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Notes

OCR'S BIND: ADMINISTRATIVE RULEMAKING AND CAMPUS SEXUAL ASSAULT PROTECTIONS

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ABSTRACT—During President Barack Obama's Administration, significant light was shed on the depth of the United States' campus sexual assault problem. As a result, the Department of Education's Office for Civil Rights increased enforcement of Title IX provisions by way of its 2011 "Dear Colleague Letter." This Note argues that the Dear Colleague Letter was improperly enforced as if it were a formal legislative rule and was therefore illegitimate. Nevertheless, this Note contends that the preponderance of the evidence standard initially enshrined within the Dear Colleague Letter should be adopted through the notice-and-comment procedures President Donald Trump's Administration promises in order to protect the interests of campus sexual assault survivors.

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INTRODUCTION

In an age when the seriousness of the United States' campus sexual assault problem has gained national prominence,[1] but public sexual assault accusations against celebrities and the President of the United States are frequently ignored,[2] the federal government's efforts to reform public schools' approach to these matters has never been more critical. In April 2011, the Office for Civil Rights (OCR) issued a "Dear Colleague Letter" (DCL) as a "significant guidance document" to aid schools in navigating

[1] *See, e.g.*, Irin Carmon, *What Advocates Are Doing to End Sexual Assault on Campus*, NBC NEWS (Sept. 4, 2016, 5:20 PM), http://www.nbcnews.com/news/us-news/what-advocates-are-doing-end-sexual-assault-campus-n642156 [https://perma.cc/NT27-NPF]; Niraj Chokshi, *University of Wisconsin Student Arrested in Multiplying Sexual Assault Cases*, N.Y. TIMES (Oct. 26, 2016), http://www.nytimes.com/2016/10/27/us/university-of-wisconsin-student-arrested-in-multiplying-sexual-assault-cases.html [https://perma.cc/QDH6-3NZF]; Manohla Dargis, *Review: "The Hunting Ground" Documentary, a Searing Look at Campus Rape*, N.Y. TIMES (Feb. 26, 2015), http://www.nytimes.com/2015/02/27/movies/review-the-hunting-ground-documentary-a-searing-look-at-campus-rape.html [https://perma.cc/K7BA-GPLE]; Christine Hauser, *Judge's Sentencing in Massachusetts Sexual Assault Case Reignites Debate on Privilege*, N.Y. TIMES (Aug. 24, 2016), http://www.nytimes.com/2016/08/25/us/david-becker-massachusetts-sexual-assault.html [https://perma.cc/69FR-GF47].

[2] *See, e.g.*, Sarah Kliff, *Trump, Cosby, Ailes: It Took Celebrity Accusers to Make Us Listen to Sexual Assault Victims*, VOX (Oct. 18, 2016, 11:00 AM), http://www.vox.com/identities/2016/10/18/13306300/trump-cosby-ailes-sexual-harrasment [https://perma.cc/BZC6-AU5P]; Leslie Savan, *The Rape Allegations Against Trump: If Jane Doe Breaks Her Silence, Will the Media Break Theirs?*, NATION (Nov. 2, 2016), https://www.thenation.com/article/the-trump-allegations-as-jane-doe-breaks-her-silence-will-the-media [https://perma.cc/AE22-TFRA]; Bill Wyman, *The Press Is Responsible for Ignoring Bill Cosby Rape Allegations: Where Were Journalists 10 Years Ago When Claims Originally Surfaced Against Him?*, COLUM. JOURNALISM REV. (Nov. 20, 2014), http://www.cjr.org/behind_the_news/bill_cosby_downfall.php [https://perma.cc/H8WW-YJZU].

their Title IX duties[3] to "take immediate and effective steps to end sexual harassment and sexual violence" on campuses.[4] The DCL included an array of previously undisclosed directives that inform schools of the standards they will be held to if OCR ever evaluates them for Title IX violations. These directives cover how schools are expected to investigate sexual assault investigations,[5] how the adjudications should proceed,[6] and what standard of proof should be used in those proceedings.[7] However, OCR disseminated the DCL to schools without undergoing notice-and-comment rulemaking—the process normally required if agencies wish to legally enforce the provisions within a given document.[8] Although the DCL did not undergo the notice-and-comment process, over the past several years, OCR has concluded investigations of schools with resolution agreements requiring the institution to alter aspects of their campus adjudicatory processes to align with provisions in the DCL.[9] This enforcement scheme has raised concerns among jurists, legal scholars, activists, and the broader legal community about whether OCR abused its power by misusing exceptions to the rulemaking processes.[10]

Additionally, some educators and lawyers disagree with the letter's requirement that schools utilize a preponderance of the evidence standard

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[3] Title IX prohibits sex discrimination in "any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012). The statute has been interpreted to require schools to take active measures to ensure that women receive equal educational opportunities, including a learning environment free from sexual harassment. *See generally* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, TITLE IX RESOURCE GUIDE (2015). These requirements attach to nearly every public and private educational institution because even the large majority of undergraduate and graduate schools receive federal monetary support in the form of financial aid. *See* Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding: The Schools Avoid Reporting Requirements, but Students Can't Get Grants or Loans*, ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253 [https://perma.cc/52DK-KN4W] (discussing and listing the limited number of religious institutions that have chosen not to accept federal funds, in large part to avoid Title IX).

[4] RUSSLYNN ALI, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 1 n.1, 2 (2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/L3S9-VJ5H] [hereinafter 2011 DCL].

[5] *See, e.g.*, *id.* at 10 ("Although a school may need to delay temporarily the fact-finding portion of a Title IX investigation while the police are gathering evidence . . . [afterward,] the school must promptly resume and complete its fact-finding for the Title IX investigation.").

[6] *See, e.g.*, *id.* at 12 ("OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing.").

[7] *See id.* at 11 ("[I]n order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard . . . .").

[8] *See infra* Section II.A.

[9] *See infra* Section III.A.

[10] *See infra* Part III.

in all campus sexual assault adjudications.[11] This requires a showing that "it is more likely than not that sexual harassment or violence occurred."[12] Some believe that this standard provides marginal protection for the accused and creates an unjust risk that a finding will be entered against them.[13] The history of campus sexual assault proceedings says otherwise, however, and many schools applied the preponderance standard long before the DCL was published.[14] Victims of sexual assault need the procedural protections provided by the preponderance standard, but it cannot be legally enforced unless it is a valid exercise of agency rulemaking.

The DCL's legitimacy has been an open question since its implementation[15] and has taken center stage since the appointment of Betsy DeVos as the Secretary of the Department of Education in early 2017.[16] Petitioners have legally challenged the DCL, and some have directly

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[11] *See, e.g.*, Harvard University Professors, Opinion, *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 [https://perma.cc/A9ZJ-3CUM]; Penn Law Professors, *Open Letter from Members of the Penn Law School Faculty* (Feb. 18, 2015), http://media.philly.com/documents/OpenLetter.pdf [https://perma.cc/52WU-E65V].

[12] 2011 DCL, *supra* note 4, at 11.

[13] *See infra* note 167; *see also, e.g.*, Barclay Sutton Hendrix, Note, *A Feather on One Side, a Brick on the Other: Tiling the Scale Against Males Accused of Sexual Assault in Campus Disciplinary Proceedings*, 47 GA. L. REV. 591, 615 (2013) ("[S]tudents accused of sexual assault in campus disciplinary proceedings are due a clear and convincing burden of proof because their interests far outweigh any costs imposed on the university by this additional protection . . . ."); Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), https://www.wsj.com/articles/SB10001424053111903596904576516232905230642 [https://perma.cc/W8WP-RDGS] ("[U]niversities are institutionalizing a presumption of guilt in sexual assault cases.").

[14] *See* Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L. J. 1940, 1986–87, 1987 n.257 (2016) (citing HEATHER M. KARJANE ET AL., U.S. DEP'T OF JUSTICE, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 120 (2002), http://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf [https://perma.cc/N2BH-F7GT]) (stating that 80% of colleges that named a standard of proof in their school codes used a preponderance of the evidence standard).

[15] *See, e.g.*, Will Creeley, *Why the Office for Civil Rights' April "Dear Colleague Letter" Was 2011's Biggest FIRE Fight*, FIRE (Jan. 3, 2012), https://www.thefire.org/why-the-office-for-civil-rights-april-dear-colleague-letter-was-2011s-biggest-fire-fight/ [https://perma.cc/Z3W9-ZQDT]. *See generally* Jeannie Suk Gersen, *College Students Go to Court Over Sexual Assault*, NEW YORKER (Aug. 5, 2016), https://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault [https://perma.cc/29D4-4LWZ].

[16] Although Secretary DeVos initially refused to declare a stance on campus sexual assault in her confirmation hearings, proponents of the Obama Administration's campus sexual assault reform measures have always been concerned about what her views may be. *See* Molly Redden & Sabrina Siddiqui, *Betsy Devos Hearing Prompts Fears for Campus Sexual Assault Protections*, THE GUARDIAN (Jan. 17, 2017), https://www.theguardian.com/us-news/2017/jan/17/betsy-devos-hearing-prompts-fears-for-campus-sexual-assault-protections [https://perma.cc/6JNS-LSNH]. Despite this Administration's reluctance to further the DCL, a later Administration could take up the issue.

challenged the enforcement of the preponderance of the evidence standard. The plaintiff in one such case, *Doe v. Lhamon*,[17] argued that the DCL's assertion that schools utilize a preponderance of the evidence standard in campus adjudications "ensures that victims, like Plaintiff John Doe" become "collateral damage" in the government's battle to reform Title IX.[18] Though the suit is not yet resolved,[19] and though the DCL's fate may have recently been sealed by Secretary DeVos's decision to denounce the DCL,[20] the dispute provides insight into the controversy surrounding the measures the DCL attempted to implement. The *Doe* case demonstrates the procedural deficiencies of the DCL and why documents of this kind can be so easily revoked—something that President Trump's Administration has apparently taken note of.[21]

This Note addresses both the need for sexual assault reform and the limits of OCR's power within our country's agency-based federal legal system. In a sense, this Note sides with anti-DCL advocates who believe the guidance was always invalid. But, while those advocates believe that the DCL's procedural deficiencies go hand in hand with the perceived substantive shortcomings of the preponderance standard, this Note demonstrates that they should be considered separately and that the substantive preponderance requirement should be preserved. The only way to preserve the preponderance standard is to legitimize it fully through legislative rulemaking.[22] OCR could then enforce the use of the preponderance standard to aid victims of sexual assault at educational institutions across the country. A legislative rule is the strongest weapon OCR can wield, and it could affirmatively aid the movement for campus sexual assault reform.

Part I of this Note discusses the background of OCR's Title IX enforcement and rule promulgation both before and after the DCL's issuance. Part II then surveys the administrative law scheme to which OCR must adhere and discusses the difference between legislative rules and the

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[17] No. 1:16-cv-01158-RC (D.D.C. June 16, 2016).

[18] Amended Complaint at 2, *Doe*, No. 1:16-cv-01158-RC (D.D.C. Aug. 15, 2016).

[19] A motion to hold in abeyance was jointly filed by the parties and agreed to by the court on August 11, 2017. Order at 1, *Doe*, No. 1:16-cv-01158-RC (D.D.C. Aug. 14, 2017).

[20] *See infra* notes 60–62 and accompanying text.

[21] *See* CANDICE JACKSON, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER (2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/3YWN-CD9Y] [hereinafter 2017 DCL] (announcing the withdrawal of the 2011 DCL, in part because the "Department imposed . . . regulatory burdens without affording notice and the opportunity for public comment").

[22] Legislative rulemaking is the process whereby an agency promulgates a rule that is independently enforceable against regulated entities. *See infra* Part II.

relevant nonlegislative rules that operate as exemptions. It also addresses methods that courts use to determine whether an agency document was properly promulgated under an exception. Next, Part III evaluates the *Doe* plaintiffs' contentions that the DCL was an invalid legislative rule and ultimately concludes that the DCL was procedurally invalid because it was a legislative rule that was improperly promulgated. Lastly, Part IV discusses the challenges of the notice-and-comment rulemaking process that OCR must undergo to promulgate a legislative rule. It also argues, chiefly, that the preponderance standard should be adopted through notice-and-comment rulemaking because it is necessary to create a campus adjudication process that effectuates the goals of Title IX.

I. SETTING THE SCENE: TITLE IX ENFORCEMENT

Congress passed Title IX of the Educational Amendments Act[23] in 1972 as a response to the limited educational opportunities available to women.[24] Under the Act, "[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."[25] Thus, Title IX explicitly prohibits discrimination based on sex in any school receiving federal financial aid, from preschool through graduate programs.[26] It was not until 1986, however, that courts permitted victims of sexual assault to bring successful lawsuits under a theory of sex discrimination.[27] This made similar Title IX challenges possible, and in a series of cases in the late 1990s, the Supreme Court held that sexual violence is a form of Title IX discrimination for which individuals can bring suit against educational institutions.[28]

In addition to private causes of action brought under Title IX, the ban on sex discrimination within education is governmentally enforced against

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[23] 20 U.S.C. §§ 1681–88 (2012).

[24] *See* U.S. DEP'T OF JUSTICE, EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 2 (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf [https://perma.cc/SXV9-9LR9]; UNITED EDUCATORS, UNDERSTANDING HOW AND WHY TITLE IX REGULATES CAMPUS SEXUAL VIOLENCE 1 (2015), https://www.ue.org/uploadedFiles/History%20of%20Title%20IX.pdf [https://perma.cc/NR22-U5YW].

[25] § 1681(a).

[26] § 1681(c) (defining the institutions subject to regulation).

[27] *See* Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 63–69 (1986) (finding that sexual harassment constitutes sex discrimination in an employment context).

[28] *See, e.g.*, Davis *ex rel.* Lashonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999) (creating liability for schools based on deliberate indifference to student-on-student sexual harassment); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–84 (1998) (allowing private suits against schools based on student sexual harassment by teachers); *see also* UNITED EDUCATORS, *supra* note 24, at 3 (discussing the impact of *Davis* and *Gebser* on Title IX's reach).

schools by OCR,[29] a branch of the U.S. Department of Education headed by the Assistant Secretary for Civil Rights.[30] Schools have the obligation to address complaints of sexual harassment because they are uniquely situated to provide remedies that criminal adjudications cannot.[31] If OCR finds that a school knew or should have known about any kind of sexual harassment on its campus and did not properly address it, then the agency will usually begin an investigation into the school's policies and procedures.[32] Investigations leading to a finding that the school has violated Title IX often require that the school agree with the terms of a "resolution agreement,"[33] which reflects the school's acknowledgement of necessary changes to ensure compliance with Title IX.[34] OCR is able to exact compliance with these agreements because it wields the power to revoke federal funding from schools, and though OCR has never used that power, it is a formidable threat.[35]

The text of Title IX is vague and, because it does not explicitly cover sexual harassment, subsequent regulations have instructed schools about their responsibilities in preventing and combatting sexual assault. In 1997, OCR published a document entitled "Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties"[36] and issued a revised version of that guidance in 2001.[37] Much of the language remained the same between the two versions,[38] and both emphasized the importance of "prompt and equitable" grievance

[29] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, HELPING TO ENSURE EQUAL ACCESS TO EDUCATION 1 (2012), https://www2.ed.gov/about/reports/annual/ocr/report-to-president-2009-12.pdf [https://perma.cc/WAS7-Y37C].

[30] *Id.* at ii.

[31] *See* Anderson, *supra* note 14, at 1974 ("For example, schools can facilitate changes in living situations or classes as necessary, or prohibit an alleged perpetrator from contacting the complainant.").

[32] *See* UNITED EDUCATORS, *supra* note 24, at 3.

[33] *See id.*; *infra* notes 53–54.

[34] Jennifer Garrett, *Office for Civil Rights (OCR) Title IX Investigations: What to Expect*, CAMPUS L. CONSIDERED (Jan. 13, 2016), http://www.campuslawconsidered.com/office-for-civil-rights-ocr-title-ix-investigations-what-to-expect [https://perma.cc/6Z2N-4T6F].

[35] UNITED EDUCATORS, *supra* note 24, at 3.

[36] Sexual Harassment Guidance, 62 Fed. Reg. 12,034 (Mar. 13, 1997)

[37] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE ii (2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#Guidance [https://perma.cc/VGZ2-UK5H].

[38] However, there were a few changes in the 2001 guidance that were aimed at addressing how enforcement would differ from the standards put in place by recent Supreme Court decisions. *See* UNITED EDUCATORS, *supra* note 24, at 3 (referring to Supreme Court decisions such as Davis *ex rel.* Lashonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999), and Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283–84 (1998)).

procedures when students file sexual assault complaints.[39] An important difference between the two, however, is that the 2001 guidance went through notice-and-comment rulemaking.[40] That process is necessary to ensure that provisions within a document are given the force and effect of law.[41] Thus, the 2001 guidance codified OCR's standards for compliance with Title IX and is enforceable against educational institutions.

The agency provided the next update to OCR's enforcement standards in 2011 when it published the DCL. The DCL did not undergo notice-and-comment rulemaking, but it added details to Title IX standards that the 2001 guidance document omitted.[42] The agency designated the DCL as a "significant guidance document"[43] based on the definition set out by the Office of Management and Budget.[44] Under this definition, the DCL embodies "interpretive rules of general applicability and statements of

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[39] U.S. DEP'T OF EDUC., *supra* note 37, at 19; Sexual Harassment Guidance, *supra* note 36, at 12,043.

[40] Notice of the revised guidance was published on November 2, 2000, in the Federal Register, and the final document was available at the same location on January 19, 2001. *See* U.S. DEP'T OF EDUC., *supra* note 37, at ii.

[41] Documents carrying the "force and effect of law" are those like legislative rules that are binding on a regulated entity, while nonlegislative rules that do not have such force cannot be categorically imposed upon the regulated entity. *See* Kristin E. Hickman, *Unpacking the Force of Law*, 66 VAND. L. REV. 465, 475 (2013) ("The Supreme Court has explained that legislative rules carry the 'force and effect of law' while nonlegislative rules do not." (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979))); *see also infra* Part II (discussing the difference between different kinds of administrative rules and how courts determine into which category a document falls).

[42] For example, it required specific procedures for the adjudications, detailing what kind of interviews students may conduct, how parties may present witnesses, and how much information parties should have access to. *See* 2011 DCL, *supra* note 4, at 11.

[43] *Id.* at 1 n.1.

[44] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434 (Jan. 25, 2007). A "significant guidance document" is defined as:

> [A] guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; or (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended. Under the Bulletin, significant guidance documents include *interpretive rules of general applicability and statements of general policy* that have the effects described in Section I(4)(i)–(iv).

Id. (emphasis added). The Office of Management and Budget is the body responsible for overseeing the administration of federal agencies. *See* THE WHITE HOUSE, OFFICE OF MANAGEMENT AND BUDGET, https://www.whitehouse.gov/omb [https://perma.cc/S7RX-Y963] (listing some of the Office's responsibilities as "[m]anagement, including oversight of agency performance, human capital, Federal procurement, financial management, and information technology" and "[r]egulatory policy, including coordination and review of all significant Federal regulations by executive agencies").

general policy."[45] The DCL clarified previous standards, including the requirement that schools give both the accuser and the accused equal access to information used in sexual assault proceedings[46] and use a preponderance of the evidence standard in those adjudications.[47] The preponderance standard is the most significant and contested change because no standard of proof was previously articulated in the 2001 guidance.[48] Until 2011, educational institutions were free to set their own standards of proof,[49] though only one in five schools identified one in their sexual harassment codes.[50]

After the DCL's publication, OCR responded to some of the document's critics[51] via letters written by the Assistant Secretary during the Obama Administration, Catherine Lhamon.[52] In spite of the criticism, the agency continued to create DCL-provision-based resolution agreements with institutions it investigated for deficient sexual assault regulations.[53] Some of the agreements were made public,[54] and other schools were able to look to them as an indication of OCR's intent to enforce certain provisions.

In 2014, the Obama Administration furthered its crackdown on universities by assembling the White House Task Force to Protect Students from Sexual Assault.[55] A resulting report, accompanied by a lengthy questions and answers document, largely echoed the requirements of the

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[45] Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. at 3434.

[46] *See* 2011 DCL, *supra* note 4, at 11.

[47] *See id.* at 10–11.

[48] Creeley, *supra* note 15 (identifying the problems and concerns raised by "OCR's new requirements"). Substantive arguments against the preponderance standard are addressed later in this Note. *See infra* Part IV.

[49] The majority of schools with a stated standard of proof utilized the preponderance of the evidence standard, while some (mostly Ivy League schools) used a clear and convincing standard of proof. *See* Anderson, *supra* note 14, at 1986 and accompanying text.

[50] *See id.* at 1986–87.

[51] *See infra* notes 140–41 and accompanying text.

[52] *See, e.g.*, Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford (Feb. 17, 2016), http://www.chronicle.com/items/biz/pdf/DEPT.%20of%20EDUCATION%20RESPONSE%20TO%20LANKFORD%20LETTER%202-17-16.pdf [https://perma.cc/X6Y4-Z3DW].

[53] *See generally* Katie Jo Baumgardner, Note, *Resisting Rulemaking: Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813 (2014) (discussing the use of resolution agreements in these situations, specifically as related to the University of Montana, and the impact such agreements have on the university in question).

[54] *See, e.g.*, RESOLUTION AGREEMENT AMONG THE UNIVERSITY OF MONTANA – MISSOULA, THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, EDUCATIONAL OPPORTUNITIES SECTION AND THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS (2013), https://www.justice.gov/crt/about/edu/documents/montanaagree.pdf [https://perma.cc/S9V4-Q4LZ].

[55] *See* UNITED EDUCATORS, *supra* note 24, at 4.

DCL and reiterated the mandatory preponderance standard.[56] Additionally, around the same time that the questions and answers document was released, OCR increased enforcement of Title IX nationwide.[57] Between the time of the DCL's publication in April 2011 and October 2017, OCR launched more than 440 investigations into the sexual assault standards at universities, over 350 of which remain unresolved.[58]

OCR has not disseminated any further written guidance after the DCL, though Secretary DeVos announced a departmental intent to "launch a transparent notice-and-comment process" during a speech at George Mason University in September 2017.[59] In the same speech, Secretary DeVos also expressed her belief that the "[Obama] administration weaponized the Office for Civil Rights to work against schools and against students."[60] Additionally, the Secretary denounced the application of the preponderance of the evidence standard.[61] The DCL is, therefore, no longer the policy of the Department of Education.[62] However, several questions remain: whether the DCL was ever a legitimate exercise of nonlegislative rulemaking, if similar documents can replace it, and whether any new guidance or rule should adopt the same evidentiary standard for campus sexual assault adjudications.

II. THE BACKDROP: AGENCY RULEMAKING STANDARDS

Though many believe that increased enforcement is necessary given the pervasiveness of the campus sexual assault problem,[63] that does not mean that all of OCR's enforcement efforts have been legitimate. But, before analyzing the validity of the DCL, it is necessary to survey the

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[56] *See id.*; CATHERINE E. LHAMON, U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/A7W8-J8PR].

[57] *See Title IX: Tracking Sexual Assault Investigations*, CHRON. HIGHER EDUC., http://projects.chronicle.com/titleix/ [https://perma.cc/5W3K-JX2V].

[58] *See id.*

[59] *See* Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/ [https://perma.cc/XF6H-QNDJ]. At the time of this writing, however, the Trump administration had proposed no new rule.

[60] *Id.*

[61] *Id.*

[62] *See* 2017 DCL, *supra* note 21 (withdrawing the 2011 DCL as a statement of policy and guidance).

[63] *See, e.g.*, KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 1 (2016), http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf [https://perma.cc/9ZC8-JVAY].

administrative law scheme that gives OCR power to enforce Title IX regulations.

The United States uses a complex system in which agencies specify the proper implementation of federal statutes, including those that impact the receipt of federal funding.[64] Agencies, like the Department of Education's OCR, wield the power to create "rules" that bind the agency, courts, and the entities regulated by the agency.[65] These rules govern how the agency enforces the laws it has a statutory mandate to administer.

The Administrative Procedure Act (APA)[66] establishes how agencies must promulgate rules, which the statute defines broadly as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[67] The APA also creates exemptions from rulemaking in situations where substantive rights are not at issue.[68] Under these exemptions, agencies can create documents that resemble enforceable rules using less arduous procedures. Rules that are created through the rulemaking process are given "the force and effect of law" and are hence termed "legislative rules," whereas documents that are promulgated under one of the exemptions cannot be given such force and are thus called "nonlegislative rules."[69] An understanding of these principles is necessary to apply them to the DCL and determine its validity as a nonlegislative rule. This Part therefore discusses how agencies promulgate rules, how agencies can use exemptions to avoid the rulemaking process, and how courts differentiate between rules promulgated with or without utilization of an exemption when agency enforcement is challenged.

A. When Legislative Rulemaking Is a Requirement

There are two types of legislative rulemaking processes: formal and informal.[70] The formal rulemaking process requires lengthy trial-like proceedings and is rarely used unless the agency is obligated to do so by

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[64] *See, e.g.*, A–Z INDEX OF U.S. GOVERNMENT DEPARTMENTS AND AGENCIES, USA.GOV (2017), https://www.usa.gov/federal-agencies/a [https://perma.cc/PR3G-BUS8].

[65] *See* 1 RICHARD J. PIERCE, JR., 1 ADMINISTRATIVE LAW TREATISE § 6.6, at 471 (5th ed. 2010).

[66] 5 U.S.C. §§ 551–59 (2012).

[67] § 551(4).

[68] § 553(b). Substantive rights are not at issue when the agency is creating "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.*

[69] Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like–Should Federal Agencies Use Them to Bind the Public?*, 41 DUKE L.J. 1311, 1327–28 (1992).

[70] *See* §§ 553, 556, 557. However, more specific organic statutory provisions may supplement or supersede the APA's requirements. § 559.

the underlying, "organic" statute it administers.[71] Informal rulemaking is much more common and is generally referred to as "notice-and-comment" rulemaking because of its requirement that agencies give notice of the proposed rule and provide time for the public to comment on it.[72] Notice-and-comment rulemaking is required by § 553 of the APA, which describes the process as one in which the agency must issue notice of the proposed rule, receive comments from the public on its substance, and ultimately publish the final rule with "a concise general statement of [its] basis and purpose."[73]

Though it is still more attractive than the cumbersome formal process, notice-and-comment rulemaking has become increasingly burdensome since the 1960s[74] as Congress, the President, and the courts have added requirements.[75] The present process is complicated and requires far more time and resources than many agencies are able to devote, given understaffing and underfunding.[76] Some scholars believe that the agency's loss of time and resources through notice-and-comment procedures makes the process overly burdensome.[77] Additionally, scholars argue that the onerous notice-and-comment process is part of what drives agencies to utilize exemptions more often.[78] Whatever the reason for their creation, many documents, like the DCL, do not go through notice-and-comment

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[71] *See* §§ 553(c), 556, 557; *see also* United States v. Fla. E. Coast Ry. Co., 410 U.S. 224, 240–41 (1973) (requiring specific language in statute to trigger formal rulemaking procedures).

[72] § 553(c)–(d).

[73] *See* § 553(c); *see also* PIERCE, *supra* note 65, at 594 (paraphrasing the requirements of the rule).

[74] The push was primarily made by the D.C. Circuit during the 1960s and 1970s, and all branches of government have joined in adding requirements. David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 283–84 (2010). This continues to happen, despite the Supreme Court's determination in 1978 that § 553 of the APA "established the maximum procedural requirements" that Congress wished to impose on agencies. *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 524 (1978).

[75] Congress has increased the burden on agency rulemaking by requiring the agency to review proposed rules' impact on the environment, small businesses, and local governments, while the White House now requires proposed rules to undergo review by the Office of Management and Budget. *See* Franklin, *supra* note 74, at 283 (discussing these and other added requirements). Courts, particularly the D.C. Circuit, seem to question agency decisionmaking at every turn, demand replies to public comments, and much more. *Id.*

[76] *See* PIERCE, *supra* note 65, at 601 ("[S]ome agencies have concluded that they cannot issue a major rule in less than a decade."); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, 67 ADMIN. L. REV. 65, 79 (2015) ("[I]nvoking an exemption to the APA's notice-and-comment process takes far less staff time than issuing a notice of proposed rulemaking (NPRM), reading and responding to the ensuing comments, and modifying the rule as appropriate.").

[77] *See, e.g.*, Raso, *supra* note 76, at 78–79.

[78] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L. J. 1385, 1386 (1992).

rulemaking, and so their validity hinges on whether they fit into one of the exemptions from legislative rulemaking.

B. When Legislative Rulemaking Is Not a Requirement

Agencies utilize exemptions from notice-and-comment when seeking to streamline enforcement of ambiguous statutes without the costs and burdens associated with legislative rulemaking.[79] They allow agencies to issue proposed rules without the public dialogue required by the notice-and-comment process. As appealing as this option sounds for agencies, it can only be used in limited circumstances. A proposed rule is exempt from rulemaking procedures only if it fits into one of the two categories named in the APA. Under § 553(b)(3), an agency action is specifically exempt from notice-and-comment rulemaking if it: (A) issues "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," or (B) "for good cause finds" that notice and comment is impracticable and unnecessary in the specific circumstances.[80] Because the DCL was promulgated as a significant guidance document, a category that by definition includes both interpretive rules and general statements of policy,[81] this Note focuses on the exemptions in subsection (A).

While the APA does not provide definitions for the terms *interpretive rule* and *policy statement*, working definitions are set forth in the 1947 Attorney General's Manual on the Act.[82] The Manual states that interpretive rules "advise the public of the agency's construction of the statutes and rules which it administers," while policy statements "advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power."[83] The vagueness of these definitions means that courts have had to define the contours of each exemption.

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[79] *See* Franklin, *supra* note 74, at 303–04 ("[Nonlegislative rulemaking] provides relatively swift and accurate notice to the public of how the agency interprets the statutes or rules that it administers and how it intends to carry out its statutory mandate. In particular, the use of interpretive rules allows agencies to clarify their understanding of ambiguous statutes or rules without initiating a new round of notice and comment." (footnote omitted)).

[80] 5 U.S.C. § 553(b)(3) (2012).

[81] *See supra* note 44 and accompanying text.

[82] TOM C. CLARK, U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT 30 n.3 (reprt. ed. 1973) ; *see also* Franklin, *supra* note 74, at 286 (noting that courts have frequently looked to this manual as a guide to agency terminology).

[83] *See* CLARK, *supra* note 82, at 30 n.3. The Supreme Court used this manual to interpret the APA in *Director, Office of Workers' Compensation Programs v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 126–27 (1995), and *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979).

Interpretive rules give substance to the language of a preexisting statute or legislative rule that has a sufficiently concrete meaning.[84] Thus, true interpretive rules do not add new content: they only elucidate previous legislative terms and phrases.[85] While the limits of this exemption are unclear, the D.C. Circuit has frequently allowed agencies to issue interpretive rules that create tests to decipher ambiguous statutory terms (such as "interurban railway"[86] and "average pay"[87]) or to remind regulated entities about their duties.[88] Though courts give agency interpretations deference, interpretive rules may not create new requirements or laws.[89]

Policy statements are agency statements that advise the public about how the agency intends to operate.[90] Unlike interpretive rules, these statements do not seek to build upon or define existing legislation.[91] Statements of policy also may "not impose any rights and obligations on an operator."[92] Instead, they create new policies to inform regulated entities.[93] For example, in *American Bus Association v. United States*, the D.C. Circuit found that tentative language indicating an agency's expressed

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[84] *See* Shalala v. Ill. Council on Long Term Care, Inc., 529 U.S. 1, 21 (2009) (finding that the agency's interpretation of a statute was valid because there was no convincing alternative meaning for the statutory language in question); *see also* Anthony, *supra* note 69, at 1335 (discussing the meaning of the phrase *interpretive rules*). In other words, "[a]n interpretative rule is one which does not have the full force and effect of a substantive [i.e., legislative] rule but which is in the form of an explanation of particular terms in an Act." Gibson Wine Co. v. Snyder, 194 F.2d 329, 331 (D.C. Cir. 1952).

[85] *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045 (D.C. Cir. 1987) (explaining that interpretive rules arise when "an agency is merely explicating Congress' desires," not when "the agency is adding substantive content of its own").

[86] *See Gibson Wine*, 194 F.2d at 331 (highlighting this term as an example of something to which an agency can give meaning via an interpretive rule).

[87] *See* Am. Postal Workers Union, AFL-CIO v. U.S. Postal Serv., 707 F.2d 548, 559 (D.C. Cir. 1983).

[88] *See, e.g.*, Warshauer v. Solis, 577 F.3d 1330, 1338 (11th Cir. 2009) (finding that answers to frequently asked questions, even if containing specifics about the agency's enforcement standards, are interpretive).

[89] *See, e.g.*, Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000) ("If an agency . . . treats [an allegedly interpretive] document in the same manner as it treats a legislative rule, if it bases enforcement actions on the policies or interpretations formulated in the document . . . then the agency's document is for all practical purposes 'binding.'"); *see also* Anthony, *supra* note 69, at 1324 (noting the result of cases analyzing interpretive rules).

[90] *See* CLARK, *supra* note 82, at 30 n.3.

[91] *See* United Techs. Corp. v. U.S. EPA, 821 F.2d 714, 719 (D.C. Cir 1987) (policy statements are "rules in which the agency sought to fill gaps and inconsistencies left by the statutory scheme . . . [and] picked up where the statute left off; 'by no stretch of the imagination could [they] have been derived by mere "interpretation" of the instructions of Congress'" (quoting Citizens to Save Spencer Cty. v. U.S. EPA, 600 F.2d 844, 879 (D.C. Cir. 1979))).

[92] *See* 627 F.2d 525, 529 (D.C. Cir. 1980) (quoting Texaco v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969)).

[93] *See* Anthony, *supra* note 69, at 1324; *see also* Vietnam Veterans of Am. v. Sec'y of the Navy, 843 F.2d 528, 537 (D.C. Cir. 1988) ("A binding policy is an oxymoron.").

preference for a certain implementation method qualified as a policy statement but that a recitation of factors that guided an agency's decisions did not.[94] If an agency enforces a policy, the policy statement alone is not a sufficient justification and a court will question whether the document was a legitimate use of an exemption.[95]

C. Courts and the Legitimacy of Interpretive Rules and Policy Statements

Though interpretive rules and policy statements are different, neither carries the force and effect of law.[96] Parties can challenge, and courts can rule illegitimate, interpretive rules and policy statements that agencies enforce against regulated entities.[97] To evaluate whether an agency has improperly labeled something an interpretive rule or policy statement, a court must determine whether the substance of the rule is actually legislative—meant to bind the regulated entity—and thus illegitimate.[98] In this analysis, the distinction between interpretive rules and policy statements is crucial because each type of nonlegislative rule can only serve specific purposes. Because interpretive rules and policy statements perform discrete functions, courts use different analyses to determine whether the nonlegislative rule operates as permitted and is thereby valid.

A court first determines whether the document in question is an interpretive rule or a policy statement.[99] To determine that, the court will consider whether the document is interpreting sufficiently concrete statutory language or language within a rule that has gone through notice-and-comment procedures. If so, it is an interpretive rule.[100] These rules

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[94] *See Am. Bus Ass'n*, 627 F.2d at 530.

[95] *See* Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38–39 (D.C. Cir. 1974) ("When the agency applies the policy in a particular situation, it must be prepared to support the policy just as if the policy statement had never been issued. An agency cannot escape its responsibility to present evidence and reasoning supporting its substantive rules by announcing binding precedent in the form of a general statement of policy." (footnote omitted)).

[96] *See* Hickman, *supra* note 41, at 475 ("The Supreme Court has explained that legislative rules carry the 'force and effect of law' while nonlegislative rules do not." (quoting Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979))).

[97] *See* Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 411–12 (2007); *see also Vietnam Veterans of Am.*, 843 F.2d at 537 ("[S]tatements whose language, context and application suggest an intent to bind agency discretion and private party conduct—the sort of statements requiring compliance with § 553—will have that effect if valid; interpretive rules or policy statements will not, *regardless* of their validity.").

[98] "If a document expresses a change in substantive law or policy (that is not an interpretation) which the agency intends to make binding, or administers with binding effect, the agency may not rely upon the statutory exemption for policy statements, but must observe the APA's legislative rulemaking procedures." Anthony, *supra* note 69, at 1355 (footnote and emphasis omitted).

[99] *See id.* at 1339.

[100] *See supra* Section II.B.

generally withstand the court's scrutiny as long as they do not alter substantive rights.[101] If a document issued by an agency is truly interpretive, then it is a valid form of nonlegislative rulemaking,[102] and the inquiry into the rule's legitimacy can end here.[103] On the other hand, if a court determines that the nonlegislative document is not interpreting concrete statutory language, then its validity will depend on whether it is a valid policy statement.[104] If the courts determine it is neither an interpretive rule nor a policy statement, then the document is actually a legislative rule that should have gone through notice-and-comment rulemaking.

Generally, courts can make determinations about interpretive rules easily.[105] The tricky part is determining whether a policy statement is performing a permissible function or if it is operating as an improperly promulgated legislative rule. Unfortunately, courts do not simply look at a noninterpretive document that has not gone through notice-and-comment rulemaking and state that it must be a policy statement.[106] Not only is the test more complicated but it has also varied from case to case, so the lower federal courts have proposed several different means to distinguish legislative rules from policy statements.[107] The differences between the existing tests largely turn on how much trust the court places in an agency's decision about whether to engage in legislative rulemaking.

A brief survey of two judicially created tests will lay the foundation for their application to the DCL. One test is the "agency label" test, in which the court essentially chooses to adopt the agency's characterization of the rule.[108] This test it is not used very often, however, because it is

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[101] *See* Am. Hosp. Ass'n v. Bowen, 834 F.2d 1037, 1045–46 (D.C. Cir. 1987) (discussing previous cases in which courts had upheld or struck down interpretive rules). The D.C. Circuit has treated substantive rights as those that would create a cause of action if they were infringed. *See, e.g.*, JEM Broad. Co. v. FCC, 22 F.3d 320, 327 (D.C. Cir. 1994) (discussing the ability to file a license application as a substantive right, which could not be infringed by a narrow time window for filing in *Ranger v. FCC*, 294 F.2d 240 (D.C. Cir 1961)).

[102] *See* Anthony, *supra* note 69, at 1339.

[103] Whether the DCL qualifies for the interpretive rule exception is discussed in Part III, *infra*.

[104] *See* Anthony, *supra* note 69, at 1339.

[105] *See supra* Section II.B.

[106] *See* Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 384 ("Because their legal effect is difficult to determine, [policy statements and interpretive rules] typically resist easy placement in legislative or nonlegislative pigeonholes."). Some scholars, though, suggest that courts should adopt a single test. *See, e.g.*, William Funk, *When is a "Rule" a Regulation? Marking a Clear Line Between Nonlegislative Rules and Legislative Rules*, 54 ADMIN L. REV. 659, 663 (2002) (stating that courts should use a "notice-and-comment test" requiring that anything that has not gone through notice-and-comment rulemaking should be considered an interpretive rule or policy statement).

[107] *See* Franklin, *supra* note 74, at 278.

[108] *See* Asimow, *supra* note 106, at 389–90 (naming the test and presenting illustrative cases).

extremely deferential to the agency's decisionmaking in an area where the agency has acted without much oversight.[109]

The most commonly utilized test is the "legal effect" test, which asks whether a challenged rule creates new legal rights or duties for regulated entities.[110] The courts that apply this test often begin by looking at the agency's characterization of the statement[111] but will then consider whether a regulated entity's discretion to act in a certain manner has been relinquished.[112] If it finds that the result of the statement is "not simply to limit administrative discretion, but to abolish it," then the statement is considered legislative.[113] Moreover, in a variant of the test that is used when an agency has a track record of implementing the standards in the document, courts will look at whether the agency has actually bound itself to the pronouncements made within the statement.[114] If the statement looks like a "press release" or another "informational device" that an agency cannot use as grounds for enforcement, then it is properly considered a

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[109] *See id.* at 390 ("[M]any courts have declared that labels are entitled to judicial deference, but cannot be dispositive of the issue of the proper characterization of a rule."). For that reason, agency labels are rarely determinative. *See, e.g.*, Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 171–73 (2007) (holding in part that a rule in a document entitled "Interpretations" was actually legislative because it was promulgated via notice-and-comment rulemaking); First Bancorporation v. Bd. of Governors of the Fed. Reserve Sys., 728 F.2d 434, 438 (10th Cir. 1984) (treating a policy statement in informal adjudication as legislative rule); Am. Bus Ass'n v. United States, 627 F.2d 525, 531 (D.C. Cir. 1980) (also finding a policy statement to be a legislative rule). Moreover, the viability of the agency label test is questionable. *See* Asimow, *supra* note 106, at 389 n.39 (noting that the Senate Judiciary Committee has criticized courts' use of the agency label test); Franklin, *supra* note 74, at 287 n.52 (suggesting that the "agency's label" test may have been implicitly overruled by the Supreme Court).

[110] Franklin, *supra* note 74, at 288; *see also Am. Bus Ass'n*, 627 F.2d at 529 ("[A] 'general statement of policy' is one that does not impose any rights and obligations on an operator . . . ." (quoting Texaco v. Fed. Power Comm'n, 412 F.2d 740, 744 (3d Cir. 1969))); Pac. Gas & Elec. Co. v. Fed. Power Comm'n, 506 F.2d 33, 38 (D.C. Cir. 1974) ("The critical distinction between a substantive rule and a general statement of policy is the different practical effect that these two types of pronouncements have in subsequent administrative proceedings.").

[111] *See, e.g.*, *Pac. Gas & Elec. Co.*, 506 F.2d at 39 ("Often the agency's own characterization of a particular order provides some indication of the nature of the announcement.").

[112] *See, e.g.*, Mada-Luna v. Fitzpatrick, 813 F.2d 1006, 1014 (9th Cir. 1987) ("[T]o the extent that the directive 'narrowly limits administrative discretion' or establishes a *binding norm* . . . it effectively replaces agency discretion with a new binding rule of substantive law.") (quoting Ryder Truck Lines, Inc. v. United States, 716 F.2d 1369, 1377 (11th Cir.))); *Am. Bus Ass'n*, 627 F.2d at 531–32 (finding that a pronouncement by the Interstate Commerce Commission was determinative of rights and therefore legislative).

[113] *See Am. Bus Ass'n*, 627 F.2d at 532.

[114] *See* U.S. Tel. v. FCC, 28 F.3d 1232, 1234 (D.C. Cir 1994) ("The distinction between the two types of agency pronouncements has not proved an easy one to draw, but we have said repeatedly that it turns on an agency's intention to bind itself to a particular legal policy position." (citing Pub. Citizen, Inc. v. U.S. Nuclear Regulatory Comm'n, 940 F.2d 679, 681–82 (D.C. Cir. 1991); Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 (D.C. Cir. 1987))).

policy statement.[115] Conversely, substantive legislative rules establish "binding norms" that agencies may enforce and, thus, must go through formal or informal rulemaking.[116]

The legal effect test thus boils down to two inquiries: (1) whether the statement is essentially creating new substantive law, and (2) whether the agency created it with the intent that it should have binding effects on the parties being regulated.[117] If the court answers either inquiry in the affirmative, then the policy statement is actually legislative rulemaking that is illegitimate because it has not undergone notice-and-comment procedures.[118] Invalid rulemaking is a procedural error, and upon finding that it has occurred, a court generally vacates the document and requires notice-and-comment rulemaking to continue enforcement.[119] In fact, courts do not evaluate the substance of the document until it has gone through notice-and-comment rulemaking.[120]

Even with its flaws, the courts' analytical process provides a method of understanding the DCL as an administrative document and how courts may interpret other similar forms of guidance when they are enacted and enforced.

III. THE CENTRAL CONFLICT: THE DEAR COLLEAGUE LETTER AS AN EXERCISE OF NONLEGISLATIVE RULEMAKING

Once a nonlegislative rule is created, a court will only evaluate its validity if a lawsuit is filed to challenge the agency's enforcement actions. Due to the Obama Administration's aggressive enforcement of Title IX,[121] several students found responsible for campus sexual assaults have challenged the procedures underlying campus adjudications.[122] Spurred on

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[115] *See, e.g.*, *Pac. Gas & Elec. Co*., 506 F.2d at 39.

[116] *See, e.g.*, *id.* at 38 & n.18 (citing Reginald Parker, *The Administrative Procedure Act: A Study in Overestimation*, 60 YALE L.J. 581, 598 (1951)).

[117] *See* Anthony, *supra* note 69, at 1327.

[118] *See id.* at 1322, 1327.

[119] *See id.* at 1355; *cf.* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1028 (D.C. Cir. 2000) (vacating a document for failure to comply with the requirements of the Clean Air Act, which are similar to those of the APA).

[120] *See* Anthony, *supra* note 69, at 1318.

[121] *See* Gersen, *supra* note 15.

[122] *See* Anderson, *supra* note 14, at 1988–89 (discussing a few recent federal cases that have agreed that certain basic due process requirements were not being met in school adjudications, but noting that all of those "due process requirements are consistent with OCR guidance"); Tovia Smith, *For Students Accused of Campus Rape, Legal Victories Win Back Rights*, NPR (Oct. 15, 2015, 4:45 AM), http://www.npr.org/2015/10/15/446083439/for-students-accused-of-campus-rape-legal-victories-win-back-rights [https://perma.cc/CK79-93Y2] (detailing a few court cases brought by students found responsible for campus sexual assault).

by the efforts of the Foundation for Individual Rights in Education (FIRE),[123] and no doubt encouraged by letters written by law professors[124] and Senator James Lankford of Oklahoma,[125] recent lawsuits have challenged the validity of the 2011 DCL directly.[126] These plaintiffs argue that the DCL is an invalid exercise of legislative rulemaking because it did not go through notice-and-comment rulemaking.[127]

This Part focuses on one such plaintiff, John Doe, who filed his initial complaint against OCR in June 2016.[128] The arguments therein frame the debate surrounding the DCL, especially as it pertains to the preponderance of the evidence standard. Doe's complaint represents the perspective of advocates who view the DCL as a flawed document that should not require schools to use the preponderance standard in campus sexual assault adjudications.[129] At the time that Doe's complaint was filed, the Assistant Secretary for OCR was Catherine Lhamon, who staunchly supported the legitimacy of the DCL as a nonlegislative rule.[130] Lhamon's written

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[123] *See, e.g.*, Creeley, *supra* note 15 (discussing FIRE's 2011 campaign to roll back OCR's new mandates); Greg Lukianoff, *OCR's April 4 Letter and Opposition in the National Media*, FIRE (Dec. 26, 2011), https://www.thefire.org/ocrs-april-4-letter-and-opposition-in-the-national-media [https://perma.cc/WF63-R8P4].

[124] *See* Harvard University Professors, *supra* note 11 ("Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."); Penn Law Professors, *supra* note 11 ("[W]e believe that OCR's approach exerts improper pressure upon universities to adopt procedures that do not afford fundamental fairness.").

[125] *See* Letter from Senator James Lankford to John B. King, Acting Secretary of Education 1 (Jan. 7, 2016), https://www.scribd.com/doc/294821262/Sen-Lankford-letter-to-Education-Department [https://perma.cc/HV9W-PUQ3] (stating that Lankford "believe[s] that the Dear Colleague letters advance substantive and binding regulatory policies that are effectively regulations . . . [and] should have been promulgated subject to notice-and-comment procedures").

[126] *See, e.g.*, Complaint at 3, Doe v. Lhamon, No. 1:16-cv-01158-RC (D.D.C. June 16, 2016); Complaint at 3, Neal v. Colo. State Univ.–Pueblo, No. 1:16-cv-00873-RM-CBS (D. Colo. May 4, 2016).

[127] *See, e.g.*, Complaint at 3, *Doe*, No. 1:16-cv-01158-RC; Complaint at 3–4, *Neal*, No. 1:16-cv-00873-RM-CBS.

[128] *See* Complaint at 23, *Doe*, No. 1:16-cv-01158-RC. In a slight amendment to the original complaint, Oklahoma Wesleyan joined as a plaintiff in the suit because the school "reasonably fears that it is just a matter of time before OCR threatens it with enforcement action" based on its noncompliance with the preponderance standard. Amended Complaint at 20, *Doe*, No. 1:16-cv-01158-RC (D.D.C. Aug. 15, 2016). Wesleyan's involvement, however, is outside the scope of this Note.

[129] *See supra* note 124 (presenting arguments that the DCL's preponderance of the evidence standard creates concerns about procedural fairness).

[130] Lhamon has continued to stand by her arguments since stepping down from her position and learning of the new Department of Education's denunciation of the DCL. *See* Susan Svrluga & Nick Anderson, *DeVos Decries "Failed System" on Campus Sexual Assault, Vows to Replace It*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/protesters-gather-anticipating-devos-speech-on-campus-sexual-assault [https://perma.cc/4KZ4-YQAZ] ("The

statements and filings in the case provide the backbone for the opposing contention to Doe's: they contend that OCR was within its rights in implementing and enforcing the DCL.

Though *Doe v. Lhamon* now remains in limbo[131] due to the Trump Administration's expressed intent to revisit the language of the DCL,[132] a discussion of *Doe* is instructive on three fronts. First, it allows us to define some of the limits of Title IX nonlegislative rulemaking and better understand why the DCL can be revoked so easily. Second, *Doe* illuminates the criticism that surrounds the DCL and sheds light on its procedural illegitimacy. And, third, it might inform OCR's approach moving forward because the questions that underscore the case appear to have indirectly given rise to the Trump Administration's decision to rescind support for the DCL.[133]

A. Doe v. Lhamon *and the Arguments Against the Dear Colleague Letter*

The *Doe* complaint alleged that the agency's alteration of previous administrative rule requirements, in particular the imposition of the preponderance standard, exceeded OCR's authority to enforce Title IX.[134] Doe contended that the DCL was not interpretive because the 1997 and 2001 guidance documents issued by OCR defined six elements of "Prompt and Equitable Grievance Procedures,"[135] none of which require any specific standard of proof.[136] Additionally, he argued that the preponderance standard was a new substantive requirement that constitutes rulemaking under the APA.[137]

Catherine Lhamon, in her capacity as then-Assistant Secretary for OCR, argued on a motion to dismiss that the language from the DCL "does

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[DeVos] speech pretty clearly sent a message that sexual assault will not be taken seriously by this administration. That could not be more damaging.").

[131] *See* Defendants' Unopposed Motion to Hold Case in Abeyance, at 1, *Doe,* No. 1:16-cv-01158-RC (D.D.C. Aug. 11, 2017).

[132] *See supra* note 59 and accompanying text.

[133] *See* Jeannie Suk Gersen, *Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault*, NEW YORKER (Sept. 8, 2017), https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault (quoting Betsy DeVos as saying: "Any school that refuses to take seriously a student who reports sexual misconduct is one that discriminates. And any school that uses a system biased toward finding a student responsible for sexual misconduct also commits discrimination.").

[134] *See* Amended Complaint at 3, *Doe*, No. 1:16-cv-01158-RC (D.D.C. Aug. 15, 2016).

[135] *See* U.S. DEP'T OF EDUC., *supra* note 37, at 20; Sexual Harassment Guidance, *supra* note 36, at 12,044.

[136] *See* Amended Complaint at 21, *Doe*, No. 1:16-cv-01158-RC.

[137] *See id.* Plaintiffs also stated that there was no justification for the preponderance standard because it has no relation to sexual misconduct investigations and that the comparison to federal civil rights lawsuits is improper. *Id.*

not add requirements to applicable law," and that the preponderance standard is merely an interpretation of the phrase "equitable" in the 2001 Guidance.[138] Similarly, in a letter to Senator James Lankford of Oklahoma, an outspoken critic of OCR's efforts to reform campus sexual assault adjudications,[139] Lhamon explained that the preponderance standard "stem[s] from the Department's Title IX regulations, including, but not limited to, the requirement that educational institutions adopt 'grievance procedures providing for prompt and equitable resolution' of complaints."[140] In that same letter, Lhamon also pointed out that the preponderance standard was required in resolution agreements made with schools prior to the promulgation of the 2011 DCL.[141] Under the agency label test,[142] this supports the assertion that the 2011 DCL is simply a clarification of OCR's standards and was issued merely to provide notice of the department's construal of Title IX.[143] This test is disfavored,[144] however, and thus it is unclear how determinative the agency's label is.

Indeed, Doe's argument is more persuasive because evidence supports the position that the preponderance standard embodied in the DCL is not interpretive. Under the legal effect test, the language, tone, and impact of the DCL all weigh toward finding that the rule should have undergone notice-and-comment procedures. The DCL qualifies for neither relevant exemption to notice-and-comment rulemaking because: (1) it is not interpretive and thereby must be analyzed as a policy statement, and (2) as a policy statement, the DCL was improperly enforced as if it was a binding document.

As the *Doe* complaint points out, Lhamon's assertion that the preponderance standard is an interpretation of "prompt and equitable" does not stand up to scrutiny. The language of the 2001 guidance document may be vague enough to encompass a standard of proof, but that vagueness is its

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[138] *See* Motion to Dismiss at 2, 8, *Doe*, No. 1:16-cv-01158-RC (D.D.C. Sept. 1, 2016) (quoting a litigation exhibit); *see also* 2011 DCL, *supra* note 4, at 11 (stating that any standard other than the preponderance standard is not "equitable").

[139] *See* Emma Brown, *U.S. Senator: Education Dept. Overstepped Authority on Sexual Assault Complaints*, WASH. POST (Jan. 7, 2016), https://www.washingtonpost.com/news/education/wp/2016/01/07/u-s-senator-education-department-overstepped-authority-on-sexual-assault-complaints [https://perma.cc/U3N2-B5CC].

[140] Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford, *supra* note 52 (quoting 34 C.F.R. § 106.8(b) (2000)).

[141] *See id.*

[142] *See supra* notes 108–09 and accompanying text.

[143] *See supra* notes 108–09 and accompanying text.

[144] *See* Anthony, *supra* note 69, at 1339.

downfall.[145] The 2001 guidance sets forth the "prompt and equitable" factors as elements for evaluating a school's grievance procedures,[146] but it does not impose any affirmative measures on the schools themselves. Conversely, the DCL directive that schools *must* use the preponderance standard seems to be imposing an affirmative requirement for campus adjudications. That kind of "interpretation" is not an interpretation at all because it is creating a new substantive policy.[147] Thus, the DCL can only be evaluated as a policy statement.

In order to be a valid policy statement, the DCL cannot have practically binding effects.[148] Just as a court using the legal effect test and its variant that is applied after an agency has made use of a promulgated document would, Doe underscored that OCR *has* been enforcing the preponderance of the evidence and other DCL standards against regulated entities.[149] As the *Doe* complaint states, OCR has been using resolution agreements to require schools to adopt the preponderance standard.[150] Lhamon admitted as much in her letter to Senator Lankford, which acknowledged that OCR had a history of bringing schools into compliance with that standard.[151] She also acknowledged that the OCR guidance documents are meant to "assist schools in understanding what policies and practices will lead OCR to *initiate proceedings to terminate Federal financial assistance*."[152] Lhamon's latent promise to initiate proceedings is underscored by the reality that OCR was, indeed, requiring schools to alter their standard of proof to reflect the DCL's preponderance mandate at that time.[153]

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[145] *See id.* (noting that courts must first determine "whether a given statement interprets *sufficiently concrete* statutory language as to qualify as interpretive" (emphasis added)).

[146] *See* U.S. DEP'T OF EDUC., *supra* note 37, at 20.

[147] *See* Anthony, *supra* note 69, at 1339 n.161 ("But where the rules use the statutory words in a 'positive' way—not merely to require refraining from unfair or deceptive acts but to require affected parties to perform affirmative acts to be safe from prosecution—it would seem hard to say they draw any tangible meaning from the statutory language. To the extent these rules are policy statements, as they are not interpretive.").

[148] *See id.* at 1332–33 ("An agency may use interpretive rules in a manner that makes them binding as a practical matter, but it may not so use policy documents." (footnote omitted)).

[149] *See* Amended Complaint at 12, Doe v. Lhamon, No. 1:16-cv-01158-RC (D.D.C. Aug. 15, 2016).

[150] *See id.* at 14–15, 18.

[151] *See* Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford, *supra* note 52.

[152] *Id.* (emphasis added).

[153] *See* Jake New, *The Wrong Standard*, INSIDE HIGHER ED. (Nov. 6, 2014, 3:00 AM), https://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard-proof-sexual-assault-cases-last-legs [https://perma.cc/EWD6-MJ3G] (after OCR reached an agreement with Princeton, the school altered its adjudication standard to a preponderance of the evidence).

The *Doe* complaint mentions that at least twenty-four universities used a higher standard of proof prior to the DCL's promulgation.[154] Additionally, there is no evidence that OCR was willing to approve a school's Title IX procedures when a higher standard of proof was used.[155] Princeton University, the last Ivy League school to retain a higher standard of proof, shifted to the preponderance standard in 2014 after OCR's finding that the school was not adjudicating claims "promptly and equitably."[156] Many—and perhaps most—other universities have been compelled to proactively, or by threat of investigation, do the same and comply with the DCL.[157] As a whole, these circumstances suggest that school administrators felt they were required to comply with the preponderance standard if they wished to retain their federal funding.[158] That reality contradicts Lhamon's statements that the DCL was not meant to have the "force and effect of law."[159] Under the legal effect test, practically binding effects such as these lead to a determination that the DCL is legislative.[160]

Finally, turning to the tone and language of the DCL, there are further indications that use of the preponderance standard is binding and nonnegotiable for schools. The DCL states that a school "*must* use a preponderance of the evidence standard," because higher standards "are . . . not equitable under Title IX."[161] Not only does the preponderance standard appear to be mandatory, but also the tone of the letter overall suggests that

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[154] *See* Amended Complaint at 12, *Doe*, No. 1:16-cv-01158.

[155] *See* 2011 DCL *supra* note 4, at 11 ("Grievance procedures that use [a] higher standard [than the preponderance of the evidence] are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.").

[156] See New*, supra* note 153 ("'Princeton was one of the last holdouts,' Sokolow said. 'Off the top of my head, I can't think of a single campus still using a higher standard. And that's a very positive change.'").

[157] For instance, Harvard University, Michigan State University, the State University of New York, and Tufts University all changed their standard to preponderance after a Title IX investigation revealed that they were utilizing a higher standard of proof. *See* Jake New, *Must vs. Should*, INSIDE HIGHER ED (Feb. 25, 2016, 3:00 AM), https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance [https://perma.cc/7ZF9-GASW]; Harvard University Professors, *supra* note 11; *see also* New, *supra* note 153 ("Brett Sokolow, president of the National Center for Higher Education Risk Management, said that with Princeton adopting the lower standard and the department continuing to find colleges in violation of Title IX if they do not adopt it, there are 'probably only a handful of colleges left' who use a higher burden of proof.").

[158] Though no school has ever lost funding, it remains a powerful threat because almost every institution in the nation, save three, relies on it. *See* Baumgardner, *supra* note 53, at 1814.

[159] Letter from Catherine E. Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., to Senator James Lankford, *supra* note 52.

[160] Hickman, *supra* note 41, at 479.

[161] *See* 2011 DCL, *supra* note 4, at 11 (emphasis added).

it is an enforcement document.[162] In all, the term *must* appears thirty-six times in the DCL, and many provisions state what schools are "required" to do.[163] Although OCR disclaimed the notion that the DCL had any kind of legally binding effect, the actual text of the letter seems to explicitly tell schools what they must do to comply with Title IX.

For all these reasons, the DCL was, from its inception, invalid and unenforceable. When creating the document, the Lhamon-led OCR tried to play both sides of the field, calling the DCL provisions interpretive while simultaneously adding substantive requirements that mandate schools' compliance. Though OCR had good reasons for promulgating the DCL, it cannot legitimately effectuate its goals and the document should be ruled illegitimate if any legal challenges persist.

B. Implications Moving Forward

Many of the arguments raised by Doe echo those of anti-DCL and preponderance standard commentators.[164] Indeed, Secretary DeVos may have considered the arguments of advocates who disagree with the enforcement of the preponderance standard when she suggested that the Department of Education will consider changes to Title IX campus sexual assault standards during a speech at George Mason University.[165] Ultimately, the DCL was merely unenforceable policy guidance that could be overturned at any time. As the preference of OCR changes, as it often does between administrations, so may its decisions regarding the interpretation of various provisions of Title IX. Moving forward, any further specification of Title IX requirements for schools should undergo the notice-and-comment process.

IV. THE RESOLUTION: FIGHTING FOR THE PREPONDERANCE STANDARD

Notwithstanding its procedural shortcomings, the legal community and administrators in higher education must recognize the importance of the DCL's preponderance of the evidence standard. The next step toward legitimizing it should come in the form of commentary on any pending

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[162] For instance, Representative Virginia Foxx has argued that the Dear Colleague Letter is legislative and uses a "strong intimidation tone" so that schools view it as having the force of law. Tyler Kingkade, *Republicans Push Education Department to Defend Its Handling of Sexual Assault Cases: Obama's Pick to Lead the Department Can Expect to Spend the Next Year Justifying Its Treatment of Colleges*, HUFFINGTON POST (Feb. 25, 2016, 7:30 PM), https://www.huffingtonpost.com/entry/education-secretary-title-ix_us_56cf45e8e4b0bf0dab31253d [https://perma.cc/BRT2-5J5F].

[163] *See* 2011 DCL, *supra* note 4, at 4–8, 10–16, 18–19.

[164] *See infra* note 167.

[165] *See* Gersen, *supra* note 133.

legislative rule regarding Title IX during the notice-and-comment process. That process has, unfortunately, become increasingly cumbersome,[166] and critics of the DCL and the preponderance standard will almost definitely put up a fight during the comment period as well.[167] Thus, this Part discusses the difficulty that OCR may encounter during the notice-and-comment process before delving into reasons why future Title IX guidance regarding these issues should include the preponderance of the evidence standard as a requirement.

A. Challenges of the Notice-and-Comment Process

When a potential rule goes through the notice-and-comment process, an agency is required to do three things: (1) issue a notice in the Federal Register, (2) allow the public to participate by sending the agency feedback, and (3) consider that feedback in creating the final rule.[168] Though this sounds like a simple process,[169] Congress, the Executive Branch, and the courts have all contributed to making notice-and-comment rulemaking more and more burdensome over time.[170] Due to heightened requirements, receiving feedback and ultimately promulgating a rule is not enough. Agencies like OCR must now provide extensive documentation of the sources relied upon when adopting a rule and must provide detailed explanations for why it adopted the final version of the rule.[171] Agencies must also show that they took a "hard look" at significant objections and provide reasons for ruling out alternatives.[172] Given these guidelines, if an agency promulgates a rule through notice and comment that is later

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[166] *See supra* notes 72–78 and accompanying text.

[167] For a sampling of critics, see Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges*, CHRON. HIGHER EDUC. (Oct. 1, 2012), http://chronicle.com/article/Campus-Is-a-Poor -Court-for/134770 [https://perma.cc/MES8-DT2C]; Gersen, *supra* note 133; Nancy Gertner, *Sex, Lies and Justice: Can We Reconcile the Belated Attention to Rape on Campus with Due Process?*, AM. PROSPECT (2015), http://prospect.org/article/sex-lies-and-justice [https://perma.cc/F69E-U37H]; Lukianoff, *supra* note 123 (naming and providing links to a slew of criticisms in the media).

[168] *See* Franklin, *supra* note 74, at 282.

[169] The APA itself names only those three simple requirements. *See* 5 U.S.C. § 553 (2012).

[170] *See* Mark Seidenfeld, *A Table of Requirements for Federal Administrative Rulemaking*, 27 FLA. ST. U. L. REV. 553 (2000) (presenting a chart of over 100 requirements that may be required for any given notice-and-comment process); *see also supra* notes 74–75 and accompanying text (discussing requirements added by courts, the Executive Branch, and Congress).

[171] *See* MARTIN SHAPIRO, WHO GUARDS THE GUARDIANS? JUDICIAL CONTROL OF ADMINISTRATION 41–54 (1988); Seidenfeld, *supra* note 170, at 533.

[172] *See* PIERCE, *supra* note 65, at 595 ("Indeed, in one major rulemaking, EPA wrote thousands of pages explaining how it resolved hundreds of issues based on its consideration of over one hundred studies and over one hundred thousand comments it received in response to its notice of proposed rulemaking."); Franklin, *supra* note 74, at 283 (noting that this is a requirement that has been added by the courts).

challenged, the rule has the greatest chance of surviving if its initial assertion is well supported.

Any administration that attempts to pass new regulations regarding Title IX campus sexual assault will have to decide whether to mandate a standard of proof for campus adjudications. The preponderance standard, which would very likely be challenged during notice and comment,[173] is one provision of the DCL that should be preserved. The preponderance of the evidence standard creates the proper balance of procedural protections for each party involved in campus sexual assault adjudications. As such, it is exceedingly important that those in the educational and legal communities who support OCR's push toward Title IX reform stand up for its importance just as ardently as the naysayers who call for its downfall. The agency should exercise its discretion to take steps toward attacking regulatory problems,[174] and ensuring the legitimacy of the preponderance standard is a crucial next step for both the educational community and the legal community.

B. The Necessity of the Preponderance of the Evidence Standard

Though the preponderance standard is a procedural protection, it has concrete implications for victims of sexual assault, most of whom are women.[175] Adopting the preponderance standard both aligns with the standards and practices of most educational institutions in addressing other campus civil rights violations and enhances the likelihood that Title IX can

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[173] A significant number of law professors and scholars and at least one independent organization have spoken out against the preponderance standard and would likely oppose it during the notice-and-comment process. *See, e.g.*, Berkowitz, *supra* note 13; Harvard University Professors, *supra* note 11; Penn Law Professors, *supra* note 11; *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault*, LANKFORD.SENATE.GOV (May 16, 2016), https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf [https://perma.cc/ZW7B-H73P]; *see also* Hendrix, *supra* note 13, at 615 (arguing that the clear and convincing standard of proof should govern campus sexual assault proceedings).

[174] "[A]gencies have wide latitude to attack a regulatory problem in phases and . . . a phased-attack often has substantial benefits." Grand Canyon Air Tour Coal. v. FAA, 154 F.3d 455, 471 (D.C. Cir. 1998).

[175] Surveys suggest that around 20% of women experience rape at some point in their lives, while the statistic is about 1% for men. *See* MICHELE C. BLACK ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/3HPN-9J9M]. This survey does not even account for other forms of sexual assault. As such, the remainder of this section will largely refer to survivors of campus sexual assault using female pronouns and referents.

effectively combat sexual assault that "denies or limits a student's ability to participate in or benefit from [a] school's program."[176]

1. Conceptual Framework

In order to approach the question of evidentiary standards for campus sexual assault adjudications, it is important to clarify the conceptual standpoint of this Note. The arguments below are formulated around the baseline assumption that the accuser is at least somewhat likely to be telling the truth. Despite many stereotypes to the contrary,[177] there is no proof that false rape or sexual assault allegations are more common than with any other kind of complaint.[178] In fact, the FBI estimates that there is a very low likelihood of false reporting of rape, and existing studies support that conclusion.[179] Starting with any assumption other than one that the report might be true automatically tips the scale away from the accuser and inherently disfavors her viewpoint. The procedural standards for campus adjudications should, therefore, be engineered to avoid making a value judgment that the accuser is not telling the truth.

It is also important to clarify, before delving into the specifics, that campus proceedings are not the same as, or even akin to, criminal proceedings. When one student files a complaint that another sexually harassed or assaulted her, there are only a few possible end results. The most drastic possible outcome of a campus proceeding is that a student

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[176] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., *Sex-Based Harassment*, ED.GOV (2017), https://www2.ed.gov/about/offices/list/ocr/frontpage/pro-students/issues/sex-issue01.html [https://perma.cc/7LBM-RP3L].

[177] For example, rape law traditionally required corroboration of rape accusations and cautionary instructions to juries because of the "societal notion that women have a tendency to lie about rape and sexual assault." *See* Anderson, *supra* note 14, at 1948. Today, these sentiments persist in the criminal justice system and manifest in police officers who refuse to log sexual assault complaints or label them as such, choose not to investigate rape reports, and fail to test rape kits. *See id.*; Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017). Gender stereotyping can also be accompanied by racial stereotyping, which has created a situation where women of color are less likely to report sexual assault than white women because they fear being disbelieved. *See* Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 MONT. L. REV. 109, 138 (2017).

[178] *See* Brake, *supra* note 177, at 134.

[179] A study conducted by the FBI found that only 8% of forcible rape complaints were verifiably false. *See* FED. BUREAU OF INVESTIGATION, CRIME INDEX OFFENSES REPORTED (1996), https://ucr.fbi.gov/crime-in-the-u.s/1996/96sec2.pdf [https://perma.cc/3E74-8R7V]. A subsequent study placed the number between 2% and 10%. *See* David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318 (2010). However, some suggest that this number might be skewed toward the high end because of the methodological assumption that recanting means that the original report was false, when in fact a number of pressures may lead a survivor to recant a true statement. *See, e.g.*, Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1363 (2010). Further, because of these statistical flaws, some suggest the exact statistic may be impossible to pin down. *See, e.g.*, *id.*

adjudged to be responsible would be expelled from the institution.[180] This result does not even remotely resemble those at play in a criminal trial: there is no potential criminal punishment or jail time or any mark on the accused's criminal record. Because none of the relevant penological outcomes are attached to campus adjudications, even for accusations that might even rise to the level of a crime, neither should the criminal due process requirements attach.[181]

2. Adjudicative Proceedings on Campus

Because sexual assault adjudications and criminal trials for sexual assault are starkly different, the two should not be conflated. Instead, when advocating for the continued use of the preponderance of the evidence standard, organizations and scholars helpfully compare campus adjudications for sexual assault violations with other forms of redress. For example, many have argued, as OCR does,[182] that because civil rights violations tried in court require the preponderance standard of proof, a parallel standard should be required for Title IX adjudications because Title IX is a civil rights statute.[183] Similarly, victims of sexual assault may choose to sue the perpetrator in court to claim civil damages, and those trials also require the application of the preponderance standard.[184] Furthermore, most other adjudications for violations of campus rules, such as academic dishonesty, require the use of a preponderance of the evidence standard.[185] Thus, at the majority of schools, to treat sexual assault

[180] *See, e.g.*, NW. UNIV. STUDENT AFFAIRS, *Disciplinary Sanctions for Individuals*, STUDENT CONDUCT, http://www.northwestern.edu/student-conduct/student-code-of-conduct/sanctions/disciplinary-sanctions-for-individuals/index.html [https://perma.cc/RD29-955Y] (listing expulsion, degree revocation, exclusion, suspension, disciplinary probation, university warning, fine, financial restitution, and restriction on access or contact).

[181] *See* Mathews v. Eldridge, 424 U.S. 319, 348–49 (1976) (acknowledging that formal procedural rules required in courts of law are not always appropriate for administrative agencies); Dixon v. Ala. State Bd. of Educ., 294 F.2d 150, 159 (5th Cir. 1961) (setting the standard that most federal courts follow that student disciplinary proceedings do not need to have all of the procedural formalities of a criminal trial—they only need to ensure fair adversarial procedures); *see also* Brake, *supra* note 177, at 137 ("The criminal law's allocation of harm reflects the exceptionally high stakes of incarceration resulting from criminal proceedings. In civil cases, the [preponderance] standard reflects the equivalence of significant stakes on both sides.").

[182] *See* 2011 DCL, *supra* note 4, at 11.

[183] *See, e.g.*, Anderson, *supra* note 14, at 1986; Letter from Know Your IX to Senators Lamar Alexander and Patty Murray (Feb. 25, 2016), http://knowyourix.org/wp-content/uploads/Letter-to-HELP-Cmte-Re-Office-for-Civil-Rights.pdf; Letter from the Nat'l Women's Law Ctr. to Catherine Lhamon, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ. (Nov. 21, 2013), https://nwlc.org/wp-content/uploads/2015/08/letter_to_ocr_re_sexual_harassment_and_violence.pdf [https://perma.cc/RMC7-C89L].

[184] Anderson, *supra* note 14, at 1987.

[185] *Id.* at 1985–86. The question of what standard should apply to campuses that utilize a higher standard of proof for all campus adjudications naturally arises. But the preponderance standard is proper

differently would be to afford those accused of campus sexual assault abuses special rights that no other student respondent in a campus proceeding enjoys, even though the punishments are parallel.[186]

Despite these persuasive procedural arguments, opponents of the preponderance standard remain firmly entrenched in the idea that those accused of sexual assault on campus are at a severe procedural disadvantage.[187] Many of these commentators believe that the clear and convincing standard of proof is more apt.[188] However, clear and convincing is not definitively associated with a likelihood of guilt; it merely lies somewhere between a 51% and a 100% chance that the accused is responsible.[189] The clear and convincing standard would create even more ambiguity in an adjudication marred by the stereotypes surrounding sexual assault complainants.[190] In a situation where accusers are already likely to be distrusted, raising the bar on the "believability" of their claims by some immeasurable margin could be extremely harmful to the fairness of the process.

Though it is considered less demanding, the preponderance of the evidence standard still requires *more than* a 50% likelihood that the accuser's version of events is accurate—a fact that does not seem to dissuade those who claim that "he said-she said" scenarios will likely lead to more determinations in favor of accusers with this standard.[191]

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in all campus sexual assault proceedings, regardless of the standard used for other offenses. This is because of the unique circumstances and difficulties inherent in sexual assault adjudications, as discussed in this Section. A school's individual rationale for applying a higher standard does not weaken the necessity for procedural balancing to aid sexual assault survivors.

[186] *See id.*

[187] *See, e.g.*, Hendrix, *supra* note 13, at 615 ("[S]tudents accused of sexual assault in campus disciplinary proceedings are due a clear and convincing burden of proof because their interests far outweigh any costs imposed on the university by this additional protection . . . ."); Berkowitz, *supra* note 13 ("[U]niversities are institutionalizing a presumption of guilt in sexual assault cases."); *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault*, *supra* note 173 (citing individuals who have spoken up about the due process implications of the Dear Colleague Letter).

[188] *See, e.g.*, Tamara Rice Lave, *Campus Sexual Assault Adjudication: Why Universities Should Reject the Dear Colleague Letter*, 64 KAN. L. REV. 915, 957 (2016).

[189] *Clear and Convincing Evidence*, WEX LEGAL DICTIONARY, https://www.law.cornell.edu/wex/clear_and_convincing_evidence [https://perma.cc/QP84-67ZN].

[190] For examples of these stereotypes, see Brake, *supra* note 177, at 134–35.

[191] *See, e.g.*, Conor Friedersdorf, *What Should the Standard of Proof Be in Rape Cases? A New Lawsuit Takes Aim at the Department of Education's Push to Force Colleges to Decide Cases Based on a "Preponderance of the Evidence,"* ATLANTIC (June 17, 2016), https://www.theatlantic.com/politics/archive/2016/06/campuses-sexual-misconduct/487505 [https://perma.cc/K2RQ-2FBA] ("Under the stronger standards, it's possible to find against an accuser without implying or seeming to imply that he or she is a liar . . . . Whereas under a 'preponderance of the evidence' standard, an adjudicator who finds against an accuser is arguably saying that it's more likely than not that he or she is lying (though it is technically possible that the evidence is split right down the middle). I suspect that will cause many

Commentators who criticize the use of the preponderance standard in campus sexual assault proceedings have also pointed to the typical use of the standard as one in which litigants are meant to "share the risk of error in roughly equal fashion."[192] But that may actually be some of the best support for upholding the preponderance standard: Title IX is intended to curtail the risk that a victim will have to live near, go to class with, continue to be harassed by, or generally have her education disrupted by a perpetrator of sexual assault.[193] The risk that the survivor will continue to deal with emotional, and potentially life-altering, effects of her sexual assault are surely "roughly equal" to the risk of the accused losing some educational privileges if he or she is found responsible.[194]

3. Shortcomings of Campus Proceedings

A conclusion about what process is due to the accused in campus sexual assault adjudications must be grounded in reality. To understand why the preponderance of the evidence standard is necessary to ensure that Title IX actually protects against sex discrimination in schools, and especially university settings, those who question the standard must keep the actual plight of victims in mind. Roadblocks at every step of the campus sexual assault reporting and adjudication processes make it unlikely that any form of punishment will result that may lend some relief to a victim. For example, victims of sexual assault underreport their encounters.[195] One study found that less than 1% of victims of campus sexual assault initiated grievance proceedings against the perpetrator, despite almost one in five college women experiencing sexual assault during the period of her enrollment.[196] Low reporting rates can be explained

adjudicators to feel some pressure, if only self-imposed, to render verdicts that validate the claims of accusers—pressure that either endangers innocents or is a long overdue corrective to 'rape culture,' depending on your perspective.").

[192] *See* Hendrix, *supra* note 13, at 611 (quoting Addington v. Texas, 441 U.S. 418, 423 (1979)).

[193] *See* UNITED EDUCATORS, *supra* note 24, at 3 ("Colleges [have] a duty to eliminate the harassing conduct and ensure the survivor/victim full participation in any education program or activity.").

[194] Additionally, those who are ultimately found responsible will not be subject to any kind of criminal sentencing, marks on their criminal record, or civil collateral consequences. *See* Anderson, *supra* note 14, at 1987.

[195] *See* BONNIE S. FISHER ET AL., NAT'L INST. OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23–24 (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [https://perma.cc/U9UT-HLW4] (finding that 95.2% of completed rapes went unreported to police).

[196] CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUSTICE, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY 5-1, 5-27 (2007), http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc/5WHH-K3QF]. Additionally, 6.1% of men will experience the same. *See id.* Since the one-in-five statistic emerged in 2007, it has been widely challenged for methodological reasons—including the challenges of measuring such a large population—but has continued to be substantiated by further studies. *See, e.g.*, Charlene L. Muehlenhard et al., *Evaluating the One-in-Five Statistic: Women's Risk of Sexual Assault While in College*, 54 J. SEX RES. 549 (2017) (finding that the statistic is

by a complex mix of societal pressures felt by the victim, including doubt about whether the incident constituted sexual assault,[197] fear of retaliation by the perpetrator,[198] and concerns that her account of the story will not be believed.[199] The fact that survivors of rape are met with incredulity in the U.S. criminal justice system[200] is unfortunately not entirely mitigated by the Title IX requirement that schools investigate each complaint. Schools often fail to follow up on complaints in a timely manner or investigate them fully, likely leading many victims to believe that reporting the incident is futile.[201]

Campus sexual assault cases are also imperfect in that schools have a limited capacity to investigate claims and uncover corroborative evidence.[202] As such, there is a strong likelihood that the victim would be unable to bolster her case enough to meet a heightened standard of proof. Proving that an allegation is *substantially* likely to be true under the clear and convincing standard would almost undoubtedly require more evidence than it would be possible for the victim to present.[203] This means that victims have an even lower likelihood of successfully addressing the difficulties of going to school with or living near their abusers merely because they suffered a crime that often bears no witnesses.

Even when the campus adjudicatory process finds a perpetrator responsible for his or her actions and issues some form of punishment, that punishment often fails to adequately mitigate the aftereffects of sexual assault for victims.[204] Though critics of the preponderance standard generally contend that the punishments that the accused may face are too serious to permit such a low standard of proof, the punishments are not always as strict as one might expect. OCR does not regulate the punishment

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supported and the controversy surrounding it is based on misunderstandings about the studies' methods and results, as well as their value implications).

[197] *See* Amy Chmielewski, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 159–60.

[198] *See id.* at 159.

[199] *See* Tuerkheimer, *supra* note 177, at 11.

[200] For elaboration on this point, see *id*., at 20.

[201] *See* Sarah Edwards, *The Case in Favor of OCR's Tougher Title IX Policies: Pushing Back Against the Pushback*, 23 DUKE J. GENDER L. & POL'Y 121, 127 (2015) (discussing how schools are not complying with mandated procedures, and citing as an example the 2014 OCR examination of Harvard Law School found the school had failed to conduct prompt investigations).

[202] Tuerkheimer, *supra* note 177, at 5.

[203] For an explanation of the standard, see *Clear and Convincing Evidence*, *supra* note 189.

[204] A victim may still be forced to go to class with or interact with her assaulter on campus if the assaulter is not suspended, for example. *See* Chmielewski, *supra* note 197, at 166–67.

phase of campus adjudication at all.[205] And, perhaps as a result of the lack of guidance, less than 30% of students found responsible for sexual assault are expelled, while about 50% are temporarily suspended—the remainder receive even less serious punishments.[206] Even when students are suspended, their punishments are regularly delayed until after they have completed graduation requirements, and sometimes the perpetrator is even given permission to return to campus.[207] This allows abusers to haunt their victims' educational experience by interrupting their ability to attend class and lead a normal life.

All in all, inadequate fact-finding procedures and punishments exacerbate the underreporting problem, allowing the specter of sexual assault to loom large over U.S. schools. These macrolevel institutional failings discourage reporting and send a message to victims that their experiences are not worthy of remediation.[208] They also allow campus sexual assault to be swept under the rug and further add to a culture of tacit acceptance of sexist acts that Title IX should actively combat.

4. Why Campus Sexual Assault Adjudications Are Necessary

Campus adjudications are far from perfect forums for adjudicating claims. With all the system's flaws, some question whether these claims are better left to the criminal justice system alone. While it is true that campus adjudications do not implement criminal law, they are still necessary.[209] This is so for two reasons: (1) campus complaints can operate through

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[205] *See* Tyler Kingkade, *Sexual Assault Victims Complain About Loopholes in Their Attackers' Suspensions*, HUFFINGTON POST (published May 8, 2015, 8:09 PM; updated May 17, 2015), http://www.huffingtonpost.com/2015/05/08/sexual-assault-suspensions_n_7228198.html [https://perma.cc/HJ6P-24ZD].

[206] *See* Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFINGTON POST (Sept. 29, 2014, 8:59 AM; updated Sept. 29, 2014), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [https://perma.cc/8JYH-MWCV] (citing data gathered through Freedom of Information Act requests regarding the adjudications at more than 125 schools during the 2011–13 fiscal years); *see also* Caleb Diehl, *500-Word Essay Assigned as Punishment for Sexual Assault at Gustavus College,* USA TODAY COLL. (Mar. 11, 2016, 1:02 PM), http://college.usatoday.com/2016/03/11/500-word-essay-assigned-as-punishment-for-sexual-assault-at-gustavus-college [https://perma.cc/ZX8F-QBCN] (noting that one student was only required to write a 500-word essay).

[207] *See* Kingkade, *supra* note 205 (discussing investigations of student punishments at Michigan State University, University of California at San Francisco, and University of Nevada at Las Vegas).

[208] *See* Brake, *supra* note 177, at 119 ("The stories of survivors contain abundant accounts of institutional insensitivity, blunders, and cover-ups protecting accused students . . . and showcase a major reason why campus sexual assault is underreported: the fear that institutions will side with the accused student and that nothing will be done.").

[209] That is not to say that the criminal justice system does not need to be concerned with sexual assaults that occur on campuses. Indeed, criminal charges should be brought in many campus sexual assault cases.

student honor codes, which may contain different standards than those for criminal sexual assault; and (2) the protections that educational institutions can offer are far different than the brand of justice offered by criminal courts.

Universities have their own codes of ethics, which demarcate honor code violations and grounds for academic punishments.[210] For sexual assault, most institutions can make independent determinations about what sexual consent is required, and many institutions have decided to raise the bar above state and federal law to require affirmative consent.[211] This means that a sexual assault complaint that may not be prosecuted in criminal court could still proceed to campus adjudication. Through the campus processes, victims may, therefore, have unique rights to adjudication of claims that would otherwise be overlooked. In this way, campus proceedings can sometimes allow for more expansive definitions of sexual assault or rape that may help remedy the overall problem on campuses.

In addition to the potential for new claims, Title IX campus adjudications create protections for victims that the criminal justice system cannot. Campus adjudications can result in special living or class accommodations for the victim, aimed at minimizing any chance that the abuser will interrupt her education.[212] Criminal prosecutions, while ensuring a brand of justice that is unavailable in campus proceedings, are rarely undertaken,[213] are often extremely lengthy and arduous, and may fail to remove the abuser from the presence of the victim.[214] Thus, in order for a sexual assault victim's education to continue with the least amount of disturbance, campus adjudications (though far from ideal) are necessary.

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[210] Recently, some of these requirements have been determined by state law. *See, e.g.*, Jeanne Zaino, *Changing Definitions of Sexual Consent on College Campuses*, INSIDE HIGHER ED (July 21, 2015, 8:42 PM), https://www.insidehighered.com/blogs/university-venus/changing-definitions-sexual-consent-college-campuses [https://perma.cc/H7A8-ESQ2] (discussing the recent shift beginning with New York and California laws regarding the sexual consent standard on campuses).

[211] *See id.*

[212] Available remedies can include no-contact orders, adjusting class or activity schedules, changing on-campus housing, providing academic support that might include makeup test dates, and offering counseling services. *See University Student, Faculty, and Staff Title IX Rights*, HOPKINSWAY, PLLC (Mar. 24, 2015), http://www.hopkinsway.com/university-student-faculty-staff-title-ix-rights [https://perma.cc/2N4Y-7KHZ].

[213] *See The Criminal Justice System: Statistics*, RAINN (2016), https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/S45P-CDLG] (indicating that only 11 out of every 310 reported rapes get referred to prosecutors).

[214] The offender will only be removed if he is jailed, but only 6 out of every 310 reported rapes lead to the perpetrator's incarceration. *See id.*

Despite the utility of campus proceedings, the odds are still stacked against a victim who speaks out against her assaulter. Obstacles include the fact that incorrect societal presumptions exist about women falsely reporting sexual assault, that very little evidence is available prior to the proceedings, and that the remedies are often inadequate. These factors converge to create an extremely low likelihood that victims can successfully adjudicate their complaints and receive sufficient relief. The preponderance standard tackles this imbalance because it necessarily tips the scales of procedural equality back toward equilibrium between the two parties.

CONCLUSION

In an effort to improve campus sexual assault adjudications, the Obama Administration's OCR went too far by enforcing the DCL. Though it was promulgated nonlegislatively, the DCL was improperly given the force of law. OCR may have done so to improve campus adjudications of sexual assault, but the DCL was invalid because it did not undergo notice-and-comment procedures.

Hope for campus sexual assault reform lies with the notice-and-comment process which, though daunting, creates the opportunity for Title IX enforcement backed by law. When OCR opens the door for comments on its legislative rulemaking, those in favor of campus sexual assault reform have the responsibility to support the invaluable provisions once contained in the DCL. The preponderance of the evidence standard should outlast the notice-and-comment process because of its unique capability to ensure adjudications that protect the rights of campus sexual assault victims. The educational opportunities of sexual assault victims should no longer be sidelined under the guise of necessary additional protections for the accused. Sexual assault survivors deserve a legitimate shot at proving their claims and receiving a remedy that will allow them to continue their education. The preponderance standard can provide that. Title IX is only helpful to the extent that it actually performs an equalizing function in education, and the preponderance standard is indispensable in effectuating that goal.