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## NOT YET ENOUGH: WHY NEW YORK'S SEXUAL ASSAULT LAW DOES NOT PROVIDE ENOUGH PROTECTION TO COMPLAINANTS OR DEFENDANTS

*Nicolo Taormina\**

*Title IX requires colleges to investigate and adjudicate allegations of sexual assault between students. New York State has recently passed a new law called "Enough is Enough," which strengthens Title IX's requirements. However, neither Title IX nor "Enough is Enough" provides strict guidelines for the procedures colleges must use when adjudicating complaints. This means that colleges across New York employ different procedures and offer different sets of rights to their students. After examining federal and state law, some examples of college procedures and the effects they have on students, this Note concludes that "Enough is Enough" must be amended to ensure a fair process for all students across the state.*

### INTRODUCTION

Just two weeks into the school year at Hobart and William Smith Colleges, freshman Anna<sup>1</sup> suffered a life-changing horror.<sup>2</sup> During

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<sup>1</sup> Anna allowed her real first name to be used for the N.Y. Times article. Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014), [http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?\\_r=0](http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexual-assault-complaint.html?_r=0).

<sup>2</sup> *Id.*

a party she attended at a fraternity house, a friend of Anna's noticed a senior football player leading her up the stairs, but was unable to stop them.<sup>3</sup> That friend soon received some alarming text messages from Anna: "I'm scared" and "He won't leave me."<sup>4</sup> The friend began a frantic search for Anna, and eventually found her in a local dance hall called the Barn.<sup>5</sup> She was "bent over a pool table as a football player appeared to be sexually assaulting her from behind . . . with six or seven people watching and laughing. Some had their cellphones out, apparently taking pictures."<sup>6</sup> A medical report indicated that Anna had "intercourse with either multiple partners, multiple times or that the intercourse was very forceful."<sup>7</sup> She did not remember what happened at the Barn, but later remembered being assaulted at the fraternity house.<sup>8</sup> Tests "found sperm or semen in her vagina, in her rectum and on her underwear."<sup>9</sup> Doctors found no date-rape drugs in her system, but they estimated that her blood alcohol level at the time of the first assault would have been "twice what is considered legally drunk."<sup>10</sup> The police officer who drove her home from the hospital had to pull over four times so that she could vomit.<sup>11</sup> Anna's story did not end there, however, and her experience in dealing with her college's internal adjudication process demonstrates the larger problem of how sexual assault cases are handled.

The next day Anna reported the assault to campus officials, who were required by federal law to investigate the matter.<sup>12</sup> The college assembled a three-person panel to serve "as prosecutor, judge and jury, [and to] question students and rende[r] a judgment."<sup>13</sup> The

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; see also U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>13</sup> Bogdanich, *supra* note 1.

accused changed their stories multiple times, but the panel ultimately cleared all three.<sup>14</sup> Anna filed an appeal and the decision was upheld.<sup>15</sup> For her efforts, Anna received more abuse from students: “physical threats and obscenities on her dormitory door, being pushed in the dining hall and asked to leave a fraternity party.”<sup>16</sup>

While on-campus adjudication proceedings are typically kept confidential, the New York Times obtained a transcript revealing that the panel in Anna’s case was ill-equipped to take testimony from a person who experienced a sexual assault.<sup>17</sup> For example, they asked if perhaps she had simply been dancing with the football player at the Barn, despite the fact that her friend’s statement clearly indicated that both of their pants were down.<sup>18</sup> When Anna began to describe the details of what happened when she was alone with the football player, the panel cut her off to ask about her text messages.<sup>19</sup> The panel asked about how she had been dancing at the party, and she felt that “admitting you were grinding — a common way of dancing — ‘means you therefore consent to sex or should be raped.’”<sup>20</sup> They also questioned her as to why she initially refused a rape exam.<sup>21</sup> As her lawyer later put it: “[d]oes anyone really believe that it is pleasant to have rectal, vaginal, vulva and cervical swabs taken? . . . Not to mention photographs of your private parts and dye injected into your vagina?”<sup>22</sup> Inexplicably, the chairwoman of the panel decided not to allow the other two panelists to examine the medical records.<sup>23</sup> These medical records showed the Anna had suffered “blunt force trauma”<sup>24</sup> and were important to corroborate her account.

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *See id.*

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *See id.*

While federal law requires colleges to investigate allegations of sexual abuse,<sup>25</sup> New York State has recently passed new legislation, titled Implementation by Colleges and Universities of Sexual Assault, Dating Violence, Domestic Violence and Stalking Prevention and Response Policies and Procedures (“Enough is Enough”),<sup>26</sup> which implements a more detailed set of rules and guidelines to attack the problem of sexual assaults on campuses.<sup>27</sup> Enough is Enough first seeks to change the way students understand sexual encounters by adopting an affirmative consent standard.<sup>28</sup> The law defines affirmative consent as the “knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.”<sup>29</sup> The law also requires schools to adopt an amnesty policy so that victims of sexual violence who were using drugs or alcohol will not be subject to punishment by the school.<sup>30</sup> The law requires the school to inform students of their rights, has reporting requirements, and counseling and safety requirements.<sup>31</sup> Finally, Enough is Enough requires schools to create and make available a “Student’s Bill of Rights”<sup>32</sup> which includes the rights to “[m]ake a report to local law enforcement,”<sup>33</sup> to have disclosures of sexual violence treated seriously,<sup>34</sup> to choose whether or not to participate in the process free from school pressures,<sup>35</sup> and to be treated with dignity.<sup>36</sup>

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<sup>25</sup> Dear Colleague Letter, *supra* note 12.

<sup>26</sup> *Enough is Enough: Combatting Sexual Assault on College Campuses*, NY.GOV, <https://www.ny.gov/programs/enough-enough-combatting-sexual-assault-college-campuses> (last visited Aug. 13, 2016) [hereinafter *Enough is Enough*].

<sup>27</sup> See N.Y. EDUC. LAW § 6441–6448 (McKinney 2015).

<sup>28</sup> *Id.* § 6441(1).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* § 6442(1).

<sup>31</sup> *Id.* § 6444.

<sup>32</sup> *Id.* § 6443.

<sup>33</sup> *Id.* § 6443(1).

<sup>34</sup> *Id.* § 6443(2).

<sup>35</sup> *Id.* § 6443(3).

<sup>36</sup> *Id.* § 6443(5).

While these reforms are certainly important, *Enough is Enough* makes little change to the schools' obligations when adjudicating complaints.<sup>37</sup> The Student's Bill of Rights does require that students be allowed to "[p]articipate in a process that is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard."<sup>38</sup> The law also requires that students have the opportunity to appeal decisions<sup>39</sup> and be accompanied by an advisor.<sup>40</sup> However, the law fails to provide specific and uniform guidelines for colleges to create and implement adjudication procedures.

Missouri Senator Claire McCaskill, a former sex-crimes prosecutor, stated of schools' handling of sexual assault case that "[t]hey are a little like snowflakes—they are all different."<sup>41</sup> Kevin Kruger, the president of the Student Affairs Administrators in Higher Education ("NASPA"),<sup>42</sup> recently expressed "concern" that if states continued to "pass[] legislation on campus sexual assault awareness and prevention, [there] may soon [be] a state-by-state patchwork dictating . . . very complex campus processes."<sup>43</sup> Even he, however, ignores the patchwork of processes that occur within the state itself.

Because each college has the discretion to create its own procedures, limited only by the minimum state and federal standards, the process inevitably varies from school to school and can lead to troubling results.<sup>44</sup> Without uniform procedures and

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<sup>37</sup> See generally EDUC. § 6441–6448; *Enough is Enough*, *supra* note 26 (discussing how the celebrated parts of the legislation are a new definition of affirmative consent and stronger prevention efforts).

<sup>38</sup> EDUC. § 6443(4).

<sup>39</sup> *Id.* § 6443(9).

<sup>40</sup> *Id.* § 6443(10).

<sup>41</sup> Bogdanich, *supra* note 1.

<sup>42</sup> See *ABOUT NASPA*, NASPA: STUDENT AFFAIRS ADMINISTRATORS IN HIGHER EDUCATION, <https://www.naspa.org/about> (last visited Aug. 13, 2016).

<sup>43</sup> Kevin Kruger, *'Enough IS Enough': Colleges Don't Need More Sex-Assault Legislation*, WASH. POST (July 27, 2015), <https://www.washingtonpost.com/news/grade-point/wp/2015/07/27/enough-is-enough-colleges-dont-need-more-sex-assault-legislation/>.

<sup>44</sup> See Lee Higgins, *SUNY Grad Says School Made Her Prosecute Her Own Sex Attacker*, USA TODAY: LOHUD (Feb. 23, 2015), <http://www.lohud.com/story/news/local/westchester/2015/02/22/stony-brook-student-prosecute-alleged-sex-attacker-lawsuit-says/23743857/>; Tovia Smith,

rules, the outcome of an adjudication can lead to injustice for both complainants and defendants; complainants may feel as though they are reliving their attack, while defendants may feel as if the process is skewed against them.<sup>45</sup> Moreover, the outcome of the complaint will vary based on where the incident and adjudication occur. If schools are required by law to conduct these investigations and hearings, then they ought to be required by law to conduct them equally, fairly, and in the same manner across the state.

This Note argues that New York's Enough is Enough legislation missed an opportunity to meaningfully reform on-campus adjudication. Part I of this Note examines the nature of sexual assaults on campuses both on a national and state level and briefly explains the policy reasons for having colleges handle sexual assault cases. Part II discusses the federal law requiring schools to adjudicate sexual assault cases, including Title IX, New York's Enough is Enough, and various examples of the procedures New York colleges employ. Part III examines the various ways in which a lack of strict requirements can lead to unfairness and injustice. Part IV concludes by proposing amendments to Enough is Enough which would create a uniform standard and promote fairness on campuses across the state.

## I. THE POLICY BEHIND ON-CAMPUS ADJUDICATIONS

### A. *The Prevalence of Sexual Assaults on College Campuses*

Sexual assaults on college campuses are a prevalent and serious issue.<sup>46</sup> A Westat study found that almost one in four women will be

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*For Students Accused Of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015),

<http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights> [hereinafter Smith, *Legal Victories*].

<sup>45</sup> See Higgins, *supra* note 44; Smith, *Legal Victories*, *supra* note 44.

<sup>46</sup> See Kelly Wallace, *23% of Women Report Sexual Assault in College, Study Finds*, CNN (Sept. 23, 2015), <http://www.cnn.com/2015/09/22/health/campus-sexual-assault-new-large-survey>; Richard Pérez-Peña, *1 in 4 Women Experience Sex Assault on Campus*,

the victim of unwanted sexual contact while she is a college student.<sup>47</sup> The same study reported that 13.5% of college women experienced assault in the form of “penetration, attempted penetration or oral sex.”<sup>48</sup> Another study published in the *Journal of Adolescent Health* found that 11.4% of female students suffer a rape or attempted rape during their first semester.<sup>49</sup> Campus responses to sexual assault allegations are thus of great importance because less than 5% of rape victims will report their assault to local police.<sup>50</sup>

To address the problem, Senator McCaskill commissioned a study of 440 universities both on the prevalence of college sexual assaults and how colleges were responding to complaints (“McCaskill Study”).<sup>51</sup> Among the troubling results of the survey were findings of grievance processes that did not comply with “best practices.”<sup>52</sup> Best practices include making information about the procedures available, not allowing students to participate in adjudication boards, using the same procedures for athletes and nonathletes, and “provid[ing] adequate training for the individuals who adjudicate sexual assault claims.”<sup>53</sup> The McCaskill Study found violations of best practices included the following: 33% of schools did not provide training to adjudicators regarding “rape myths,”

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N.Y. TIMES (Sept. 21, 2015), <http://www.nytimes.com/2015/09/22/us/a-third-of-college-women-experience-unwanted-sexual-contact-study-finds.html?ref=us>.

<sup>47</sup> DAVID CANOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 28 (Sept. 21, 2015), [http://www.aau.edu/uploadedFiles/AAU\\_Publications/AAU\\_Reports/Sexual\\_Assault\\_Campus\\_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf](http://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf); Pérez-Peña, *supra* note 46.

<sup>48</sup> Pérez-Peña, *supra* note 46.

<sup>49</sup> Kate B. Carey et al., *Incapacitated and Forcible Rape of College Women: Prevalence Across the First Year*, 56 J. ADOLESCENT HEALTH 678, 679 (Feb. 25, 2015), [http://i2.cdn.turner.com/cnn/2015/images/05/20/carey\\_jah\\_proof.pdf](http://i2.cdn.turner.com/cnn/2015/images/05/20/carey_jah_proof.pdf).

<sup>50</sup> U.S. SENATE SUBCOMM. FIN. & CONTRACTING OVERSIGHT, SEXUAL VIOLENCE ON CAMPUS: HOW TOO MANY INSTITUTIONS OF HIGHER LEARNING ARE FAILING TO PROTECT STUDENTS 1 (2014) [hereinafter SEXUAL VIOLENCE ON CAMPUS], <http://www.mccaskill.senate.gov/SurveyReportwithAppendix.pdf>.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 2.

<sup>53</sup> *Id.* at 11.



students participated in adjudication panels in 27% of institutions sampled and over 40% of large public schools allow students to participate in sexual assault adjudication, and “[m]ore than 20% of institutions in the national sample [gave] the athletic department oversight of sexual violence cases involving student athletes.”<sup>54</sup> The McCaskill Study revealed that more than 40% of schools surveyed had not conducted any investigations over the past five years.<sup>55</sup>

The situation in New York is not much better than it is nationally. As of August 2015, twenty New York colleges were under investigation for violation of federal requirements to investigate and adjudicate sexual assaults.<sup>56</sup> New York colleges also report sexual assaults at a higher rate than most other large states, but some claim this is a product of New York colleges being diligent in their documentation and not a systematic problem of violence.<sup>57</sup>

### *B. Why a Majority of Sexual Assault Survivors Do Not Report to the Police*

A very low number of sexual assault survivors report the assault to the police.<sup>58</sup> A 2007 study found that “just 2% of sexual assault victims incapacitated by drugs or alcohol and just 13% of ‘physically forced’ victims reported the crimes to law enforcement.”<sup>59</sup> Multiple surveys have found that, overall, only 5% of survivors will report a rape to the police.<sup>60</sup> A Westat survey found that 5% reported to police or campus officials in cases of

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<sup>54</sup> *Id.* at 2, 11.

<sup>55</sup> *Id.* at 8.

<sup>56</sup> Jessica Bakeman & Brendan Cheney, *College Sexual Assaults in N.Y., by the Numbers*, POLITICO N.Y. (Aug. 5, 2015), <http://www.capitalnewyork.com/article/albany/2015/08/8573200/college-sexual-assault-ny-numbers>.

<sup>57</sup> *See id.*

<sup>58</sup> *See* Eliza Gray, *Why Victims of Rape in College Don't Report to the Police*, TIME (June 23, 2014), <http://time.com/2905637/campus-rape-assault-prosecution/>; SEXUAL VIOLENCE ON CAMPUS, *supra* note 50, at 9.

<sup>59</sup> Gray, *supra* note 58.

<sup>60</sup> SEXUAL VIOLENCE ON CAMPUS, *supra* note 50, at 1; BONNIE S. FISHER ET AL., THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN, U.S. DEP'T OF JUSTICE 23 (2000), <https://www.ncjrs.gov/pdffiles1/nij/182369.pdf>.

“incapacitation” and 25% in cases of “forced penetration.”<sup>61</sup> Still, the Westat report deemed the reporting rate “quite low.”<sup>62</sup> Therefore, some argue, an on-campus option is necessary to provide survivors an alternative option for reporting.<sup>63</sup>

Survivors may choose an on campus adjudication over going to the police for several reasons. First, they may have a prior relationship with the accused and might want to spare him from a criminal proceeding.<sup>64</sup> Survivors fear losing friends, experience feelings of self-blame, and fear not being believed.<sup>65</sup> Second, they may fear “the police won’t believe them.”<sup>66</sup> The same study found that “21% of physically forced victims and 12% of incapacitated victims did not report because they did[] [not] think the police would take the crime seriously and 13% of forced victims and 24% of incapacitated victims feared the police would treat them poorly.”<sup>67</sup> Third, survivors may not report because they believe they will lose control of the situation once they report to the police.<sup>68</sup> Even if a survivor decides she no longer wants to pursue the case, a prosecutor may do so against her wishes.<sup>69</sup> Finally, “[v]ictims are afraid of going through a public rape trial because of how awful it can be for the victim. Media portrayals of rape trials show how often they are about the victim’s character and credibility.”<sup>70</sup> When survivors choose this route over a criminal complaint, a major factor in their decision is likely the fear of being cross-examined.<sup>71</sup> Victims of

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<sup>61</sup> CANOR ET AL., *supra* note 47, at xxi.

<sup>62</sup> *Id.*

<sup>63</sup> See Dana Bolger & Alexandra Brodsky, *Victim’s Choice, Not Police Involvement, Should be Lawmakers’ Priority*, MSNBC (Feb. 12, 2016), <http://www.msnbc.com/msnbc/campus-rape-victims-choice-should-be-lawmakers-priority> (“[T]ime and again campus survivors tell us that, had their schools been empowered to turn their reports over to the police without their permission, they would have reported to no one at all.”).

<sup>64</sup> See Gray, *supra* note 58.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see also CANOR ET AL., *supra* note 47 at, iv.

<sup>67</sup> Gray, *supra* note 58.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> See Amelia Gentleman, *Prosecuting Sexual Assault: “Raped All Over Again,”* GUARDIAN (Apr. 13, 2013),

sexual assault are also likely to suffer from a range of physical ailments including “headaches, stomachaches, back pain, cardiac arrhythmia and menstrual symptoms.”<sup>72</sup> Additionally, “facing the perpetrator in court, remember[ing] [the] details of the crime, and confronting others who were present at the time of the original offense (such as witnesses or the police) can all trigger secondary responses to the initial trauma.”<sup>73</sup>

In contrast to criminal prosecution, on-campus adjudication provides several advantages that encourage survivors to come forward. It allows greater access to counseling and many schools provide academic support.<sup>74</sup> For those survivors who know their attackers and wish to spare them from a criminal proceeding, on-campus adjudication provides an alternate avenue.<sup>75</sup> On-campus adjudications are ultimately necessary because, despite reluctance to use the criminal justice system, sexual assault survivors have the right to an educational environment free of their abusers.<sup>76</sup>

## II. THE LAW AND ITS IMPLEMENTATION

### A. Title IX and its Evolving Interpretation

Title IX of the Education Amendments of 1972, (“Title IX”) is the federal law that requires colleges to adjudicate on campus sexual

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<http://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court>.

<sup>72</sup> Lori A. Zoellner et al., *PTSD Severity and Health Perception in Female Victims of Sexual Assault*, 13 J. TRAUMATIC STRESS 635, 636 (2000).

<sup>73</sup> Jim Parsons & Tiffany Bergin, *The Impact of Criminal Justice Involvement on Victim’s Mental Health*, 23 J. TRAUMATIC STRESS 182, 184, (2010).

<sup>74</sup> David DeMatteo et al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 PSYCHOL. PUB. POL’Y & L. 227, 229 (2015).

<sup>75</sup> *Id.*

<sup>76</sup> Alexandra Brodsky & Elizabeth Deutsch, *No, We Can’t Just Leave College Sexual Assault to the Police*, POLITICO MAG. (Dec. 03, 2014), <http://www.politico.com/magazine/story/2014/12/uva-sexual-assault-campus-113294>.

assault cases.<sup>77</sup> In 1972 Congress passed Title IX, which read in part: “[n]o 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.”<sup>78</sup> In accordance with the reasoning that “when students suffer sexual assault and harassment, they are deprived of equal and free access to an education,”<sup>79</sup> Title IX requires colleges to address sexual violence.<sup>80</sup>

The current understanding of Title IX began with *Davis v. Monroe*, where the Supreme Court held that sexual harassment was gender discrimination for the purposes of Title IX.<sup>81</sup> The Court was asked to consider whether a school could be held liable for failing to protect a fifth-grade student from harassment by one of her classmates.<sup>82</sup> In examining the responsibilities of schools under Title IX, the Court noted that a school is liable if it acts “deliberately indifferent” to a complaint of sexual harassment.<sup>83</sup> The Court “conclude[d] that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute.”<sup>84</sup> The Court also held that schools were liable under Title IX for failing to prevent or correct “where the behavior is so severe, pervasive, and objectively offensive that

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<sup>77</sup> *Know Your Rights: Title IX Requires Your School to Address Sexual Violence*, DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, <https://www2.ed.gov/about/offices/list/ocr/docs/know-rights-201404-title-ix.pdf> (last visited Aug. 13, 2016) [hereinafter *Know Your Rights*].

<sup>78</sup> Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2015).

<sup>79</sup> *Title IX and Sexual Violence in Schools*, ACLU, <https://www.aclu.org/title-ix-and-sexual-violence-schools?redirect=womens-rights/title-ix-and-sexual-violence-schools> (last visited Aug. 13, 2016); see QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS 1 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>80</sup> *Know Your Rights*, *supra* note 77.

<sup>81</sup> *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643 (1999).

<sup>82</sup> *Id.* at 633.

<sup>83</sup> *Id.* at 643.

<sup>84</sup> *Id.* at 649.

it denies its victims the equal access to education that Title IX is designed to protect.”<sup>85</sup>

In response, the Department of Education Office of Civil Rights (“OCR”) wrote a letter titled, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (“Grievance Letter”), explaining what steps schools should take to remain in compliance with Title IX.<sup>86</sup> The letter focuses mostly on sexual harassment,<sup>87</sup> which now is understood to include sexual violence.<sup>88</sup> It clarifies important points such as Title IX’s applicability to harassment of gays and lesbians.<sup>89</sup> The Grievance Letter also recommends factors for establishing hostile environment harassment, which include: “[t]he degree to which the conduct affected one or more students’ education,” “[t]he type, frequency, and duration of the conduct,” the relationship between the subject and the harasser, “[t]he number of individuals involved,” the age and sex of everyone involved, “[o]ther incidents at the school,” and “[i]ncidents of gender based, but nonsexual harassment.”<sup>90</sup> The Grievance Letter requires schools to take “immediate effective action” upon discovery of harassment to eliminate the hostile environment and “prevent its recurrence,” but provides little guidance on what that means or what steps to take.<sup>91</sup> In regards to on-campus procedures, the Grievance Letter states only that “[s]chools are required by the Title IX regulations to adopt and publish grievance procedures providing for prompt and equitable resolution of sex discrimination complaints.”<sup>92</sup>

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<sup>85</sup> *Id.* at 651.

<sup>86</sup> See U.S. DEP’T OF EDUC. OFFICE OF CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001) [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE], [http://www.nccpsafety.org/assets/files/library/Revised\\_Sexual\\_Harassment\\_Guidance\\_2001.pdf](http://www.nccpsafety.org/assets/files/library/Revised_Sexual_Harassment_Guidance_2001.pdf).

<sup>87</sup> See *id.* at i.

<sup>88</sup> Dear Colleague Letter, *supra* note 12, at 1 (“Sexual harassment of students, which includes acts of sexual violence, is a form of sex discrimination prohibited by Title IX.”).

<sup>89</sup> REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 86, at 3.

<sup>90</sup> *Id.* at 5–7.

<sup>91</sup> See *id.* at 12.

<sup>92</sup> *Id.* at 14.

*B. Dear Colleague*

On April 4, 2011, the OCR released its “Dear Colleague” letter (“Dear Colleague”) to further clarify schools’ obligations under Title IX.<sup>93</sup> Dear Colleague is a “significant guidance document”<sup>94</sup> which the OCR issues “to recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights.”<sup>95</sup> Dear Colleague reaffirms that sexual harassment creates a hostile environment under Title IX.<sup>96</sup> It also reaffirms that sexual violence is included in sexual harassment.<sup>97</sup> Importantly, it defines sexual violence as “physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent due to the victim’s use of drugs or alcohol.”<sup>98</sup> The letter clarifies that schools are not exempt from remedying the situation just because the assault happened off-campus.<sup>99</sup> Dear Colleague also requires schools to provide notice of nondiscrimination and to designate an employee as a Title IX “coordinator” who is responsible for making sure the school stays in compliance.<sup>100</sup>

With respect to the adjudication process, Dear Colleague provides many guidelines and few rules.<sup>101</sup> The grievance process must begin with notice that is “easily understood, easily located, and

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<sup>93</sup> Dear Colleague Letter, *supra* note 12, at 1.

<sup>94</sup> *Id.* at 1 n.1. For an explanation of such documents see the Office of Management and Budget’s Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), [http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory\\_matters\\_pdf/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/012507_good_guidance.pdf).

<sup>95</sup> Dear Colleague Letter, *supra* note 12, at 1 n.1 (“OCR’s legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”).

<sup>96</sup> *Id.* at 2.

<sup>97</sup> *Id.* at 1.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 4.

<sup>100</sup> *Id.* at 6. For a discussion of the ramifications of non-compliance see *infra* notes 179–81 and accompanying text.

<sup>101</sup> See Dear Colleague Letter, *supra* note 12, at 8–12.

widely distributed.”<sup>102</sup> Dear Colleague takes a somewhat strong stance against mediation, deeming it inappropriate.<sup>103</sup> After receiving a report, a school must conduct an impartial investigation.<sup>104</sup> However, a concurrent police investigation does not relieve a school of their duty to investigate an alleged assault.<sup>105</sup> At the actual hearing and during any investigation, both parties must be allowed to present witnesses and evidence.<sup>106</sup> If a school chooses to allow lawyers to be present, it must do so for both parties, and the same rule applies if lawyers are to be allowed to speak.<sup>107</sup> During the hearing, schools are “strongly discourag[e]d from allowing the parties personally to . . . cross-examine each other.”<sup>108</sup> Dear Colleague requires that those involved in implementing a school’s grievance procedure receive training in complaints of sexual harassment and sexual violence, that the proceedings be impartial, and recommends an appeals process.<sup>109</sup> Finally, schools are required

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<sup>102</sup> *Id.* at 9.

<sup>103</sup> *Id.* at 8. *But see An Open Letter to OCR*, INSIDE HIGHER ED. (Oct. 28, 2011), <https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students> (stating that an anonymous college administrator laments that mediation is not allowed to work out disputes).

<sup>104</sup> Dear Colleague Letter, *supra* note 12, at 9.

<sup>105</sup> *Id.* at 10.

<sup>106</sup> *Id.* at 11.

<sup>107</sup> *Id.* at 12. *But see* Elizabeth Bartholet et al., *Rethink Harvard’s Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> (showing how Harvard law professors expressed concern about “[t]he failure to ensure adequate representation for the accused, particularly for students unable to afford representation”).

<sup>108</sup> Dear Colleague Letter, *supra* note 12, at 12. *But see* Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 513 (2012) (“Cross-examination [is] very important because, without such evidence, the risk of erroneous deprivation of liberty is high.”).

<sup>109</sup> Dear Colleague Letter, *supra* note 12, at 12. *But see* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 64 (2013) (worrying that training performed by biased trainers “poses a strong threat to accused student rights”); Barclay Sutton Hendrix, *A Feather on One Side, A Brick on the Other: Tilting the Scale Against Males Accused of Sexual Assault in Campus Disciplinary*

to use a preponderance of the evidence standard, which means, “it is more likely than not that sexual harassment or violence occurred.”<sup>110</sup>

Much of Dear Colleague has been codified by Congress in the 2013 Campus Sexual Violence Elimination Act (“SaVe Act”).<sup>111</sup> The SaVe Act requires schools to “increase transparency about the scope of sexual violence on campus, guarantee victims enhanced rights, provide for standards in institutional conduct proceedings, and provide campus community wide prevention educational programming.”<sup>112</sup> Specifically, the SaVe Act requires schools to develop programs to promote sexual assault awareness.<sup>113</sup> The school must determine policies for protection, punishment, and disciplinary procedures.<sup>114</sup> The procedures must “provide a prompt,

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*Proceedings*, 47 GA. L. REV. 591, 618 (2013) (“Allowing an accuser to appeal the result of a campus disciplinary proceeding tilts the scale too far in favor of accusers at the expense of depriving those accused sufficient due process protections. It also resembles double jeopardy.”).

<sup>110</sup> Dear Colleague Letter, *supra* note 12, at 11. However, many have argued that this lower standard is contrary to the American value of due process. See Laura I Appleman, *A Tragedy of Errors: Blackstone, Procedural Asymmetry, and Criminal Justice*, 128 HARV. L. REV. F. 91, 96 (2015) (“Title IX’s new requirements have led to a system that some have alleged lacks ‘the most basic elements of fairness and due process.’”); Wendy Kaminer, *Sexual Harassment and the Loneliness of the Civil Libertarian Feminist*, ATLANTIC (Apr. 6, 2011), <http://www.theatlantic.com/national/archive/2011/04/sexual-harassment-and-the-loneliness-of-the-civil-libertarian-feminist/236887/> (discussing that Dear Colleague “suggests, oddly and ominously, that the statutory rights of the accuser trump the constitutional due-process rights of the accused”).

<sup>111</sup> Susan Hanley Duncan, *The Devil is in the Details: Will the Campus SaVe Act Provide More or Less Protection to Victims of Campus Assaults?*, 40 J. C. & U. L. 443, 452 (2014); see 20 U.S.C. §§ 1092(f)(8)(B)(iv)(I)–(II) (2012).

<sup>112</sup> *The Campus Sexual Violence Elimination Act*, JEANNE CLERY ACT INFORMATION, <http://www.cleryact.info/campus-save-act.html> (last visited Aug. 13, 2016) (“President Obama signed the measure into law as part of the Violence Against Women Reauthorization Act of 2013.”).

<sup>113</sup> 20 U.S.C. §§ 1092(f)(8)(B)(i) (2015) (discussing that the school must develop “[e]ducation programs to promote the awareness of rape, acquaintance rape, domestic violence, dating violence, sexual assault, and stalking”).

<sup>114</sup> *Id.* § 1092(f)(8)(B)(ii) (discussing that the school must develop “[p]ossible sanctions or protective measures that such institution may impose following a final determination of an institutional disciplinary procedure



fair, and impartial investigation and resolution,”<sup>115</sup> and they must be conducted by a neutral party who receives training regarding the issues that surround sexual assault.”<sup>116</sup> Schools must provide students an equal opportunity to have others present during the process<sup>117</sup> and schools must inform students in writing of their decision.<sup>118</sup> These minimum standards, however, leave much to the discretion of the institution, such as whether the school will provide representation, evidentiary standards, and methods for direct and cross examination.

### C. *Enough is Enough*

In February of 2015, Governor Andrew Cuomo announced his “Enough is Enough” initiative, so that New York State could further combat the issue of sexual assaults on campuses.<sup>119</sup> Governor Cuomo signed the bill into law on July 7, 2015.<sup>120</sup> Figures such as former Speaker of the House Nancy Pelosi and pop artist Lady Gaga offered their public support of the law.<sup>121</sup> Most of this praise, however, has been focused on the preventative or cultural changes

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regarding rape, acquaintance rape, domestic violence, dating violence, sexual assault, or stalking”).

<sup>115</sup> *Id.* § 1092(f)(8)(B)(iv)(I)(aa).

<sup>116</sup> *Id.* § 1092(f)(8)(B)(iv)(I)(bb).

<sup>117</sup> *Id.* § 1092(f)(8)(B)(iv)(II).

<sup>118</sup> *Id.* § 1092(f)(8)(B)(iv)(III).

<sup>119</sup> Kenneth Lovett, *Cuomo Unveils Campaign to Fight Sexual Assaults on College Campuses*, N.Y. DAILY NEWS (Feb. 25, 2015), <http://www.nydailynews.com/news/politics/cuomo-unveils-campaign-fight-sexual-assault-colleges-article-1.2129809>.

<sup>120</sup> *Enough is Enough*, *supra* note 26.

<sup>121</sup> See Jillian Jorgensen, *Nancy Pelosi Backs Andrew Cuomo’s Push for Nation’s ‘Toughest’ Campus Rape Law*, OBSERVER (May 11, 2015), <http://observer.com/2015/05/nancy-pelosi-backs-andrew-cuomos-push-for-nations-toughest-campus-rape-law>; Lady Gaga & Andrew Cuomo, *Lady Gaga, Gov. Cuomo Pen Essay Urging Passage of ‘Enough Is Enough’ Bill: Exclusive*, BILLBOARD (June 8, 2015), <http://www.billboard.com/articles/news/6590572/lady-gaga-andrew-cuomo-enough-is-enough-legislation>.

the law seeks to generate, rather than the way it addresses the issue of how colleges must respond to reports of sexual assault.<sup>122</sup>

The “legislation requires all colleges to 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.”<sup>123</sup> The law shifted the standard of sexual consent to require affirmative consent, commonly understood as “yes means yes” instead of “no means no.” Enough is Enough defines affirmative consent as the “knowing, voluntary, and mutual decision among all participants to engage in sexual activity. Consent can be given by words or actions, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.”<sup>124</sup> Enough is Enough also requires schools to adopt an amnesty policy so that victims of sexual violence who were using drugs or alcohol will not be subject to punishment by the school.<sup>125</sup>

Notably absent from the Enough is Enough website, however, is any mention of the adjudication process.<sup>126</sup> The law again gives colleges the discretion to create their own adjudication processes and establishes only minimum standards.<sup>127</sup> These minimum standards fall into three broad categories. First, the accused must be given notice of the claim against him.<sup>128</sup> Second, the parties must have the “opportunity to [present] evidence during the investigation and . . . hearing . . . and have access to . . . [the] record.”<sup>129</sup> Third,

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<sup>122</sup> For example, in a press release Nancy Pelosi praised the affirmative consent provision. Press Release, Nancy Pelosi, Pelosi Remarks at New York ‘Enough is Enough’ Bill Signing Ceremony (July 7, 2015), <https://pelosi.house.gov/news/press-releases/pelosi-remarks-at-new-york-enough-is-enough-bill-signing-ceremony>. She also stated the bill was about “freedom for kids, young people to go to school, to learn, freedom to go to school, to grow, and not fear that they are not going to be safe, any threat to their safety or to their reputation.” *Id.*

<sup>123</sup> *Enough is Enough*, *supra* note 26.

<sup>124</sup> N.Y. EDUC. LAW § 6441(1) (McKinney 2015).

<sup>125</sup> *Id.* § 6442(1).

<sup>126</sup> *Enough is Enough*, *supra* note 26.

<sup>127</sup> *See* EDUC. § 6444(5)(b).

<sup>128</sup> *Id.* § 6444(5)(b)(I).

<sup>129</sup> *Id.* § 6444(5)(b)(ii).

both parties must have the opportunity to appeal.<sup>130</sup> With only these very minimum standards, it is no surprise that colleges handle such cases in incredibly different ways.<sup>131</sup>

#### *D. College Adjudication Procedures*<sup>132</sup>

Currently, federal and state laws provide only very minimal standards for how colleges and universities must conduct adjudication proceedings.<sup>133</sup> Procedures vary greatly from institution to institution. Some universities, like Columbia University, detail who can be present during a hearing, provide a roadmap of opening statements and witness testimony, and prohibit direct questioning by the parties.<sup>134</sup> Others, like St. John's University, state only that "an investigation may include initial meetings with the Complainant and with the Respondent, a discussion of the available procedures, and a discussion of possible avenues for resolution of the complaint."<sup>135</sup> Students at Columbia enjoy the privilege of knowing exactly what is going to happen before the hearing begins, whereas students at St. John's appear to be kept in the dark. Students also have different guarantees of rights

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<sup>130</sup> *Id.* § 6444(5)(b)(III).

<sup>131</sup> *See generally id.* § 6444 (providing only minimal standards). One other significant addition is that the law allows students the right to "exclude their own prior sexual history with persons other than the other party in the judicial or conduct process." *Id.* § 6444(5)(c)(vi).

<sup>132</sup> Please note that the colleges chosen for discussion were chosen to show the differences both in specificity in procedure and actual procedural practices for on-campus adjudications. This sample is not intended to be representative.

<sup>133</sup> *See, e.g.*, 20 U.S.C. § 1681(a) (2012); Dear Colleague Letter, *supra* note 12; *supra* Part II (discussing the aforementioned state and federal laws).

<sup>134</sup> GENDER-BASED MISCONDUCT (POLICY AND PROCEDURES) FOR STUDENTS), COLUMBIA U. 28 (Sept. 1, 2016) [hereinafter COLUMBIA POLICY AND PROCEDURES], <http://www.columbia.edu/cu/studentconduct/documents/GBMPolicyandProceduresforStudents.pdf>.

<sup>135</sup> *Policy 704 - Policy Against Discrimination and Harassment and Related Complaint Procedures*, ST. JOHN'S UNIVERSITY, <http://www.stjohns.edu/about/administrative-offices/human-resources/hr-policy-manual/policy-704-policy-against-discrimination-and-harassment-and-related-complaint-procedures> (last visited Aug. 13, 2016) [hereinafter *St. John's Policy and Procedures*].

depending on which school they attend, despite those schools being located in the same state.

Columbia provides a very detailed description of its adjudication process.<sup>136</sup> For example, character witnesses are expressly excluded from the investigation.<sup>137</sup> If both respondent and complainant agree, they may engage in informal resolution or mediation.<sup>138</sup> If a hearing is required, the University chooses a panel of “three members drawn from a small group of specially-trained administrators”<sup>139</sup> who have “receive[d] relevant training once a year.”<sup>140</sup> Both complainant and respondent may then submit written responses and each has the opportunity to review the other party’s statement.<sup>141</sup> These statements are limited to the results of the investigation and the panel with not consider the impact of the alleged conduct or potential punishment.<sup>142</sup>

Columbia University also provides a fairly detailed description of its hearing process.<sup>143</sup> Columbia notes that the proceeding is closed to all except parties, advisors, and witnesses.<sup>144</sup> The order of proceedings is: the complainant and then the respondent give opening statements, the complainant and respondent are questioned by the panel, witnesses give testimony and are questioned by the panel, the investigator is questioned by the panel, and finally the complainant and then the respondent give closing statements.<sup>145</sup> Neither party may be in the hearing room during the other’s testimony, but they are allowed to view via closed circuit television.<sup>146</sup> Only the panel may directly ask questions to anyone who is testifying.<sup>147</sup>

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<sup>136</sup> See *infra* text accompanying notes 138–43.

<sup>137</sup> COLUMBIA POLICY AND PROCEDURES, *supra* note 134, at 23.

<sup>138</sup> *Id.* at 25.

<sup>139</sup> *Id.* at 27.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See *infra* notes 144–47 and accompanying text.

<sup>144</sup> COLUMBIA POLICY AND PROCEDURES, *supra* note 134, at 28.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

New York University (“NYU”) has a policy that is similar to Columbia in specificity but contains differences in substance. For example, the school has a Title IX Coordinator, rather than another administrator, who makes the initial determination of whether or not an investigation is necessary.<sup>148</sup> Rather than a panel, there is a single adjudicator.<sup>149</sup> NYU specifies that “[a] [c]omplainant is not required to participate in person at the hearing in order for the hearing to proceed” and that either “[c]omplainant or [r]espondent may request alternative testimony options that would not require physical proximity to the other party.”<sup>150</sup>

NYU has no required hearing procedure, but the following is provided as a “general example.”<sup>151</sup> First, the adjudicator explains the process and reads the charges.<sup>152</sup> Next, the investigator outlines the investigation and highlights the “areas of agreement and disagreement.”<sup>153</sup> Both parties, starting with the complainant, are then allowed to make statements and be questioned by the adjudicator.<sup>154</sup> At the adjudicator’s discretion, these questions can involve questions suggested by the opposing party.<sup>155</sup> Next, the “[a]djudicator, [c]omplainant, and [r]espondant may then question the investigator.”<sup>156</sup> Witnesses are then questioned by the adjudicator and “as appropriate, the [c]omplainant and

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<sup>148</sup> Compare *id.* (describing Columbia University’s adjudication procedures), with N.Y. UNIV., REPORTING, INVESTIGATION, AND RESOLVING SEXUAL MISCONDUCT, RELATIONSHIP VIOLENCE, AND STALKING – COMPLAINTS AGAINST STUDENTS 5 (2016) [hereinafter N.Y.U. POLICY AND PROCEDURES], <https://www.nyu.edu/content/dam/nyu/studentAffairs/documents/studentCommunityStandards/Sexual%20Misconduct%20-%20Procedures%20for%20Student%20Respondent%202016-10-13.pdf> (describing New York University’s adjudication procedures).

<sup>149</sup> See N.Y.U. POLICY AND PROCEDURES, *supra* note 148, at 7.

<sup>150</sup> *Id.* at 9.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

[r]espondent.”<sup>157</sup> The parties are then given the opportunity to make a final statement.<sup>158</sup>

Other New York schools, such as Stony Brook University, provide some grievance procedures details, but they lack enough detail to ensure a fair process for both parties.<sup>159</sup> The school notes that complaints may be filed in writing or orally and should be done within ninety days.<sup>160</sup> It advises complainants that they will be required to participate in an intake interview.<sup>161</sup> If the school determines an investigation is required, it will review records, interview witnesses, and take statements from complainant and respondent.<sup>162</sup> The school “reserves the right to continue its investigation, regardless of [c]omplainant cooperation or involvement.”<sup>163</sup> There is no mention of a hearing, but after the investigation the “staff issues a written statement indicating whether the complaint was substantiated.”<sup>164</sup> Currently, and in apparent violation of Enough is Enough, Stony Brook University does not provide for an appeals process.<sup>165</sup>

At the other end of the spectrum are colleges that have almost no publicly available adjudication procedures.<sup>166</sup> Either the procedures do not exist or are not available for scrutiny. For example, Excelsior College states simply that “[i]f the accused is a member of the College community, the Office of Human Resources will review evidence and statements made by the victim and conduct

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<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> See *infra* text accompanying notes 161–66.

<sup>160</sup> COMPLAINT PROCEDURE FOR ALLEGATIONS OF DISCRIMINATION, STONEY BROOK UNIVERSITY OFFICE OF DIVERSITY & AFFIRMATIVE ACTION 7 (Mar. 2014) [hereinafter STONY BROOK POLICY AND PROCEDURES], [http://www.stonybrook.edu/diversity/documents/complaint\\_booklet.pdf](http://www.stonybrook.edu/diversity/documents/complaint_booklet.pdf).

<sup>161</sup> *Id.* at 9.

<sup>162</sup> *Id.* at 10.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 11.

<sup>165</sup> See *id.*; see also N.Y. EDUC. LAW § 6444(5)(b) (McKinney 2015) (describing the requirement for access “to at least one level of appeal”).

<sup>166</sup> See *infra* text accompanying notes 165–71.

an investigation.”<sup>167</sup> Similarly, St. John’s University, while providing for formal written or informal oral complaints, does little to explain how those complaints are processed or how decisions are rendered.<sup>168</sup> The policy dictates only that there be an investigation which may include meetings with either party.<sup>169</sup> Farmingdale College has an interesting panel selection process: both the complainant and respondent each choose a panel member from an existing pool, and those two members select a third member.<sup>170</sup> The details of the panel review, however, amounts to: “[t]he tripartite panel shall review all relevant information, interview pertinent witnesses, and, at their discretion, hear testimony from the complainant and the respondent, if desirable.”<sup>171</sup>

Enough is Enough problematically allows such variety in adjudication procedures. Without equality in procedure, schools can place undue burdens on the complainant<sup>172</sup> and the defendant.<sup>173</sup> Schools themselves can feel intense pressure without strong guidance.<sup>174</sup> The results of all this can often be troubling.<sup>175</sup>

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<sup>167</sup> *Sexual Assault, Domestic Violence, and Stalking Prevention*, EXCELSIOR C., <https://info.excelsior.edu/student-policies/sexual-assault-domestic-violence-and-stalking-prevention/> (last visited Aug. 13, 2016).

<sup>168</sup> See *St. John’s Policy and Procedures*, *supra* note 135.

<sup>169</sup> *Id.*

<sup>170</sup> STATE UNIVERSITY OF NEW YORK, DISCRIMINATION COMPLAINT PROCEDURE, FARMINGDALE COLLEGE, 4 (Apr. 29, 2015) [hereinafter FARMINGDALE POLICY AND PROCEDURES], [http://www.farmingdale.edu/administration/equity-diversity/pdf/discrimination\\_complaint\\_procedure.pdf](http://www.farmingdale.edu/administration/equity-diversity/pdf/discrimination_complaint_procedure.pdf).

<sup>171</sup> *Id.* at 5.

<sup>172</sup> See *infra* notes 195–210 and accompanying text.

<sup>173</sup> See *infra* notes 211–29 and accompanying text.

<sup>174</sup> See discussion *infra* Section III.A.1.

<sup>175</sup> See discussion *infra* Section III.A.

## III. CRITICISMS AND PROPOSED SOLUTIONS

A. *How the Current System Can Lead to a Miscarriage of Justice*

## 1. Pressures on Universities

Federal law now requires that schools investigate and adjudicate sexual assault complaints. Failure to do so can lead to loss of federal funds.<sup>176</sup> Some critics argue that universities are unfairly pressured by the OCR to crack down on sexual assaults and that schools have to appear tough on the issue or risk financial sanctions.<sup>177</sup> Many schools “complain of heavy-handed pressure from Washington and a growing bureaucracy.”<sup>178</sup> The OCR will investigate colleges for noncompliance with Title IX and those schools can be subject to stiff financial penalties.<sup>179</sup> For example, recently nearly two-dozen

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<sup>176</sup> Meredith Clark, *Official to Colleges: Fix Sexual Assault or Lose Funding*, MSNBC (July 15, 2014), <http://www.msnbc.com/msnbc/campus-sexual-assault-conference-dartmouth-college#51832> (“Speaking at a conference on campus sexual assault held at Dartmouth College, Assistant Secretary for Civil Rights at the Department of Education Catherine Lhamon said that despite the fact it has never been done before, she is prepared to cut off federal funding to schools that violate Title IX, the 1972 gender equity law.”).

<sup>177</sup> See Henrick, *supra* note 109, at 53 (“OCR primarily cares about the complainant’s rights, as evidenced by its guidances and enforcement opinion letters, conviction carries a much lower risk of administrative enforcement than acquittal.”); Tovia Smith, *Some Accused Of Sexual Assault On Campus Say System Works Against Them*, NPR (Sep. 3, 2014), <http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them> (“[S]ome students say schools are running so scared that they’re violating the due process rights of defendants instead.”) [hereinafter Smith, *System Works Against Them*].

<sup>178</sup> David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015), <http://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html>.

<sup>179</sup> See Press Release, U.S. Dep’t of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014) (on file with Journal of Law & Policy), <http://www.ed.gov/news/press-releases/us-department-education-releases-list->



women have filed federal complaints against Columbia University.<sup>180</sup> The number of schools under investigation by the OCR reached 129 in August 2015.<sup>181</sup>

However, the pressures a university faces are not always financial; there are social pressures that come with bad publicity.<sup>182</sup> Indeed, “[b]ecause universities appeal to popular sentiment to attract students and receive alumni donations, they shun negative publicity.”<sup>183</sup> Columbia Student Emma Sulkowicz, after an alleged sexual assault, gained notoriety for an art project named “Carry that Weight” in which she carried her mattress around campus.<sup>184</sup> Sulkowicz alleges she was raped in her dorm room by a former sexual partner.<sup>185</sup> She reported the attack, and after an investigation and hearing, the school found the male student not responsible.<sup>186</sup> She began carrying the mattress, identical to the one in which she claims to have been raped, around campus to protest the university’s

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higher-education-institutions-open-title-ix-sexual-violence-investigations; Clark, *supra* note 176 (“Assistant Secretary for Civil Rights at the Department of Education Catherine Lhamon said that despite the fact it has never been done before, she is prepared to cut off federal funding to schools that violate Title IX.”).

<sup>180</sup> Jenny Kutner, *Emma Sulkowicz Was Never Alone: Report Finds Columbia University Repeatedly Bungled Sexual Assault Investigations*, SALON (June 15, 2015), [http://www.salon.com/2015/06/15/emma\\_sulkowicz\\_was\\_never\\_alone\\_report\\_finds\\_columbia\\_university\\_repeatedly\\_bungled\\_sexual\\_assault\\_investigations/](http://www.salon.com/2015/06/15/emma_sulkowicz_was_never_alone_report_finds_columbia_university_repeatedly_bungled_sexual_assault_investigations/).

<sup>181</sup> Savage & Phelps, *supra* note 178.

<sup>182</sup> One anonymous college administrator wrote “And my fear — yes, it’s fear — of seeing my institution’s name in *Inside Higher Ed* or *The Chronicle of Higher Education* as the subject of an investigation.” *An Open Letter to OCR*, *supra* note 103.

<sup>183</sup> Henrick, *supra* note 109, at 82; see Julie Novkov, *Equality, Process, and Campus Sexual Assault*, 75 MD. L. REV. 590, 599 (2016) (showing that schools are “concerned about the public relations damage—and the possible impact on student recruitment efforts.”).

<sup>184</sup> Roberta Smith, *In a Mattress, a Lever for Art and Political Protest*, N.Y. TIMES (Sept. 21, 2014), [http://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html?\\_r=0](http://www.nytimes.com/2014/09/22/arts/design/in-a-mattress-a-fulcrum-of-art-and-political-protest.html?_r=0).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

decision.<sup>187</sup> She continued the project throughout her final year, even carrying the mattress onstage to accept her diploma.<sup>188</sup>

## 2. The Lack of Consistent Procedures Can Make the Process Unfair or Even Traumatizing to Both Parties

Critics of Enough is Enough believe the law may make the campus sexual assault problem worse.<sup>189</sup> Legal scholars claim the law is based on a misunderstanding of how sexual encounters among young people occur.<sup>190</sup> Assemblyman Kieran Lalor of Dutchess County wrote that “victims’ pursuit of justice will be impaired by a vague set of rules and an enforcement system outside of the courts that won’t have the same access to evidence and witnesses (a campus tribunal has no subpoena power, for example) that a court would.”<sup>191</sup> Victims “need a system complete with experienced investigators and a forum capable of distinguishing guilt from innocence with the ability to deliver punishment and prevent predators from harming others.”<sup>192</sup> While Assemblyman Lalor ultimately argues for eliminating on-campus adjudications altogether, his criticisms of Enough is Enough’s shortcomings can be used to strengthen, rather than abandon, the law.<sup>193</sup>

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<sup>187</sup> Soraya Nadia McDonald, *It’s Hard to Ignore a Woman Toting a Mattress Everywhere She Goes, Which is Why Emma Sulkowicz is Still Doing it*, WASH. POST (Oct. 29, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/29/its-hard-to-ignore-a-woman-toting-a-mattress-everywhere-she-goes-which-is-why-emma-sulkowicz-is-still-doing-it/>.

<sup>188</sup> Kate Taylor, *Mattress Protest at Columbia University Continues into Graduation Event*, N.Y. TIMES (May 19, 2015), <http://www.nytimes.com/2015/05/20/nyregion/mattress-protest-at-columbia-university-continues-into-graduation-event.html>.

<sup>189</sup> Madison Iszler, *Law Professors Line Up Against New York’s New Campus Sexual-Assault Law*, C. FIX (July 22, 2015), <http://www.thecollegefix.com/post/23449/>.

<sup>190</sup> *Id.*

<sup>191</sup> Kieran Lalor, Opinion, *How Cuomo’s ‘Yes Means Yes’ Law Harms Victims, Too*, N.Y. POST (July 14, 2015), <http://nypost.com/2015/07/14/how-cuomos-yes-means-yes-law-harms-victims-too/>.

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

Where complainants are concerned, one notable problem is that, unlike the criminal justice system where the parties are the state and the defendant, many colleges consider the two parties to be the complainant and the respondent.<sup>194</sup> For a student at Stony Brook University, this meant that she was forced to act as the prosecutor in her own sexual assault case.<sup>195</sup> Sara Tubbs claimed that after a night of drinking she accompanied her attacker back to his dorm room where he sexually assaulted her.<sup>196</sup> She reported the attack to university police who told her she probably did not have a viable case, so she filed a complaint with the University, and soon learned that she would have to prosecute the case herself.<sup>197</sup> She “had to create exhibits, write an opening statement and pursue witness testimony, preparation that she said took [sixty] hours.”<sup>198</sup> This occurred “at the same time she was trying to prepare for and take her final exams, causing her significant stress and anxiety and impacting her ability to perform; indeed she has to postpone handing in one final because of this process.”<sup>199</sup>

At the hearing, Tubbs was forced to question and be cross-examined by the defendant in front of school officials and other students.<sup>200</sup> Tubbs explained to the school that she did not wish to see her attacker at the hearing, so “the University placed a paper screen between the two of them.”<sup>201</sup> However, “nothing could

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<sup>194</sup> See N.Y.U. POLICY AND PROCEDURES, *supra* note 148, at 9 (NYU hearing procedures allow the “Complainant” and the “Respondent” to make statements and propose questions to be asked by the adjudicator); STONY BROOK POLICY AND PROCEDURES, *supra* note 160, at 9 (referring to Complainants and Respondents as “the parties”).

<sup>195</sup> Higgins, *supra* note 44.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> Complaint at 10, Tubbs v. Stony Brook Univ., (S.D.N.Y. 2015) (No. 15-0517).

<sup>200</sup> Higgins, *supra* note 44; David Ferguson, *University Forces Woman to Cross-Examine Her Alleged Rapist Because She Didn't Violently Resist*, RAWSTORY (Feb. 24, 2015), <http://www.rawstory.com/2015/02/university-forces-woman-to-cross-examine-her-alleged-rapist-because-she-didnt-violently-resist/>.

<sup>201</sup> Complaint at 12, Tubbs v. Stony Brook Univ., (S.D.N.Y. 2015) (No. 15-0517).

address the trauma of having to question, and be questioned by” the defendant.<sup>202</sup> Tubbs claims she feared an aggressive retaliation from the defendant and that after the hearing she was diagnosed with post-traumatic stress disorder.<sup>203</sup> She found herself “unable to sleep, afraid of being alone, depressed, and experiencing panic attacks.”<sup>204</sup> The school found the defendant to be “not responsible” and informed Tubbs on the day of her graduation.<sup>205</sup> Stony Brook has since updated its policy, but it still “does[] [not] specifically outlaw the practice of having victims confront their attackers at disciplinary hearings.”<sup>206</sup>

In contrast, critics argue that adjudication procedures are unfair to the accused because they presume guilt or deny basic due process rights; they have criticized Dear Colleague, its requirements, or a particular school’s implementation of those requirements.<sup>207</sup> In 2014, a group of twenty-eight Harvard Law faculty penned an open letter criticizing Harvard’s new sexual assault policy as “inconsistent with many of the most basic principles we teach.”<sup>208</sup> The procedures, they claimed, “lack[ed] the most basic elements of fairness and due process [and] [were] overwhelmingly stacked against the accused.”<sup>209</sup> Specifically, they cited “[t]he absence of any adequate opportunity to discover the facts charged and to

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<sup>202</sup> *Id.*

<sup>203</sup> Higgins, *supra* note 44.

<sup>204</sup> Complaint at 12, Tubbs v. Stony Brook Univ., (S.D.N.Y. 2015) (No. 15-0517).

<sup>205</sup> *Id.* at 12.

<sup>206</sup> Higgins, *supra* note 44; *see also* STONY BROOK POLICY AND PROCEDURES, *supra* note 160, at 9 (showing that Stony Brook provides no details of the hearing process at all, only that the school expects the parties or meet with staff “as needed” and that the school will “[t]ake all reasonable steps necessary to complete the investigation within 90 calendar days”).

<sup>207</sup> *See* Bartholet et al., *supra* note 107; ‘Accused is Guilty’: Campus Rape Tribunals Punish Without Proof, Critics Say, FOX NEWS (June 20, 2015), <http://www.foxnews.com/us/2015/06/20/accused-is-guilty-campus-rape-tribunals-punish-without-proof-say-critics/> [hereinafter *Campus Rape Tribunals*]; Henrick, *supra* note 109, at 54 (“Quite simply, the process of resolving sexual misconduct allegations under Title IX is fundamentally unfair to the accused and unduly prone to false conviction.”).

<sup>208</sup> Bartholet et al., *supra* note 107.

<sup>209</sup> *Id.*

confront witnesses and present a defense,” the combination “of investigation, prosecution, fact-finding and appellate review and one office . . . , [and] [t]he failure to ensure adequate representation for the accused.”<sup>210</sup> Other critics argued that consequences of being found guilty by a campus tribunal, while not as severe as in the criminal system, are still very real and “can mean both expulsion and a career-destroying black mark on your permanent record.”<sup>211</sup>

A mixture of students, lawyers, and commentators are beginning to claim that the social and government pressures on colleges to crack down on sexual assaults have created a situation where accused students must affirmatively prove their innocence.<sup>212</sup> National Public Radio reported that one University of California, San Diego student accused of sexual assault was denied the right to introduce text-message evidence or to “effectively cross examine his accuser.”<sup>213</sup> The student was suspended and challenged the procedure in court.<sup>214</sup> His claim was successful, as the court found that the “process was unfairly skewed against [him].”<sup>215</sup> In another case, a University of Massachusetts, Amherst student was accused of sexual assault after what he claimed was consensual sex.<sup>216</sup> The complainant, he alleged, had told him to bring a condom and

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<sup>210</sup> *Id.*

<sup>211</sup> Christina Hoff Sommers, *In Making Campuses Safe for Women, a Tragedy of Justice for Men*, CHRON. HIGHER EDUC. (June 5, 2011), <http://chronicle.com/article/In-Making-Campuses-Safe-for/127766/>.

<sup>212</sup> See *Campus Rape Tribunals*, *supra* note 207 (“Essentially the procedure there works under the assumption that the accused is guilty and needs to use the hearing to prove his innocence.” - K.C. Johnson, author of “Until Proven Innocent: Political Correctness and the Shameful Injustice of the Duke Lacrosse Rape Case.”); Ariel Kaminer, *New Factor in Campus Sexual Assault Cases: Counsel for the Accused*, N.Y. TIMES (Nov. 19, 2014), [http://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?\\_r=0](http://www.nytimes.com/2014/11/20/nyregion/new-factor-in-campus-sexual-assault-cases-counsel-for-the-accused.html?_r=0) [hereinafter Kaminer, *Counsel for the Accused*] (“Now, defense lawyers are denouncing inconsistent standards and inadequate training, but they arrive at the opposite conclusion: The system is biased, the lawyers say, against men.”); Smith, *Legal Victories*, *supra* note 44.

<sup>213</sup> Smith, *Legal Victories*, *supra* note 44.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> Smith, *System Works Against Them*, *supra* note 177.

“repeatedly indicated that she wanted to have sex.”<sup>217</sup> The complainant felt that the hearing board presumed his guilt, and he was expelled as a result.<sup>218</sup> While these cases did not arise in New York colleges, they demonstrate the sort of complaints that may arise from any on-campus adjudication process, and *Enough is Enough* does nothing to address the possibility of such problems occurring in New York.

*B. Enough is Enough Should be Amended to Provide Strict, Uniform Standards for New York Schools*

To provide true meaningful protections for students in New York, *Enough is Enough* ought to be amended and move away from minimum standards and suggested procedures toward concrete requirements for all colleges. This would allow both complainants and defendants, regardless of which institutions they attended to be treated with respect and have equal opportunity to justice. Unfortunately, much of the academic writings focus on broad themes and do not delve into the gritty and specific details of the actual adjudication procedure.<sup>219</sup> Therefore, the suggestions offered are based on the complaints of participants and the models of some universities.

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<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> See Janet Napolitano, “*Only Yes Means Yes*”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387, 401 (2015) (arguing that the government should “[p]rovid[e] a clear and uniform set of requirements [which] will increase compliance and reduce the burden and cost inherent in the current regulatory scheme” but neglecting to suggest what the scheme might be); *CAMPUS SEXUAL ASSAULT: SUGGESTED POLICIES AND PROCEDURES*, AM. ASS’N UNIV. PROFESSORS (Nov. 2012), [http://www.aaup.org/file/Sexual\\_Assault\\_Policies.pdf](http://www.aaup.org/file/Sexual_Assault_Policies.pdf) (focusing on education, faculty training, reporting guidelines, and streamlining the process). *But see* Triplett, *supra* note 108, at 510–26 (arguing that some form of cross examination should be allowed, that only minimum discovery is required, and that students should have equal access to attorneys).

### 1. Complainants Should Never Prosecute Their Own Cases

Once a college receives a complaint, it should be responsible for preparing the case and conducting the hearing, not the complainant. To force complainants to prosecute their own cases is traumatizing and likely a violation of Title IX. Currently, Enough is Enough provides that students have the right to “be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent throughout the judicial or conduct process including during all meetings and hearings related to such process.”<sup>220</sup> Equal opportunity to counsel is recommended by Dear Colleague,<sup>221</sup> and is, for the most part, supported by scholars.<sup>222</sup> The complainant, however, should not need an attorney because she should not be a party, but simply a witness.

Title IX requires that “[n]o 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.”<sup>223</sup> Requiring complainants to prepare and adjudicate their cases forces them to relive their trauma and is against the true spirit of Title IX. Sara Tubbs of Stony Brook University was forced to prepare and adjudicate her own case, a process that took her over sixty hours, left her suffering from post-traumatic stress disorder,<sup>224</sup> and negatively affected her academics.<sup>225</sup> Since courts and the OCR have held that sexual assault itself violates a person’s equal access to education,<sup>226</sup> it follows that forcing a survivor of assault to spend her time away from her schoolwork and to relive a traumatic experience would again be preventing her from attaining equal access to education.

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<sup>220</sup> See N.Y. EDUC. LAW § 6444(5)(c)(i) (McKinney 2015).

<sup>221</sup> Dear Colleague Letter, *supra* note 12, at 12.

<sup>222</sup> See Triplett, *supra* note 108, at 525–26.

<sup>223</sup> 20 U.S.C. § 1681(a) (2012).

<sup>224</sup> Higgins, *supra* note 44.

<sup>225</sup> Complaint at 10, *Tubbs v. Stony Brook Univ.*, (S.D.N.Y. 2015) (No. 15-0517).

<sup>226</sup> *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 643, (1999); Dear Colleague Letter, *supra* note 12, at 1.

Finally, any student unfamiliar with the process, one who is not a complainant with an interest in the outcome of the case, is not the most logical candidate to conduct the hearing. A prosecutor-like party, appointed by the school, familiar with the process is best to shield the complainant from further trauma and is most likely to obtain justice in the case.

## 2. Colleges Should Provide the Accused with Representation.

Requiring the school, rather than the complainant, to act as the prosecutor during the hearing, would put defendant at a decided disadvantage not to also have representation provided by the school. Again, Dear Colleague only requires equal access to attorneys for both parties<sup>227</sup> and Enough is Enough states only that students have the right to an advisor.<sup>228</sup> Some argue that schools should adopt a liberal policy for counsel: both students should have the option unless one student cannot afford one.<sup>229</sup> Rather, I propose that the school must provide the defendant with the option of counsel in order to ensure a fair process.

Importantly, an advocate for the accused would alleviate some of the due process concerns raised by critics of on-campus adjudications.<sup>230</sup> With the growing number of on-campus adjudications, there are a growing number of attorneys familiar with the process, some of which claim “the system is biased . . . against men.”<sup>231</sup> In order to maintain recruitment and alumni donations, schools feel enormous pressure to project an image of protecting their students from sexual assault.<sup>232</sup> Therefore, some argue, it is difficult for a male defendant to receive a fair hearing.<sup>233</sup> While the

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<sup>227</sup> Dear Colleague Letter, *supra* note 12, at 12.

<sup>228</sup> N.Y. EDUC. LAW § 6443 (McKinney 2015).

<sup>229</sup> Triplett, *supra* note 108, at 525–26.

<sup>230</sup> See Bartholet et al., *supra* note 107; *Campus Rape Tribunals*, *supra* note 207.

<sup>231</sup> Kaminer, *Counsel for the Accused*, *supra* note 212.

<sup>232</sup> See Henrick, *supra* note 109, at 82; Novkov, *supra* note 183, at 599 (demonstrating that schools are “concerned about the public relations damage--and the possible impact on student recruitment efforts”).

<sup>233</sup> Kaminer, *Counsel for the Accused*, *supra* note 212.



consequences of an on-campus adjudication are not as severe as those in a criminal case, the accused still faces academic sanctions, expulsion, damage to reputation, and damage to future career prospects.<sup>234</sup>

Finally, if the complainant is no longer acting as a party, and the school is prosecuting the case, the defendant deserves access to an advocate familiar with the process. Since the school official prosecuting the case will be knowledgeable about such procedures, the school should provide an advocate to the defendant. An advocate for the accused “will compel the school to adhere to its own procedures that benefit his client and challenge those procedures that are prejudicial.”<sup>235</sup> The provided representation need not necessarily be an attorney, but if the prosecutor is an attorney, the defendant must be provided a lawyer, or be allowed to hire his own. Finally, instead of forcing schools to pay for lawyers, “schools might create and maintain a list of local attorneys who have agreed, if called upon, to provide service on a pro bono basis.”<sup>236</sup>

### 3. The Students Should Never Directly Cross-Examine Each Other

As suggested by Dear Colleague,<sup>237</sup> students should never directly cross-examine each other because of the trauma this can inflict on a complainant. Complainants often specifically chose an on-campus adjudication because of the fear of being cross-examined.<sup>238</sup> In a criminal court setting, survivors who testified often experienced the physical symptoms of a secondary trauma.<sup>239</sup> While a closed, small setting hearing may alleviate some of that trauma, being directly questioned by her alleged attacker can only undo any protections the environment might provide. The policy behind shielding survivors from such a secondary trauma is two-fold. First, forcing upon a female a second trauma which might

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<sup>234</sup> Sommers, *supra* note 211.

<sup>235</sup> Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 342 (1999).

<sup>236</sup> *Id.* at 343–44.

<sup>237</sup> Dear Colleague Letter, *supra* note 12, at 12.

<sup>238</sup> See Gray, *supra* note 58.

<sup>239</sup> Parsons & Bergin, *supra* note 73, at 184.

result in physical symptoms is seemingly a violation of her equal right to education and thus a violation of Title IX. Second, if survivors are assured they will not be directly questioned by the defendant, they are more likely to come forward.

However, the right to confront one's accuser is fundamental to American law and the U.S. Constitution and should not be abandoned here.<sup>240</sup> Cross-examination is especially important because "this special context the entire proceeding often turns on witness credibility."<sup>241</sup> Additionally, "[c]ross-examination reduces the risk of erroneous guilty outcomes."<sup>242</sup> If the accused is provided with representation, counsel can direct the cross-examination. Even if schools do not provide representation, cross-examination can be directed through third parties.<sup>243</sup>

#### 4. Factfinders Should Consider All Available Evidence

Often in sexual assault cases there is very little evidence beyond the testimony of the complainant and defendant,<sup>244</sup> and therefore, where there is greater evidence available, factfinders should consider such evidence. However, schools can and do exclude relevant evidence from their decision-making. Past proposals have included somewhat elaborate discovery proposals including "written interrogatories when witnesses are unavailable or unwilling to participate in the hearing" and having school officials "contact potential witnesses and ask questions for the purpose of reporting the contents of these conversations to the judicial panel."<sup>245</sup> Although these suggestions might aid in the process of achieving

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<sup>240</sup> U.S. CONST. amend. VI.

<sup>241</sup> Triplett, *supra* note 108, at 522.

<sup>242</sup> Hendrix, *supra* note 109, at 617; *see* Berger & Berger, *supra* note 235 ("Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested.").

<sup>243</sup> Columbia, for example, allows the complainant and respondent to present questions that they wish to ask their adversary to the panel, who may then ask the opposing party. COLUMBIA POLICY AND PROCEDURES, *supra* note 134, at 24.

<sup>244</sup> *See* Triplett, *supra* note 108, at 522 ("In this special context the entire proceeding often turns on witness credibility.").

<sup>245</sup> *Id.* at 524.

justice for victims of sexual violence, schools can improve their adjudication processes by simply considering all evidence in their possession.

The issue of evidence arose in several cases previously discussed. In the case of the Hobart and William Smith student, Anna, the head of the adjudication panel did not share medical records of her alleged assault with the other two members of the panel.<sup>246</sup> Sara Tubbs experienced a similar problem when her medical records “were not reviewed or made part of the investigation.”<sup>247</sup> In another case, a University of San Diego student was prevented from introducing potentially exculpatory text messaging evidence.<sup>248</sup> Enough is Enough currently allows schools to exclude such evidence. Instead, factfinders should be required to consider such evidence. They may be entitled to give whatever weight to the evidence that they believe is appropriate, but a party must at least be able to introduce and explain the relevance of his or her evidence.

##### 5. Students Should Not Act as Factfinders

Finally, Enough is Enough should be amended to prevent students acting as jurists in sexual assault cases. Enough is Enough is silent on the matter with regards to hearings, but does allow that appeal panels “may include one or more students.”<sup>249</sup> In contrast, Dear Colleague seems to suggest that students should not be members of the panel, as the letter explicitly states that all individuals involved in the process “must have training and experience in handling complaints of sexual harassment and sexual violence.”<sup>250</sup> The McCaskill Study claims student participation is a violation of best practices.<sup>251</sup> It also claims “[t]he overwhelming

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<sup>246</sup> Bogdanich, *supra* note 1.

<sup>247</sup> Complaint at 10, Tubbs v. Stony Brook Univ., (S.D.N.Y. 2015) (No. 15-0517).

<sup>248</sup> Smith, *Legal Victories*, *supra* note 44.

<sup>249</sup> N.Y. EDUC. LAW § 6444(5)(b)(iii) (McKinney 2015).

<sup>250</sup> Dear Colleague Letter, *supra* note 12, at 12.

<sup>251</sup> SEXUAL VIOLENCE ON CAMPUS, *supra* note 50, at 11.

majority of experts believe students should not participate in adjudication boards in sexual assault cases.”<sup>252</sup>

There are compelling arguments on both sides of the issue, but overall the harms of student factfinders outweigh the benefits. Some argue that student jurists are a positive because they better understand their own generation’s sexual norms and modern technology.<sup>253</sup> The opposing side, however claims that the process is better left to trained faculty, that students will not keep confidentiality, and that “many victims may not come forward if they know their peers will judge them.”<sup>254</sup> The social pressures simply add yet another layer on the already difficult process of coming forward. Additionally, the McCaskill Study notes that student panels “create conflicts of interest, as students may know the survivor and/or the alleged perpetrator.”<sup>255</sup> For these reasons, it is in the interest of both complainant and defendant that students not act as jurists.

## CONCLUSION

Sexual assaults on college campuses deny survivors the right to education, and under federal law colleges are required to adjudicate complaints they receive from their students.<sup>256</sup> However, because the federal government only established minimum standards for the procedures, they are conducted differently at each institution. New York’s recent Enough is Enough law missed a chance to correct this problem and raise the bar for those standards.

Enough is Enough should be amended to require the same procedures across the state. First, the complainant should never be forced into the role of the prosecutor; the school should perform that

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<sup>252</sup> *Id.*

<sup>253</sup> Adam Liptak, *Should Students Sit on Sexual Assault Panels?*, N.Y. TIMES (Apr. 10 2015), [http://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html?\\_r=0](http://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html?_r=0).

<sup>254</sup> *Id.*; see SEXUAL VIOLENCE ON CAMPUS, *supra* note 50, at 11 (“Student participation can present privacy concerns for survivors who can be forced to divulge intimate and painful details of their experiences to peers that they live and study among.”).

<sup>255</sup> SEXUAL VIOLENCE ON CAMPUS, *supra* note 50, at 11.

<sup>256</sup> Dear Colleague Letter, *supra* note 12, at 4.

function. Second, the defendant must be provided counsel or the opportunity to retain his own. Third, the students should not be allowed to question each other, the counsels should question all witnesses. Fourth, all relevant evidence should be admissible. Finally, the factfinders should be trained faculty, not students. With these additions, New York can truly become a leader in combatting sexual violence while protecting the rights of the accused and the dignity of the complainant. There will be equality in outcomes of adjudications across the state. Justice should be determined by the facts, not by the forum.