

# THE FUTURE OF SEXUAL HARASSMENT POLICIES AT U.S. COLLEGES: FROM REPEAL OF THE 2011 DOE- OCR GUIDELINES TO LAUNCH OF THE #METOO MOVEMENT ON SOCIAL MEDIA

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On September 22, 2017, the U.S. Department of Education's Office for Civil Rights ("DOE-OCR"), under the leadership of U.S. President Donald Trump, repealed the previous administration's sexual harassment prevention guidelines that had required colleges to appoint a Title IX compliance officer and prosecute sexual harassment claims under a "preponderance of the evidence" standard (the "2011 Guidelines").<sup>1</sup> Although some college administrators have praised the DOE-OCR's efforts to overturn the 2011 Guidelines,<sup>2</sup> others have described the Trump administration's repeal as "a disgrace and a disservice to everyone who has worked to address sexual violence."<sup>3</sup> Opponents of the repeal, in particular, have pointed to U.S. President Donald Trump's own history of alleged sexual harassment and the burgeoning #MeToo social media

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1. Lauren Camera, *Trump Administration Rescinds Obama-Era Campus Sexual Assault Guidance*, US NEWS (Sept. 22, 2017, 11:40 AM), <https://www.usnews.com/news/education-news/articles/2017-09-22/trump-administration-rescinds-obama-era-campus-sexual-assault-guidance>. See also Kimberly Hefling & Caitlin Emma, *Obama-Era School Sexual Assault Policy Rescinded*, POLITICO (Sept. 22, 2017, 10:46 AM), <https://www.politico.com/story/2017/09/22/obama-era-school-sexual-assault-policy-rescinded-243016> (further noting that the DOE-OCR issued "a question-and-answer document" to help schools navigate Title IX issues while new guidelines are under consideration); Letter from Candice Jackson, Assistant Secretary for Civil Rights on Title IX of the Education Amendments of 1972 (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

2. See Hefling & Emma, *supra* note 1 (indicating praise for new Trump administration decision from Cynthia Garrett, co-president for Families Advocating for Campus Equality).

3. See Sophie Tatum, *Education Department Withdraws Obama-Era Campus Sexual Assault Guidance*, CNN (Sept. 22, 2017, 3:09 PM), <http://www.cnn.com/2017/09/22/politics/betsy-devos-title-ix/index.html> (quoting staunch opposition to the repeal coming from Senator Kirsten Gillibrand (D-NY) and Bernie Sanders, among others).

campaign as signs that American institutions, including its colleges, need to do far more to help eradicate sexual harassment.

This article argues that, even though the DOE-OCR has repealed its 2011 sexual harassment guidelines, colleges—in light of the #MeToo movement—need to maintain the gravamen of their safeguards against sexual harassment. Part I of this Article introduces Title IX of the Education Amendments Act of 1972 and the subsequent DOE-OCR interpretive guidelines. Part II discusses recent efforts by society to expose the sustained prevalence of sexual harassment, including through the #MeToo movement. Part III discusses three prevailing criticisms of the DOE-OCR’s 2011 Title IX Guidelines. Finally, Part IV suggests best practices for how colleges should respond to the DOE-OCR’s repeal of its 2011 Guidelines, especially in light of the #MeToo movement.

#### I. TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972 AND THE DOE-OCR GUIDELINES

Title IX of the Education Amendments of 1972 (“Title IX”), in pertinent part, states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>4</sup> Although commentators frequently cite to Title IX in the context of gender equity in collegiate sports, federal courts, since the 1977 decision in *Alexander v. Yale University*, have recognized that Title IX also prevents colleges from permitting sexual harassment.<sup>5</sup> A broad definition of “sexual harassment” includes sexual violence.<sup>6</sup>

During the forty-five years since Congress passed Title IX, the DOE-OCR has periodically issued administrative guidelines to help explain colleges’ obligations to comply with the administrative aspects of the act.<sup>7</sup> The DOE-OCR’s most significant statement on

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4. 20 U.S.C. § 1681(a) (2012).

5. See Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations under Title IX*, 125 YALE L. J. 2106, 2111 (2016). Cf. J. Brad Reich, *When Is Due Process Due? Title IX, “The State,” and Public College and University Sexual Violence Procedure*, 11, CHARLESTON L. REV. 1, 7 (2017) (explaining that Title IX only technically applies to colleges that accept federal funding; however, almost all colleges accept such funding).

6. See Reich, *supra* note 5, at 8 (referencing the expansion of enforcement of Title IX policy first into the area of traditional sexual harassment and then to sexual violence, which is cognizable as a form of sexual harassment); see also Letter from Russlynn Ali, Assistant Secretary for Civil Rights on Title IX of the Education Amendments of 1972 at 1 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (describing sexual harassment to “also cover sexual violence” and referring to sexual violence as including “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”).

7. Bolger, *supra* note 5, at 2111 (citing *Alexander v. Yale U.*, 459 F. Supp. 1, 3 (D. Conn. 1977)).

this topic came in 2001 when it explained that colleges are liable for peer-on-peer sexual harassment even if they lacked actual knowledge about specific student wrongdoing.<sup>8</sup> By placing an affirmative duty on colleges to investigate and prevent sexual harassment, the DOE-OCR compelled colleges, for the first time, to proactively address the problem of turning a blind eye to sexual misconduct.<sup>9</sup>

Then, on April 4, 2011, the DOE-OCR substantially expanded its interpretation of Title IX when it passed the 2011 Guidelines.<sup>10</sup> The 2011 Guidelines, for the first time, required colleges to take three specific steps to reduce sexual harassment: (1) the publishing of nondiscrimination notices; (2) the designating of at least one college employee to coordinate efforts to comply and carry out Title IX enforcement; and (3) the adopting and publishing of grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.<sup>11</sup> The 2011 Guidelines, moreover, mandated that colleges establish internal tribunals to review student claims of sexual harassment based on a “preponderance of the evidence” standard.<sup>12</sup>

Many sexual harassment experts viewed the DOE-OCR’s 2011 Guidelines as an important step toward eventually eradicating on-campus sexual harassment. Nevertheless, on September 22, 2017—nearly one year after Donald Trump was elected as the new U.S. president—the DOE-OCR fully repealed these guidelines. In a statement that foreshadowed the repeal, U.S. Secretary of Education Betsy DeVos expressed her view that Title IX “had helped to make clear that educational institutions have a responsibility to protect every student’s right to learn in a safe environment,” but that aspects of the 2011 Guidelines “trample free speech rights.”<sup>13</sup> DeVos also criticized the 2011 Guidelines for encouraging colleges to

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8. Letter from Russlyn Ali, *supra* note 6, at 4 (citing 2001 Revised Sexual Harassment Guidance Policy, at <https://www.atixa.org/wordpress/wp-content/uploads/2012/01/OCR-2001-Revised-Sexual-Harassment-Guidance-Title-IX.pdf>). These guidelines shifted the standard for liability under Title IX from the need to show “actual knowledge or deliberate indifference” of sexual misconduct to the lesser burden of providing that the college reasonably should have known.” *Id.* at 4, n. 12 (comparing the 2011 DOE-OCR standard with the elevated standard that was currently used in the courts where plaintiffs sought monetary damages rather than injunctive relief).

9. *Id.* at 4, 6 (citing affirmative, preemptive duties schools must adhere to be in compliance with Title IX).

10. *Id.* at 1.

11. *Id.* at 6.

12. Camera, *supra* note 1. *See also* Letter from Candice Jackson, *supra* note 1.

13. Press Release, Secretary DeVos Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

adopt what she perceived as “ambiguous and incredibly broad definitions of assault and harassment.”<sup>14</sup>

## II. WIDESPREAD PATTERNS OF SEXUAL HARASSMENT AND THE IMPORTANCE OF THE 2011 GUIDELINES IN LIGHT OF THE #METOO MOVEMENT

In many respects, a repeal of the DOE-OCR’s 2011 Guidelines could not have come at a politically worse time. Within days of the DOE-OCR’s repeal, numerous reports emerged that high-profile Hollywood producer Harvey Weinstein allegedly raped three women and sexually harassed many others over the course of his more than thirty-year entertainment career.<sup>15</sup> Between October 5, 2017 and December 5, 2017, the media revealed at least thirty-eight other instances of sexual harassment in the high-profile worlds of entertainment and politics.<sup>16</sup> These allegations led to the nearly instantaneous firing of numerous high-profile entertainers, including NBC television host Matt Lauer, PBS television host Charlie Rose, and Netflix actor Kevin Spacey.<sup>17</sup> Sexual harassment allegations also led U.S. Congressmen John Conyers Jr. and Al Franken to retire in the middle of their terms, as well as increased societal pressure from women’s rights groups for Congress to impeach U.S. President Donald Trump.<sup>18</sup>

The renewed public conversation about the extent of sexual harassment in the workplace also led women throughout America to begin to share their own experience as victims of sexual harassment—often using the hashtag #MeToo in their social media posts.<sup>19</sup> By early December 2017, the #MeToo movement became so important in bringing the issue of sexual harassment to society’s forefront that *Time Magazine* awarded all of the Silence Breakers with Person of the Year.<sup>20</sup> However, even as society began to increasingly speak about the horrors of sexual violence in the workplace, the immediate sentiment from some colleges seemed to be thankfulness for the repeal of the DOE-OCR’s Title IX guidelines and not, as it should have been, a call to do more to help end all forms of sexual harassment.

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14. *Id.*

15. See Fiza Pirani, *From Weinstein to Lauer: A Timeline of 2017’s Sexual Harassment Scandals*, AJC.COM (Dec. 4, 2017, 4:39 PM), <http://www.ajc.com/news/world/from-weinstein-lauer-timeline-2017-sexual-harassment-scandals/qBKJmUSZRJqgOzeB9yN2JK>.

16. *See id.*

17. *See id.*

18. *See id.*

19. *See id.*

20. See Bill Chappell, *#MeToo Movement Is Person of the Year, Time Says*, NPR (Dec. 6, 2017), <https://www.npr.org/sections/thetwo-way/2017/12/06/568773208/-metoo-movement-is-person-of-the-year-time-says>.

### III. THREE PREVALENT CRITICISMS OF THE DOE-OCR'S 2011 GUIDELINES

Indeed, even as the Silence Breakers and #MeToo movement brought to light the prevalence of sexual harassment, some college administrators maintained their concerns about the sexual harassment safeguards put in place under the 2011 DOE-OCR Guidelines. First, some college administrators have contended that the DOE-OCR's 2011 Guidelines violated the fundamental due process rights of accused<sup>21</sup> because they require using a "preponderance of the evidence" standard, which is the lowest possible legal threshold for evaluating alleged wrongdoing.<sup>22</sup>

In addition, other college administrators have criticized the DOE-OCR's 2011 Guidelines for punishing conduct that would not typically fall within a vernacular definition of sexual harassment. For instance, some colleges, in response to the 2011 Guidelines, had implemented "affirmative consent rules," that required students to reach an affirmative agreement, either written or oral, before engaging in any sexual act, including a first kiss.<sup>23</sup> As a result of this uniquely strict definition of sexual harassment, the occasional student who after a bad first date misguidedly attempted a kiss risked an administrative investigation under a school's sexual harassment policy.<sup>24</sup>

Finally, still other college administrators complained that the DOE-OCR's 2011 Guidelines imposed too heavy of a financial burden.<sup>25</sup> According to one *New York Times* article, during the period in which the DOJ-OCR enforced the 2011 Guidelines, some colleges spent upwards of one million dollars "to hire lawyers, investigators, case workers, survivor advocates, peer counselors, workshop leaders and other officials to deal with increasing numbers of [sexual harassment] complaints."<sup>26</sup> Meanwhile, other colleges have hired full-time Title IX compliance officers at annual salaries of \$50,000 to \$150,000 per year.<sup>27</sup> While these financial obligations are minimal to schools with upwards of 40,000 enrolled

21. Camera, *supra* note 1; Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 62 (2013). *See also* Office for Civil Rights, Dear Colleague Letter on Title IX of the Education Amendments of 1972 (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

22. Camera, *supra* note 1; Henrick, *supra* note 21 at 62 (2013). *See also* Office for Civil Rights, *supra* note 21.

23. Anemona Hartocollis, *Colleges Spending Millions to Deal with Sexual Misconduct Complaints*, N.Y. TIMES (Mar. 29, 2016), <https://nyti.ms/22XlkW1>.

24. *Id.*

25. *Id.* (explaining that many colleges have spent "thousands to millions of dollars" on Title IX compliance).

26. *Id.* (noting that the University of California, Berkeley purports that its spending on Title IX compliance has increased by upwards of \$2 million between 2013 and 2016).

27. *Id.*

students such as the University of Michigan, compliance costs reasonably could shift away academic resources from smaller colleges with fewer than 1,000 enrollees.<sup>28</sup>

#### IV. HOW COLLEGES SHOULD RESPOND TO THE DOE-OCR REPEAL OF THE 2011 GUIDELINES

Even if the DOE-OCR's 2011 sexual harassment guidelines are no longer compelled by the DOE-OCR's federal guidelines, there is still strong and appropriate societal pressure placed on colleges to remain vigilant against sexual harassment.

For instance, even without legal mandate, the failure of a college to maintain a cogent policy against sexual harassment could hamper a college's annual donation total. According to at least one recent article in the *Yale Law Journal*, college students who suffer from sexual violence are more likely to drop out of school—in essence, ensuring that these particular students never become donors.<sup>29</sup> Forgoing a potential gift from even one large donor could substantially shift a college's future prospects—especially not knowing, in advance, who that donor would be. To provide such an example, University of Nebraska graduate Mildred Topp Othmer has donated over \$125 million to her alma mater.<sup>30</sup> If Ms. Othmer had dropped out of college due to being sexually harassed, the University of Nebraska may not have nearly the campus resources that it does today.

Colleges also need to recognize the impact of their sexual harassment policies on student enrollment. At present, female students represent more than fifty-five percent of undergraduate students enrolled in four-year colleges in the United States.<sup>31</sup> If any

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28. With an endowment of \$10.9 billion, the University of Michigan and other similarly situated universities can easily bear the financial burden of hiring full-time Title IX compliance officers. See Rick Fitzgerald, *U-M Endowment Rebounds to \$10.9B with 13.8 Percent Return*, UNIVERSITY RECORD (Oct. 19, 2017), <http://record.umich.edu/articles/u-m-endowment-rebounds-109b-138-percent-return>. However, these costs may pose a much larger strain on smaller universities that are required to be much more cost-conscious in order to survive. See Jeffrey J. Selingo, *40 Percent of U.S. Colleges Enroll Fewer than 1,000 Students*, WASH. POST (June 10, 2016), [https://www.washingtonpost.com/news/grade-point/wp/2016/06/10/40-percent-of-u-s-colleges-enroll-fewer-than-1000-students/?utm\\_term=.10c05f991d56](https://www.washingtonpost.com/news/grade-point/wp/2016/06/10/40-percent-of-u-s-colleges-enroll-fewer-than-1000-students/?utm_term=.10c05f991d56).

29. See generally Bolger, *supra* note 5 at 2116-17 (discussing the financial and educational impact on students who have been the victim of sexual misconduct).

30. See BEST SCHOOLS, *The 50 Most Generous Alumni Donors to American Colleges and Universities*, <https://thebestschools.org/features/most-generous-alumni-donors> (last visited Feb. 18, 2018).

31. See Matt Rocheleau, *On Campus, Women Outnumber Men More Than Ever*, BOSTON GLOBE (Mar. 28, 2016), <https://www.bostonglobe.com/metro/2016/03/28/look-how-women-outnumber-men-college-campuses-nationwide/YROqwfCPSIKPtSMAzpWloK/story.html>.

college were to develop a reputation as being soft on sexual harassment, that college could likely suffer from a severe decline of high-caliber female applicants. This could translate to financial loss for a college either directly in terms of lost tuition dollars or indirectly based on the college's need to dig deeper into its applicant pool to fill its incoming class.

Finally, colleges need to accept the importance of avoiding high-profile incidents of sexual harassment, as one extremely negative case that makes national news can produce a long-term harm to the brand equity of a given school, as is clearly evidenced by the fate of Kent State University and Penn State University.<sup>32</sup> Indeed, whatever upfront costs may arise from attempting to appropriately prevent patterns of sexual harassment at a given university probably pale in comparison with the public relations expenses that a college may face if a national news story breaks indicating the school's pattern of indifference toward sexual wrongs.

#### V. CONCLUSION

U.S. colleges should continue to vigilantly investigate and punish sexual harassment, even despite the DOE-OCR's repeal of the 2011 Guidelines. In particular, colleges should continue to empower Title IX administrators to investigate allegations of sexual harassment and continue to maintain internal mechanisms to ensure aggressive internal prosecution of the accused. Furthermore, even though the DOE-OCR repealed its 2011 Guidelines, colleges should only scale back their Title IX enforcement for the purposes of preserving a different fundamental value such as safeguarding due process rights or for ensuring the maintenance of minimal financial resources to operate academic units.

For purposes of clarity, even with the DOE-OCR's legal changes, now is not the right time for colleges to let down their guard in the battle to eradicate sexual harassment.<sup>33</sup> Not only do colleges have a moral obligation to help eradicate sexual harassment from U.S. society, but, furthermore, most colleges' financial interests lie strongly in favor of maintaining vigilance against the wrongs of peer-on-peer sexual harassment.

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32. See generally Matt Poe, *The Price of Reputation: When the Culture of Sports Dominates Institutional Integrity*, THE BURR MAG.: THE COMMUNITY (Nov. 26, 2016), <http://theburr.com/the-price-of-reputation-when-the-culture-of-sports-dominates-institutional-integrity/>; Tim Rohan, *Groups Want Bad Image of Penn State to Go Away*, N.Y. TIMES (Sept. 16, 2013), <https://nyti.ms/1eXFvH>.

33. See Hefling & Emma, *supra* note 1 (noting that the DOE-OCR under its new Secretary of Education, Betsy DeVos, has suggested that a higher standard of proof known as "clear and convincing evidence" might be an alternative appropriate standard for colleges to consider when reviewing allegations of sexual harassment).