III argues that colleges and universities should enact a uniform burden of proof for Title IX Coordinators during the investigation stage of a Title IX claim. Although there is currently a uniform burden of proof during the adjudication phase of Title IX claims, there is no uniform burden of proof that Title IX Coordinators must satisfy before passing a claim on to an adjudication board. Moreover, there is no data available on what standards Title IX Coordinators are currently satisfying during the investigation stage. Part IV outlines the different burdens of

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[14] Greta Anderson, *More Title IX Lawsuits by Accusers and Accused*, INSIDE HIGHER ED, https://www.insidehighered.com/news/2019/10/03/students-look-federal-courts-challenge-title-ix-proceedings (last visited Jan. 26, 2020).

proof used in different types of investigations, ultimately concluding that a hybrid approach requiring a claim both overcomes a Rule 12(b)(6) motion to dismiss and satisfies a "sufficient evidence" burden of proof should be used by Title IX Coordinators during the investigation stage of Title IX claims. This burden of proof would alleviate the problems of both erroneous expulsions as well as the reversal of expulsions that might have been legitimate but were subject to an error objection by the student filing a lawsuit.

I. TITLE IX GENERALLY

A. The Establishment and Expansion of Title IX

From its inception, Title IX was far-reaching. Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[15] This broad language permits this statute to be used successfully in the fight against sexual assault on college campuses because no matter how little federal aid an institution receives, it must be compliant with Title IX to retain that funding.[16] Since almost every college in the country is a recipient of some federal funding, Title IX's impact is widespread.[17]

Title IX, in the context of college campuses, has historically progressed by way of guidance issued by OCR. In 2001, OCR published "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties."[18] This document specified that recipients of federal funding must "designate at least one employee to coordinate compliance with the regulations, including coordination of

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[15] 20 U.S.C. § 1681 (2018).

[16] Jennifer James, Comment, *We Are Not Done: A Federally Codified Evidentiary Standard Is Necessary for College Sexual Assault Adjudication*, 65 DEPAUL L. REV. 1321, 1325 (2016).

[17] *Id.*

[18] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

investigations of complaints alleging noncompliance."[19] Although not given the official label yet, the concept of a Title IX Coordinator was created.[20]

OCR guidance continued to advance the role of Title IX on college campuses in 2011 when the Dear Colleague Letter was released.[21] This letter laid out specific guidelines and protections included under Title IX.[22] Although the Dear Colleague Letter was not dispositive law, it was still given high deference by many colleges and universities because the letter explicitly stated the standards OCR considered when determining if a school was compliant with Title IX.[23] The Dear Colleague Letter emphasized that a "school's Title IX investigation is different from any law enforcement investigation, and a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct."[24] The Dear Colleague Letter also explicitly created the label "Title IX Coordinator"[25] and identified the Title IX Coordinator's role and responsibilities throughout the investigation and adjudication of a Title IX claim.[26] Under the Dear Colleague Letter, colleges and universities were required to adjudicate Title IX using a preponderance of the evidence burden of proof.[27]

Over the course of the next few years, Title IX continued to be a powerful force on college campuses. In the past two decades, OCR has opened numerous investigations of colleges and universities across the country in response to Title IX claims filed by survivors of sexual and interpersonal violence on their campuses.[28] Since April 4, 2011, OCR "has conducted 502 investigations of colleges for possibly mishandling reports of sexual violence. So far, 197 cases have been resolved and 305 remain open," numbers that are no longer being updated under the current administration.[29]

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[19] *Id.* at 4.

[20] *Id.*

[21] Dear Colleague Letter: Sexual Violence, Russlynn Ali, Office for Civil Rights, U.S. Dep't of Educ. 7–8 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[22] *Id.* at 9, 12–13.

[23] *Id.* at 1.

[24] *Id.* at 4.

[25] *Id.* at 7.

[26] *Id.* at 7–8.

[27] *Id.* at 10–11.

[28] *Title IX: Tracking Sexual Assault Investigations*, *supra* note 13.

[29] *Id.*

In 2017, the Dear Colleague Letter was rescinded and Title IX compliance was further complicated by the interim guidance issued. In place of the Dear Colleague Letter, OCR released Interim Q&A guidance ("Q&A") designed to assist colleges and universities in the interim while OCR drafted new guidelines regarding Title IX.[30] The Q&A withdrew the Dear Colleague Letter's requirement of a "preponderance of the evidence" burden of proof, and instead permits college disciplinary boards to choose between either a "preponderance of the evidence" or a "clear and convincing evidence" burden of proof at the adjudication stage.[31] The Q&A also retracted the sixty-day estimate regarding the length of an investigation and instead only requires a "good faith effort" to conduct a Title IX investigation.[32] Both changes drastically depart from the goal of uniformity historically associated with Title IX compliance. The Q&A also reiterated the Dear Colleague Letter's guidance requiring timely and impartial response and provided elements to be considered when determining whether a response is fair and equitable.[33] Ultimately, the rescission of the Dear Colleague Letter and implementation of interim guidelines has further confused the realm of Title IX compliance.

B. Title IX Coordinators Play an Integral Role in the Investigation of Title IX Claims

Today, every college and university is required to designate an employee who is tasked with the job of investigating all Title IX complaints on a college campus; this employee is the Title IX Coordinator.[34] The Title IX Coordinator plays an integral role in the life of a Title IX complaint; she is the gatekeeper to the disciplinary board.[35] Her findings are often passed on to a disciplinary board, which will then conduct a hearing,[36] and if the student is found guilty of violating Title IX, sanctions will be

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[30] Q&A, *supra* note 11, at 1.

[31] *Id.* at 5.

[32] *Id.* at 3.

[33] *Id.* at 4 ("An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence—including both inculpatory and exculpatory evidence—and take into account the unique and complex circumstances of each case.").

[34] *Id.* at 2.

[35] *Id.* at 3–4.

[36] *Id.* at 5.

imposed.[37] A Title IX Coordinator must not only be responsive to complaints that are brought to her attention, but must also act even if no complaint is filed.[38]

It is clear from OCR publications and from the history of Title IX that Title IX Coordinators are integral figures in Title IX investigation and adjudication, yet the general public barely knows anything about them. A recent 2018 study was conducted after recognizing "there is little, if any, empirical research that has examined the role of Title IX coordinators regarding how they handle Title IX complaints, their training, background, and their specific knowledge of campus resources and Title IX federal legislation."[39] Although the sample-size in this study was relatively small,[40] it does offer some insight into the roles and responsibilities of Title IX Coordinators.[41]

Title IX Coordinators are tasked with a great deal of responsibility but are constrained by limited resources.[42] They must "monitor[] outcomes, identify[] and address[] any patterns [of sexual and interpersonal violence], and assess[] effects on the campus climates."[43] The role of the Title IX Coordinator is not just to screen Title IX claims but rather to "help campuses avoid Title IX violations" in a multitude of ways.[44] The public has high expectations for Title IX Coordinators.[45] A Title IX Coordinator should never be an adversary but rather must be an unbiased fact-finder when investigating Title IX claims.[46] The Q&A explicitly states an interest in a prompt and equitable investigation of a Title IX claim and provides an extensive

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[37] *Id.* at 6.

[38] *Id.* at 1 (noting that if "the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately").

[39] Jacquelyn D. Wiersma-Mosley & James DiLoreto, *The Role of Title IX Coordinators on College and University Campuses*, 8 BEHAV. SCI. 1, 2 (2018), https://www.mdpi.com/2076-328X/8/4/38.

[40] *Id.* at 1.

[41] *Id.* at 11 ("Although the response rate was low (32%) for participation among 2100 possible Title IX coordinators, the current study did provide a national sample that included 692 coordinators/campuses from 42 different states.").

[42] *Id.* at 1–2, 4.

[43] *Id.* at 2.

[44] *Id.*

[45] *Id.* at 4 (explaining that Title IX Coordinators need "substantial [qualifications] (listening skills, organization, and follow-through) . . . [they must endure] unpredictable hours, and they [must] . . . be extremely knowledgeable about sexual violence and Title IX . . . [while] remain[ing] neutral and unbiased at all times.").

[46] Q&A, *supra* note 11, at 3–5.

explanation of what an equitable investigation is, the responsibility of which falls on the shoulders of the Title IX Coordinators.[47]

Title IX Coordinators are operating with limited campus resources. Title IX Coordinators do not always receive support from other campus employees,[48] and many Title IX Coordinators hold other positions on campus that occupy their time.[49] Given the limited resources available to Title IX Coordinators, there is an interest in efficiently using the limited resources that are available.[50] Title IX Coordinators are integral to the investigation of Title IX claims,[51] and therefore must be given proper guidance during all stages of a Title IX claim.

II. HOW PUBLIC AND PRIVATE UNIVERSITIES DIFFER

Public and private colleges and universities are held to different standards of judicial review regarding their disciplinary board determinations. In 1995, the New York Appellate Division Second Department held "[w]hen a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed."[52] However, this holding differs depending on the type of college or university. A private college or university need only be compliant with its own stated policies and procedures.[53] Conversely, a public college or university must be compliant both with its own stated policies and procedures and New York State Education Law.[54]

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[47] *Id.* at 3–4.

[48] Weirsma-Mosley & DiLoreto, *supra* note 39, at 3.

[49] *Id.* at 7 ("[M]ost coordinators wore multiple hats, with 67% of them indicating that their Title IX role was *part*-time.").

[50] Q&A, *supra* note 11, at 2–4.

[51] *Id.* at 1.

[52] Gruen v. Chase, 215 A.D.2d 481, 481 (2d Dep't 1995) (quoting Tedeschi v. Wagner Coll., 49 N.Y.2d 652, 660 (1980)).

[53] *See* Doe v. Cornell Univ., 163 A.D.3d 1243, 1245 (3d Dep't 2018) (stating that a private university determination will also be overturned if it lacks a rational basis); Doe v. Skidmore Coll., 152 A.D.3d 932, 934–35 (3d Dep't 2017); Hall v. Hofstra Univ., No. 003540/17, 2018 N.Y. Slip Op. 50549(U), at 10 (Sup. Ct. Nassau Cnty. Apr. 3, 2018).

[54] *See* Jacobson v. Blaise, 157 A.D.3d 1072, 1074 (3d Dep't 2018); Weber v. State Univ. of N.Y., Coll. at Cortland, 150 A.D.3d 1429, 1431 (3d Dep't 2017).

A. Private Colleges and Universities Need Only Be Compliant with Their Stated Policies and Procedures[55]

When determining whether a college or university has substantially complied with its stated policies and procedures, the court will consider a variety of factors.[56] Although one failure by the school to adhere to its published policies and procedures might not constitute failure to substantially comply, multiple failures definitely do.[57] However, it is unclear exactly how many failures constitutes a failure to substantially comply.[58]

Substantial compliance by private colleges and universities also requires a fair and equitable investigation and adjudication.[59] A "determination must be annulled where a school acts arbitrarily and not in the exercise of its honest discretion, it fails to abide by its own rules or imposes a penalty so excessive that it shocks one's sense of fairness."[60] Moreover, a university's failure to adhere to its own stated policies and procedures governing Title IX would certainly result in a decision that was "arbitrary and capricious" and would be overturned.[61]

Whether a private college or university is compliant with its stated policies and procedures depends on a variety of factors.[62] Both the number of failures to comply and the implementation of policies and procedures play a role in recent court determinations.[63] Ultimately, the variation in the courts' interpretations of recent cases emphasizes the need for equity and uniformity when investigating and adjudicating Title IX claims.

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[55] *Cornell Univ.*, 163 A.D.3d at 1245; *Skidmore Coll.*, 152 A.D.3d at 934–35; *Hall*, 2018 N.Y. Slip Op. 50549(U) at 10.

[56] *Skidmore Coll.*, 152 A.D.3d at 935.

[57] *Id.*

[58] *Id.*

[59] *Hall*, 2018 N.Y. Slip Op. 50549(U), at 1, 10.

[60] *Id.* at 10.

[61] Doe v. Cornell Univ., 163 A.D.3d 1243, 1245 (3d Dep't 2018) (internal citation omitted).

[62] *Id.* at 1244–45; *Skidmore Coll.*, 152 A.D.3d at 934–35; *Hall*, 2018 N.Y. Slip Op. 50549(U) at 10–11.

[63] *Cornell Univ.*, 163 A.D.3d at 1245–46; *Skidmore Coll.*, 152 A.D.3d at 934; *Hall*, 2018 N.Y. Slip Op. 50549(U) at 10.

B. Public Colleges and Universities Must Comply with Both Their Own Stated Policies and Procedures and New York State Education Law

Public colleges and universities are all governed by New York State Education Law, but they are free to make additions to the standard policies and procedures provided by the state law.[64] In its own words, "New York State has the most aggressive policy in the nation to fight against sexual assault on college campuses."[65] In July 2015, New York State Governor Cuomo signed into law New York State Education Law Article 129-B, the "Enough is Enough Law," with the stated purpose of "amend[ing] the education law, in relation to the implementation by colleges and universities of sexual assault, dating violence, domestic violence and stalking prevention and response policies and procedures . . . ."[66] Amongst its requirements, public colleges and universities in New York State must "adopt a set of comprehensive procedures and guidelines, including a uniform definition of affirmative consent, a statewide amnesty policy, and expanded access to law enforcement . . . [to] protect all of New York's college students from rape and sexual assault."[67] Thus, when reviewing a public college or university's disciplinary board determination, a court will not only look to whether the school followed its own policies and procedures but will also look to its compliance with New York State Education Law.[68]

When determining whether a public college or university has substantially complied with its policies and procedures and New York State Education Law, a court will closely scrutinize the requirements of both texts.[69] In 2018, the New York Appellate Division, Third Department, remitted a public university case for a new trial after concluding the university had failed to follow its stated definition of affirmative consent.[70] During her testimony

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[64] Jacobson v. Blaise, 157 A.D.3d 1072, 1079 (3d Dep't 2018).

[65] *Enough is Enough: Combating Sexual Assault on College Campuses*, N.Y. ST., https://www.ny.gov/programs/enough-enough-combating-sexual-assault-college-campuses (last visited Jan. 18, 2020).

[66] S. 5965, 2015–2016 Reg. Sess. (N.Y. 2015).

[67] N.Y. ST., *supra* note 65.

[68] *See Jacobson*, 157 A.D.3d at 1079–80. The court was unable to determine whether the disciplinary board's determination was proper because the Title IX Coordinator provided an incorrect definition of "affirmative consent" that was not compliant with the "Enough is Enough" law. *Id.*

[69] *See id.* at 1080–81 (Devine, J., concurring in part and dissenting in part).

[70] *Id.* at 1080.

the Title IX Coordinator, Butterfly Blaise, recited the statutory definition of affirmative consent.[71] However, when questioned on the definition, she incorrectly interpreted the university's published definition resulting in remittal of the case for a new hearing.[72] There, the court emphasized the importance of guaranteeing the college or university had complied with both New York State Education Law and its own stated policies and procedures.[73]

In another close reading of a university's policies and procedures, the Third Department upheld a college disciplinary determination, concluding the college had substantially complied.[74] There, the court looked to the student code of conduct and concluded there was nothing in the code of conduct that proffered the rights the student claimed he was guaranteed during the adjudication.[75]

When determining if a public college or university disciplinary board determination should be upheld, a court will look to whether the college or university has substantially complied with its own stated policies and procedures and New York State Education Law.[76] A court will reach this conclusion by closely reading the rights and requirements presented by the policies and procedures as well as New York State Law.[77]

III. THE NEED FOR AN ESTABLISHED UNIFORM BURDEN OF PROOF DURING INVESTIGATION

In light of the differences between the standards used to evaluate public and private universities' adjudication of Title IX claims, there is an even greater need for an establishment of a uniform burden of proof during the preliminary stages of an investigation. When a court reviews a disciplinary board's determination, it is closely scrutinizing every aspect of the investigation and adjudication procedures.[78] The investigatory stage is as—if not more—important than the adjudication stage.

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[71] *Id.* at 1079 (majority opinion).

[72] *Id.*

[73] *Id.* at 1074 (recognizing that New York State Education Law "establishes minimum requirements for cases of sexual and interpersonal violence . . . but institutions may offer more rights and requirements").

[74] Weber v. State Univ. of New York, 150 A.D.3d 1429, 1431–32 (3d Dep't 2017).

[75] *Id.* at 1431.

[76] *Jacobson*, 157 A.D.3d at 1074–75.

[77] *Id.*

[78] *See supra* Part II.

Adjudication does not exist without the facts discovered during a Title IX investigation. Given the complicated and fact-specific nature of Title IX investigations and adjudication, it is important that uniform policies and procedures are present at all stages of a Title IX claim. An explicitly stated burden of proof for Title IX Coordinators will send Title IX claims on a clear trajectory for proper adjudication that will result in fewer court decisions overturning university and college disciplinary board determinations.

Any solution advocating discord across the country would wreak havoc on Title IX campus compliance. It may be true that Title IX investigation and adjudication differs based on the factual components of the claims but there is nothing to suggest that a Title IX claim with the exact same facts should result in different outcomes on different campuses. Rather, it has been asserted time and time again that uniformity is an integral goal of Title IX compliance.[79]

Although more people and organizations are recognizing the need for additional Title IX support, no one is offering a viable solution to these problems. One organization, the Association for Title IX Administrators ("ATIXA") correctly recognizes that "Title IX compliance is all over the map."[80] ATIXA offers an "Investigation in a Box" on its website that provides over 200 pages of information aimed at guaranteeing an impartial investigation is administered.[81] Although this type of uniformity and detail is desirable, membership in ATIXA is voluntary,[82] and the "Investigation in a Box" is not a free resource.[83] Rather, a Title IX Coordinator, who is not a member of ATIXA, must purchase the box for $499 to receive the 200 plus pages of documents.[84] ATIXA

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[79] *See* S. 5965, 2015–2016 Reg. Sess. (N.Y. 2015).

[80] ASS'N OF TITLE IX ADM'RS & SCH. & COLL. ORG. FOR PREVENTION EDUCATORS, ATIXA/SCOPE 2016 JOINT NATIONAL CONFERENCE: CONFERENCE PROGRAM 38 (2016), https://cdn.atixa.org/website-media/atixa.org/wp-content/uploads/2016/09/12193144/joint-conference-program_091916_Clean.pdf ("[W]e're still not entirely sure what the appropriate role, functions, and expectations of Coordinators are.").

[81] *The ATIXA Investigation in a Box Kit*, ATIXA, https://atixa.org/products-and-services/investigation-in-a-box/ (last visited Jan. 18, 2020).

[82] *See Join Overview*, ATIXA, https://atixa.org/join/overview/ (last visited Jan. 18, 2020).

[83] *The ATIXA Investigation in a Box Kit: Cost & Purchasing*, ATIXA, https://atixa.org/products-and-services/investigation-in-a-box/#cost (last visited Oct. 29, 2019).

[84] *Id.*

is correctly recognizing the need for uniformity and additional resources during the investigatory stage of a Title IX claim, but the execution is lacking.

A clearly stated burden of proof during the investigatory stage of Title IX claims would provide uniformity. This burden of proof would not be enacted with the purpose of placing another obstacle in the way of survivors of sexual assault, but rather to ensure Title IX Coordinators are correctly and objectively gathering pertinent information to ensure the most comprehensive and equitable investigation is occurring. This burden of proof should not fall on the shoulders of the complainant or the respondent.[85] Rather, this burden of proof should be implemented with the purpose of requiring a Title IX Coordinator to collect extensive evidence to provide a disciplinary board with a comprehensive picture of a Title IX complaint.

In 2017, the New York Appellate Division, Third Department, emphasized the significance of the evidence Title IX Coordinators collect during an investigation.[86] There, the court ruled there was "[s]ubstantial evidence [to] support[] the determination that the victim did not consent to having sexual intercourse with [the] petitioner."[87] The court relied heavily on the evidence presented at the hearing when making its determination, such as the victim's testimony and text messages she sent to friends.[88]

In 2016, the Third Department emphasized the importance of the investigatory stage of a Title IX claim.[89] There, the court recognized that the formal rules of evidence do not apply in an administrative proceeding.[90] Rather, the court deferred to the school's judgement when determining the relevance of evidence.[91] A Title IX Coordinator plays a significant role in the investigative stage of a Title IX claim.[92] A Title IX Coordinator's primary job is

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[85] Q&A, *supra* note 11, at 3–4 ("[T]he burden is on the school . . . to gather sufficient evidence . . . .").

[86] *See* Weber v. State Univ. of N.Y., Coll. at Cortland, 150 A.D.3d 1429, 1430 (3d Dep't 2017).

[87] *Id.*

[88] *Id.* at 1430–31 ("According to the victim, . . . she repeatedly asked to go to a friend's house instead of proceeding to petitioner's house as he had proposed . . . [and] the victim sent text messages to at least three individuals indicating that she feared that she was about to be raped.").

[89] Lambraia v. State Univ. of N.Y. at Binghamton, 135 A.D.3d 1144, 1147 (3d Dep't 2016).

[90] *Id.*

[91] *Id.*

[92] Q&A, *supra* note 11, at 2.

to investigate and present the evidence to a disciplinary board that is then tasked with making a determination based upon the evidence presented.[93] Because the formal rules of evidence do not apply in administrative proceedings,[94] the Title IX Coordinator is free to present the disciplinary board with all relevant evidence regarding the claim to give the disciplinary board the most comprehensive picture of the claim.

To continue to make progress in the realm of Title IX, the focus needs to be on how colleges and universities can better support Title IX Coordinators. Title IX Coordinators should have a uniform burden of proof to apply to Title IX complaints during the investigation stage to better equip them to successfully and objectively investigate Title IX claims without making errors.

IV. A SUGGESTED BURDEN OF PROOF DURING THE INVESTIGATION STAGE

The proper burden of proof for a Title IX Coordinator during the investigation stage of a Title IX claim is a hybrid approach satisfying Federal Rule of Civil Procedure 12(b)(6) and a "sufficient evidence" burden of proof. When evaluating the proper burden of proof that must be satisfied for a Title IX Coordinator to refer an investigation to a disciplinary board, it is important to consider the roles of these different burdens of proof in the specific contexts in which they are currently used and how analogous those contexts are to Title IX investigations on college and university campuses.

A. A Hybrid Burden of Proof Requiring Satisfaction of Rule 12(b)(6) and "Sufficient Evidence" Would Most Effectively Promote the Goals of Title IX Compliance

1. A Requirement That Title IX Claims Satisfy Rule 12(b)(6) Would Promote the Efficient Use of Campus Resources

Given the limited resources available to Title IX Coordinators,[95] there is an interest in efficiently using campus resources to pursue claims.[96] Under the Federal Rules of Civil Procedure, a defendant can file a 12(b)(6) motion for "failure to

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[93] *Id.* at 5.
[94] *Lambraia*, 135 A.D.3d at 1147.
[95] *See infra* Section I.B.
[96] *See* Q&A, *supra* note 11, at 2–4.

state a claim upon which relief can be granted."[97] It would not make sense for a university or college to pursue adjudication where the disciplinary board cannot redress the situation. Rule 12(b)(6) should be part of the burden of proof used by Title IX Coordinators during the investigation stage of Title IX claims to guarantee Title IX Coordinators are not pursuing unviable claims. However, this burden of proof is not alone sufficient to provide much-needed uniform guidance to Title IX Coordinators during the investigation stage of Title IX claims.

2. A Requirement That Title IX Coordinators Collect Sufficient Evidence Before Passing an Investigation on to a Disciplinary Board Would Promote Uniformity and Objectivity

Sufficient evidence "means competent evidence which, if accepted as true, would establish every element of an offense charged and the defendant's commission thereof."[98] This burden of proof is often used in criminal proceedings at grand jury indictments.[99] Like the objective members of a grand jury, a Title IX Coordinator during the investigatory stage must determine if there is sufficient evidence to pass her findings along to a disciplinary board.

The Q&A passively mentions the "sufficiency" of evidence but fails to provide guidance beyond that single mention.[100] This burden of proof is workable in the context of Title IX investigations. However, if Title IX Coordinators are going to properly implement this burden of proof, there must be more guidance provided than the single mention in the Q&A.

A burden of proof that requires a Title IX Coordinator to take one party's evidence as true would not run afoul of the objective nature of Title IX Coordinators. There may be concern that if a Title IX Coordinator is taking the complainant's evidence as true prior to passing the evidence on to a disciplinary board, the scales are already weighed heavily in favor of the complainant. However,

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[97] FED. R. CIV. P. 12(b)(6).

[98] N.Y. CRIM. PROC. § 70.10 (McKinney 2019).

[99] People v. Booker, 164 A.D.3d 819, 820–21 (2d Dep't 2018); People v. Pino, 162 A.D.3d 910, 910–11 (2d Dep't 2018).

[100] Q&A, *supra* note 11, at 4. ("In every investigation conducted under the school's grievance procedures, the burden is on the school—not on the parties—to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed.").

this burden of proof would not result in inequitable Title IX investigation and adjudication because the investigatory stage is not dispositive. Rather, a Title IX Coordinator can objectively collect all the evidence, then determine if all the evidence, taken as true, would be sufficient to support the conclusion that a violation had occurred. Under this burden of proof, Title IX Coordinators would still be required to provide the most comprehensive picture.

This burden of proof requires competent evidence to prove each and every element of the claim. A competency requirement seems to add an additional step to a Title IX investigation and require a Title IX Coordinator to step outside of her role as the unbiased fact-gatherer and make judgements about both the complainant and respondent. This is untrue. A competency requirement does not require the Title IX Coordinator to evaluate the credibility of witnesses. Instead, it only requires the Title IX Coordinator to critically evaluate the presence of evidence and if it is conflicting.[101] Thus, a burden of proof requiring sufficient evidence would not run afoul to the goals of Title IX Coordinators, but rather would promote uniformity and objectivity.

B. A Higher Burden of Proof During the Investigation Stage Would Be Too Burdensome and Restrictive

A burden of proof higher than the burden of proof used during adjudication would be inappropriate during the investigatory stage of a Title IX claim. Therefore, a "beyond a reasonable doubt" burden of proof for a Title IX Coordinator is inappropriate at the investigatory stage of a Title IX claim. Currently, the Q&A permits the use of either a "clear and convincing evidence" or "preponderance of the evidence" burden of proof during the adjudication phase of a Title IX claim.[102]

A "clear and convincing evidence" burden of proof is used both in criminal cases[103] and in civil cases.[104] A "preponderance of the evidence" burden of proof is used by juries in civil cases that have

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[101] Lambraia v. State Univ. of N.Y. at Binghamton, 135 A.D.3d 1144, 1146 (3d Dep't 2016).

[102] Q&A, *supra* note 11, at 5.

[103] *See* People v. Mitchell, 142 A.D.3d 542, 543 (2d Dep't 2016).

[104] Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 282 (1990). The clear and convincing burden of proof of review is used in civil cases where the risk of loss is relatively high such as termination of life-sustaining care. *Id.* at 282–83.

gone to trial.[105] This burden of proof is used to assess which party is liable.[106] Given the current circumstances, it seems unlikely that either a "clear and convincing evidence" or "preponderance of the evidence" burden of proof would be appropriate for a Title IX Coordinator to use during the investigatory stage of a Title IX claim. It would not make sense for a complainant to have to overcome the same burden of proof twice—once during the investigation stage and once during the adjudication stage.

Even if OCR were to require all colleges and universities to use a "clear and convincing evidence" burden of proof when adjudicating Title IX claims, a "preponderance of the evidence" burden of proof at the investigatory stage would prove unworkable given its historical context. A Title IX Coordinator is supposed to be an unbiased fact-finder.[107] A Title IX Coordinator is not in a position to be evaluating whether a certain party is "more likely than not" responsible.[108] Therefore, neither "clear and convincing evidence" nor "preponderance of the evidence" is an appropriate burden of proof for the investigation stage of a Title IX claim.

C. The Alternative Burdens of Proof of Reasonable Suspicion and Probable Cause Run the Risk of Promoting Subjectivity and Are Unworkable in the Context of Title IX Investigations

A "reasonable suspicion" or "probable cause" burden of proof would be unworkable in the context of Title IX investigations because of their subjective components. A "reasonable suspicion" means less than probable cause but more than a "mere hunch."[109] For there to be a "reasonable suspicion," an investigator "must be able to point to specific and articulable facts which[] [must be] taken together with rational inferences . . . ."[110]

This burden of proof would prove unworkable in the context of the Title IX investigatory stage. Since objectivity is a primary goal of Title IX investigations,[111] implementing a burden of proof that

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[105] *Civil Cases*, U.S. CTS., http://www.uscourts.gov/about-federal-courts/types-cases/civil-cases (last visited Jan. 18, 2020).

[106] *Id.*

[107] *See* Q&A, *supra* note 11, at 4.

[108] *Civil Cases*, *supra* note 105.

[109] *See* Terry v. Ohio, 392 U.S. 1, 27 (1968) ("[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experiences.").

[110] *Id.* at 21.

[111] Q&A, *supra* note 11, at 3–4.

requires a "reasonable person" standard would only further complicate Title IX compliance because a "reasonable person" standard has both objective and subjective components. Given the lack of understanding of the role of Title IX Coordinators, it would prove difficult to ascertain what "a reasonable Title IX Coordinator" is. This burden of proof also puts too much power in the hands of the Title IX Coordinator and may result in bias, which runs afoul to the expectations of Title IX Coordinators.[112]

Requiring Title IX Coordinators to satisfy this burden of proof would stifle the investigation. This standard would result in biased investigations and more court decisions overturning disciplinary board determinations. The Title IX Coordinators would not be investigating with the understanding that they must collect and present the most comprehensive picture of the Title IX claim to the school's disciplinary board. Rather, Title IX Coordinators would be forced to rely too heavily on their own subjective beliefs.

Probable cause is a similarly subjective burden of proof.[113] Probable cause means there is " 'a reasonable ground for belief of guilt,' . . . and that the belief of guilt must be particularized with respect to the person."[114] A probable cause burden of proof is rooted in the Fourth Amendment,[115] and it is used during arrests, searches and seizures, and grand jury indictments.[116] This burden of proof is most often in used in circumstances to justify arrest or the production of further incriminating evidence—searches and seizures.[117]

This burden of proof is unworkable in the context of a Title IX investigation. Because a Title IX coordinator must remain impartial throughout the investigation and adjudication of a Title IX claim, she does not search for more incriminating evidence or evidence to support an arrest. Instead, Title IX Coordinators investigate and gather facts for the purpose of passing on a comprehensive objective picture of the claim to a disciplinary board.

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[112] *Id.*

[113] Maryland v. Pringle, 540 U.S. 366, 371 (2003).

[114] *Id.* (quoting Ybarra v. Illinois, 444 U.S. 85, 91 (1979)).

[115] U.S. CONST. amend. IV.

[116] *Probable Cause*, BOUVIER LAW DICTIONARY (Desk ed. 2012); Haynes v. City of New York, 29 A.D.3d 521, 523 (2d Dep't 2006).

[117] *Id.*

D. Evidence Standards That Require the Title IX Coordinator to Evaluate the Substantiality and Adequacy of Evidence Are Both Unworkable in the Context of Title IX Investigations

1. Substantial Evidence

A substantial evidence burden of proof means "more than a mere scintilla" of evidence.[118] "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[119]

In 2016, the New York Appellate Division, Third Department, held there was substantial evidence present to find the respondent had committed sexual assault.[120] There, the court held that evidence that the student "promptly reported" the assault, had to leave school, and was diagnosed with posttraumatic stress disorder was "substantial evidence."[121] Although the forms of substantial evidence in this case are not dispositive, they do provide some guidance as to what constitutes substantial evidence. However, the court does not clarify whether these pieces of evidence taken together constitute substantial evidence or whether one piece of evidence standing alone could be rendered "substantial."

In 2018, the Third Department suggested that the substantiality of evidence is reduced if it conflicts with other statements.[122] There, the court's analysis focused on the fact that the complainant's testimony at the disciplinary hearing contradicted earlier testimony given to the police.[123] The court recognized that a witness's testimony regarding the incident was consistent with the first statement given to police but not the complainant's statement given at the hearing.[124]

A substantial evidence burden of proof is unworkable in the Title IX Coordinator context. It would require a Title IX Coordinator to evaluate evidence in such a way that she is not

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[118] Richardson v. Perales, 402 U.S. 389, 401 (1971) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)); *see also* N.Y. C.P.L.R. § 7803(4) (MCKINNEY 2003).

[119] *Richardson*, 402 U.S. at 401 (quoting *Consolidated Edison Co.*, 305 U.S. at 229).

[120] Lambraia v. State Univ. of N.Y. at Binghamton, 135 A.D.3d 1144, 1146 (3d Dep't 2016).

[121] *Id.*

[122] West v. State Univ. of N.Y. at Buffalo, 159 A.D.3d 1486, 1487 (4th Dep't 2018).

[123] *Id.*

[124] *Id.*

equipped to do at the investigatory stage. Although the Title IX Coordinator could evaluate the amount of evidence present, a substantial evidence burden of proof seems to require evaluation of evidence beyond mere objective quantification.[125] Imposing such a role on a Title IX Coordinator would certainly lead to instances of accused bias and hinder the Title IX Coordinator's ability to properly serve the role of an objective investigator.

2. Adequate Evidence

An adequate evidence burden of proof is used by the United Nations in administrative proceedings following an investigation.[126] However, there is limited jurisprudence using this burden of proof given the niche category of investigations to which it applies. An adequate evidence burden of proof means evidence that is "information sufficient to support the reasonable belief that a particular act or omission has occurred."[127]

In a United Nations Administrative Tribunal hearing, "adequate evidence" must be collected and that evidence must support the allegations by a preponderance of the evidence.[128] During the investigative—preliminary—stage, the only burden to be met is whether "the report of misconduct . . . [is] well founded" and indicated by the evidence.[129] After this initial inquiry by the investigator, there are two possible avenues for the investigation.[130] The investigator can pass on her findings for a more complete inquiry or recommend "summary dismissal."[131] Title IX offers no such latter avenue for a Title IX Coordinator.[132] Further, given that the adequate evidence standard is not used during the primary investigatory stage—the much lower "well-founded" standard of proof is used—an adequate evidence burden of proof seems unworkable in the context of Title IX investigation.

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[125] *See generally* Q&A, *supra* note 11.

[126] Araim v. Secretary-General of the United Nations, Judgments U.N. Admin. Trib., No. 1022, at 7, U.N. Doc. AT/DEC/1022 (2001).

[127] 2 C.F.R. § 180.900 (2019).

[128] Applicant v. Secretary-General of the United Nations, Judgment U.N. Disp. Trib., No. UNDT/2011/054, at 28, Case No. UNDT/NBI/2009/61 (2011), https://www.un.org/en/internaljustice/files/undt/judgments/undt-2011-054.pdf.

[129] *Id.* at 17.

[130] *Id.* at 29.

[131] *Id.*

[132] *See generally* 20 U.S.C. § 1681 (2018).

These alternative burdens of proof are inappropriate during an investigatory stage. A Title IX Coordinator is tasked with objectively collecting the evidence and later presenting it to a disciplinary board and it is up to the disciplinary board to make further determinations that are outside the scope of the Title IX Coordinator's responsibilities.[133]

E. An Additional Burden of Proof at the Investigation Stage of Title IX Claims Will Benefit Both Complainants and Respondents

There may be concerns that requiring an additional burden of proof will stifle victim reporting and further exacerbate the problem. However, this seems unlikely. The recent court decisions overturning college disciplinary board determinations are likely stifling victim reporting because even when perpetrators get expelled, errors are occurring, and perpetrators are being reinstated as students. This process is likely discouraging survivors from coming forward with their claims. If survivors know Title IX Coordinators are properly investigating their claims due to a clearly stated burden of proof that must be satisfied before a claim can be passed on to a disciplinary board for adjudication, it seems likely survivors will have new hope for more permanent disciplinary board determinations.

There may also be a concern that students are unaware of these recent court decisions and the establishment of any uniform burden of proof would prove meaningless.[134] But this argument fails to account for the role students have played in the growth and development of Title IX campus adjudication.[135] The uptick in OCR investigations of colleges' and universities' handling of Title IX claims is likely due to a student-led movement.[136] This suggests students—especially survivors—are very aware of the way their colleges and universities are handling Title IX claims. Given the significant number of students who report being sexually assaulted on college campuses,[137] it is also likely that an individual knows someone who has been assaulted and who has gone through

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[133] Q&A, *supra* note 11, at 5.

[134] Wiersma-Mosley, *supra* note 39, at 11. (noting that a Title IX Coordinator's role is neither "understood by the public or even the campus community").

[135] *See* THE HUNTING GROUND, *supra* note 3.

[136] *See id.*

[137] CHRISTOPHER P. KREBS ET AL., *supra* note 10, at 6-1.

the process.[138] Because courts overturning these decisions is a relatively new phenomenon, it is not clear how aware students are of these recent court decisions. However, given the history of Title IX, it seems likely that students are aware—or will become aware—as this continues to happen to more students.

Colleges and universities are also required to publish their Title IX policies and procedures, making them readily available to anyone who wants to access them.[139] If colleges were to adopt a clear burden of proof for the investigatory stage and clearly explain its role as a proactive measure, it would be visible to any student who accessed the college's or university's website.

CONCLUSION

The burden of proof that a Title IX Coordinator must satisfy before bringing an investigation to a disciplinary board should be a hybrid between surviving a Rule 12(b)(6) motion to dismiss and satisfying a sufficient evidence burden of proof. This burden of proof is neither on the claimant nor on the respondent, but must be satisfied by the Title IX Coordinator. This burden of proof requires the Title IX Coordinator to develop the most comprehensive picture of the events that occurred and pass her findings on to the disciplinary board so that it can properly adjudicate the matter. Therefore, there is no concern that this burden of proof would require a Title IX Coordinator to overstep boundaries into the realm of biased evaluation.

Implementing a burden of proof during the investigatory stage is not an exhaustive solution to the issues surrounding Title IX—but it is a start. Title IX progress is complicated and slow-moving. But it is important that we do not shy away from the complex and often discouraging realm of Title IX. Forty-eight years ago, there was no Title IX. Until 1997, sexual harassment was not considered to be a form of sex discrimination under Title IX.[140] Nine years ago, there were no explicitly required Title IX Coordinators.

Continuing to critically evaluate Title IX investigations, recognize weaknesses, and work to find solutions, is the only way to strengthen this federal law and protect the millions of college

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[138] *See id.*

[139] N.Y. EDUC. LAW § 6440(1)(a) (McKinney 2019).

[140] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., SEXUAL HARASSMENT GUIDANCE 1997 (1997), https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html (last visited Jan. 20, 2020).

students who will be—or already are—survivors of sexual and interpersonal violence on college campuses. We cannot change the perpetrators—we can only change how we respond.