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CHASING TITLE IX: EXAMINING THE CIRCULAR EFFECTS OF TITLE IX FROM AN UNPOPULAR PERSPECTIVE

MITCHELL W. BILD*

INTRODUCTION

“No means no.” “It’s on us.” “Me too.”

At first glance, these phrases seem trivial and inconsequential. Couple them with the power of social media and a simple “hashtag,” however, and they quickly become prevalent means of unifying people against a common cause: sexual assault. The rise in sexual assault awareness campaigns has made a traditionally-taboo subject come to the fore of national discourse. It is doubtlessly true that society is now better off having recognized the need to make the public more keenly aware of the problems associated with sexual assault and harassment. Appallingly, it has reached the point where these problems are

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commonly referred to as “rape culture.”

Rape culture becomes worse still on college campuses. For decades, rape culture had become engrained in the college experience, but ignored by school authorities. Because institutions of higher education failed to provide adequate responses to students’ horrific experiences with collegiate rape culture, and have perhaps aggravated the effects of those experiences, politicians took the reins in finding a solution. As the Seventh Circuit recently recognized, the solution authorized—and essentially required—by the federal government has backfired and created a whole new set of problems for individuals accused of sexual misconduct.

Colleges and universities have responded aggressively to sexual misconduct accusations since the U.S. Department of Education imposed harsh requirements upon them in 2011. But they have done so at great expense to another significant, yet unpopular, group of students—those accused of sexual misconduct. Colleges and universities have unreasonably harmed the accused and obstructed the truth-seeking purpose of sexual misconduct investigations by, for example, refusing to permit hearings, prohibiting their lawyers’ involvement in adjudicatory proceedings, and requiring the accused to prove his or her innocence. They have also failed to apply consistent standards of proof, thus causing inconsistent and arbitrary results, among other things.

Yet, colleges and universities fear that if they ease these procedures to favor the truth-seeking process, they will lose federal financial aid. College students accused of sexual misconduct have therefore been mistreated by their beloved schools even before they are duly found responsible for the alleged misconduct. The common result in these proceedings is that the accused are often deprived of their education, and perhaps their future endeavors, without the process to which they are constitutionally and statutorily due.

This Comment highlights the accused’s perspective of schools’

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responses to sexual misconduct allegations. It argues, perhaps controversially, that courts have a duty to protect the interests of those students accused of sexual misconduct, and that the Seventh Circuit has rightly joined other courts in recognizing and enforcing this duty. To be clear, this Comment does not seek to undermine or otherwise criticize students’ allegations of sexual misconduct. Rather, this Comment seeks to illuminate an underappreciated perspective through the lens of the Seventh Circuit’s 2019 decision in *Doe v. Purdue University, et al.*³

Part I of this Note explores the historical foundation about schools’ responses to sexual misconduct allegations via Title IX of the Education Amendments Act of 1972. Part I discusses Title IX’s evolution over the last several decades as well as its present implications. Part II introduces the Seventh Circuit’s response to a faulty implementation of Title IX procedures and surveys how the Seventh Circuit’s position compares with other courts’ early interpretations. Part III finally advocates that, while the Seventh Circuit’s decision in *Doe v. Purdue University* rightly concludes that Purdue University deprived the male student-plaintiff of his rights, it did not go far enough. Specifically, Part III will discuss how the Seventh Circuit’s decision, together with those from other circuit courts of appeals, highlights the federal government’s role in systematically depriving male students of constitutional rights and, ironically enough, the guarantees afforded by Title IX.

I. BACKGROUND

A. Title IX of the Education Amendments Act of 1972

1. *History Leading Up to Title IX*

   The story behind higher education’s response to rape culture begins decades ago. Interestingly, that story does not even begin with sexual assault or harassment per se, but rather with gender

³ 928 F.3d 652 (7th Cir. 2019).
discrimination in education⁴ and extra-curricular athletics.⁵

Before Congress enacted Title IX, gender discrimination in education and extra-curricular athletics existed beyond doubt.⁶ The problem to be addressed by Title IX was not necessarily express rejection of women’s rights, although that issue certainly also existed within the education system. The problem was instead a lack of parity with women’s educational, professional, and athletic opportunities, even where such opportunities existed in some basic form.⁷

Perhaps clearer still were the discriminatory practices targeting women’s athletics.⁸ Whereas universities provided team doctors, insurance, and more than ample funding to men’s athletics programs, women’s athletics programs did not receive team doctors or insurance and received little, if any, funding.⁹ This stemmed at least in part from the underlying attitudes toward women’s athletics compared to men’s athletics.¹⁰ As the Association of American Colleges reported, athletics have “perpetuate[d] sex stereotypes and myths about what is

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⁴ See Neal v. Bd. of Trs. of California State Universities, 198 F.3d 763, 766 (9th Cir. 1999); Nat’l Wrestling Coaches Ass’n v. Dep’t of Educ., 366 F.3d 930, 934 (D.C. Cir. 2004) (quoting 118 Cong. Rec. 5804 (1972) (statement of Sen. Bayh)).


⁸ See Waxman, supra note 6.

⁹ Id.

‘right’ for men and what is ‘right’ for women.”\textsuperscript{11} The attitude is that “[m]en are ‘supposed to be’ strong and aggressive, both physically and emotionally, while women are ‘supposed to be’ weak and passive.”\textsuperscript{12} The traditional view was that “the traits associated with athletic excellence—achievement, self-confidence, aggressiveness, leadership, strength, swiftness—[were] often seen as being in ‘contradiction’ with the role of women.”\textsuperscript{13} These attitudes fueled “the total athletic opportunities that [were] available to women,” such as funding, adequacy of athletic facilities, and “employment conditions of their teachers and coaches.”\textsuperscript{14}

Yet laws governing public institutions of higher education before Title IX seemed to have only perpetuated this ongoing discrimination by “deliberately exclud[ing] women from earlier antidiscrimination legislation on the grounds that educational institutions were autonomous entities that ought not to be subjected to government interference.”\textsuperscript{15}

Federal public officials thus contemplated a more precise resolution focusing on gender discrimination in higher education.

2. \textit{Enactment of Title IX}

Though many already saw the need for congressional action, public support for legislation curbing gender discrimination in higher education really began in the midst of the Civil Rights Era.\textsuperscript{16} In 1965, in what was apparently a direct response to the Civil Rights

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\textsuperscript{11} Id. \\
\textsuperscript{12} Id. \\
\textsuperscript{13} Id. \\
\textsuperscript{14} Id. \\
\end{flushleft}
Movement, President Johnson publicly declared “the policy of the Government of the United States to provide equal opportunity in Federal employment for all qualified persons” and “to prohibit discrimination in employment because of race, creed color, or national origin,” among other things.\textsuperscript{17} Even outside of direct federal employment, Executive Order 11246 prohibited all entities that contract with the federal government from discriminating in employment based on “race, creed, color, or national origin.”\textsuperscript{18}

Wholly absent from President Johnson’s directive, however, was the prohibition on sex discrimination.\textsuperscript{19} Recognizing this error, President Johnson amended the Order “to include discrimination based on sex.”\textsuperscript{20} From there, women’s rights activists took advantage of the directive and challenged employment practices based on sex.\textsuperscript{21} One such activist, Martha Griffiths, was a member of the U.S. House of Representatives.\textsuperscript{22} Representative Griffiths “gave the first speech in the U.S. Congress concerning discrimination against women in education” on March 9, 1970.\textsuperscript{23} That speech ignited the passions of other federal public officials, resulting in “the first [federal government] contract compliance investigation involving sex discrimination.”\textsuperscript{24}

Representative Griffiths’ speech caught the attention of the chair of the House Special Subcommittee on Education, Representative Edith Green.\textsuperscript{25} The House Special Subcommittee on Education (hereinafter the “Subcommittee”) first attempted to prohibit

\textsuperscript{17} Exec. Order No. 11246, § 101, 30 Fed. Reg. 12319 (1965) (prior to amendment).
\textsuperscript{18} Id. § 202.
\textsuperscript{19} See generally id.
\textsuperscript{20} Valentin, supra note 16, at 2.
\textsuperscript{21} Id.
\textsuperscript{22} Id.; Am. Ass’n of Univ. Professors, supra note 15, at 70.
\textsuperscript{23} Valentin, supra note 16, at 2.
\textsuperscript{24} Id.; Am. Ass’n of Univ. Professors, supra note 15, at 70.
\textsuperscript{25} See Valentin, supra note 16, at 2; Am. Ass’n of Univ. Professors, supra note 15, at 70; see also 143 Cong. Rec. H4,218 (identifying the specific subcommittee chaired by Representative Green).
sex discrimination “in any program or activity receiving Federal financial assistance” by amending the Civil Rights Act of 1964, which originally prohibited only race, color, and national origin. But since doing so would have pegged the ban on discrimination based on sex in more than just education, and thus would have sparked a massive change in the Civil Rights Act beyond what was initially intended by Representatives Griffith and Green, they turned their attention to the Higher Education Act.

Title X of House Resolution 7248 therefore sought to “prohibit discrimination on the basis of sex in any educational program receiving Federal funds.” The House bill also “authorized the Civil Rights Commission to investigate sex discrimination,” among other things. After it was reported out of the House Education and Labor Committee in late September 1971, the full House made some changes but left the prohibition on sex discrimination intact.

Meanwhile, the Senate considered its own amendments to the Higher Education Act. But when the Senate Committee on Labor and Public Welfare reported its Higher Education Act amendments to the full Senate, it contained no prohibitions on sex discrimination. Instead, Senator Birch Bayh, during the full Senate’s floor debate in August 1971, proposed an amendment to the Senate bill “to ban sex discrimination in any public higher education institutions or graduate program receiving federal funds.” The Senate’s first attempt at prohibiting sex discrimination in education was halted in its tracks, however, when a majority of the Senators voted it down on the ground that Senator Bayh’s amendment was irrelevant to the rest of the bill,

26 143 Cong. Rec. H4218 (statement of Rep. Mink) (discussing the history of Title IX to celebrate the twenty-fifth anniversary of its enactment).
27 Id. The Higher Education Act was codified as 20 U.S.C. § 1001, et seq.
28 Id.
29 Id.
30 See id. at 4218-19.
31 Id. at 4219.
32 Id.
33 Id.
which had nothing to do with sex discrimination.  

Senator Bayh persisted. In February 1972, when the Senate considered the House’s version of the Higher Education Amendments—which did contain language about the usage of federal education funds—Senator Bayh once again offered an amendment to ban sex discrimination at educational institutions receiving federal funds. The Senate’s final version of the Higher Education Act’s amendments, which contained Senator Bayh’s prohibition (with some exemptions added to appease some skeptical senators), passed without objection.  

The final version was styled the Education Act Amendments of 1972 and included in Title IX of the legislation a ban on “sex discrimination in all Federal education institutions receiving Federal funds, except for undergraduate admissions policies of private higher education institutions and public institutions of a traditional single-sex policy.” The full House and Senate each passed the Education Amendments Act on June 8, 1972. President Nixon signed it into law just fifteen days later.  

Title IX has, ever since, contained the following groundbreaking language: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .”  

B. Evolution of Title IX

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34 Id.
35 Id.
36 See id.
37 Id.
38 Id.
39 Id.
40 None of the subsequent legislative amendments to Title IX, codified at 20 U.S.C. § 1681, impacted this central language.
The initial passage of Title IX was, as seen infra Section I.A.2, relatively uncontroversial. But that was before people realized Title IX’s massive reach. Section 1 below first discusses how the executive and judicial branches have expanded the reach of Title IX’s language. Section 2 then introduces the Obama Administration’s guidance document that expanded Title IX too much.

1. Expansion of Title IX’s Reach

After Congress enacted Title IX, the Department of Health, Education, and Welfare\(^\text{42}\) took on the task of promulgating regulations to effect Title IX’s ban on sex discrimination in education.\(^\text{43}\) In 1975, that Department imposed regulations requiring the institutions subject to Title IX to designate a coordinator to oversee compliance with Title IX, post publicly the contact information for the Title IX coordinator as well as all relevant policies, and conduct a one-time evaluation of their compliance with Title IX.\(^\text{44}\) The 1975 regulations also permitted educational institutions to “take remedial and affirmative steps to increase the participation of students in programs or activities where [sex] bias has occurred.”\(^\text{45}\) These regulations fit well into the overall scheme of preventing and remedying sex discrimination at educational institutions. These regulations were primarily “use[d] in the early years of the statute . . . by female athletes demanding equal opportunities to participate in school athletic programs.”\(^\text{46}\)

Courts began expanding the reach of Title IX’s language in

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\(^{42}\) The executive department in charge of implementing Title IX changed to the Department of Education upon that Department’s creation in 1979. See generally Act of Oct. 17, 1979, Pub. L. No. 96-88, §§ 201, 301, 93 Stat. 668 (1979). There is no indication that the Department of Education was created because of Title IX, but was instead created for other reasons not pertinent here.

\(^{43}\) See Valentin, supra note 16, at 2.

\(^{44}\) Id. at 2-3.

\(^{45}\) Id. at 3.

\(^{46}\) Cecily Fuhr, Causes of Action Under Title IX of Education Amendments Act of 1972 Against College or University for Sexual Harassment of Student by School Personnel or Other Student, 78 Causes of Action 2d 381, § 2 (2019).
1977 with the Connecticut federal district court’s decision in *Alexander v. Yale University*.\(^{47}\) The court there faced the foundational question of whether students had standing to bring a private cause of action under Title IX.\(^{48}\) It answered that question in the affirmative, thus permitting one of the plaintiffs (a female student) to proceed with her Title IX claim.\(^{49}\) At the same time *Alexander* implied a private right of action under Title IX, the Seventh Circuit refused to recognize such an implied right in *Cannon v. University of Chicago* \(^{50}\) The United States Supreme Court then granted certiorari to resolve the disagreement between *Alexander* and *Cannon*. In a six to three decision, the Supreme Court agreed with *Alexander* that a private right of action under Title IX existed.\(^{51}\)

The Supreme Court’s decision in *Cannon* therefore paved the way for an influx of Title IX lawsuits.\(^{52}\) In 1998, the Supreme Court held that sexual harassment by agents of a covered school could be remedied under Title IX where the school had “actual knowledge” and acted with “deliberate indifference” to its agent’s sexual harassment.\(^{53}\) And the Court extended this holding just one year later, holding that covered schools are liable under Title IX for student-on-student sexual harassment pursuant to the “actual knowledge” and “deliberate

\(^{47}\) 459 F. Supp. 1 (D. Conn. 1977); see Fuhr, *supra* note 46, § 2 (explaining the historical developments of Title IX in the courts).

\(^{48}\) 459 F. Supp. at 2, 4.

\(^{49}\) *Id.* at 5-7, *aff’d in relevant part*, 631 F.2d 178, 186 (2d Cir. 1980).

\(^{50}\) *See id.* at 4 (citing and disagreeing with *Cannon v. University of Chicago*, 559 F.2d 1063, 1082 (7th Cir. 1977)).

\(^{51}\) *Cannon v. Univ. of Chic.*, 441 U.S. 677, 709, 717 (1979).

\(^{52}\) A few years after *Cannon* recognized an implied right of action under Title IX, “Congress amended Title IX to eliminate the states’ Eleventh Amendment immunity in Title IX action,” thus allowing causes of action against public universities over any objections on sovereign immunity grounds. *See* Fuhr, *supra* note 46, at § 2. And the Court extended the right to seek monetary damages in a Title IX lawsuit in 1992. *Id.* (citing Franklin v. Gwinnett Cty. Pub. Schs., 503 U.S. 60 (1992)).

indifference” standards.\textsuperscript{54}

In response to the Supreme Court’s pronouncements on Title IX in the 1990s, the Department of Education’s Office for Civil Rights (OCR) implemented two important guides into how schools can prevent sexual harassment under Title IX’s dictates.\textsuperscript{55} The first, published in 1997, “require[ed] that schools have a grievance process for reporting sexual harassment and warning that schools that fail to respond to a hostile environment ‘permit[ ] an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX.’”\textsuperscript{56} Four years later, OCR clarified that its guidance was intended to “‘emphasize that, in addressing allegations of sexual harassment, the good judgment and common sense of teachers and school administrators are important elements of a response that meets the requirements of Title IX.’”\textsuperscript{57} In other words, a driving purpose of the 1997 and 2001 guidance documents was to grant flexibility to schools to develop the policies and procedures that they saw fit.

This changed in 2011.

2. \textit{Dear Colleague Letter}

Despite the fundamental changes stemming from Title IX’s enactment in 1972, nothing had more impact on Title IX enforcement—and eventually on John Doe’s deficient sexual misconduct proceedings—than a seemingly innocuous letter dated


\textsuperscript{55} See Amy B. Cyphert, \textit{The Devil Is in the Details: Exploring Restorative Justice as an Option for Campus Sexual Assault Responses Under Title IX}, 96 DENV. L. REV. 51, 57 (2018).

\textsuperscript{56} Id. (quoting Sexual Harassment Guidance: Harassment of Students By School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,034 (Mar. 13, 1997)).

\textsuperscript{57} Id. (quoting REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, at ii-iv (Jan. 2001), available at https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf).
April 4, 2011.\textsuperscript{58} Unfortunately for everyone—schools, victims, and the accused—this letter, now coined the “Dear Colleague Letter,” became anything but innocuous.

In the Letter, the Department of Education’s Office for Civil Rights explained numerous statistics emphasizing the urgency of its words.\textsuperscript{59} It first identified the daunting statistics related to sexual violence involving students: “that about 1 in 5 women are victims of completed or attempted sexual assault”; about “6.1 percent of males were victims of completed or attempted sexual assault”; “college campuses reported nearly 3,300 forcible sex offenses” in 2009; “800 reported incidents of rape and attempted rape and 3,800 reported incidents of other sexual batteries at public high schools”; and “the likelihood that a woman with intellectual disabilities will be sexually assaulted is estimated to be significantly higher than the general population.”\textsuperscript{60}

Recognizing these terrifying statistics about sexual harassment and sexual violence on university or college campuses, the Department saw the immediate need for “a call to action for the nation.”\textsuperscript{61} The Letter therefore served to “ensur[e] that all students feel safe in their school, so that they have the opportunity to benefit fully from the school’s programs and activities.”\textsuperscript{62} In other words, the so-called Dear Colleague Letter “spell[ed] out for schools exactly how they should undertake certain duties under Title IX” as a means of remedying, or at least mitigating, these problems.\textsuperscript{63}

The Dear Colleague Letter’s first task was to expand the definition of “sexual harassment” under the court precedents discussed


\textsuperscript{59} Id. at 2.

\textsuperscript{60} Id.

\textsuperscript{61} Id.

\textsuperscript{62} Id.

\textsuperscript{63} See Cyphert, supra note 55, at 58.
Without any laws or court decisions to support its ultimate conclusion, the Letter concluded, without explanation, that “[s]exual harassment of students . . . includes acts of sexual violence.” This is the first sign that the Letter attempted to improperly develop Title IX.

The Dear Colleague Letter also “discuss[ed] the proactive efforts schools can take to prevent sexual harassment and violence” and “provid[ed] examples of remedies that schools and OCR [the Department of Education’s Office for Civil Rights] may use to end such conduct, prevent its recurrence, and address its effects.” The proactive efforts included implementing more educational programs related to sexual harassment and violence, increasing the amount and types of resources for victims, employing formal training programs for student and faculty employees, making materials explaining the applicable policies, rules, and resources easily accessible to the community, and improving efforts to encourage students to report incidents of sexual harassment and violence, among other things. These proactive efforts are not the target of this Comment’s condemnation.

Rather, it is the Department’s mandated remedies that have been cause for concern. The Dear Colleague Letter set forth the following significant changes, among other things:

(1) Mandated that schools use a “preponderance of the evidence standard” when weighing whether sexual harassment had occurred;
(2) Strongly discouraged schools from allowing the parties personally to question or cross-examine each other during the hearing;
(3) Mandated that universities conclude their investigations within a “reasonably prompt”

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64 See Dear Colleague Letter, supra note 58, at 1, 1 n.2
65 Id. at 1.
66 Id. at 2.
67 Id. at 14-15.
time frame, which the OCR suggested is generally under sixty days; and

(4) [R]equired schools that allowed appeals to permit either party to appeal.68

It is also noteworthy that the Dear Colleague Letter “forbade the use of mediation, even on a voluntary basis where all parties agreed, to resolve complaints of sexual assault brought under Title IX.”69

The Dear Colleague Letter clarified that it sought to give only “significant guidance” to schools on how to approach Title IX-related inquiries; it apparently did not provide schools with a binding formal mandate.70 And yet the Letter immediately backtracked on this seemingly innocuous language. It clarified that, while it did not “add requirements to applicable law,” it “provide[d] information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations.”71 In other words, while OCR did not purport to establish a rule with binding legal effect, it did seek to strip schools of federal benefits (funding) if it did not comply with the Letter’s “guidance,” even if it would not otherwise be in violation of federal law.72 The Letter has therefore placed schools between a rock and a hard place; they either (1) disregard the Letter and risk losing the funding that they desperately need, or (2) succumb to what the Letter says and impose merciless

68 Cyphert, supra note 55, at 58.
69 Id. at 58-59.
70 See Dear Colleague Letter, supra note 58, at 1 n.1 (pointing out that the Letter “does not add requirements to applicable law, but provides information and examples to inform recipients [schools] about how OCR evaluates whether covered entities are complying with their legal obligations”); Cyphert, supra note 55, at 58-59.
71 Dear Colleague Letter, supra note 58, at 1 n.1.
disciplinary procedures for those accused of sexual misconduct.⁷³

Schools have overwhelmingly chosen the latter, perhaps
because that kind of choice has put schools in a position where they
must choose between the better of two undesirable options. OCR
indeed thought about this ahead of time, for they enforced the terms of
the Dear Colleague Letter at least in large part based on fear, not on
any binding legal force. Professor Lave sums up this fear-based
influence well:

[In the [Dear Colleague Letter], OCR told academic
institutions that if they didn’t take certain measures
(like lowering the burden of proof) they would be found
in violation of Title IX. In an unprecedented move,
OCR began publishing a list of universities under
investigation for violating Title IX, which put
tremendous financial and social pressure on schools to
comply with the [Dear Colleague Letter]. Even
universities that may believe the [Dear Colleague
Letter] is procedurally or substantively invalid are
rolling over and complying because the cost of not
doing so is simply too high. In essence, OCR’s actions
have transformed what could have been a legitimate
guidance document (if it had not had language that
gave it the force of law) into something that is legally
binding.⁷⁴

Schools have therefore imposed the procedures that the Letter requires
notwithstanding the traditional flexibility that they historically had in
imposing their own methods of complying with Title IX.⁷⁵

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⁷³ See Lave, supra note 72, at 947.
⁷⁴ Id. (emphasis in original).
⁷⁵ See id. at 947-48 (explaining that OCR’s previous, unchallenged guidance
from 1997 and 2001 “give universities significant flexibility in deciding how to
address allegations of sexual assault”).
3. Responses by President Trump’s Department of Education

On September 7, 2017, President Trump’s Secretary of Education, Betsy DeVos, indicated publicly that the Trump Administration intended to repeal and replace the Dear Colleague Letter. 76 The Trump Administration followed through on their intentions later that month when they “formally rescinded” the Letter and replaced it with interim guidance pending a new administrative rule governing how schools can remain in compliance with Title IX. 77 This interim guidance purportedly “removed many of the restrictions in the 2011 Dear Colleague Letter placed on colleges, including the requirement that they use a preponderance of the evidence standard . . . and the suggestion that most investigations should conclude within sixty days.” 78

Secretary DeVos’ words rang loud when she declared that the “era of rule by letter is over.” 79 Though her words are gallant, they are not necessarily true; the devastating effects of the Dear Colleague Letter cannot be dispelled so easily. The unstable history of the OCR’s Title IX enforcement makes it difficult for colleges and universities to know how they can stay in compliance with Title IX. 80 Because of the massive risks to colleges and universities, it is not unreasonable to think that they will be hesitant to change their policies at all in fear that the federal government will deprive them of the funds on which they so heavily rely. It is thus clear that, although the Dear Colleague

76 Cyphert, supra note 55, at 61.
77 Id. at 62.
78 Id.
80 See Note, Michelle J. Harnik, University Title IX Compliance: A Work In Progress In the Wake of Reform, 19 Nev. L.J 647, 687 (2018) (“The OCR’s failure to provide clear guidelines and its failure to require hearings, appeals, and a uniform evidentiary standard has left colleges having to decide for themselves how to handle such complaints and risk improperly carrying out their Title IX obligations.”).
Letter has been rescinded, fear of the OCR survives. What is more, the Dear Colleague Letter will continue to have an impact for all students affected by college and university policies and procedures implemented from April 4, 2011, at least until September 7, 2017. For at least six and a half years, a letter that seemed so innocuous on its face rooted itself in schools’ disciplinary systems and wreaked havoc among students’ education and livelihood. Such devastation is likely to remain at least until the right compromise between protecting victims and protecting the accused is reached.81

II. THE COURTS STEP IN

With such frightening instability in how schools are supposed to comply with Title IX, and the devastating consequences of messing up, simply rescinding the Dear Colleague Letter is only the first step in the road to recovery. Fortunately, courts are stepping in to begin remediying many of the problems associated with the Dear Colleague Letter’s impact on schools’ policies and procedures regarding sexual misconduct on campus.

Section II.A below introduces the legal framework within which the courts operate in Title IX litigation. Section II.B then delves into the Seventh Circuit’s groundbreaking decision in Doe v. Purdue University that recognized the Dear Colleague Letter’s harmful impact on male students. Section II.C discusses the Seventh Circuit’s retreat from precedent in Doe v. Columbia College Chicago, where it refused to recognize the harms inherent in the Dear Colleague Letter. Finally, Section II.D discusses how other circuits have addressed the concerns facing the Seventh Circuit in Purdue University and Columbia College Chicago.

A. Title IX’s Legal Framework

As noted earlier, Title IX “provides that ‘[n]o person in the United States shall, on the basis of sex, be excluded from participation

81 See id.
in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

A student claiming that his or her school violated Title IX must therefore establish three elements: (1) that the school received funding from the federal government; (2) that the student “was excluded from participation in or denied the benefits of an educational program” at the school; and (3) that the school discriminated against the student because of his or her sex. Where a student has been disciplined after a sexual misconduct proceeding, the first two elements are relatively easy to satisfy. The third element is generally the determinative element.

Some circuits use an intricate test using several categories of discrimination to determine whether a school discriminates based on sex. The Second Circuit, for example, analyzes Title IX lawsuits against schools using “erroneous outcome” and “selective enforcement” approaches. The “erroneous outcome” category requires a plaintiff-student to “show that he ‘was innocent and wrongly found to have committed the offense.’” The “selective enforcement” category includes proof “that ‘regardless of [his] guilt or innocence, the severity of the penalty and/or the decision to initiate the proceeding was affected by the student’s gender.’” The Fifth Circuit

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83 See Doe v. Columbia Coll. Chic., 933 F.3d 849, 854 (7th Cir. 2019).
84 See Purdue Univ., 928 F.3d at 667 (“It is undisputed that Purdue receives federal funding and that John was ‘excluded from participation in [or] denied the benefits of . . . [an] education program’ when Purdue suspended him.” (alterations in original)).
85 See, e.g., Columbia Coll. Chic., 933 F.3d at 854; Purdue Univ., 928 F.3d at 667.
86 See Purdue Univ., 928 F.3d at 667.
87 Id. (citing Yusuf v. Vassar Coll., 35 F.3d 709, 715 (2d Cir. 1994)).
88 Id. (quoting Yusuf, 35 F.3d at 715).
89 Id. (quoting Yusuf, 35 F.3d at 715).
has adopted the Second Circuit’s two-factored approach.\footnote{\textit{Id.} (citing Plummer v. Univ. of Hous., 860 F.3d 767, 777-78 (5th Cir. 2017)).} And the Eleventh Circuit applies the Second Circuit’s “erroneous outcome” approach.\footnote{\textit{Id.} (quoting Doe v. Valencia Coll., 903 F.3d 1220, 1236 (11th Cir. 2018)).}

The Sixth Circuit uses not only the Second Circuit’s two categories, but also added two more categories of its own: the “deliberate indifference” and “archaic assumptions” tests.\footnote{\textit{Id.} (citing Doe v. Miami Univ., 882 F.3d 579, 589 (6th Cir. 2018)).}

The Seventh Circuit, however, believed that these specific approaches “simply describe ways in which a plaintiff might show that sex was a motivating factor in a university’s decision to discipline a student.”\footnote{\textit{Id.}} Assuming the first two elements are satisfied, courts in the Seventh Circuit ask one simple question to determine whether a student has stated a valid Title IX discrimination claim: Do the facts, taken as true, “raise a plausible inference that the university discriminated” against the student because of his or her sex?\footnote{\textit{Columbia Coll. Chic.}, 933 F.3d at 855 (quoting \textit{Purdue Univ.}, 928 F.3d at 667-68).}

B. The Seventh Circuit Speaks: \textit{Doe v. Purdue University}

1. \textit{Facts}\footnote{Unless otherwise noted, facts stated in this subsection are taken from the Seventh Circuit’s decision in \textit{Doe v. Purdue Univ.}, 928 F.3d 652, 656-58 (7th Cir. 2019).}

The plaintiff, fictitiously named John Doe, was a student at Purdue University enrolled as a member of the Navy Reserve Officers’ Training Corps (ROTC). Other than the disciplinary proceedings discussed below, John had an “unblemished disciplinary record.”\footnote{Brief of Appellant at 3, \textit{Doe v. Purdue Univ.}, No. 17-3565 (7th Cir. Apr. 6, 2018).} Jane Doe was also a student at Purdue University and was a Navy
ROTC member.

Purdue University was, and still is, “a land grant university established by the State of Indiana with a main campus in West Lafayette, Indiana and is audited by the State of Indiana, the beneficiary of state authorized bonds and recipient of state and federal grants.”

John and Jane’s story was, at first, a happy one—they were romantically involved during the fall of 2015. Between October and December 2015, John and Jane engaged in consensual sexual intercourse about fifteen to twenty times. There was never any dispute that, throughout this three-month period of time, all of the instances of sexual intercourse between John and Jane were consensual.

Over the course of the fall 2015 semester, however, their relationship eroded. Suffering from depression, Jane talked with John about her feelings of hopelessness and expressed to him that she hated her life and wanted to run away. Jane’s behavior became “increasingly erratic.” Her depression culminated in a suicide attempt which occurred immediately in front of John on December 13, 2015. Though they continued dating after Jane’s suicide attempt, John and Jane’s sexual relationship ended. Neither Jane nor John informed anyone else, apparently including emergency medical personnel, about Jane’s suicide attempt.

Whatever remaining romantic relations terminated, however, when John reported Jane’s suicide attempt to two university resident assistants and an advisor. Jane thereafter broke off all relations with John and distanced herself from him. Throughout all of this, Jane made no reports to Purdue, the police, or any other third party about any alleged sexual misconduct by John. Nor did Jane make any reports of sexual misconduct by John to anyone through March 2016.

April 2016 was, however, Sexual Assault Awareness Month. To spread awareness, organizations such as the Center for Advocacy, Response, and Education (CARE), a center at Purdue “dedicated to supporting victims of sexual violence,” hosted events across Purdue’s campus.

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97 Id. at 3-4.
98 Id. at 4.
campus that encouraged students to report sexual assaults. CARE achieved its praiseworthy goal within just the first few days of April: five students reported sexual misconduct to Purdue.

Jane was one of those five students. Jane reported to Purdue officials that she woke up to John “groping her over her clothes without her consent” while she was sleeping in his room. Jane, according to her initial report, declined John’s sexual advances only to find out that John “confessed that he had digitally penetrated her while the two were sleeping in Jane’s room earlier that month.” She also complained of additional acts of misconduct, such as sifting through her underwear drawer, chasing her around while joking that he would taser her, entering her room without permission after they broke up, and becoming angry in front of her.

Soon after her report, Purdue’s Dean of Students and Title IX coordinator, Katherine Sermersheim, reached out to John by letter to inform him that Purdue had initiated a formal investigation into Jane’s allegations of sexual misconduct. Upon receipt of Sermersheim’s letter, “John was suspended from the Navy ROTC, banned from all buildings where Jane had classes, and barred from eating in his usual dining hall because Jane also used it.” Although Jane had not filed a formal complaint, Purdue decided to investigate anyway, perhaps because the Dear Colleague Letter obliged schools to investigate any instances of sexual harassment or violence regardless of whether they are asked to do so by complaining witnesses.99

John thereafter denied in writing every one of Jane’s allegations of misconduct. John admitted, however, that he once “touched Jane’s knee while she was sleeping on a futon and he was on the floor next to her” after her suicide attempt. Other than that, John unequivocally denied all of Jane’s allegations of sexual misconduct, including her allegation that he groped her and engaged in other inappropriate sexual and nonsexual behavior.

In addition to outright denying sexual misconduct, John provided circumstantial evidence of his innocence. He informed Sermersheim that Jane continued to talk with John over the winter

99 See Dear Colleague Letter, supra note 58, at 4.
holidays and invited him to her room on campus when school resumed that following January. John also produced evidence to Sermersheim indicating that Jane was emotionally “troubled” and “unstable.” And when John and his “supporter” (someone who could accompany John to any meetings) met with investigators, he continued to deny the allegations, provided evidence that he believed showed his innocence, including “friendly” text messages between Jane and him, as well as the names of more than thirty people who could and would “speak to his integrity.”

Pursuant to Purdue’s Title IX policies, Sermersheim submitted a completed “investigators’ report” to a three-person panel assembled by Purdue’s Advisory Committee on Equity. The Committee’s ultimate purpose was to review Sermersheim’s report, listen to the parties’ accounts of what happened, and then make a recommendation to Sermersheim on guilt or innocence and any recommended sanctions.

John’s hearing with the Committee panel was, however, lackluster at best. Although John appeared at the hearing to defend himself, he was neither given a copy of Sermersheim’s report nor allowed to review it. John became aware of Sermersheim’s findings only because a Navy ROTC representative gave him a redacted copy to review for a few minutes. From this cursory review of the factual findings, John learned that the investigators “falsely claimed that he had confessed to Jane’s allegations” and “failed to include John’s description of Jane’s suicide attempt.”

John and his supporter attended the hearing and met with the Committee members for about thirty minutes. Because Jane did not appear at the hearing, CARE’s director wrote a letter on behalf of the allegations against John summarizing the accusations. To John’s amazement, he had read more of the investigators’ report in his cursory review than two of the three panelists; those two panelists “candidly stated that they had not read the investigative report.” And the third panelist apparently assumed John’s guilt. John was not allowed to see or address the evidence at the hearing. He was also not allowed to present any witnesses, “including character witnesses and a roommate who would state that he was present in the room at the time
of the alleged assault and that Jane’s rendition of events was false.”

About one week after the hearing, Sermersheim informed John in “a perfunctory letter” that she found him guilty of sexual violence and therefore suspended him from Purdue for an academic year. Because Sermersheim failed to detail any factual basis for her determination, John briefly won an appeal to Purdue’s Vice President for Ethics and Compliance, Alysa Rollock. But Sermersheim quickly responded with the following “detailed” factual findings:

1. [Jane Doe] had fallen asleep on a futon with you on the floor beside her. She woke up and found that you inappropriately touched her over her clothing and without her consent by placing your hand above her knee, between her legs, and moved it up to her “crotch” areas; and

2. On another occasion, while she was sleeping and without her consent, you inappropriately touched [Jane Doe] by digitally penetrating her vagina.

Sermersheim identified the basis for these factual findings in a similarly perfunctory fashion: “I find by a preponderance of the evidence that [John Doe] is not a credible witness. I find by a preponderance of the evidence that [Jane Doe] is a credible witness.”

This time, however, Rollock upheld Sermersheim’s factual findings, determination of guilt, and imposed sanction. John was thereafter forced to resign from the Navy ROTC because of its zero-tolerance sexual harassment policy.

2. **Procedural History**

John sued various agents of Purdue University, including Sermersheim, Rollock, and the investigators, for violating the Fourteenth Amendment, alleging that they deprived him of his liberty.
and property without due process of law. On the Fourteenth Amendment claims, he separately sought monetary relief and injunctive relief. He also sued Purdue University for violating Title IX by discriminating against him because he was a male.

A federal magistrate judge dismissed all three claims with prejudice. The magistrate judge dismissed John’s § 1983 claim pursuant to the Fourteenth Amendment because “the disciplinary proceedings did not deprive John of either liberty or property, so the Due Process Clause did not apply.” The magistrate dismissed John’s claim for injunctive relief for lacking standing since there was no evidence of future harm. The magistrate judge also dismissed John’s Title IX claim because he could not show enough evidence of discrimination on the basis of sex.

John appealed to the U.S. Court of Appeals for the Seventh Circuit, where he challenged the dismissal of all three claims for relief.

3. John Doe’s Fourteenth Amendment Claim

John first alleged that “he was punished pursuant to a process that failed to satisfy the minimum standards of fairness required by the Due Process Clause. He claimed that Purdue’s procedures failed due process scrutiny in eight ways: (1) “he was not provided with the investigative report or any of the evidence on which the decisionmakers relied in determining his guilt and punishment”; (2)
“Jane did not appear before the Advisory Committee”; (3) John “had no opportunity to cross-examine Jane”; (4) “Sermersheim found Jane credible even though neither Sermersheim nor the Advisory Committee talked to her in person”; (5) “Jane did not write her own statement for the panel, much less a sworn one”; (6) “Sermersheim was in charge of both the investigation and the adjudication of his case”; (7) “the Advisory Committee was blatantly biased against him”; and (8) “the Advisory Committee refused to allow him to present any evidence, including witnesses.”

The court first noted that Seventh Circuit precedent holds that “due process claims in the context of university discipline has focused on whether a student has a protected property interest in his education at a state university.” But precedent also holds that education, without more, does not constitute a property interest under the Fourteenth Amendment. Rather, courts in the Seventh Circuit “ask whether the student has shown that he has a legally protected entitlement to his continued education at the university.”

The first way John could assert a constitutionally-protected property interest in his education is by claiming a valid contractual entitlement. The court quickly rejected John’s claim of such a contractual entitlement because his claim rested on an Indiana state court holding that the Fourteenth Amendment protects students from expulsion or suspension without due process of law, a generalized property interest that the Seventh Circuit has squarely rejected.

The court nevertheless allowed John to proceed on his Fourteenth Amendment claim because he stated a constitutionally-protected liberty interest in pursuing his occupation of choice: naval

109 Id.
110 Id.
111 Id.
112 Id. (quoting Charleston v. Bd. of Trs. of Univ. of Ill. at Chic., 741 F.2d 769, 773 (7th Cir. 2013) (emphasis in original)).
113 See id. at 660.
114 Id. (citing Williams v. Wendler, 530 F.3d 584, 589 (7th Cir. 2008)) (rejecting John Doe’s reliance on Reilly v. Daly, 666 N.E.2d 439, 444 (Ind. Ct. App. 1996)).
service.115 Under Seventh Circuit precedent, John had to satisfy the “‘stigma plus’ test, which require[d] him to show that the state inflicted reputational damage accompanied by an alteration in legal status that deprived him of a right he previously held.”116 This test requires more than simply having to tell future employers about a guilty finding from Purdue to maintain a Fourteenth Amendment claim.117

Writing for the unanimous panel, Judge Barrett concluded that John satisfied the stigma plus test because Purdue’s guilty finding came with a legal obligation to disclose it to the Navy.118 Ordinarily, disclosure of a guilty finding is voluntary and therefore does not by itself tarnish the reputation so as to violate the Fourth Amendment’s stigma plus test.119 But John alleged more; he alleged that the state forced Purdue’s hand—and necessarily harmed John’s future—because the law required John to allow Purdue to disclose his guilty finding to the navy.120

John also adequately met the second part of the stigma plus test: a change in John’s legal status.121 Once Purdue formally adjudicated John’s guilt, “he went from a full-time student in good standing to one suspended for an academic year.”122 The “official determination of guilt . . . deprived John of occupational liberty” by “caus[ing] his expulsion from the Navy ROTC program (with the accompanying loss of scholarship) and foreclosed the possibility of his

115 See id. at 661-63.
116 See id. at 661.
117 See id. at 662.
118 Id.
119 See id. at 661-62 (citing Olivieri v. Rodriguez, 122 F.3d 406, 408-09 (7th Cir. 1997)) (explaining that “a plaintiff who publicizes negative information about himself cannot establish that the defendant deprived him of a liberty interest,” and that it is often “uncertain whether [a plaintiff’s] prospective employers would ever find out” the reasons for a discharge or expulsion).
120 Id. at 662.
121 Id. at 662-63.
122 Id. at 662 (citing analogous Seventh Circuit cases).
re-enrollment in it.”

John therefore satisfied the stigma plus test, thus allowing the court to delve into the adequacy of Purdue’s procedures that led to the guilty finding.

The test for Fourteenth Amendment-compliant procedures is fundamental fairness, which “is always a context-specific inquiry.” Schools have ample authority to implement procedures and penalties. Many factors, such as “the severity of the consequence and the level of education,” inform the schools’ choice to impose particular procedures and penalties. Notably, the Supreme Court has held that “[a] 10-day suspension warrants fewer procedural safeguards than a longer one.”

Given this framework, John’s Seventh Circuit panel agreed with John. Reasoning that John “was suspended by a university rather than a high school, for sexual violence rather than academic failure, and for an academic year rather than a few days,” the court concluded that “John’s circumstances entitled him to relatively formal procedures.” Yet Purdue did not disclose evidence to John and withheld relevant evidence in adjudicating his guilt, which is “itself sufficient to render the process fundamentally unfair.”

What is more, the court had even more reason to believe that Purdue’s procedures were fundamentally unfair because John’s hearing acted as a “‘sham or pretense.’” For example, the panelists at John’s hearing admitted their failure to read the investigative report prior to the hearing; the investigator favored Jane’s credibility over John’s

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123 Id. at 662-63.
124 See id. at 663.
125 Id. (quoting Goss v. Lopez, 419 U.S. 565, 574 (1975)).
126 See id.
127 Id.
128 Id. (citing Goss, 419 U.S. at 584).
129 See id. at 663-64.
130 Id. at 663.
131 Id. (citing Goss, 419 U.S. at 580).
132 Id. (quoting Dietchweiler by Dietchweiler v. Lucas, 827 F.3d 622, 629 (7th Cir. 2016)).
credibility while never having had occasion to evaluate Jane’s credibility; and Purdue’s agents refused to consider exculpatory evidence justifying clearing John of the allegations against him.\textsuperscript{133}

These procedures—or lack thereof—together with the significant loss of liberty at stake, provided the court with plenty of reason to permit John’s Fourteenth Amendment claim to proceed.\textsuperscript{134}

4. \textit{John Doe’s Title IX Claim}

John also claimed that Purdue violated Title IX by discriminating against him in the sexual misconduct proceedings because he is male.\textsuperscript{135} Though the court recognized that other circuits employ different tests to determine whether a school violates Title IX, it decided that the question is quite obvious: “do the alleged facts, if true, raise a plausible inference that the university discriminated against John ‘on the basis of sex.’”\textsuperscript{136} The tests employed by other circuits, according to the court, “simply describe ways in which a plaintiff might show that sex was a motivating factor in a university’s decision to discipline a student.”\textsuperscript{137} Therefore, John could establish a Title IX violation via many avenues, including, but not necessarily limited to, showing that he was innocent, that a severe penalty or decision was imposed because he was male, that Purdue was deliberately indifferent to the faulty proceedings that harmed John, or that Purdue used archaic assumptions in imposing misconduct procedures, in their finding of guilt, or in their choice of sanction.\textsuperscript{138}

In large part, John blamed the Dear Colleague Letter for

\textsuperscript{133} \textit{See} \textit{id.} at 663-64.

\textsuperscript{134} \textit{See generally} \textit{id.} After finding that John stated a valid Fourteenth Amendment claim, and before it discussed John’s Title IX claim, the court discussed the type of remedies properly available to John moving forward in the litigation. \textit{See id.} at 664-67. This discussion is not pertinent to this Comment’s analysis and is therefore left out.

\textsuperscript{135} \textit{See id.} at 667.

\textsuperscript{136} \textit{Id.} at 667-68.

\textsuperscript{137} \textit{Id.} at 667.

\textsuperscript{138} \textit{See id.}
Purdue’s mistreatment of him in his sexual misconduct proceedings.139 The Seventh Circuit panel summarized John’s claim as follows:

According to John, this letter reveals that Purdue had a financial motive for discriminating against males in sexual assault investigations. To protect its federal funds, John says, the university tilted the process against men accused of sexual assault so that it could elevate the number of punishments imposed. The resulting track record of enforcement would permit Purdue to signal its commitment to cracking down on campus sexual assault, thereby fending off any suggestion that it was not complying with the Department of Education’s directive. And because the Office of Civil Rights . . . had opened two investigations into Purdue during 2016, the pressure on the university to demonstrate compliance was far from abstract. That pressure may have been particularly acute for Sermersheim, who, as a Title IX coordinator, bore some responsibility for Purdue’s compliance.140

To determine Purdue’s liability under Title IX, the court first discussed whether, and to what extent, John’s reliance on the Dear Colleague Letter was justified.141 Noting that “[o]ther circuits have treated the Dear Colleague letter as relevant in evaluating the plausibility of a Title IX claim,” the Seventh Circuit followed suit.142 The court adopted the perspectives of the Second and Sixth Circuits, both of which recognize the relevance of the Dear Colleague Letter’s

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139 See id. at 668 (“John casts his Title IX claim against the backdrop of a 2011 ‘Dear Colleague’ Letter from the U.S. Department of Education to colleges and universities.”).
140 Id. (citation omitted).
141 See id. at 668-69.
142 See id. (citing Doe v. Miami Univ., 882 F.3d 579, 594 (6th Cir. 2018); Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018); Doe v. Columbia Univ., 831 F.3d 46, 58 (2d Cir. 2016)).
inherent pressures on schools to impose aggressive reforms.\footnote{143 See id. (citing Miami Univ., 882 F.3d at 594; Baum, 903 F.3d at 586; Columbia Univ., 831 F.3d at 58).}

Accordingly, the Seventh Circuit now recognizes that “‘pressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if [schools] fail[ ] to comply,’” together with other factual allegations, supports “‘a reasonable inference of gender discrimination.’”\footnote{144 Id. at 668 (quoting Miami Univ., 882 F.3d at 594).} As the Sixth Circuit has stated, the pressure from a government “‘investigation and the resulting negative publicity ‘provides a backdrop, that, when combined with other circumstantial evidence of bias in Doe’s specific proceeding, gives rise to a plausible claim.’”\footnote{145 Id. at 668-69 (quoting Baum, 903 F.3d at 586).} Put differently, the Seventh Circuit now holds that it is sufficiently plausible to withstand a motion to dismiss to suggest an “‘inference that the panel adopted a biased stance in favor of the accusing female and against the defending male . . . to avoid further fanning the criticisms that [the school] turned a blind eye to [sexual] assaults.’”\footnote{146 Id. at 669 (quoting Columbia Univ., 831 F.3d at 58).}

The extent to which the Dear Colleague Letter and its corresponding financial incentive actually impacts the outcome of a motion to dismiss, however, rests on the adequacy of additional factual allegations in the complaint.\footnote{147 See id.} In other words, the Dear Colleague Letter cannot establish a Title IX claim alone, but merely “‘gives John a story about why Purdue might have been motivated to discriminate against males accused of sexual assault.’”\footnote{148 Id.} Following the court of appeals cases that came before it, the court in Purdue University ultimately recognized that, for John to state a claim of Title IX discrimination, “he must allege facts raising the inference that Purdue acted at least partly on the basis of sex in his particular case.”\footnote{149 Id.}
The egregious facts concerning John’s disciplinary proceedings made this case an easy one for the unanimous panel. Pairing Purdue’s intolerably unfair prosecution of John with the reasons for doing so, as easily inferred by the Dear Colleague Letter, *Purdue University* held that “John’s allegations raise[d] a plausible inference that he was denied an educational benefit on the basis of his sex.”

The court concluded by explaining how the standard to survive a motion to dismiss assists John’s arguments: “To be sure, John may face problems of proof, and the factfinder might not buy the inferences that he’s selling. But his claim should have made it past the pleading stage, so we reverse the magistrate judge’s premature dismissal of it.” In so stating, the court effectively told future panels that the pressure placed on schools, coupled with schools’ implementation of the Dear Colleague Letter’s requirements, as seen in the disciplinary process enforced against male students, is enough to state a claim of sex discrimination under Title IX.

**C. The Seventh Circuit Retreats: *Doe v. Columbia College Chicago***

*Purdue University* brought the Seventh Circuit’s Title IX jurisprudence full-circle and properly recognized the federal government’s failures toward the accused. Less than two months later, however, a panel of the Seventh Circuit retreated from the progress made in recognizing the rights of the accused in *Doe v. Columbia College Chicago*. In *Columbia College Chicago*, Jane Roe and John Doe II

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150 See *id.* at 669-70.
151 *Id.* at 670.
152 See *id.* at 668-70.
153 933 F.3d 849 (7th Cir. 2019).
154 In the lawsuit against Columbia College, the plaintiff is styled as “John Doe.” This Comment, however, refers to *Columbia College Chicago*’s John Doe as “John Doe II” to distinguish him from the John Doe in *Purdue University*. 

engaged in a sexual encounter in December 2015.\textsuperscript{155} About two
months later, Roe filed a Title IX complaint with Columbia College
alleging that she did not consent to sexual activity with Doe II.\textsuperscript{156}
Unlike in \textit{Purdue University}, Columbia College here provided Doe II
with at least some process.\textsuperscript{157} Doe II was given a chance to present his
own evidence, and was specifically asked to provide exculpatory
evidence; the Title IX coordinator allowed the investigation to
continue after first deciding that “there was sufficient evidence for a
reasonable hearing panel to conclude that Doe [II] had violated the
school’s sexual misconduct policy”; and Doe II was given a chance to
review the investigation materials before the hearing.\textsuperscript{158} Doe II was
also expressly permitted to bring his attorney with him to any
meetings with investigators; university administrators met with Doe II
to address his specific concerns about the proceedings; Columbia
College properly addressed Doe II’s complaints of retaliation by Roe’s
friends; investigators sent Doe II letters specifying the allegations
against him and repeatedly requesting evidence or witnesses on his
behalf; and Columbia College provided Doe II “with an academic
advisor who could approve any accommodations [he] might need.\textsuperscript{159}
Columbia College’s investigators also provided Doe II with the
evidence supplied by Roe during the investigation and permitted Doe II
to respond in writing to that evidence and ensured that every piece
of evidence presented by both Roe and Doe II was presented to the
panelists at Doe II’s hearing.\textsuperscript{160}

The hearing panel ultimately concluded that Doe II was
responsible for violating Columbia College’s sexual misconduct
policy, but not responsible for Roe’s other two claims of
misconduct.\textsuperscript{161} And when Doe II appealed this decision, Columbia

\begin{footnotes}
\item[\textsuperscript{155}] \textit{Id.} at 852.
\item[\textsuperscript{156}] \textit{Id.}
\item[\textsuperscript{157}] \textit{See id.} at 852-54.
\item[\textsuperscript{158}] \textit{Id.} at 852.
\item[\textsuperscript{159}] \textit{Id.} at 853.
\item[\textsuperscript{160}] \textit{Id.}
\item[\textsuperscript{161}] \textit{Id.}
\end{footnotes}
College granted Doe II’s request to substitute the appeals officer because the officer had been involved with a documentary that appeared to favor sexual assault survivors over the rights of the accused.\textsuperscript{162} The new appeals officer, about whom Doe II had no objections, affirmed the hearing panel’s factual findings and sanction, which recommended that Doe II be suspended for one academic year.\textsuperscript{163}

Doe II filed the underlying lawsuit against Columbia College alleging Title IX violations, among other allegations.\textsuperscript{164} Just as in \textit{Purdue University}, Doe II alleged discrimination based on sex because the Dear Colleague Letter, “pressure from the Office of Civil Right investigations, and the aforementioned on-campus programming combined to cause Columbia College to implement anti-male policies to increase convictions of male students.”\textsuperscript{165} Although Doe II made similar, if not identical, claims under Title IX as did John Doe in \textit{Purdue University}, his claims were not taken as seriously as they deserved.\textsuperscript{166}

Judge Bauer, writing for the unanimous panel in \textit{Columbia College Chicago}, significantly undermined the treatment given to the Dear Colleague Letter in \textit{Purdue University}—its mandatory precedent decided less than two months earlier.\textsuperscript{167} Judge Bauer’s linguistic selections are telling:

To address [the problem of high percentages of sexual assaults on college campuses], the [Dear Colleague Letter] \textit{encouraged} schools to publish their discrimination policies, adopt and publish grievance

\textsuperscript{162} See \textit{id.}.
\textsuperscript{163} \textit{id.}.
\textsuperscript{164} \textit{id.} at 853-54. Doe II did not claim Fourteenth Amendment violations, unlike in \textit{Purdue University}, perhaps because the procedures at issue in \textit{Columbia College Chicago} likely satisfied constitutional minimums.
\textsuperscript{165} \textit{id.} at 855.
\textsuperscript{166} See \textit{id.}.
\textsuperscript{167} See \textit{id.}.
procedures, ensure their employees are trained to report and effectively respond to incidents of harassment, and appoint a Title IX coordinator. The letter also encouraged schools to apply a preponderance of the evidence standard when adjudicating sexual assault cases.168

Contrast this language from that used in *Purdue University* less than two months earlier:

[The Dear Colleague Letter] ushered in a more rigorous approach to campus sexual misconduct allegations by, among other things, defining “sexual harassment” more broadly than in comparable contexts, mandating that schools prioritize the investigation and resolution of harassment claims, and requiring them to adopt a lenient “more likely than not” burden of proof when adjudicating claims against alleged perpetrators. The Department of Education made clear that it took the letter and its enforcement very seriously. And it warned schools that “[t]his Administration is committed to using all its tools to ensure that all schools comply with [Title IX] so campuses will be safer for students across the country.” In other words, a school’s federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct.169

*Columbia College Chicago* rightly explains that the Dear Colleague Letter, without more, is insufficient to permit Doe II to

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168 *Id.* (emphasis added) (internal citation omitted).

169 Doe v. Purdue Univ., 928 F.3d 652, 668 (7th Cir. 2019) (emphasis added) (second and third alterations in original) (internal citations omitted).
withstand a motion to dismiss.\textsuperscript{170} But the court failed to address in its opinion pertinent facts that demonstrate reasons to believe that the Dear Colleague Letter was accompanied by Columbia College’s discrimination specifically based on Doe II’s sex—facts that the district court acknowledged:

- A toxicology report found “that Roe falsely alleged her self-induced alcohol consumption caused her to fade ‘in and out of consciousness’ when interacting with Doe”;
- Affidavits from three students “indicated that Roe did not manifest signs of incapacitation the night of the incident”; 
- The hearing panel “concluded that Roe falsely alleged that Doe held her down and forced her to engage in non-consensual kissing”;  
- “A polygraph expert confirmed that Doe honestly testified that he did not force Roe to perform oral sex on him, Roe did not push his head away when he performed oral sex on her, and Roe did not appear to Doe to be under the influence of alcohol or drugs”; 
- “Roe sent Doe a text message the morning after the incident saying she had a ‘great time’ with Doe”; and
- “Roe admitted to the Hearing Panel that her responses to Doe were ‘unclear or very passive’ despite previously claiming that she made repeated

\textsuperscript{170} See Columbia Coll. Chic., 933 F.3d at 855; see also Purdue Univ., 928 F.3d at 669 (“[T]he letter, standing alone, is obviously not enough to get John over the plausibility line.”); Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018) (clarifying that the Dear Colleague Letter “alone is not enough to state a claim that the university acted with bias in this particular case”).
requests for the sexual interaction to stop.\textsuperscript{171}

Rather than delving into why the panel thought none of these facts were sufficient, it ignored all but one and simply concluded—without meaningful explanation—that it was plausible for the hearing board to determine that Roe did not consent to sexual activity with Doe II.\textsuperscript{172}

The court focused not on the ways in which the facts as pled were insufficient to survive a motion to dismiss, but instead on the ways in which Columbia College defended against Doe II’s Title IX claim.\textsuperscript{173} But this does not answer the question posed by a Title IX discrimination lawsuit, which asks instead whether it is plausible that Columbia College Chicago imposed a process that was biased against Doe II because he was a male student.\textsuperscript{174} And it deviates from the well-settled principles that the allegations in the pleadings are to be accepted as true and judged on the reasonable inferences drawn therefrom in a light most favorable to the plaintiff.\textsuperscript{175}

The panel also mischaracterized the requirement that allegations involving the financial incentive and publicity concerns addressed in the Dear Colleague Letter be coupled “with facts particular to [the] case.”\textsuperscript{176} It therefore deviated from the precedent set in \textit{Purdue University}. The facts supporting the plaintiff in \textit{Purdue University} may have been more egregious than those in \textit{Columbia College Chicago}, but the decision whether to permit the plaintiffs to proceed to discovery on their Title IX claims does not rest on identical fact patterns. Rather, all that needs to be shown under \textit{Purdue University} is pressure inflicted by the Dear Colleague Letter coupled

\textsuperscript{172} See \textit{Columbia Coll. Chic.}, 933 F.3d at 856 (explaining how a toxicology report that Doe II used to prove that Roe was not incapacitated, and therefore could have consented, was inconclusive).
\textsuperscript{173} See \textit{id.} (explaining the ways in which Doe II was provided procedures to his benefit, not the sufficiency or insufficiency of Doe II’s allegations).
\textsuperscript{174} See \textit{Purdue Univ.}, 928 F.3d at 667-68.
\textsuperscript{175} See \textit{Ashcroft v. Iqbal}, 556 U.S. 662, 678 (2009).
\textsuperscript{176} \textit{Columbia Coll. Chic.}, 933 F.3d at 855.
with facts tending to show bias against male students.\(^{177}\)

D. Other Circuits’ Case Law

With its decision in \textit{Purdue University}, the Seventh Circuit joined at least two other circuits that have held the federal government indirectly accountable for its undue influence on schools in sexual misconduct disciplinary policies and procedures.\(^{178}\)

The Sixth Circuit, for example, has become a leading circuit on this issue. In \textit{Doe v. Miami University}, the Sixth Circuit’s first of two oft-cited opinions on this issue, a male student was suspended from school for eight months, although the student’s successful appeal caused his suspension to be reduced to four months.\(^{179}\) In addition to some facts tending to show bias against the male student in the disciplinary process,\(^{180}\) the court in \textit{Miami University} again recognized the importance of the external pressures placed on the university by not only the public, but also the federal government.\(^{181}\) Explaining that statistical evidence showed a pattern in favor of female accusers and against accused male students in recent years, the court agreed that such a pattern could have been caused by “external pressure from the federal government and lawsuits brought by private parties.”\(^{182}\)

Agreeing with the plaintiff-student’s argument, the court clarified that the Dear Colleague Letter could have played a large role in this pattern of discrimination: “[P]ressure from the government to combat vigorously sexual assault on college campuses and the severe potential punishment—loss of all federal funds—if it failed to comply, led Miami University to discriminate against men in its sexual-assault

\(^{177}\) \textit{Purdue Univ.}, 928 F.3d at 668-69.
\(^{178}\) \textit{See, e.g.}, Doe v. Baum, 903 F.3d 575, (6th Cir. 2018); Doe v. Miami Univ., 882 F.3d 579, (6th Cir. 2018); Doe v. Columbia Univ., 831 F.3d 46, 58 n.11 (2d Cir. 2016).
\(^{179}\) 882 F.3d 579, 584 (6th Cir. 2018).
\(^{180}\) \textit{See id.} at 592-93.
\(^{181}\) \textit{See id.} at 593-94.
\(^{182}\) \textit{See id.}
adjudication process.” On these facts, and notwithstanding whether other plausible explanations existed for Miami University’s adjudication of male students, the male student’s Title IX discrimination claim survived dismissal.

In Doe v. Baum, the Sixth Circuit’s second well-known Title IX case, a male student brought a Title IX lawsuit after the student voluntarily withdrew from the University of Michigan in lieu of expulsion. About two years before the student’s disciplinary proceedings, the University of Michigan came under fire from the federal government for its failures in responding to sexual misconduct allegations. That investigation led to public outcry against the University, which lasted at least through the plaintiff-student’s disciplinary proceedings. As in Purdue University, the Sixth Circuit recognized that the “public attention and the ongoing investigation put pressure on the university to prove that it took complaints of sexual misconduct seriously.” It also “stood to lose millions in federal aid if the Department found it non-compliant with Title IX” and “knew that a female student had triggered the federal investigation and that the news media consistently highlighted the university’s poor response to female complaints.”

Also like in Purdue University and its progeny, Baum noted there must be more than simply pressure on the university to be biased against male students; there must also be some evidence that they acted on that pressure. Evidence that raised a “plausible claim” included the fact that the University favored statements from the victim and her witnesses while discrediting the accused’s statement

183 See id. at 594 (citing Dear Colleague Letter, supra note 58).
184 Id.
185 See Baum, 903 F.3d at 578, 580.
186 Id. at 586.
187 Id.
188 Id. (emphasis added); cf. Doe v. Purdue Univ., 928 F.3d 652, 668 (7th Cir. 2019).
189 Baum, 903 F.3d at 586.
190 See id.
and statements from his witnesses. Baum concluded that at least “one plausible explanation is that the Board discredited all males . . . and credited all females . . . because of gender bias.” All that was needed to allow the male student’s claim to proceed was a combination of “specific allegation[s] of adjudicator bias” and “external pressure facing the university.”

The Second Circuit took a similar approach. In Doe v. Columbia University, the university suspended the male student for one and one half years for violating its sexual misconduct policy. The male student sued under Title IX and the Second Circuit quickly agreed that his lawsuit could proceed. The court reasoned that the hearing panel, dean, and Title IX investigator “were all motivated . . . by pro-female, anti-male bias” in order “to refute criticisms circulating in the student body and in the public press that Columbia was turning a blind eye to female students’ charges of sexual assaults by male students.” The university, in other words, was “motivated to favor the accusing female over the accused male, so as to protect themselves and the University from accusations that they had failed to protect female students from sexual assault.” The plaintiff-student alleged specific facts that the University incorrectly weighed evidence to favor the female complainant and changed its policies and procedures in the wake of mounting public pressures from those that were originally intended to protect the accused. He also alleged, as in Purdue University, that “the investigator and the [hearing] panel declined to seek out potential witnesses Plaintiff had identified as sources of information favorable to him.”

191 Id.
192 Id.
193 See id.
194 831 F.3d 46, 52 (2d Cir. 2016).
195 See id. at 56.
196 Id.
197 Id. at 57.
198 See id. at 56-57
199 See id. at 56; cf. Doe v. Purdue Univ., 928 F.3d 652, 669 (7th Cir. 2019).
“substantial criticism” and mounting pressure for the university to prove its compliance with Title IX gave plenty of plausible reasons to maintain the male student’s Title IX claim.200

*Columbia University* went even further toward recognizing the true harms caused by financial implications of the federal government’s determination that the school is noncompliant with Title IX, albeit in a footnote:

> [T]he possible motivations mentioned by the district court as more plausible than sex discrimination, including a fear of negative publicity or of Title IX liability, are not necessarily . . . lawful motivations distinct from sex bias. A defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex.201

With this, the Second Circuit confirmed the significance of the Dear Colleague Letter and the corresponding financial duress placed on hundreds, if not thousands, of colleges and universities. Decisions holding the federal government responsible for years of discrimination against male students is growing beyond these few circuits.202 Because courts are now acknowledging the circular

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200 See *Columbia Univ.*, 831 F.3d at 57-58.
201 See *id.* at 58 n.11.
202 See, e.g., Doe v. Amherst Coll., 238 F. Supp. 3d 195, 204-05, 222-23 (D. Mass. 2017) (providing the Dear Colleague as the backdrop for the college’s sexual
consequences of taking Title IX enforcement too far, it will not be surprising to see more courts, and perhaps the U.S. Supreme Court, join the Second, Sixth, and Seventh Circuits.

III. *DOE v. PURDUE UNIVERSITY* PROPERLY RECOGNIZES THE SYSTEMATIC PROBLEMS WITH TITLE IX ENFORCEMENT, BUT SHOULD HAVE GONE FURTHER.

Courts have clearly become more receptive to male students’ Title IX discrimination claims. Yet, as *Columbia College Chicago* shows, courts inconsistently apply the standards that permit the Dear Colleague Letter and financial duress as sufficient to establish sex discrimination under Title IX. In *Purdue University*, however, the Seventh Circuit had before it a perfect set of facts to hold the federal government accountable for its role in discriminatorily punishing male students. It could—and indeed should—have gone further.

The court first should have discussed how the facts pled by John Doe plausibly established a systematic attempt to discriminate against a male student, and denying a motion for judgment on the pleadings in relevant part); Doe v. Lynn Univ., Inc., 235 F. Supp. 3d 1336, 1339-43 (S.D. Fla. 2017) (denying the university’s motion to dismiss a male student’s Title IX claim relying on the Second Circuit’s decision in *Columbia University*, reasoning that the federal government’s pressure, among other things, supports a Title IX claim). *But see* Doe v. Univ. of Colo., Boulder, though Bd. of Regents of Univ. of Colo., 255 F. Supp. 3d 1064, 1074-79 (D. Colo. 2017) (citing cases dismissing male students’ Title IX claims and explaining the difference between “pro-victim” bias versus “anti-male” bias).

When this Comment discusses holding the federal government accountable, it necessarily refers to holding universities responsible for their role since they are the defendants in these lawsuits. However, the Seventh Circuit could have written in dicta how extensively the federal pressure on universities led to sex discrimination. By permitting lawsuits to proceed on this theory, even without such obvious and egregious facts as in *Purdue University*, the message to the federal government would be clear.

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203 See generally supra Part II.
204 See 933 F.3d 849, 855-56 (7th Cir. 2019) (explaining how federal pressure to favor female accusers was not enough because the plaintiff’s complaint lacked “something more”).
205 When this Comment discusses holding the federal government accountable, it necessarily refers to holding universities responsible for their role since they are the defendants in these lawsuits. However, the Seventh Circuit could have written in dicta how extensively the federal pressure on universities led to sex discrimination. By permitting lawsuits to proceed on this theory, even without such obvious and egregious facts as in *Purdue University*, the message to the federal government would be clear.
against male students in sexual misconduct disciplinary proceedings, thus resulting in Purdue’s mistreatment of him. Second, it could have addressed commentators’ concerns over the potential emptiness of OCR’s threats in the Dear Colleague Letter given the lack of authority to enforce its terms.²⁰⁶

A. The Financial Incentives Provision of Title IX, Together With the Dear Colleague Letter’s Terms, Is an Inescapable Violation of Title IX as Applied to Sexual Misconduct Disciplinary Proceedings.

An anonymous university student affairs administrator noted, not long after OCR published the Dear Colleague Letter, the following about the Letter’s impact on his or her job:

[M]y fear—yes, it’s fear—of seeing my institution’s name in Inside Higher Ed or The Chronicle of Higher Education as the subject of an investigation, or, even worse, having the “letter of agreement” OCR makes public displayed for all to read—makes me toe the line in a way I sometimes have trouble justifying to myself.²⁰⁷

The terms of the Dear Colleague Letter are, however, only the first red flag; OCR’s efforts to enforce those terms are much more telling.²⁰⁸

²⁰⁶ This argument is perhaps weaker with respect to Doe v. Purdue University and the other cases discussed supra Part II because the Department of Education’s lack of authority to enforce the Dear Colleague Letter’s mandates was never introduced in the plaintiff-students’ complaints. However, it is another avenue that could support future plaintiffs’ complaints’ sufficiency to survive motions to dismiss and is therefore worthy of discussion.


²⁰⁸ See Am. Ass’n of Univ. Professors, supra note 15, at 79-80 (explaining the impact of the Dear Colleague Letter on Title IX enforcement efforts).
About three years after OCR published the Dear Colleague Letter, “the OCR announced investigations of fifty-five colleges and universities for possible violations of Title IX in their handling of sexual violence and harassment complaints.” A year and a half later, in September 2015, that number increased to 130. And another six months saw thirty-nine more schools added to the list of those being investigated. In other words, the pressure to conform to the OCR’s mandates was mounting quickly.

When the OCR concludes its investigations into universities’ Title IX compliance, it sets forth its findings “in long, detailed letters” to the institutions in question. In these letters, OCR explains schools’ failure to respond promptly enough to sexual misconduct allegations, failure to protect sexual assault complainants, and the general failure to “address the issue of sexual harassment and violence in the campus community,” among other things. Through these letters, the OCR tells schools that they must conform to the OCR’s mandates in the manner recommended in the letters or else they risk losing their federal funding.

As the American Association of University Professors put it, “the OCR’s approach to compliance has become increasingly punitive.” And “[t]he threatening nature of the OCR’s actions is fueled by the ever-broadening scope of its investigations, both in terms of the number of institutions under scrutiny and the breadth of the OCR’s investigations at each institution.” Put more bluntly, the OCR has managed to weaponize the financial incentives provision of

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209 Id. at 80.
210 Id.
211 Id.
212 Id. at 80.
213 Id. at 80-81.
214 See id. (“The OCR’s recent or current investigations . . . have taken on an adversarial character, leading to increasing fear that the OCR may wield its power to initiate proceedings to withdraw federal funding.”
215 Id. at 81.
216 Id.
Title IX to obtain total compliance.

The OCR’s actions have unquestionably extended beyond those contemplated by Congress in the early 1970s. As a result of the OCR’s attempts at cracking down on Title IX compliance, schools “‘scrambled to ensure compliance with [OCR’s] guidance and avoid becoming the subject of an OCR investigation.’”217 With hundreds of open investigations and blanket threats by the OCR about the potential for losing federal funding, whether and how schools would be found noncompliant with Title IX was a matter of great concern because it “remained a mystery even to most college officials.”218

In May 2016, a group of twenty-one professors from across the United States concluded that they had had enough.219 In a letter published online, the professors protested that the OCR “unlawfully expanded the nature and scope of institutions’ responsibility to address sexual harassment.”220 They concluded that the OCR has “compelled institutions to choose between fundamental fairness for students and their continued acceptance of federal funding.”221

This is precisely the issue that is addressed in the case law discussed supra Part II, albeit less critically. Yet the case law considers the Dear Colleague Letter and the financial incentives aspect of Title IX compliance only as a “backdrop” that must be coupled with other specific reasons to believe that the school discriminated against the male student based on his sex.222 It is entirely understandable why courts tend to require more than just the pressure that the federal

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218 See id.
219 See Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault, at 1, 6-7 (May 16, 2016), https://www.lankford.senate.gov/imo/media/doc/Law-Professor-Open-Letter-May-16-2016.pdf [hereinafter Open Letter].
220 Id. at 1.
221 Id.
222 See Doe v. Purdue Univ., 928 F.3d 652, 669 (7th Cir. 2019) (quoting Doe v. Baum, 903 F.3d 575, 586 (6th Cir. 2018)).
government places on schools, for if that were enough to state a claim of Title IX discrimination, then every male student in the country who has been disciplined in sexual misconduct proceedings would be able to sue their schools for Title IX discrimination.

The problem is instead that the courts, and particularly the Seventh Circuit, have failed to recognize the systematic discrimination against male students encouraged by the federal government since 2011. Purdue University came to the right conclusion, but left open the door to the decision in Columbia College Chicago, where, against the same backdrop involving federal pressure, the court simply concluded that the particular facts did not sufficiently establish sex discrimination.223 The court rejected the plaintiff’s claim that restricting access to investigative documentation indicated sex discrimination because they are “divorced from gender.”224

But that is the precise reason why courts apply the “backdrop” of the Dear Colleague Letter. It ought to go without saying that schools will not make decisions that obviously favor one gender over another, as that would be obvious sex discrimination. The backdrop offered by the Dear Colleague Letter and the financial duress it places schools under taints sexual misconduct disciplinary proceedings where the schools apply the changes demanded by the OCR.

The clearest example of this taint is with respect to the burden of proof requirement from the Dear Colleague Letter. The Letter defines noncompliance with Title IX to include any school that uses a burden of proof standard higher than “preponderance of the evidence.”225 Without explaining why the burden of proof to establish a public employer’s civil rights violation (preponderance of the evidence) should be the same as the burden of proof to establish that a student sexually harassed or assaulted another student, the OCR simply concludes that standards of proof higher than a preponderance of the evidence are always inconsistent with Title IX, even to prove

223 See Doe v. Columbia Coll. Chic., 933 F.3d 849, 856 (7th Cir. 2019).
224 See id.
225 See Dear Colleague Letter, supra note 58, at 11.
rape allegations.\textsuperscript{226} The Dear Colleague Letter goes further. It also specifically requires that schools favor complaining victims over the students accused of misconduct.\textsuperscript{227} It requires that schools “afford[ ] a complainant a prompt and equitable resolution.”\textsuperscript{228} It requires that schools assure that they “will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant.”\textsuperscript{229} It prohibits an accused’s access to due process protections from “restrict[ing] or unnecessarily delay[ing] the Title IX protections for the complainant.”\textsuperscript{230} It mandates that schools “take steps to protect the complainant as necessary” and “minimize the burden on the complainant.”\textsuperscript{231} It requires that schools “ensure that complainants are aware of their Title IX rights and any available resources, such as counseling, health, and mental health services.”\textsuperscript{232} Ultimately, the Letter’s purpose is stated as follows:

When OCR finds that a school has not taken prompt and effective steps to respond to sexual harassment or violence, OCR will seek appropriate remedies for both the complainant and the broader student population. . . . When a recipient [covered school] does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of Justice for litigation.\textsuperscript{233}

Notably, all of these mandates, among others in the Letter, assume that

\begin{itemize}
  \item \textsuperscript{226} See id.
  \item \textsuperscript{227} See id. at 8-9, 12, 15-16.
  \item \textsuperscript{228} Id. at 8 (emphasis added).
  \item \textsuperscript{229} Id. at 9 (emphasis added).
  \item \textsuperscript{230} Id. at 12 (emphasis added).
  \item \textsuperscript{231} Id. at 15-16 (emphasis added).
  \item \textsuperscript{232} Id. at 16 (emphasis added).
  \item \textsuperscript{233} Id. (emphasis added).
\end{itemize}
accused students are guilty of the sexual misconduct allegations. They compel schools to favor complainants throughout the process, even at the cost of due process rights for the accused.\footnote{See id. at 12.}

As noted earlier, the Seventh Circuit came to the right conclusion in Indiana. But it did not consider the systematic discrimination mandated—either directly or indirectly—by the Dear Colleague Letter. Given that there was evidence in the case that Purdue was under investigation by the OCR for failing to meet the standards set forth in the Dear Colleague Letter,\footnote{Doe v. Purdue Univ., 928 F.3d 652, 668 (7th Cir. 2019).} the court could—and indeed should—have found enough specific facts to believe that the systematic attempt at discriminating against males reached Purdue’s campus. Evidence of discrimination in a specific proceeding, as required in the Second, Sixth, and Seventh Circuits, should be satisfied with evidence that the university put in place changes in response to the Dear Colleague Letter.

The systematic attempt at discriminating against male students becomes worse still when courts begin recognizing that the federal government—tasked with representing the entirety of the country, not just complainants—threatens schools with devastation if they do not enforce policies that discriminate against a protected class.

B. Having No Force of Law, the Dear Colleague Letter Instilled Fear Under False Pretenses.

1. \textit{The OCR Failed to Publish the Dear Colleague Letter Under Appropriate Administrative Processes.}

To determine whether an agency action has the binding force of law, courts look to three factors in totality: (1) how the agency characterizes its action; (2) where the action was published; and (3) “whether the action has binding effects on private parties or on the
agency.” The last factor, however, matters most. The inquiry that determines the Dear Colleague Letter’s legal weight most therefore rests on whether it was merely advisory, as the Letter claimed, or whether it was in effect a legislative rule.

The Dear Colleague Letter expressly refers to itself as a “significant guidance document” that announced the OCR’s policy “about how [it] evaluate[d] whether covered entities [were] complying with their legal obligations.” The OCR’s own conclusion that the Letter is simply a statement of policy and nothing more does not save its attempt at creating a rule with the binding force of law. Notably, legislative rules trigger the need for formal notice-and-comment procedures under the Administrative Procedure Act. If an agency action “carries the force and effect of law,” then the agency “may not escape the notice and comment requirements . . . by labeling a major substantive legal addition to a rule a mere interpretation.”

Professor Lave concludes that the Dear Colleague Letter is effectively a legislative rule that evaded notice-and-comment procedures. She points out eleven instances in which the Letter “tells schools that they must take certain steps in order to be in compliance with Title IX.” The Letter therefore “imposes binding obligations’ upon schools” by commanding, requiring, ordering, and binding.

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238 Lave, supra note 72, at 943.
239 Dear Colleague Letter, supra note 58, at 1 n.1.
240 See General Elec. Co., 290 F.3d at 382 (explaining that, while courts consider how the agency characterizes its own statement, it is neither the only factor to consider nor the most important).
241 See id. at 944.
242 Id. (quoting Appalachian Power Co. v. E.P.A., 208 F.3d 1015, 1024 (D.C. Cir. 2000)).
243 See id. at 945-47.
244 Id. at 945.
dictating how schools are to act.\textsuperscript{245} Because such language also violates agency good practices guidelines, the circumstances militate in favor of recognizing the Letter as having the binding force of law.

Professor Lave points out that the Dear Colleague Letter “is procedurally invalid,” and thus “universities have no legal obligation to adhere to it.”\textsuperscript{246} And yet, the Department of Education, and specifically the OCR, have “made the consequences for not abiding by [the Dear Colleague Letter] so significant that it is effectively legally binding.”\textsuperscript{247}

Calling this “an unprecedented move,” Professor Lave explains how the OCR abused its executive authority by following through on its threat to schools.\textsuperscript{248} It began publishing lists of universities under investigation, which in turn “put tremendous financial and social pressure on schools to comply with the Dear Colleague Letter.”\textsuperscript{249} It therefore did not matter whether schools thought the Dear Colleague Letter was valid because the ramifications of disregarding it were so devastating.\textsuperscript{250}

In sum, it is likely that no court would enforce the OCR’s attempt at withdrawing federal funds from schools based on the Dear Colleague Letter. And yet the risk that such funding would be taken away outweighed any objections that schools had to the OCR’s mandates. The OCR’s threats to financially ruin schools that did not conform to its terms was therefore an empty one, but one that left schools with no realistic choice.

\textbf{2. Compelling Sex Discrimination By Putting Schools in Financial Duress Violates the Spending Clause of the U.S. Constitution.}

\textsuperscript{245} Id. at 946 (quoting General Elec. Co. v. E.P.A., 390 F.3d 377, 385 (D.C. Cir. 2002)).
\textsuperscript{246} Id.
\textsuperscript{247} Id.
\textsuperscript{248} See id. at 947.
\textsuperscript{249} Id.
\textsuperscript{250} See id.
The U.S. Constitution authorizes the federal government “to offer federal grant funds to states and localities that are contingent on the recipients engaging in, or refraining from, certain activities.”\textsuperscript{251} The U.S. Supreme Court has declared that “the language in our earlier opinions stands for the unexceptionable proposition that the [spending] power may not be used to induce the States to engage in activities that would themselves be unconstitutional.”\textsuperscript{252} The Court added that “in some circumstances the financial inducement offered by Congress might be so coercive as to pass the point at which ‘pressure turns into compulsion.’”\textsuperscript{253} Where “states have no real choice but to accept the funding and enact or administer a federal program,” the federal government has violated the Spending Clause.\textsuperscript{254} Therefore, for example, “a grant of federal funds conditioned on invidiously discriminatory state action . . . would be an illegitimate exercise of the Congress’ broad spending power.”\textsuperscript{255} The U.S. Supreme Court has invalidated federal funding in this light only once.\textsuperscript{256} In \textit{National Federation of Independent Business v. Sebelius},\textsuperscript{257} the Court distinguished the Affordable Care Act (“ACA”), so-called “Obamacare,” from the facts in \textit{Dole} where the federal law simply encouraged the states to raise the drinking age to twenty-one.\textsuperscript{258} The ACA, however, did more than “encourage” states to conform their individual Medicaid programs with the federal Medicaid law; the ACA’s financial inducement operated as “a gun to the

\begin{itemize}
\item \textsuperscript{252} \textit{Dole}, 483 U.S. at 210 (emphasis added).
\item \textsuperscript{253} Id. at 211.
\item \textsuperscript{254} Yeh, \textit{supra} note 251, at 7 (citing \textit{Dole}, 483 U.S. at 207, 211).
\item \textsuperscript{255} \textit{Dole}, 483 U.S. at 210-11.
\item \textsuperscript{256} Yeh, \textit{supra} note 251, at 11.
\item \textsuperscript{257} 567 U.S. 519 (2012).
\item \textsuperscript{258} See \textit{id.} at 580-81.
\end{itemize}
head.” In fact, “[a] State that opt[ed] out of the [ACA]’s expansion in health care coverage thus [stood] to lose not merely ‘a relatively small percentage’ of its existing Medicaid funding, but all of it.”

Just as the threat to withdraw all federal Medicaid funding constituted a gun to the head of the States, and thus ran afoul of the Spending Clause, so too does the OCR’s threats to pull funding for noncompliance with Title IX. Here, however, the Department of Education has unequivocally conditioned the grant of federal funds on systematic discrimination against male students. It has, in other words, “compel[ed] institutions to choose between fundamental fairness for students and their continued acceptance of federal funding.” As in Sebelius, the Department of Education has effectively put a gun to the head of every school and forced them to discriminate against male students. This cannot be allowed to stand, and the Seventh Circuit missed an opportunity, at least in dicta, to hold the federal government accountable.

CONCLUSION

Sexual misconduct is, no doubt, worthy of punishment. It is certainly a principled and worthwhile cause to ensure that schools protect students from sexual violence to the best of their ability. But there comes a time when courts must step in to make sure that those righteous objectives are sought by righteous means. Because the federal government has attempted to accomplish those objectives in a manner that runs contrary to our sacred values of justice and fairness, courts must enjoin such detrimental activity. The Seventh Circuit’s decision in Purdue University makes positive strides toward protecting the accused. As more students—both males and females—are hurt by their beloved universities in Title IX proceedings, courts will continue to have no choice but to hold all parties accountable.

President Trump’s Administration began the process of reform

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259 Id. at 581.
260 Id.
261 Open Letter, supra note 219, at 6-7.
by rescinding the Dear Colleague Letter. But the Letter’s effects remain, and the fight will continue about how to best protect against sexual violence while maintaining fair and equitable disciplinary processes. Courts have a large role to play in this fight. Let’s hope they continue to pay attention to all perspectives in that fight, including the unpopular ones.