Dear OCR,

Thank you for this opportunity to submit comments regarding the regulations and guidance on Title IX. My comment concerns the wide-spread use of responsible employees/mandatory reporters within colleges and universities that existed prior to the May 2020 regulations. There is clear data that shows that a mandatory reporting policy is not supported by most survivors and often works to their detriment. There is also data to support the notion that wide-spread mandatory reporting it actually depresses reporting and thus can prevent women from receiving equal educational opportunities in contravention of Title IX. I attach an article that I wrote on this topic which was recently published in the New Mexico Law Review.

Respectfully submitted,
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Sent from Mail for Windows 10
HARMFUL REPORTING

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ABSTRACT

Title IX is used in many ways; perhaps most prominent and controversial is its use to address issues of sexual harassment and sexual assault on college campuses. The regulations governing that use have just been changed, with the Department of Education issuing new final regulations on May 6, 2020. The recent spotlight aside, an aspect of Title IX that has gotten too little attention has been the move towards having all or nearly all university employees categorized as “mandatory reporters.” A mandatory reporter is one who must report an allegation of sexual assault to the university’s Title IX coordinator. This report must be made even if it is against the wishes of the student who discloses that she or he was the victim of the assault.

This widespread use of mandatory reporters, perhaps counterintuitively, confers harm on the individual disclosing the assault. It also does not achieve the intended goals, one of which is often stated as making it known that the institution takes sexual assault very seriously. Anointing all employees, including non-supervisory faculty members, as mandatory reporters actually drives down student desire to disclose. This in turn prevents student survivors from getting the support they need in order to have equal education opportunities regardless of sex, which is the core purpose of Title IX. Therefore, having a widespread mandatory reporting requirement not only inhibits disclosure but itself may be a violation of Title IX.

Other phenomena presently influence the willingness to disclose and/or report sexual assault. The #MeToo Movement and the Harvey Weinstein trial reveal much about the challenges and trauma associated with disclosing and reporting. Further, some state legislatures have codified mandatory reporting and others have considered or will consider it. There are better ways to comply with Title IX and protect survivors. Those ways must become more widespread.

I. INTRODUCTION

“You are entering a four-year struggle to maintain bodily autonomy. There will be young men who kiss you roughly before you decide whether you want them to. There will also be the male
'friend' who sneaks into your bed at night when you're passed out, drunk and naked and ever so trusting of the sanctity of your bedroom. He will act bewildered when you scream at him to leave. Neither of you will mention the incident again." 1

Assume you are a faculty member who has had the above student in several classes and you have a close relationship with her. She comes in your office to tell you about the above incident or worse. As she begins her saga, you are compelled to say to her: I am sorry but if you tell me anything that can be deemed to be sexual assault, I am a mandatory reporter and must report the details of what you share with me to our institution’s Title IX coordinator. When the student says that she does not want the incident officially reported, you must say, I am sorry, but then you should not tell me. So the student retreats, unheard and unsupported, from your office, even though it may be adorned with a sign declaring it to be a safe space.

This scenario depicts the Title IX procedures in over two-thirds of the nation’s institutions of higher education. This article argues that this reality is harmful to sexual assault survivors and is contrary to the purpose of Title IX. Title IX is used prominently and sometimes controversially to address issues of sexual harassment and misconduct on college campuses. Title IX regulations have recently changed, with the Department of Education issuing new final regulations on May 19, 2020. 2

The recent attention to the new regulations aside, an aspect of Title IX that has gotten too little attention—despite its outsized impact—is the move at a majority of institutions towards having nearly all university employees being categorized as “mandatory reporters.” A mandatory reporter is one who must report an allegation of sexual assault to the university’s Title IX coordinator. This report must be made even if it is against the wishes of the student who discloses that she or he was the victim of the assault.

Having this widespread allocation of employees as mandatory reporters harms survivors of sexual assault. An institution that anoints nearly all employees, including non-supervisory faculty members, as mandatory reporters risks driving down student desire to disclose assault. This in turn prevents student survivors from getting the support they need in order to have equal education opportunities regardless of sex, which is the core purpose of Title IX. Therefore, having widespread mandatory reporting may itself be a violation of Title IX.

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The U.S. Department of Education (DOE) issued its new regulations\(^3\) to govern the handling of campus sexual assault\(^4\) under Title IX of the 1972 Education Act\(^5\) approximately 18 months after the proposed regulations were released. When initially proposed in November 2018,\(^6\) the regulations received much media attention and over 124,000 official comments were submitted to the department.\(^7\) The proposed regulations came about a year after DOE’s Office of Civil Rights (OCR) rescinded several of its guidance documents that had been intended to assist institutions of higher learning in appropriately handling allegations of sexual assault.\(^8\)

These new regulations are the latest pronouncements in the approximately 20 years of applying Title IX to allegations of sexual assault on college campus.\(^9\) The

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3. Id.

4. Id. at 30033 n.57 ("The final regulations define sexual harassment in § 106.30 as follows: Sexual harassment means conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or (3) ‘Sexual assault’ as defined in 20 U.S.C. 1092(f)(6)(A)(i), ‘dating violence’ as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. 12291(a)(30).")


7. As of October 3, 2019, there were 124,149 public comments. See generally REGULATIONS.GOV, supra note 6.


9. See Davis ex rel. LaShonda D. v. Monroe Cty, Bd. of Educ., 526 U. S. 629, 639–41 (1999) ("This Court has indeed recognized an implied private right of action under Title IX, Canon v. University of Chicago, [441 U.S. 677, 691 (1979)], and we have held that money damages are available in such suits.") (citing Franklin v. Gwinnett Cty., Pub. Sch., 503 U.S. 60 (1992)). See also U.S. DEPT OF EDUC., OFFICE FOR CIV. RTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (2001), https://www2.ed.gov/about/offices
regulations have been both criticized and praised.\(^{10}\) Much of the controversy has been about procedural matters such as burden of proof and mandatory live hearings with cross-examination.\(^{11}\) Other controversies include substantive matters such as how sexual misconduct is defined, the physical scope of Title IX protections, e.g., off-campus housing or overseas programs, and what triggers a university’s Title IX’s investigative obligation.

An issue receiving less publicized scrutiny—under the old regime and in the conversation about the new regulations—is the determination of who has an obligation to report an allegation of sexual assault to the institution’s Title IX coordinator or designee, who then may have an obligation to begin a Title IX investigation.\(^{12}\) Mandated reporters, called “responsible employees”\(^{13}\) in OCR regulations and guidance, have been increasingly defined to include more and more university employees.\(^{14}\) These “responsible employees” were mandated to report a disclosure of sexual assault irrespective of whether the student disclosing the assault wanted it to be officially reported. As employees encompassed by the phrase


\(\text{https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf} \text{[https://perma.cc/UL6Q-WQPJ]; U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, Q&A ON TITLE IX AND SEXUAL VIOLENCE (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf} \text{[https://perma.cc/QZB3-CWFY]; Jackson, supra note 8.} \)


11. Often the debate circles around the issue—acknowledged or not—of how much a Title IX investigation should resemble a criminal proceeding. \textit{See generally} Margaret Drew, It’s Not Complicated: Containing Criminal Law’s Influence on the Title IX Process, 6 TENN. J. OF RACE, GENDER, & SOC. JUST. 191 (2017).

12. Title IX coordinator is a term first seen in 2001. \textit{See} OCR’s 2001 Guidance, supra note 9, at 13. \textit{See also} Jacquelyn D. Wiersma-Mosley & James DiLoreto, The Role of Title IX Coordinators on College and University Campuses, 8 BEHAV. SCI. 38 (2018) (“Originally established for the first time within OCR’s 2001 guidance document and again within the 2011 DCL, campuses must appoint a specific Title IX coordinator with the primary responsibility of coordinating campus compliance with Title IX, including grievance procedures for resolving Title IX complaints.”).

13. The term responsible employee was found first in OCR’s 2001 guidance policy and was defined as: “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility,” OCR’s 2001 Guidance, supra note 9, at 13.

14. Examples include: Faculty and Resident Assistants. \textit{See} Reporting Expectations and Requirements, MICHIGAN TECH, https://www.mtu.edu/title-ix/policy/responsible-employees/ \textit{[https://perma.cc/M3WD-F5VU]} \textit{(stating responsible employees include “resident assistants (RAs), [and] orientation team leaders (OTLs)”; FAQS Regarding Title IX Best Practices and Compliance, MARQUETTE U., \textit{https://www.marquette.edu/sexual-misconduct/title-ix-faq.php} \textit{[https://perma.cc/T252-FDT8]}} (“Examples of University employees who have a duty to report include . . . faculty, adjunct faculty, staff, residence hall directors, [and] resident assistants. . . .”); Mandatory Reporters (Responsible Employees), U. OF TEX. AT AUSTIN, https://titleix.utexas.edu/mandatory-reporters \textit{[https://perma.cc/BD75-Q4YU]} \textit{(stating responsible employees include faculty members and resident assistants); Office of Title IX Compliance: Information for Responsible Employees, APPALACHIAN ST. U., https://titleix.appstate.edu/responsible-employees \textit{[https://perma.cc/8WWJ-VY6E]} \textit{(stating responsible employees include faculty and residence life staff).} \)
“responsible employees” grew larger over time so, too, grew concern over the consequences of having so many mandatory reporters.

Although sexual assault survivor groups, legal scholars, and social scientists have written about the harms of mandatory reporting, these harms have yet to be widely understood or acknowledged. Accordingly, this article will demonstrate both how the dramatic expansion of university employees who are deemed responsible employees/mandatory reporters, even if well-intended, harms survivor and how it impedes the appropriate implementation of Title IX as a means to combat educational inequity based on sex. First, the article examines the harms wrought by mandatory reporting, especially if done against the wishes of the survivor. Next, the article considers how insights drawn from the #MeToo Movement shed light on the value and harms of mandated reporting. The article then reviews the history of Title IX policy and assesses the effect of the new Title IX regulations on the responsible employee/mandatory reporter debate.

In its next section, the article analyzes recent proposed and enacted state laws that require institutions of higher education to report allegations of sexual assault to local law enforcement. In some cases, if adopted as proposed, these laws would elevate the impact of mandatory reporting beyond what has long been deemed required under Title IX. The article then highlights institutions of higher education that have resisted the sirens’ call of universality of mandatory reporters and have chosen instead a more nuanced and appropriate approach. Thereafter, the article considers the comprehensive draft of the American Law Institute on the question of proper procedural frameworks for Title IX reporting. In conclusion, the article

18. The #MeToo Movement, in many ways, centers on sexual assault/harassment survivors who do not initially report and then, at some later point, often much later, decide to disclose. Since a key concern with mandated reporting is that survivors will not seek help if they know their disclosure will be reported to others even if they oppose such action, seeking to understand this phenomenon seems critical: the goal is to assist not harm survivors. See also Lena Felton, How Colleges Foretold the #MeToo Movement, THE ATLANTIC (Jan. 17, 2018), https://www.theatlantic.com/education/archive/2018/01/how-colleges-foretold-the-meto movement/550613/ [https://perma.cc/845H-M78A].
19. See e.g., VA CODE ANN. § 23.1-806 (2015). See also infra Part IV for a discussion of state laws linking sexual assault disclosures in a university setting with an option or mandate of referrals to a local (and non-campus) law enforcement agency. The following states have introduced legislation requiring IHE to make referrals to local law enforcement: Texas, Georgia, Maryland, New Jersey, Oklahoma, Rhode Island, California, New York, and Virginia. Brodsky, supra note 16, at 139 n. 46-47.
21. The University of Oregon is one example. It adopted a policy, effective in September 2017, in which it instituted three categories of reporters. See infra Part III.
22. The American Law Institute’s forthcoming publication is expected to consist of eleven chapters, which discuss procedural frameworks for colleges and universities. See Principles of the Law: Student
argues that a move toward a narrower class of mandatory reporters will facilitate the goals of Title IX.23

II. BROADLY INCLUSIVE MANDATORY REPORTING24 IS HARMFUL AND IMPEDES THE PURPOSE OF TITLE IX

A. Introduction

Sexual assault on college campuses is both prevalent and under-reported.25 Although the statistics vary, by virtually any measure it happens with some frequency and often remains unreported.26 Further, in all-too-recent history, reported allegations of campus sexual assault were essentially ignored.27 Sexual assault can have an impact on a survivor that ripples throughout all aspects of that person’s life, education included.28 A combination of these three factors—prevalence, underreporting, and impact—led many to argue, often from the best of intentions, for a wide-spread requirement for mandatory reporting on college campuses. After all, if an assault does not get reported, the argument goes, then the survivor cannot get support, the perpetrator is not held accountable, and other parties are potentially at risk.29 Moreover, in the Title IX context, a report that finds its way to an institution’s Title IX coordinator may be the start of a formal grievance process


23. Although at first glance this might seem counter-intuitive as increasing the reporting of sexual assault has been sought for a long time, this article will demonstrate that mandatory reporting against a survivor’s wishes is not a desirable outcome.

24. Reporting and disclosure are terms that can be used imprecisely and interchangeably, but they are different. See infra Part II. B. for discussion. In this section, the word reporting generally means when a college employee reports to the Title IX coordinator or designee a disclosure of sexual assault that has been made to that employee.


that enables a school to ensure that the survivor is not deprived of educational opportunities on the basis of sex. Thus, many colleges and universities have decided that nearly all of their employees are mandatory reporters. In one study, Drs. Holland, Cortina, and Freyd found that 69% of institutions surveyed designated their entire work staff as mandatory reporters. Nineteen percent classified most employees that way and only four percent designated few employees in that manner.

Facially, reporting may seem like a social good on many levels. Nonetheless, survivors often choose not to report to authorities who can take action. If a survivor won’t make an official report, the argument continues, an employee to whom they disclose, even informally, should have to report to the Title IX coordinator so that the corrective process can commence. This course of action may be based in part on a misunderstanding of trauma-informed theory, namely that a survivor’s unwillingness to lodge an official complaint is one of the effects of the trauma and, while understandable, such a hesitancy can be overridden in the name of justice, healing, and safety.

But such a belief is misguided. Overriding a survivor’s choice is not, in fact, therapeutic. Trauma-informed experts explain that trauma informed Care (TIC) “recognizes that . . . interventions (especially those that are mandated) can be disempowering and oppressive, which can replicate traumagenic . . . conditions; TIC proactively seeks to avoid retraumatization in the service delivery setting.” And as those working with domestic violence survivors know, a core principle of TIC is to restore the survivor’s choice and control.

Whatever the benefits of trauma-informed theory, a trauma-informed process should, at a minimum, not inflict more trauma. One consequence of sexual assault is the feeling—and reality—of loss of control over one’s body and one’s self.

31. Holland et al., supra note 29, at 259 (identifying the following four assumptions as policies that are effectuated by broadly defined mandatory reporting requirements: (1) uncovering more sexual violence; (2) benefitting survivors; (3) benefitting employees; and (4) benefitting the institution).
32. Id.
33. Id. Another 8% of schools designate fewer than all but had definitions too ambiguous to define further.
34. See infra Part II. E. for a discussion.
35. Christina Maneini, Justin T. Pickett, Corey Call & Sean Patrick Roche, Mandatory Reporting (MR) in Higher Education: College Students’ Perceptions of Laws Designed to Reduce Campus Sexual Assault, 4 CRIM. JUST. REV. 219, 220 (2016).
39. Id. at 588.
Overriding a choice not to report underscores and exacerbates that loss of control. Thus, it undermines the healing process.\textsuperscript{40}

Trauma induced aside, most survivors at the university level are adults. Thus, autonomy principles dictate that the survivor controls whether, when, and to whom disclosure or reports are made. Otherwise, survivors are faced with a Hobson’s choice: disclose and risk undesired reporting or don’t disclose and forgo being connected to options for support and healing.

B. Disclosure and Reporting

“You will learn that no one is entitled to your story. You can tell it or not tell it.

People who are trying to build a philosophical argument are not entitled to your story. People who say ignorant things on the internet are not entitled to your story. People who are trying to write a novel about sexual trauma—because it’s, like, so fascinating, and maybe could you give some notes—are not entitled to your story. People who do not care about your personal or emotional safety are not entitled to your story.

Your story is yours. And you get to decide how to tell it.\textsuperscript{41}

Disclosure and reporting of sexual assault are two different, albeit related, concepts. Reporting, which can be formal or informal, involves telling someone in a position to take action and/or provide support and resources to the survivor.\textsuperscript{42} Telling an institutional employee could activate one or both of the above responses. Title IX requires that an institution provide clear notice about which employees have mandatory reporting obligations.\textsuperscript{43}

Disclosure, on the other hand, may be as “simple” as telling someone about the event. Disclosure most commonly occurs to a trusted person, such as a friend, relative, or mentor. Survivors generally choose this option over an official report. Sometimes, however, a disclosure may help create the conditions that will lead a survivor who is not initially inclined to making a formal report to decide to report.

Disclosure and reporting can each have negative and positive results.\textsuperscript{44} The tenor of the results of either action will often be dictated by the response of the person

\textsuperscript{40} Holland et al., \textit{supra} note 29, at 261. Even in the presence of conflicting results, there are many studies that demonstrate that reporting against a survivor’s wishes can increase depression and anxiety.


\textsuperscript{43} 34 C.F.R. § 106.8(a) (2019).

\textsuperscript{44} Courtney E. Ahrens, Janna Stansell & Amy Jennings, \textit{To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors’ Recovery}, \textit{25 VIOLENCE & VICTIMS} 631, 633 (2010).
told and the sensitivity and efficacy of any process that follows. If the reaction is appropriate and helpful, it may result in providing resources and support to the survivor.

Many survivors of sexual assault may desire to disclose confidentially. The reasons for this are as numerous as they are logical. In addition to physical injury and trauma, sexual assault is humiliating. It may lead the survivor to blame herself. Social and cultural reactions heavily contribute to this. Some intractable rape myths include notions such as she deserved it, she liked it, she was dressed provocatively, she was drunk, it wasn’t really rape, it was consensual, it was a false report, only strangers rape, all rape is violent, only straight women can be raped, it couldn’t have happen because men can’t be raped. Studies of the rape myth suggests that persons holding these beliefs are likely to engage in victim/survivor blaming. The survivor is not immune from holding those beliefs. She may be asking herself what happened or did it really happen? She may ponder what she did to encourage, cause, or deserve it.

Beyond the harm inflicted by persistent rape myths, survivors may be subject to threats and retaliation. These realities can shape a person’s decision on whether to make an official report. Further, survivors may rightly fear that they will lose control of the process if they make an official report. As a volunteer at a sexual assault/harassment support event observed: “The survivor is stripped of their power

49. Id.
51. The impact of trauma affects the memory in ways that may lead to someone thinking the discloser is lying because she doesn’t remember the details. See NATIONAL SEXUAL VIOLENCE RESOURCE CENTER, FALSE REPORTING: OVERVIEW (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf [https://perma.cc/VV5Z-3YGR].
and control, and one of the only aspects that remains in their control is if, how, when, and to whom to share their story.\textsuperscript{54}

Survivors may also suspect that the process will be unfair.\textsuperscript{55} Or some survivors may simply wish to be able to continue their education free from fear of further assault, retribution, or vilification. This should be possible—it is, after all, the raison d’etre of Title IX: educational access free from sex-based harm.\textsuperscript{56} Often it may be that disclosing but not reporting will achieve this goal.\textsuperscript{57} And mandatory reporting, with its possibility of discouraging disclosure, impedes this goal. In short, if one of the goals is to increase the number of official reports, finding ways to encourage more and more effective disclosure is an important way to help achieve that goal.\textsuperscript{58}

Fortunately, there are new and better ways to disclose. One key improvement is simple if not easy: resist the trend to make all employees mandatory reporters under Title IX.\textsuperscript{59} However, even as the term “responsible employee” is scrubbed from Title IX regulations, universities will still need to determine which of their employees are obliged to report a campus sexual assault disclosed to them.\textsuperscript{60} If universities continue to believe that having more mandatory reporters conveys their commitment to dealing with sexual assault, they must be disabused of that belief.

It is true that the road to increasing mandatory reporters on campus was not straight; this journey is discussed in detail in section IV. Although it may take some time to undo, now is the critical time to take action. Realizing that there is harm, not


\textsuperscript{55} Much of the current debate regarding Title IX focuses on the perceived unfairness to the accused. Press Release, Betsy DeVos, U.S. Sec’y of Educ., Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students (May 6, 2020), https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students [https://perma.cc/6HEH-9CVY]. The new Title IX regulations expressly focus on fixing what some argued was a due process deficit for the accused. However, many survivors also perceived that the process that ensued from their report of campus sexual assault—or sometimes the lack of a process ensuing—was unfair and biased against them. See Laura Garcia, “Enough Is Enough”: Examining Due Process In Campus Sexual Assault Disciplinary Proceedings Under New York Education Law Article 129-B, 69 RUTGERS U. L. REV. 1697, 1702–06 (2017); Drew Barnhart, The Office Of Civil Rights’ Failing Grade: In The Absence Of Adequate Title IX Training, Biased Hearing Panels and Title IX Coordinators Have Harmed Both Accusers and Accused In Campus Sexual Assault Investigations, 85 UMKC L. REV. 981, 982–84 (2017); Emily D. Salko, Are Campus Sexual Assault Tribunals Fair?: The Need For Judicial Review and Additional Due Process Protections In Light of New Case Law, 84 FORDHAM L. REV. 2289, 2322–25 (2016).

\textsuperscript{56} See infra Part II.D. for a discussion of how widespread mandatory reporting requirements can inhibit disclosure.

\textsuperscript{57} See supra Part XI.B & C for discussion of schools who have bucked the ubiquitous mandatory reporter trend.


\textsuperscript{59} See infra Part IV for a discussion of the new Title IX regulations.
benefit, in having all or nearly all employees be mandatory reporters is critical in this moment for at least two reasons. First, it is clear that Title IX does not require it. Second, the new methods of reporting offer to many survivors a preferable way to proceed.

These new efforts include more nuanced reporting processes. One such process is Callisto.\(^61\) Callisto is a sexual assault reporting on-line platform founded in 2015 by Jessica Lane, an epidemiologist and survivor of college sexual assault. It describes its vision and mission as follows: “Our vision is a world where sexual assault is rare and survivors are supported. Our mission is to create technology that combats sexual assault, supports survivors, and advances justice.”\(^62\) One student leader at a school that has adopted Callisto noted that the desire to report online may be a “generational change.”\(^63\) Today’s college students are, after all, of the generation that often use texts and emails for unpleasant topics.\(^64\)

Significantly, Callisto allows on-line anonymous reporting that automatically links survivors and law enforcement if a sexual assault perpetrator is identified more than once.\(^65\) This linkage is important as it is estimated that up to 90% of campus sexual assaults are committed by repeat offenders.\(^66\)

Another newer reporting program is “You Have Options.” You Have Options is a law-enforcement based program that gives the survivor a range of options, thus allowing the survivor to remain in control of the process.\(^67\) You Have Options is a victim-centric model; the reporting options available to a survivor are:

1. **Information Only Report:** Any report of sexual assault where, at the reporting party’s request, no investigative process beyond a victim interview and/or a complete or partial Inquiry into Serial Sexual Assault (ISSA) is completed.

2. **Partial Investigation:** Any report of sexual assault where some investigative processes beyond the victim interview and a complete or partial Inquiry into Serial Sexual Assault (ISSA) have been initiated by law enforcement. This may include, but is not

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62. Id.
63. Najmabadi, supra note 58.
64. Id. Student embrace of this on-line platform is evidenced in a student Title IX advisory group’s dismay with its institution’s choice not to adopt Callisto. Emilie Cochran, UW Denies Implementation of Callisto Sexual Assault Reporting Services, Students Demand Answers, BADGER HERALD (Mar. 27, 2019), https://badgerherald.com/news/2019/03/27/uw-denies-implementation-of-callisto-sexual-assault-reporting-services-students-demand-answers/ [https://perma.cc/F622-MHFR].
66. This number has varied but there is no doubting that the vast majority of sexual assaults are committed by those who have done it more than once. See John D. Foubert, Angela Clark Taylor, & Andrew F. Wall, Is Campus Rape Primarily a Serial or One-Time Problem? Evidence From a Multicampus Study, VIOLENCE AGAINST WOMEN Mar. 2019, at 9.
limited to, interviewing of witnesses and collection of evidence such as a sexual assault forensic examination (SAFE) kit.

3. Complete Investigation: Any report of sexual assault where all investigative procedures necessary to determine if probable cause exists for a criminal sexual assault offense have been initiated and completed. 68

So far, only a small number of schools have adopted alternative reporting programs. Approximately a dozen schools use Callisto 69 and two campus law enforcement programs employ You Have Options. 70 Perhaps schools will feel freer to adopt procedures that permit more leeway in disclosing now that Title IX does not focus on a broad category of mandatory reporters. Also, DOE, in its 2017 Interim Guidelines stated that the Resolution Agreements between OCR and individual schools remain in place but no longer have precedential value. 71 Hence, the University of Montana Resolution Agreement, with its naming of all employees as responsible employees/mandatory reporters no longer has “blueprint” status. Thus, to the extent schools believed that all or nearly all of their employees needed to be classified as “responsible employees” in order to steer clear of OCR Title IX trouble, that fear can now abate.

C. Personal Autonomy

There are other reasons to reject the facile non-solution of ubiquitous mandatory reporting. Prior to its extensive use in Title IX matters, mandatory reporting had been commonly required in situations where there were allegations of harm towards a minor or an otherwise impaired person. 72

Competent adults enjoy the legal right of autonomy. 73 While there may be times to override a competent adult’s decision, that should be the exception, not the norm. Making a decision that others do not agree with or believe not to be in the best interests of the decision-maker is not a basis on which to deprive persons of their personal autonomy. 74 College students are (nearly always) adults. Therefore, college

70. YOU HAVE OPTIONS PROGRAM, https://www.reportingoptions.org/directory [https://perma.cc/Y8P6-LKMF].
71. U.S. DEP’T. OF EDUC., OFFICE FOR CIVIL RIGHTS, Q & A ON CAMPUS SEXUAL MISCONDUCT at 7 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/E83N-TV5A]. See also infra p. 29 for further discussion of Resolution Agreements.
73. See generally, Justine A. Dunlap, Mental Health Advance Directives: Having One’s Say?, 89 KY. L. J. 327 (2000).
74. Id. at 386.
student survivors of sexual assault should be afforded their right to decide whether and when to make an official report, with all its attendant consequences.

This right to choose, e.g., the right to be in control of the process or in control of whether there is even a process in the first instance is even more important under Title IX, with its civil rights focus. As Professor Merle Weiner has said: “survivors’ needs should be given significant weight. After all, Title IX is meant to serve them.”

Also, there are the autonomy interests of the mandated reporter. Although certainly secondary to the interests of the person disclosing, the reporter’s interests are a legitimate focus. That is especially true if the reporter is someone who has relationship with the person disclosing. Indeed, it may be because of that relationship that a survivor has chosen to disclose.

D. Survivor Healing Includes Survivor Empowerment

Disclosure is important to survivor healing. For disclosure to serve effectively as part of the healing process, a supportive response to the disclosure is imperative. A negative response, such as victim-blaming or diversion from the story, aggravates the situation and adds to the trauma. However, healing is about more than disclosure and a supportive response thereto. Dr. Judith Herman, in her seminal book *Trauma and Recovery*, states that:

The first principle of recovery is the empowerment of the survivor. . . . Many benevolent and well-intentioned attempts to assist the survivor founder because this fundamental principle of empowerment is not observed. No intervention that takes power away from the survivor can possibly foster her recovery, no matter how much it appears to be in her immediate best interest.

Herman’s words are geared largely to therapists as they seek to help trauma survivors, including survivors of sexual assault. But the principle is equally apt to situations of sexual assault in a higher education setting. As is known beyond quibble, sexual assault is at its core the loss of control over one’s self. And in the words of Herman over 25 years ago, the “principle of restoring control to the traumatized person has been widely recognized.”

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75. Title IX is intended to safeguard equity in higher education and to protect against discrimination based on sex. See *Davis ex rel. LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 638 (1999). Sexual misconduct has long been held to be a form of sex discrimination for the purpose of activating Title IX. *Id.* at 639.


79. *Id.* at 133.


81. HERMAN, *supra* note 78, at 134.
For a survivor to choose to disclose but not report a sexual assault only to have the disclosure reported against that survivor’s wishes violates both autonomy and control. If the reporting is to a person in an official capacity who has an institutional obligation to commence a grievance process, that constitutes further loss of control. To exacerbate the situation even more, it is a loss of control directly caused by those who are supposed to be institutional helpers. It is the antithesis of promoting healing in the survivor.

Moreover, forced reporting against a survivor’s wishes is contrary to the purpose and intent of Title IX. As a civil rights statute, Title IX is to be used to help the student survivor receive equitable educational opportunities. To force reporting and thus to prolong or reintroduce the lack of survivor autonomy is likely to impede a survivor’s ability to access educational service on the basis of her sex. This itself should be deemed a breach of Title IX.

III. THE #METOO IMPACT

“IT STARTS WHEN YOU say it in words, that first push of bravery. The shock of hearing yourself tell another human: I was raped.

Sometimes that silence takes years to break. Sometimes forever.

You are a survivor now. Things are going to change—you must accept that you have entered a process of transformation. It’s going to take time but if you keep doing the work, you will get through it. I guarantee it.

Eventually you realize that you are not alone. From #MeToo to All Of Us. Our individual stories add up to a great big society in need of serious healing and transformation.”

Salma Hayek, Rachael Denhollander, and Christine Blasey Ford

Over the past several years, high profile cases have shifted the sexual assault conversation into a more open space. As one lawyer and Title IX investigator said:

82. Not all institutions require their Title IX coordinators to commence a grievance process, but it is the coordinator, not the survivor, who makes this determination. Therefore, survivor control remains lacking.

83. See Brodsky, supra note 16, at 132.


86. Salma Hayek is one of the scores of women who have accused Harvey Weinstein. Sara Montuoke & Cara Kelly, Harvey Weinstein Scandal: A Complete List of the 87 Accusers, USA TODAY (Oct. 27, 2017, 11:27 AM), https://www.usa-today.com/story/life/people/2017/10/27/weinstein-scandal-complete-list-accusers/804663001/ [https://perma.cc/MAR4-VNFR]. Rachael Denhollander was a survivor of Larry Nassar. Rachael Denhollander Shares Impact of Larry Nassar Abuse in New Memoir,
“One sign of progress is that we’re talking more openly about these things and not just through the ‘whisper network’...”

In October 2017, the media published accounts of accusations of sexual assault against Harvey Weinstein. In the wake of this, Alyssa Milano added a # to the MeToo Movement that was founded in 2007 by Tarana Burke. Millions of women responded. This grassroots movement helped underscore the ubiquity of sexual harassment and sexual assault. But on most college campuses, this was already known yet largely unacknowledged. In part due to Campus Climate Surveys, institutions of higher learning were aware of the wide-spread nature of sexual assault. What had been known, if not addressed adequately, on college campuses was now being made known elsewhere and everywhere. #MeToo appeared also to resonate on college campuses, as reports of sexual assault there rose during this time. At Harvard, for instance, reports were up 20%.


Fateful, supra note 18.

sentenced to up to 175 years in jail. The sentencing occurred after 156 women spoke of their experience of his abuse. Prior to sentencing, Nassar wrote a letter to the judge stating: “Hell hath no fury like a woman scorned.” It seems likely that this comment contributed to the judge saying to Nassar at sentencing: “You don’t get it.”

Nine months later, Christine Blasey Ford came forward with accusations of sexual assault against then-nominee to the U.S. Supreme Court, Brett Kavanaugh. After they both testified before the Senate judiciary committee, he was confirmed. He now sits as an associate justice on the Supreme Court; Blasey Ford, on the other hand, received death threats and had to hire security details for her family’s safety.

But people still wonder why there is a hesitancy to disclose.

The point of examining the #MeToo movement and ancillary events here is to mine what they reveal about the challenge of disclosure and the pervasiveness of sexual misconduct. Even prior to the attention-grabbing #MeToo Movement, it was well-established that sexual assault on college campuses was rampant and under-addressed. #MeToo served to personalize some of the trauma. The allegations against Harvey Weinstein or Brett Kavanaugh highlighted the truth that survivors delay disclosure or only disclosed informally rather than to official actors. But these high-profile situations, one can hope, help demonstrate the difficulties and perils of disclosure. They help explain—at least to those who are willing to hear—that disclosure is not such a binary choice.

Indeed, disclosing is hard and often yields poor results. Just ask the survivors of Larry Nassar’s assaults. Many disclosed over many years. For those who chose to disclose, the results of that disclosure were disheartening. For example,
Larissa Boyce, a former member of Michigan State University’s junior gymnastic team, reported Nassar in 1997.\(^{104}\) He was finally sentenced in 2018; that math is not encouraging to a survivor deciding whether to disclose.

Disclosing is hard; that difficulty is amplified when the accused has power over the accuser’s situation or career or employment or advancement in some life sphere.\(^{105}\) The difficulty is further amplified when that person can threaten consequences that he or she is quite capable of executing. Just ask the Harvey Weinstein accusers. Many stayed silent out of fear.\(^{106}\)

Disclosing is hard; that difficulty is amplified when the person accused is a high-profile “model-citizen.” Just ask Christine Blasey Ford. Her accusations against then-federal circuit judge Kavanaugh either were not believed or deemed insignificant or irrelevant to the process of picking a Supreme Court justice. Disclosing is hard even for established professionals who might, in other circumstances, come supercharged with credibility.\(^{107}\) Now try to imagine how hard it would be for a college freshman.

With this seeming flurry of accusations and MeToo responders, some numbers about the incidence of false reports may prove instructive. First, for college campuses, one early study found that less than five percent of sexual assaults were reported.\(^{108}\) Although the number may have increased incrementally in the last generation, still about 90% of sexual assaults do not get reported.\(^{109}\) So of the


\(^{105}\) Harvey Weinstein is alleged to have threatened his victims with never again getting work. See Molly Redden, *You'll Never Work Again*: Women Tell How Sexual Harassment Broke Their Careers, GUARDIAN (Nov. 21, 2017, 7:07 AM), https://www.theguardian.com/world/2017/nov/21/women-sexual-harassment-work-careers-harvey-weinstein [https://perma.cc/S64B-CEB6].


\(^{107}\) For example, Christine Blasey Ford is a professor at Palo Alto University and Stanford University PsyD Consortium. She received her undergraduate degree from the University of North Carolina at Chapel Hill, and went on to receive graduate degrees from Pepperdine University, University of Southern California, and Stanford. Additionally, she holds a Ph.D. in Educational Psychology: Research Design. Ali Rogan, *Who is Christine Blasey Ford?*, ABCNEWS (Sept. 27, 2018, 4:01 AM), https://abcnews.go.com/Politics/christine-blasey-ford/story?id=57989558 [https://perma.cc/A52U-WGY2].


approximately 5-10% that are reported, it has been estimated that false reports occur between 2-10% of the time.\textsuperscript{110} However, this number may itself be inflated due to misunderstanding what constitutes a false report.\textsuperscript{111} A report that lacks evidence to arrest, prosecute, or otherwise go forward is not a false report.\textsuperscript{112} A report that is delayed is not a false report.\textsuperscript{113} So the 2-10% false report figure, when properly viewed as a small percentage of the small percentage of reported sexual assault, is actually less than .5%.\textsuperscript{114}

Also in the fall of 2017, as Weinstein accusations and #MeToo tweets were accelerating, the Department of Education rescinded “Obama-era” Title IX guidance and issued its own Interim Guidance. It announced plans to promulgate new Title IX regulations. Although expected, this led to concern being raised by some and calls of “it’s about time” by others. To be sure, prior Title IX procedures, particularly those from 2011 and 2014, had been subject to their own outcry. For instance, after the 2014 guidance was issued, 28 Harvard Law Professors wrote an op-ed in the Boston Globe objecting to the guidance and suggesting gross violations of due process.\textsuperscript{115} But this new step, tinged too with a highly controversial Secretary of Education and a President accused of multiple sexual assaults and having been taped saying he could commit sexual assault with impunity,\textsuperscript{116} added in its own way to the public attention being paid to the issue of sexual assault.

\section*{IV. THE MANDATORY REPORTING JUGGERNAUT}

\subsection*{A. Introduction}

Since its enactment in 1972, Title IX has provided that “[n]o person . . . 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.”\textsuperscript{117} In its early days, Title IX was often used as a way to equalize opportunities and expenditures for women’s sports, at both the high school and post-secondary level.\textsuperscript{118} In the 20–30 years following Title IX’s

\begin{itemize}
\item \textsuperscript{110} See Katie Heaney, Almost No One is Falsely Accused of Rape, THE CUT (Oct. 5, 2018), https://www.thecut.com/article/false-rape-accusations.html [https://perma.cc/4X2C-BXCV].
\item \textsuperscript{111} Id.
\item \textsuperscript{112} Id.
\item \textsuperscript{113} Id.
\item \textsuperscript{114} Id.
\item \textsuperscript{117} 20 U.S.C. § 1681(a). There are some institutional exceptions including, e.g., some religious institutions, same-sex schools, and military service academies. Id. § 1681 (a)(3), (6).
\item \textsuperscript{118} See R. Shep Melnick, The Strange Evolution of Title IX, NAT’L AFFS., (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/9MU5-DZSJ] (“Title IX initially focused on what happens in the classroom. That focus soon shifted to the playing field, then shifted again to bedrooms and bathrooms.”).
\end{itemize}
passage, however, the law was interpreted to include sexual harassment and other misconduct as behaviors that ran afoul of federal statutes such as Title IX and Title VII.119 During this period, courts were also determining that gender discrimination was not only a violation of federal statutes but also violated constitutional rights.120

In construing Title IX, the U.S. Supreme Court found, in Franklin v. Gwinnett County Schools, that when a school district was aware of teacher-to-student sexual harassment, it could be held liable.121 Seven years later, in Davis ex rel. LaShonda D. v. Monroe County Board of Education, the Court extended that principle to cover student-on-student harassment.122 The standard set in Davis for civil liability, however, was fairly narrow. First, a school district’s actions in dealing with peer harassment were entitled to deference.123 Second, those actions would absolve a district from liability provided that the actions were not “clearly unreasonable” when taking into account what the district knew at the time.124

The Davis case limited civil liability to situations in which a school district or institution actually knew of the harassment. However, two years later and under a Republican Administration, the DOE’s Office of Civil Rights issued a 2001 Guidance document.125 This guidance, which went through a public notice and comment process but not official rulemaking,126 provided that, for agency enforcement actions, the standard would be whether a school “knew or should have known” about the alleged harassment.127 The 2001 Guidance document also used the phrase “responsible employee” for the first time.128 If an institution’s responsible employee knew or should have known of the harassment, then an institution’s federal funding could be in jeopardy.129

Requiring that a wide swath of university employees be responsible employees, a.k.a. mandatory reporters, seems to be grounded in several factors. First, there was the phenomenon that, for years, universities conducted virtually no investigations of sexual assaults alleged to have occurred on their campuses. Accordingly, schools were combatting years of non-action.

Second, there was more than a decade of often unclear interpretive guidance from the Office of Civil Rights within the U.S. Department of Education, the administrative body charged with enforcing Title IX. This left schools uncertain as

119. In Mentor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986), the U.S. Supreme Court held that sexual harassment in the workplace could violate Title VII.
120. ON THE BASIS OF SEX (Focus Features 2018). This movie depicts Ruth Bader Ginsburg, Associate Justice of the U.S. Supreme Court, and her efforts to gain constitutional protection for gender equality. See id.
123. See id. at 648 (“[C]ourts should refrain from second-guessing the disciplinary decisions made by school administrators.”) (citation omitted).
124. Id.
125. OCR’s 2001 Guidance, supra note 9.
126. OCR’s 2001 Guidance, supra note 9, at 13.
127. Id. at 12–13. This standard has changed under the new regulations, which have reinstituted the Davis standard of actual knowledge. See id.
128. Id. at 13.
129. Id. at 15.
to who should report. Schools thus adopted definitions and policies that were perceived as being viewed favorable by OCR. Finally, operating alongside these drivers was mounting social attention to the widespread issue of campus sexual assault.

In sum, the following factors coalesced: (1) greater knowledge that campus sexual assault was a large and largely unaddressed problem; (2) a turn in societal values and gender-equity advocacy that created a demand to address the problem of sexual assault, both on campus and in intimate relationships; (3) a federal law that had been recently interpreted to create a civil rights remedy to the problem; (4) a federal agency that, across multiple presidential administrations, increased its enforcement of the civil rights remedy and, in so doing, gave guidance that could be interpreted in a variety of ways; and (5) a new and growing fear on the part of universities and their risk managers that they could be held liable for failing to address the issue of sexual assault specifically and sexual misconduct more generally. This combination of factors led, perhaps inexorably, to an overapplication of the principle of mandatory reporting.

As mandatory reporting became ubiquitous, concern increased that it was a harmful over-correction, the efficacy of which was in doubt. Concerns raised included: (1) a view that federal law and/or policy did not require widespread mandatory reporting; (2) identifying the multiple ways in which mandatory reporting actively harms survivors; and (3) an understanding that there are better ways to protect survivors while also being in compliance with Title IX.

These concerns were raised by many groups across multiple constituencies. First and foremost, survivor groups generally oppose a widespread definition of mandatory reporters. One of the contemporary tropes is that survivors should be

131. An indirectly related phenomenon that occurred two decades before was the increased use of non-discretionary practices in intimate partner violence cases, such as mandatory arrest and mandatory or “no-drop” prosecution. In both situations, survivors—usually women—were not to be trusted to make the “right” choice. Justine A. Dunlap, Soft Misogyny: The Subtle Perversion of Domestic Violence Reform, 46 SETON HALL L. REV. 775, 797 (2016).
132. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, 6-8 (2014).
133. See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 643 (1999) (“We consider here whether the misconduct identified in Gebser—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does.”).
134. See supra Part II for a detailed discussion of the positive and negative consequences of mandated reporting. See infra Part VI for a discussion of possible solutions to the issues surrounding mandatory reporting.
135. See Brodsky, supra note 16, at 143–45, 143 n.83. See generally Tyler Kingkade, 28 Groups that Work with Rape Victims Think the Safe Campus Act is Terrible, HUFFPOST (Sept. 17, 2015), https://www.huffpost.com/entry/rape-victims-safe-campus-act_n_55f300ce4b063ecbfa4150b [https://perma.cc/1V9C-8671].
told that they are believed.  Whether one accepts that, survivors—or any other group especially affected by an issue—should be listened to very carefully when they speak of and from their experience. It is a perspective that non-survivors do not have and it deserves to be heard. If survivors are largely against mandatory reporting, that should be heard particularly. In addition to survivor groups, medical associations have opposed reporting assault when the survivor has requested confidentiality.

Also, legal scholars such as the American Law Institute have studied the issue and drafted language that opposes wide-spread universal mandatory reporting.

B. The Title IX “Responsible Employee” Narrative—DOE/OCR Guidance Then and Now

A tortuous road has led to many universities requiring that most if not all of their employees must report any disclosure of sexual assault to the school’s Title IX officer or his or her designee. The root of mandatory reporting is grounded in the term “responsible employee.” This term, which appeared only once in a heading in the old Title IX regulations, was first defined in OCR 2001 guidance.

Although the 2001 guidance policy remained in place even after DOE rescinded other significant OCR policies and guidance in 2017, the phrase “responsible employee” does not appear in the new regulations. It is reasonably safe, therefore, to predict there will be little to no vitality to this phrase going forward in

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138. As of April 2018, this discussion draft has not been ratified by the AM. L. INST., DISCUSSION DRAFT Apr. 17, 2018.

139. It has long been settled that if sexual misconduct is severe, persistent or pervasive, it can create a hostile environment that must be addressed by the institution. See Davis ex rel. LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 631 (1999) (“It is not necessary to show an overt, physically deprivation of access to school resources to make out a damages claim for sexual harassment under Title IX, but a plaintiff must show harassment that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims’ educational experience, that the victims are effectively denied equal access to an institution’s resources and opportunities.”). See also Emme Ellman-Golan, Saving Title IX: Designing More Equitable and Efficient Investigation Procedures, 116 MICH. L. REV. 155, 162 (2017) (discussing how the 2011 OCR guidance reiterated “that a ‘hostile environment’ is one in which harassment is sufficiently severe, persistent, or pervasive . . .”).

140. Holland et al., supra note 29, at 259 (“Over two thirds (69%, n=101) of the 146 policies identified all employees—i.e., all faculty and staff employed by the school—as mandatory reporters of sexual assault.”). At least part of the problem results from the use of various forms of guidance from OCR that is sometimes directed more at some forms of sexual harassment than others. This is true because OCR guidance is responsive to questions that have been posed to it.


142. Id. at 114. Although the term was used in a 1997 OCR guidance document, it was not fully defined and that guidance document was not focused on sexual assault. Id.

143. Jackson, supra note 8.
OCR enforcement of Title IX law and regulations. However, since up to 69% of institutions classify all employees as mandatory reporters and 19% so classify most employees, there is still work to be done. The removal of this term from the new regulations does not foretell that institutions of higher education will now reverse course. It remains, therefore, important to understand how mandatory reporting became nearly universal and why it is harmful.

The 2001 guidance—which is still in force—provided the potential for a school’s culpability for student-to-student, a.k.a. peer harassment, when the school was on notice of a sexually hostile environment and did not take immediate and effective steps to ameliorate the environment. The 2001 guidance defines notice as occurring when a “responsible employee” knew or should have known of the harassment. A “responsible employee” was then defined to include “any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has this authority or responsibility.”

The next significant guidance from OCR, the 2011 Dear Colleague Letter, did not directly discuss the phrase “responsible employee.” However, the 2014 OCR Q&A on Title IX and Sexual Violence did in response to a direct question about who is a “responsible employee.” It reiterated, rather unhelpfully, the language from the

144. See Jim Hermes, Washington Watch: What ED’s Title IX Proposal Means for Your College, CMTY. COLL. DAILY (Nov. 20, 2018), http://www.ccdaily.com/2018/11/eds-title-ix-proposal-means-college/  [https://perma.cc/9G4W-CFAP] (positing that the proposed regulations are in “stark contrast” with the current practice vis a vis who has to report and when an institution is on notice and must take action based on a report).
145. Holland et al., supra note 29 at 259.
146. See id.
147. See Weiner, supra note 16.
148. OCR’s 2001 Guidance, supra note 9.
149. Id.
150. Id. The phrase “any other misconduct” in the second clause of this definition could theoretically capture all faculty who, for instance, have a duty to report cheating—which is clearly “other misconduct.” Professor Merle Weiner carefully sets out the fallacy of this broad interpretation. Weiner, supra note 16 at 107–11. She analyzed the use of that term in OCR guidance for over twenty years and concluded that the second prong of the responsible employee definition: an employee “who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees,” is best read as a subset of the third prong: “an individual who a student could reasonably believe has this authority or responsibility.” Although there is much to support this interpretation, Weiner argues that a prime reason is the 2014 Q&A document that specifically responded to the question of who constitutes a responsible employee. In its response, OCR stated that schools must be clear on who is and who is not a responsible employee and must make those categories clear to students so that students can make informed choices regarding disclosure. If all, or nearly all, employees should be deemed responsible employees, this clear categorization would be unnecessary. Further, Weiner explains, OCR guidance distinguished between all employees, who are obliged to inform students of reporting options and available services, and responsible employees, who must report an allegation of a sexual assault to the Title IX coordinator. Logically, these two categories are not the same, have different obligations, and the second group is smaller than the first.
Both the 2011 and 2014 OCR guidance documents have been rescinded.

During the timeframe of these now-rescinded documents, OCR also began to conduct more frequent investigations of schools alleged to be in violation of Title IX.\(^{152}\) Further, OCR started maintaining a public list of the investigations, a move that received bipartisan Congressional support.\(^{153}\) It is likely that increased OCR administrative actions against individual institutions contributed to the widening embrace of the term “responsible employee” to include most university employees. This is so because the resolution agreements that OCR entered into with individual institutions suggested to some that OCR preferred or even demanded a broad definition of responsible employees.\(^{154}\) For instance, the 2013 Resolution Agreement with the University of Montana provided that, going forward, “all employees . . . except those who are statutorily barred from reporting,” are required “to report sexual assaults and harassment of which they become aware to the Title IX Coordinator.”\(^{155}\) In addition, the agreement’s proclamation that it was to “be a blueprint”\(^{156}\) for institutions of higher learning across the country “to protect students from sexual harassment and assault” no doubt enhanced the view that it contained the appropriate governing standards that would keep schools Title IX compliant.

In subsequent years, other OCR actions at specific colleges and universities enforced the belief that OCR was pushing a broad definition of “responsible employee.”\(^{157}\) For instance, in its enforcement interaction with Wesley College three years after the University of Montana Resolution Agreement “blueprint,” OCR expressed concerns about the potentially “over-inclusive” classification of “quasi-confidential” employees who could receive students disclosures without reporting identifying information.\(^{158}\)


\(^{155}\) See Letter from Anurima Bhargava and Gary Jackson to Royce Engstrom and Lucy France, supra note 154, at 12.

\(^{156}\) Id. at 1.


\(^{158}\) See Letter from Beth Gellman-Beer, Supervisory Att’y, U.S. Dep’t of Educ., Off. for Civ. Rts. Phila., to Robert E. Clark II, President, Wesley Coll., 15 (Oct. 12, 2016), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf [https://perma.cc/7438-95YX]. This is unfortunate because the ability to have this intermediate category is an important part of the solution. To only permit a small category of confidential employees—i.e. those in some counseling or equivalent category—with everyone else being a responsible employee with
OCR interactions with individual institutions were taken as applicable to other institutions, even if the schools were so different as to make OCR recommendations or resolutions for one school logically inapposite to another. After all, Title IX applies to an enormous range of schools which limits the practicality of overly specific OCR guidance. As the move towards a broad definition of “responsible employee” grew, third parties started weighing in on the issue of who should be a responsible employee.159 Early on, outside groups often supported broadly defining responsible employees.160

OCR’s 2017 Q&A on Campus Sexual Misconduct continued the use of the phrase responsible employee as it addressed the question of a school’s responsibility to combat campus sexual misconduct.161 It referenced the retained 2001 policy guidance, stating that an institution must have a Title IX coordinator and that other employees “may be considered responsible employees” who can help “connect” the student to the Title IX coordinator.162 There was no mention whether a mandatory reporting obligation attached to a “responsible employee.”

The new Title IX regulations do not use the term “responsible employee.” In fact, they omit the phrase in the one place it was used in the prior regulations, to wit: in the title of 34 CFR 106.8(a).163 The old regulations captioned it “Designation of responsible employee.” New Section 106.8(a) is entitled “Designation of coordinator” and provides that each institution must “designate at least one employee to coordinate its efforts to comply with its responsibilities” under Title IX. This language is largely the same as that found in the previous regulations. The proposed regulations explained that the heading was changed to eliminate confusing language.164 Further, public commentary following the issuance of the proposed regulations noted the reduced emphasis on “responsible employees.”165

V. STATE LAWS AND THE EFFORT TO CODIFY MANDATORY REPORTING

Colleges and universities have been debating and enacting policy on their definitional scope of Title IX “responsible employees” and those who would have an obligation to make an official report.166 State and federal legislators also have

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162. Id.
164. Id.
166. See Weiner, supra note 16, at 99–106 (examining the nuances between disclosing versus reporting).
been debating the idea of mandatory reporting. In addition, at least two states have codified the use of the term responsible employee. At their core, many of the laws being proposed, modified, and sometimes enacted deal with the interplay between campuses and local law enforcement when a campus receives a report of a sexual assault.

Beginning in 2013, a raft of bills introduced in state legislatures focused on the relationship between schools and local law enforcement vis-à-vis the reporting of campus sexual assault. In 2015, federal legislation was proposed. The latter, an amendment to the Clery Act, decreed that an institution could not conduct an internal investigation if it did not make a law enforcement referral. It died in the 115th Congress and was reintroduced in April 2019 during the 116th Congress’s 1st Session. After being introduced with 15 bipartisan co-sponsors, it was referred to the Health, Education, Labor and Pensions Committee.

In the state legislatures where bills were introduced between 2013 and 2017, the proposed legislation generally falls into three categories. First, there are bills that either encourage or mandate cooperation between campuses and local law enforcement. For instance, a bill might lead to a Memorandum of Understanding (MOU) between the two entities. The states that have passed MOU-type laws include Louisiana, Minnesota, and Washington.

Second are the bills proposing what are sometimes called mandatory referral laws. This type of statute generally requires universities to make a referral

167. See Brodsky, supra note 16.
168. DEL. CODE ANN. tit. 14, § 9001(a)-9007(a) (West 2017). This statute was passed in 2016 and had effective dates in both 2017 and 2018. Id. See also HAW. REV. STAT. § 304A-120 (2017). Massachusetts has pending legislation, S.B. 2203, 2017-2018 Leg., 190th Sess. (Mass. 2017), introduced November 2, 2017.
169. See Brodsky, supra note 16, at 139. Of fourteen bills introduced in eleven state legislatures, only four were passed with significant revisions. See infra text accompanying notes 184–91 for a discussion of the changes to, e.g., the Virginia and California statutes.
170. See Brodsky, supra note 16, at 138–44 for an excellent discussion of these mandatory “referral” laws, which burgeomed in 2014 and 2015.
171. Id. at 138.
173. Id.
174. Id. The Safe Campus Act was introduced during the 114th Congress but not signed into law. In 2015, the bill was reintroduced as The Campus Accountability and Safety Act, S. 856, 115th Cong. (2015). This bill was introduced by Senator Claire McCaskill during the 115th Congress but did not pass. In April 2019, the Campus Accountability and Safety Act was introduced by Senator Kirsten Gillibrand during the 116th Congress and has been referred to the Committee on Health, Education, Labor, and Pensions. S. 976, 116th Cong. (2019-2020). The two versions of the Campus Accountability and Safety Act are identical and neither proposes to reintroduce the internal investigation bar proposed in the Safe Campus Act in 2015.
175. S. 976.
181. Alexandra Brodsky uses that term in her article to differentiate these from administrative mandatory reporting laws within a university’s Title IX schema. Brodsky, supra note 16, at 133 n.9
of a disclosed sexual assault to local law enforcement, often within 24 hours of the disclosure. These bills were introduced in several states. In all four states where some type of referral law was passed, the legislative process resulted in modification to the bills as initially proposed. For instance, the California law passed specifies that campus referrals to local law enforcement will only include non-identifying information unless the victim/survivor consents to the release of identifying information after being informed of the right to have such information withheld. Consequently, the bill to codify mandatory referrals resulted in a law that emphasized the right, not the requirement, to involve law enforcement.

Likewise, the mandatory referral bill introduced in Virginia in 2014, not long after the discredited Rolling Stone article about a botched fraternity rape investigation done by campus authorities, also resulted in a less rigid law that appears to be a thoughtful compromise of interests. As introduced, it was a mandatory referral bill opposed by students who argued that it would reduce reporting and infringe on confidentiality. As passed, the law provides that institutions must establish a review committee of at least three persons comprising a law enforcement representative, the Title IX coordinator or delegate, and a student affairs representative. The Title IX coordinator, upon receiving information from a responsible employee that an act of sexual violence may have been committed, must report that information—complete with any personally identifying information—to the committee. The committee meets and determines if a criminal referral without the survivor’s consent is warranted. A referral “shall immediately” occur if it is “necessary to protect the health or safety of the student or individual” and pursuant to FERPA regulations that say that referral is warranted if there is an “articulable and significant threat to the health or safety of a student or other individuals.”

The third type of state legislation being introduced codifies the term “responsible employee.” Delaware and Hawaii have statutorily defined the term. The Delaware statute defines responsible employees to include, inter alia, “[f]aculty, teachers, or professors.” Pursuant to the statute, responsible employees who

("These laws are sometimes referred to in the press as “mandatory reporting” laws. For consistency, and to avoid confusion with other regimes of mandatory reporting within the university, I will refer to these laws as mandatory referral statutes.")

182. Id. at 140–41.
183. Id. at 140–43.
184. CAL. EDUC. CODE § 67383 (West 2014); Brodsky, supra note 16, at 139.
185. Brodsky, supra note 16, at 139.
186. Id. at 141.
187. Id.
188. VA. CODE ANN. § 23.1-806 (2016); 34 C.F.R. § 99.36 (2009). The law specifies that the Title IX coordinator or any other responsible employee can report directly to law enforcement with the victim’s consent. VA. CODE ANN. § 23.1-806B.
189. VA. CODE ANN. § 23.1-806(F).
191. Id. § 2(a).
become aware of a sexual assault must notify campus police within 24 hours who, in turn, must within 24 hours notify local law enforcement. The responsible employee must also inform the victim that a report will be made, tell them of their rights pursuant to the state Victim’s Bill of Rights, and offer them services. It is unfortunate that the right of a Delaware victim not to have an official report made is not honored.

The Hawaii statute provides that “[a]ll University of Hawaii faculty members” are designated as “responsible employees” under Title IX and “shall report any violations of University of Hawaii executive policies regarding sexual harassment, sexual assault, domestic violence, dating violence, and stalking to the Title IX coordinator.” As the Hawaii law specifically links responsible employees to Title IX, it is unclear what impact the removal of responsible employee from the Title IX regulations will have.

Finally, a more recent bill that was enacted in one state deserves special mention and opprobrium. As of January 1, 2020, Texas SB 212 requires all non-student employees of postsecondary educational institutions to report to their institutions’ Title IX coordinator or deputy any incident of dating violence, sexual assault, sexual harassment or stalking that they have witnessed or of which they become aware. Failure to comply is a criminal misdemeanor and will lead to termination of employment. This law has received much pushback from across the spectrum. Survivor groups oppose it. The organization “Foundation for Individual Rights in Education (FIRE)” calls it a terrible law. A Forbes opinion piece calls it “the worst of both worlds.” This law, like the one in Virginia, had its origins in a college Title IX investigation that was beyond botched. Some have termed this the “Baylor Effect.”

It is important to keep track of state law activity on this issue, regardless of the new Title IX regulations’ impact on the widespread categorization of responsible employees. On one level, state laws have always been germane to Title IX reporting. For instance, state laws regarding privileged communications can (and do) dictate who universities designate as confidential employees. These laws could even turn a responsible employee, i.e., one who has an obligation to report disclosure to the

195. HAW. REV. STAT. § 304A-120(b) (2016). The statute does carve out from the mandated reporting of responsible employee faculty members those faculty who are deemed, pursuant to statute, confidential advocates. Id. at 304A-120(a)(5).
196. TEX. EDUC. CODE ANN., § 51.252 (West 2020).
197. Id.
199. Id.
200. Id.
school’s Title IX Coordinator, into a confidential source. In addition, state laws on mandatory reporting for child abuse would supersede a school’s confidentiality policy regarding disclosure by students under 18 years of age. However, state laws codifying mandatory reporting should be challenged as being harmful to survivors.

VI. MORE CONSIDERED OPTIONS

"Come on. Know better. Somebody, know better." 204

A. Limiting Mandatory Reporters

Even before the 2011 and 2014 OCR guidance documents were rescinded, and Title IX regulations were changed to omit any reference to “responsible employees,” federal law, regulation, or agency “guidance” did not require all university employees to be “responsible employees” with a concomitant reporting obligation. Although many institutions appeared to perceive it that way, the focus on all employees as responsible employees was largely in now-withdrawn OCR guidance. It is surely gone from the newly effective regulations.

Nonetheless, in recent years, many institutions of higher learning have declared that most, if not all, non-confidential employees are responsible employees with mandatory reporting obligations. These determinations may be the result of extensive internal processes. Thus, schools are unlikely to rush to change their policies to a less expansive mandatory reporter requirement. Although they may no longer fear a Title IX investigation, there may be little incentive for schools to change recent policies that have been laboriously enacted or seen by some to embody best practices.

Further, some colleges and universities have expressed concern that the new regulations are in some ways more prescriptive and will make complaint resolution more time-consuming and expensive. The Association of Independent Colleges and Universities in Massachusetts (AICUM) made that assertion in its comments to the proposed regulations. AICUM also articulated a concern that the proposed

203. This caveat is found in the now-rescinded 2014 Guidance document. See U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf. However, it has also been codified in University policies. Weiner, supra note 16, at 157–58.


206. Id. at 125. It is true that the phrase was defined in 2001 OCR guidance which was not withdrawn, but since the term no longer appears in the regulations, that definition is functionally moot.


208. Holland et al., supra note 29, at 260.

regulations would deter victims from coming forward.\textsuperscript{210} AICUM’s comments noted that, over the past decade, its member institutions\textsuperscript{211} have given close attention to the theretofore under-addressed issue of campus assault. The schools engaged in “foundational efforts to shift the culture of campuses” and to “above all” build trust with individuals.\textsuperscript{212}

While a hesitance to reformulate policy recently enacted is understandable, a school that remains committed to a universal or near universal definition\textsuperscript{213} of employee as mandatory reporter risks retaining policies that could harm survivors, actually impeding disclosure and, paradoxically, reporting.\textsuperscript{214} It is also arguable that the policies themselves violate Title IX by inhibiting survivors from accessing the services needed to receive an equal education, defined here as access to educational opportunities free from sex-based harassment (including sexual assault and sexual violence) and discrimination.\textsuperscript{215} Therefore, in addition to highlighting the dangers of those policies, it is important to know there are alternatives.

B. University of Oregon’s Three Tiers of Employees— “A Better Policy”\textsuperscript{216}

In 2017, the University of Oregon concluded a more-than-eight-month process of assessing its policy on which university employees should be required to report disclosures.\textsuperscript{217} As a result, it adopted a three-tiered taxonomy for employee reporting.\textsuperscript{218} Those three categories are confidential employee,\textsuperscript{219} designated reporter,\textsuperscript{220} and student-directed employee.\textsuperscript{221}

The first two are familiar, in concept if not in scope. A confidential employee does not need to report a disclosure of sexual assault against the discloser’s wishes but is required to provide information to the disclosing student regarding
resources and reporting options. This category encompasses those who could "oppose successfully an application for a court order seeking disclosure." It includes health care and counseling professionals as well as the University Ombud and members of the crisis intervention and sexual violence support services teams. Certain attorney employees also fall within this category. As is typical with this category generally, it roughly conforms with those who have a legal privilege.

The second category of designated reporter is equivalent to the responsible employee or mandatory reporter concept. Designated reporters must report disclosures to the Title IX coordinator. However, the University of Oregon's policy defines this category in a relatively narrow fashion, especially when compared to its overbroad definition at the vast majority of institutions. At Oregon, designated reporters include high-level employees, supervisory employees, and those with special student responsibilities such as a director of student conduct. This more limited scope of employees who are designated reporters rests on the notion that these are "employees who have the authority to address prohibited conduct and whom students would reasonably expect to have the authority to remedy prohibited conduct..."

Significantly, under the University of Oregon’s 2017 policy, rank and file faculty members are not designated reporters. There has been significant critique nationally over defining “responsible employee” to include non-supervisory faculty members. This objection has been voiced by the American Association of University Professors as well as individual faculty at specific institutions. In addition, Professor Weiner’s analysis of this issue suggests that a proper reading of pertinent OCR guidance and U.S. Supreme Court cases lead to the conclusion that all faculty ought not be designated as responsible employees. Other scholars have


223. UNIV. OF OR., supra note 222, at I.

224. Id. at II. E.

225. Id.

226. The policy has useful explanations as to limits concerning privilege in the context of the policy. Id.

227. Heroy, supra note 217. Further, the Title IX Coordinator may change which employees are designated reporters "as necessary." UNIV. OF OR., supra note 222, at II. D.

228. UNIV. OF OR., supra note 222, at I. The policy also provides that, if an employee falls within both the confidential employee and designated reporter category, the confidential employee designation prevails.

229. See id.


also focused on the obvious disadvantages of faculty betraying student
confidences.234

C. Other Institutions that Limit Mandatory Reporters

The University of Oregon’s narrower structuring of the designated reporter,
a.k.a. responsible employee, category shares company with a few other schools. Other schools that have likewise opted not to stretch the responsible employee
category to all non-confidential employees include institutions as diverse as Brown
University,235 Cal-Tech,236 The Catholic University of America,237 Hofstra
University,238 University of Nebraska-Lincoln,239 New York University,240

234. See, e.g., Smith & Freyd, supra note 103. Obviously, universities and colleges should clearly
publish which employees are mandatory reporters; however, part of the definition, per OCR guidance and
U.S. Supreme Court cases, of a responsible employee turns on student expectations.
235. BROWN UNIV., TITLE IX AND GENDER EQUITY: I AM A RESPONSIBLE EMPLOYEE (2020),
https://www.brown.edu/about/administration/title-ix/get-help/i-am-responsible-employee
[https://perma.cc/ZP2V-SRAE]
236. THOMAS F. ROSENBAUM, CALTECH INSTITUTE POLICY: SEX- AND GENDER-BASED MISCONDUCT
237. CATHOLIC UNIV. OF AM., SEXUAL OFFENSES POLICY (EMPLOYEES AND THIRD PARTIES) (Nov.
238. HOFSTRA UNIV., STUDENT POLICY PROHIBITING DISCRIMINATORY HARASSMENT,
edu/pdf/studentaffairs/deanofstudents/commstandards/commstandards-policies-sexualassault.pdf
[https://perma.cc/3Y7C-FKVZ].
239. UNIV. OF NEB.-LINCOLN, UNL EMPLOYEES TITLE IX RESPONSIBILITY GUIDE, https://www.unl.edu/equity/TitleIXDownload/UNL%20Employees%20Title%20IX%20Guide.pdf
[https://perma.cc/3EQK-YX6V].
University of Michigan,\textsuperscript{241} University of North Carolina,\textsuperscript{242} and the University of South Carolina.\textsuperscript{243} Many of these policies were reviewed or updated in 2018 or 2019.

Where the Oregon policy breaks new and important ground is in its novel and thoughtful category of "student-directed employee."\textsuperscript{244} A student-directed employee is any employee who does not fall within one of the other two categories and "[t]his includes most faculty, staff, administrators and student-staff."\textsuperscript{245} Student-directed employees have three basic responsibilities.\textsuperscript{246} First, they are required to provide disclosing students with information about campus support and reporting options.\textsuperscript{247} Second, they are required to consult with a confidential employee, who is a person with more expertise.\textsuperscript{248} This consultation is intended to ensure that student-directed employees have the information needed to both assist the disclosing student


\textsuperscript{242} UNIV. OF N. C. AT CHAPEL HILL, POLICY ON PROHIBITED DISCRIMINATION, HARRASSMENT AND RELATED MISCONDUCT INCLUDING SEXUAL AND GENDER-BASED HARRASSMENT, SEXUAL VIOLENCE, INTERPERSONAL VIOLENCE AND STALKING VIII.A (Aug. 13, 2020), https://unc.policystat.com/policy/7019871/latest/ [https://perma.cc/RS4U-NSMQ]. Under this policy, only employees with administrative or supervisory responsibilities or those designated as Campus Security Authorities are responsible employees. After setting forth the scope of the category, the policy provides that responsible employees "must safeguard an individual's privacy, but are required by the University to immediately share all details about a report of Prohibited Conduct..." \textsubscript{Id.} (emphasis in the original). The policy does not provide guidance on how the responsible employee is to comply with these seemingly contradictory mandates. Moreover, all other employees except those designated as "confidential resources" and all students are "strongly encouraged" to share "any information about such conduct" with appropriate personnel—i.e. Title IX Compliance Coordinator. \textsubscript{Id.} at VIII.B (emphasis in the original). Thus, this policy wisely narrows the scope of responsible employees. But it undercut that good by strongly encouraging reporting—presumably against a discloser's wishes. And while also mandating that an individual's privacy will be safeguarded, it is not hard to understand the frustration and harm that results from such policies. See Smith & Freyd, supra note 103, at 122-23 (discussing institution betrayal); cf. UNIV. OF OR., supra note 222, at Intro ("In all cases, the University's response is designed to consider the victim's preferences regarding the University's response, and to provide deference to a victim's wishes wherever possible.").

\textsuperscript{243} UNIV. OF S. C., OFFICE OF EQUAL OPPORTUNITY PROGRAMS, SEXUAL MISCONDUCT, INTIMATE PARTNER VIOLENCE AND STALKING 7 (Nov. 16, 2018), http://www.sc.edu/policies/ppm/eop105.pdf [https://perma.cc/N24Y-MX7S].

\textsuperscript{244} UNIV. OF OR., supra note 222, at II.F.

\textsuperscript{245} UNIV. OF OR., supra note 222, at II.F.

\textsuperscript{246} See id. at III.C. The Oregon policy contains much detail and specificity to guide both employees and students. This is particularly helpful and stands in contrast to the rather muddled policies extant elsewhere.

\textsuperscript{247} UNIV. OF OR., supra note 222, at III.C. 3-4.

\textsuperscript{248} Id. at III.C. 9. They must consult with "confidential employees" who are employees with special knowledge and who are positions who are not required to report. \textsubscript{Id.}
and to assess the level of risk present. This consultation also serves to ensure that student-directed employees are themselves supported.

Third, student-directed employees must assist students who wish to report with the process of reporting. Having this category of employee enables a student to disclose, be assured of support, and get assistance in reporting to the Title IX coordinator if that is the student’s wish. But if it is not his or her wish, confidentiality is assured, absent the risk of imminent risk of serious harm. And, most critically, the survivor still has access to support.

Prior to this policy change, the University, like many others, had considered nearly all employees to be “responsible employees.” According to Professor Weiner, the chair the university group that devised the policy, the group was guided by nine “first principles,” which Professor Weiner believes are largely “generalizable” to other institutions. Those principles include what should be the non-negotiable concept of “do no harm.” By conceptualizing and creating the “student-directed” employee category and providing clear guidance therefor, the policy has the promise of living up to this principle. Of course, one must always be mindful of and guard against the risk—or perhaps even the inevitability—of unintended consequences.

The ALI Principles Discussion draft, in its Section 3.5.b. principle, suggests that colleges and universities “should consider alternative approaches to . . . defining the obligations of those who are neither mandatory reporters nor confidential resources, with a view toward improving the options for students seeking advice and support for responding to sexual misconduct.” The University of Oregon policy is such an alternative approach. Indeed, in its reporters’ notes to this principle, ALI cites to the University of Oregon’s “different approach” in creating the student-directed employee. This middle category of employees, who are neither responsible employees with their mandatory reporter function nor confidential resources, is “a promising direction” for institutions to contemplate.

249. Id. The presence of imminent risk is the core exception to a student-directed employee’s obligation to keep a confidential disclosure confidential. Id. at III. C. 10(a). Further, the student-directed employee is required to inform a student of this exception when a conversation begins. Id. at III. C. 2.

250. Id. at III. C. 9.

251. Id. at III. C.

252. Id. at III. C. 10(a). The exception policy may also mandate reporting if the student is under 18, i.e. not a legal adult, and discloses behavior that would constitute abuse. Id. at III. C. 10(b). In this circumstance, the student-directed employee must comply with state law on child abuse reporting. Id.

253. Weiner, supra note 16 at 133–34 (citation omitted).

254. Id. Harm can occur when reporting happens contrary to a survivor’s wishes. See id. at 88, 88 n.71, for a discussion of harm.

255. See Dunlap, supra note 131, for a cataloguing of the harms that have arisen as a result of “reforms” in intimate partner violence law and policy.

256. PRINCIPLES OF L., STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLS. AND UNIVS., § 3.5.b (AM. L. INST., Discussion Draft 2018).

257. Id. § 3.5.b reporters’ notes.
In 2015, the American Law Institute (ALI) began work on a project entitled "Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities." In April 2018, it issued a discussion draft of the first three of 11 proposed chapters for discussion at its 2018 Annual Meeting. The chapters released were: (1) First Principles for Procedural Frameworks; (2) Notice and Clarity of Policies; Consistency of Implementation; Support and Interim Measures; and (3) Reporting Sexual Assault and Related Misconduct. In addition, it contains an Introductory Note that sets forth in detail the legal landscape over the years since Title IX's enactment.

In describing the project, the ALI Reporters' Memorandum explains that it is addressing "an especially dynamic area of law and policy." It continues that not only is the "federal policy landscape" in flux, but also notes that there is a significant increase in caselaw, due to lawsuits brought by students against universities, as well as increased scholarship on the issues.

Chapter Three of the ALI draft covers the Reporting of Sexual Assault and Related Misconduct, which is the topic most pertinent here. The chapter has eight discrete components addressing both the disclosing and reporting of sexual misconduct. Chapter Three encourages students to both disclose and report. The disclosing should be done in a confidential way that would provide the student with access to "support and care." The reporting would permit the institution to have "better tracking of and response to incidents."

Chapter Three recognizes the importance of, wherever possible, respecting the disclosing student's request to not begin an investigation of the alleged student-perpetrator. It also states that institutions should leave both the choice and manner of reporting with the student.

Further, Chapter Three urges schools to exercise judgment in determining which faculty and staff should have an obligation to report complaints of sexual misconduct to the school's Title IX coordinator or designee. Advising deliberation in determining which employees are mandatory reporters runs contrary to much current thought and policy, even if it is now less of a focus under the current Title IX.

259. Id. intro. note at 3–12.
260. Id. at xvii.
261. Id. at xvii–xviii.
262. Id. § 3.3.
263. Id.
264. Id. at 67.
265. Id. at 96. In addition to addressing just procedural issues, the ALI draft principles focus on colleges and universities, not grades K-12, and peer misconduct, not faculty to student misconduct. Id. at xiii. The introductory note explains that the choice to focus on student-to-student misconduct arose from the "strong sense" of project advisers that this was the area in which "colleges and universities most urgently needed . . . guidance." Id. at 3.
266. Id. at 61.
267. Id. at 77.
regulations. A deliberative process here is, however, sound policy as Section 3.5 demonstrates. Earlier in the draft, the reporters explain that although perhaps counterintuitive at first glance, respecting the confidentiality request of one who is disclosing an allegation of sexual misconduct will, in fact, enhance the chances that the discloser will ultimately choose to make a formal report. Section 3.5 clearly has Title IX goals in mind when it states that schools should “carefully weigh” the classification of employees who are mandatory reporters in light of the “school’s educational interests in facilitating students’ ability to seek and obtain appropriate guidance.”

In sum, the ALI draft principles on disclosing and reporting are themselves the product of a deliberative approach and have much to recommend them. One can hope that when they are finally released (or perhaps even before) and read in conjunction with the new regulations’ de-emphasis on a large number of employees who are mandatory reporters, universities will take heed. This approach would, as the draft principles explain, lead to results desired by most.

VII. CONCLUSION

Title IX is an important tool in the battle to eliminate sex discrimination in educational opportunity. It is, however, an imperfect tool and has led to much dissention over the proper way to implement it. After over 20 years of using it to combat sexual assault on college campuses and in this time of new regulations governing Title IX, it is well to remember both what Title IX is and what it is not. It is a federal law enacted to secure equal education opportunity regardless of an individual’s sex. It is not a criminal statute and does not impose criminal penalties. It is a civil rights statute intended to protect survivors against sexual misconduct in education institutions.

The accused and the accusers have long wrangled over the proper implementation of Title IX on college campuses. This discord is in part due to efforts to use Title IX in ways that do not heed its mission. This wrangling and the disappointment wrought by poorly done investigations have led to lawsuits against universities by both the accused and the accuser.

One thing is certain: for too long, campus sexual assault was ignored and diminished. The process that ensued afforded little relief to the victim. There may have been some semblance of better implementation of late but then the accused cried foul, alleging a process tilted in favor of the accuser. There is acrimony about whether the accused is being ignored too often or believed too often. This finger-pointing and related concerns about the process involved in the investigation of a Title IX complaint sometimes takes all the air out of the room. And that is a problem because it draws attention away from other areas where fixes are both needed and feasible.

The goal of Title IX processes should be to get survivors of sexual assault the support they need in order to continue with their educational endeavors. Sometimes that support includes a full investigation pursuant to a report made to the

268. Id. at 66–67.
269. Id.
270. Drew, supra note 11, at 205.
Title IX coordinator. But sometimes, perhaps often, it is less than that. Perhaps accommodations in a class schedule or student housing. Perhaps counseling.

What does not help a person disclosing is requiring that all helpers on campus—persons to whom a victim may feel most comfortable disclosing—must report the disclosure to a Title IX coordinator or designee even when such a report is against the disclosing student’s wishes. This drives down disclosure—which is the opposite of what we all should want. In driving down disclosure, services and accommodations that are intended to achieve the Title IX goals of combating educational sex discrimination are driven away. Even for those who are on opposite sides of the Title IX procedural challenges, can’t this goal be an area of agreement?