Enhancing Title IX Due Process Standards in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice

Shannon Harper, Jon Maskaly, Anne Kirkner & Katherine Lorenz


To link to this article: http://dx.doi.org/10.1080/15388220.2017.1318578
Enhancing Title IX Due Process Standards in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice

Shannon Harper\textsuperscript{a}, Jon Maskaly\textsuperscript{b}, Anne Kirkner\textsuperscript{a}, and Katherine Lorenz\textsuperscript{a}

\textsuperscript{a}Department of Criminology, Law, and Justice, University of Illinois at Chicago, Chicago, Illinois, USA; \textsuperscript{b}School of Economic, Political, and Policy Sciences, University of Texas at Dallas, Dallas, Texas, USA

ABSTRACT

Title IX prohibits sex discrimination—including sexual assault—in higher education. The Department of Education Office for Civil Rights' 2011 "Dear Colleague Letter" outlines recommendations for campus sexual assault adjudication allowing a variety of procedures that fail to protect accused students' due process rights and victims' rights under Title IX. This article reviews two diminished due process rights in campus adjudication: cross-examination and the preponderance of the evidence standard. We use an organizational justice theoretical framework to show that limitations on due process rights reduce fair outcomes for both victims and the accused. We provide recommendations for a restorative justice approach to campus adjudication that operates within this theoretical framework to increase fair outcomes in adjudication, bolster perceptions of adjudicatory system legitimacy, and reduce campus sexual assault.

KEYWORDS

Distributive justice; due process; organizational justice; procedural justice; rape; restorative justice; sexual assault; title IX; victim rights

Introduction

Approximately one quarter of female college students report experiencing some form of forced sexual contact ranging from touching to rape (Cantor et al., 2015). Title IX of the Education Amendments of 1972 (Title IX) prohibits sex discrimination in higher education, requiring institutions of higher education (IHEs) to take prompt and effective steps to eliminate the hostile environment sexual assault creates. A hostile environment is created when an IHE fails to take effective steps to ensure the victim is able to participate in or benefit from the school's educational program (see Adjudicatory System Harms to Victims section). Title IX addresses both sexual harassment and violence; however, this article focuses specifically on student-on-student sexual assault at public IHEs. The Department of Education Office for Civil Rights (OCR) enforces IHE Title IX compliance. Title IX requires IHEs provide student sexual assault victims (victims) with a mechanism to report sexual assault and receive accommodations to ensure the benefits of education. While Title IX's goals are laudable and necessary, the OCR's requirements for the adjudication process expose how Title IX victim-specific protections often conflict with the constitutional due process rights of students accused of sexual assault (respondents). Evidence points to either the failure or counterproductive nature of Title IX, including media reports of the unjust nature of Title IX (Kipnis, 2015), and other evidence suggesting Title IX requirements are ineffectual mechanisms for protecting victims (Shibley, 2014). A growing body of evidence also suggests students perceive gross inequity within campus disciplinary proceedings where instances of student-on-student sexual assault are adjudicated (New, 2015a).
Taken together, the extant literature suggests Title IX is not only failing to accomplish its intended goals, but may actually cause undue harm to both victims and respondents. Using the frameworks of procedural and distributive justice (DJ), we explore meaningful ways to approach and reconfigure the Title IX adjudication process so that victims and those accused of sexual assault perceive the system to be fair, equitable, and legitimate. Only through attending to these procedural and DJ concerns, with a strong focus on due process, will IHEs be able to seriously address and begin to reduce the incidence of campus sexual violence. Systems of justice perceived to be legitimate can actually serve to deter crime (Tyler, 2006).

To develop our argument, we first summarize the mechanisms of Title IX—and related legislation—to address sexual assault-specific sex discrimination on IHE campuses and relevant related federal policies. This is followed by a description of typical OCR compliant adjudication procedures and the conflicting institutional, legal, federal, and moral obligations shaping these procedures that often fail to provide basic due process rights to respondents and protect victims’ rights under Title IX. Because Title IX mandates campus sexual assault adjudication procedures, we refer to it as Title IX adjudication throughout this article. We use the term respondents to denote students who have been accused of a sexual assault and who must engage with the noncriminal, IHE-based Title IX adjudication process. We acknowledge the statistically low rate of false reports of sexual assault and we believe, in accordance with empirical research on false reporting rates, the majority of sexual assault reports are valid (Lonsway, 2010). However, one of the goals of this article is to untangle issues of due process within the Title IX system and so we choose to employ language matching the perspective of IHEs wherein a student accused of sexual assault is presumed innocent until they are found guilty. Next, we analyze two of many due process rights limited in Title IX adjudication, including the preponderance of the evidence standard of proof as a lower standard, and inconsistent ability for cross-examination.

The next section presents organizational justice (OJ) as a theoretical framework to repair Title IX’s failures thus far. Finally, we provide recommendations for strengthening Title IX adjudication, including adopting a restorative justice (RJ) approach to Title IX adjudication that complements the DJ and procedural justice (PJ) model.

### Title IX and relevant policy

Table 1 summarizes each piece of legislation and OCR guidance document in greater detail than the text.

### Title IX policy

Title IX prohibits sex discrimination in educational institutions receiving federal funds, thus tying together federal funding and nondiscrimination on the basis of sex. Students may file Title IX complaints with the OCR if they feel their IHE failed to handle their sexual assault case in a manner that protected them from sex discrimination. Upon a finding of negligence, the OCR may decide to cut off up to $500 million of the IHE’s federal funding, although the OCR has yet to sever funding pursuant to an investigation (Henrick, 2013).

Over the past 30 years, legal scholars and activists have pushed for more accountability to protect students from sexual assault on campuses and as IHEs have asked the government for clarification regarding these changes. There have been several updates to the original Title IX, though many pieces of legislation overlap and remain unclear (see Table 1). The 1997 OCR Sexual Harassment Guidance document recommended IHEs investigate all allegations of severe sexual harassment and assault between staff, faculty, and students, but neglected to clarify the definition of “severe,” thus eschewing autonomy for both victims and respondents. The recommendation to investigate all allegations was cemented in the follow-up 2001 guidance document and laid the groundwork for the mandated reporting policies that would come later (where all allegations must be reported to campus authorities regardless of the victim’s wishes). The most recent OCR sexual assault and harassment guidance...
documents—the 2011 “Dear Colleague Letter” (DCL) and a 2014 Q&A on Title IX and Sexual Violence—attempt to balance IHEs’ responsibilities to investigate all sexual assault cases with respondents’ due process rights, but do not outline policies and procedures for IHEs to adopt (see Table 1).

The Jeanne Clery Act and related legislation

The Jeanne Clery Act (Clery Act), the Campus SAVE Act (Save Act), and Family Education Rights and Privacy Act (FERPA) also provide oversight and guidance to IHEs on how to handle campus crime and the rights of all parties involved (see Table 1). The Clery Act requires IHEs afford all parties the opportunity to have others present during a campus proceeding. The Save Act extends the Clery Act and asserts the rights of both parties to access information during Title IX adjudication proceedings, though it does not specify which information may be accessed. In the past, IHEs used FERPA as rationale to not disclose campus crime statistics, but this practice has been abandoned (Fisher, Hartman, Cullen, & Turner, 2002). The OCR presently sees no conflict with FERPA regarding disclosure to the victim of Title IX adjudication outcomes, however a 2003 letter from the Family Compliance Office stated FERPA protects student disciplinary records and these records cannot be shared without consent from students (or their parents if under 18; McCarthy, 2015).

Due process and Title IX adjudication

An office of student affairs usually manages Title IX adjudication. Triplett (2012) explains that in a typical adjudication, the student affairs office first informs the respondent of the allegations. The
victim and respondent then appear before a disciplinary panel comprised of students, faculty, and/or staff and present arguments and evidence. The panel then makes a judgment of responsible or not responsible, which can lead to outcomes such as suspension, expulsion, and/or academic probation. At this stage, the IHE may or may not make an appeals process available to both respondents and victims per OCR requirements, which raises due process concerns about double jeopardy, or the secondary prosecution for the same offense. Students must turn to the state or federal courts if they are dissatisfied with disciplinary outcomes (Triplett, 2012).

In developing Title IX adjudication policies and procedures, IHEs are left with the seemingly impossible task of balancing victims’ rights under Title IX with respondents’ constitutional due process rights. The result is unstandardized adjudication systems employing varying procedures that often fail to meet legal obligations to both parties. Title IX adjudication systems are bound by competing and conflicting student conduct policies, constitutional due process rights, Title IX, federal laws, case law, and contract law. The Constitution mandates the accused are provided with due process of law, while the OCR requires due process not restrict or delay Title IX’s protections for victims (Triplett, 2012). This latter requirement enhances victim safety and eliminates educational gender inequity, but also curbs due process protections for respondents, infringing on their ability to maintain innocence.

**Due process rights: An overview**

Institutions of higher education must not only work to align Title IX adjudication policies and procedures with unclear OCR due process recommendations and directives, but with constitutional, state, and federal laws emphasizing the necessity of limiting due process rights rather than expanding them. These inconsistencies and diminished due process rights may detrimentally affect the course of students’ lives (see the Procedural and Distributive Justice section). Due process rights are foundational to the American justice system for those persons accused of crimes (Gorman v, 1988). The 5th and 14th Amendments to the Constitution provide criminal defendants with substantive and procedural due process rights that work to ensure fair and just adjudication procedures. Additionally, the 6th Amendment’s Confrontation Clause protects a criminal defendant’s right to confront their accusers and cross-examine the witnesses against them. To determine which due process rights the accused is entitled to, the courts perform a three-part substantive due process test: (a) evaluating whether a person’s life, liberty, or property rights are at stake; (b) the safeguards necessary to protect those rights; and (c) the burden caused by providing those safeguards (Mathews v. Eldridge, 1976). Part 3 of the substantive test allows IHEs to consistently deny respondents more robust due process protections because of the disastrous financial risk of violating victims’ rights under Title IX (Henrick, 2013).

Civil and disciplinary proceedings require less elaborate procedural due process protections than criminal trials because the source of the respondent’s rights stems from liberty and property deprivation as opposed to life, liberty, and property deprivation. For instance, suspension or expulsion for sexual misconduct in Title IX adjudication are outcomes significantly less severe than life imprisonment or the death penalty in a murder trial. The Supreme Court held a person’s liberty can include blocked opportunities (Bolling v. Sharpe, 1954) and a person’s “good name, reputation, honor, or integrity” (Wisconsin v. Constantineau, 1971). Students can also claim a property interest in public education (e.g., Goss v. Lopez, 1975). Consequently, IHEs are required to use the preponderance-of-the-evidence standard of proof; and provide students with a notice of the allegations and a disciplinary hearing (Dixon v. Alabama State Board of Education, 1961), adequate hearing notice (Goss v. Lopez, 1975), and allowance to present relevant evidence (Silverglate & Gewolb, 2014).

Unlike civil respondents and criminal defendants, student respondents are not guaranteed the right to legal representation, to discovery, to a particular standard of proof, to cross-examine witnesses, to appeal, or to rules of evidence during proceedings. Institutions of higher education can choose to allow counsel and/or other advisors, to cross-examine witnesses, third-party expert testimony, and appeal if administratively and financially practical (Mathews v. Eldridge, 1976). If IHEs do allow additional...
rights, the OCR mandates both parties be afforded the same rights during the process. Federal courts have systematically rejected the notion that students are entitled to all-encompassing due process rights (Valente v. University of Dayton, 2008). Students possess limited due process rights when suspension or expulsion may result from the proceedings (e.g., Dixon v. Alabama State Board of Education, 1961). Respondents are entitled to these limited due process rights based on their liberty interest in remaining enrolled in the public institution (Danso v. University of Connecticut, 2007).

**Adjudicatory system harms to victims**

The Title IX adjudication system is unstandardized because the courts do not want to place undue burden on IHEs’ limited resources (Mathews v. Eldridge, 1976). Additionally, the OCR recognizes there are myriad ways for IHEs to respond appropriately. This allows IHEs to design individualized processes to handle sexual assault claims provided they meet Title IX mandates. There is no one-size-fits-all Title IX adjudication approach, but OCR guidelines provide little guidance as to how to avoid victim-blaming lines of questioning or provide proportionate outcomes after a finding of responsibility. As detailed next, victims are suing IHEs for failing to protect their rights under Title IX, indicating a lack of fairness within the adjudication process.

While Title IX and related policies were enacted to remedy and prevent sex discrimination, the adjudicatory process is often harmful to victims, leaving many to feel shamed and as though their experiences were not taken seriously and their safety unimportant (Sulkowicz, 2014). Title IX and subsequent OCR guidelines allow IHEs to implement individualized practices regarding evidence and questioning of victims, often to the detriment of victims’ mental health and well-being. According to the OCR, the guidelines are meant to permit IHEs to adopt practices that best fit the culture and size of the campus (Lhamon, 2014). The OCR has directed IHEs not to allow the victim’s sexual history into the adjudication process yet there are still few standardized recommendations for the process, thus leaving room for schools to implement their own practices (Lhamon, 2014). For example, a victim at Columbia University had to explain to disciplinary panel members in explicit detail a particular forced sex act that occurred during the incident in question because one of the panel members believed the sex act could only occur during consensual sex (Sulkowicz, 2014). The student filed a Title IX lawsuit against the university for mishandling the process, which added to her feelings of shame and self-blame (Sulkowicz, 2014).

Although research on revictimization by IHE adjudication systems is virtually nonexistent, activists, advocates, and victims claim the IHE process is harmful in ways similar to the criminal justice system; where it is well-documented that harsh questioning, not being believed, and not feeling supported by formal providers harms victims (Campbell, Wasco, Ahrens, Seft, & Barnes, 2001; Ullman, 2010). Victims who feel ashamed and blame themselves for the assault are far less likely to report victimization and to feel satisfied with case outcomes (Sabina & Ho, 2014). Adjudication processes that add to feelings of shame lead to diminished victim trust in the process and the silencing of future victims.

While many victims feel the adjudication process is degrading, others feel the outcomes of these processes are also harmful. Title IX and subsequent policy and guidelines clearly state IHEs must accommodate victims who wish to avoid the accused during the adjudication process. Most schools take this mandate seriously, allowing victims to transfer classes or change their schedules without being penalized. Yet, IHEs often fail to proportionately punish respondents who are found responsible once the adjudication process concludes, as evidenced by the over 90 schools that are now under investigation for improper handling of sexual assault cases (US Dept. of Education, 2017). In one case, a group of students received a punishment of postgraduation expulsion for videotaping themselves groping the unconscious victim (Fletcher, 2015). This outcome demonstrates the unresponsiveness of IHEs to seriously reprimand students found responsible of sexual assault. Both the process and outcome must be perceived as fair to victims if IHEs wish to foster a feeling of safety for other victims to come forward.
Adjudicatory system harms to respondents

From the perspective of respondents, the current Title IX adjudicatory environment focuses largely on protections for victims at the expense of due process rights. Many respondents feel unprotected, deprived of due process rights, and face difficulty trying to defend themselves against the charges they face (Triplett, 2012). The Title IX adjudication process can have many negative effects on respondents, including suspension or expulsion, lack of confidentiality, and perceived inability to effectively defend oneself. Discipline for serious charges—like sexual assault—not only impacts a respondent’s standing with classmates and instructors, but may also interfere with education and future employment opportunities (Triplett, 2012). This is not to suggest that those found responsible for sexual assault should not be punished, but rather we operate from an agnostic standpoint suggesting that the punishment should be just. We also aim to point out how respondents—regardless of their case outcome—often face excess adversity in the adjudication process. The current Title IX adjudication processes tilt the scales against respondents who wish to legally challenge any mistreatment and/or gender bias experienced during proceedings, and fail to offer additional safeguards to respondents that are offered to victims.

One such consequence of sexual assault accusations is expulsion, which can detrimentally impact a student’s ability to secure employment. Expulsion may be an adequate response under such circumstances and serve to protect the victim; however, expulsion (and the potentially associated consequences) is unwarranted when the respondent faces such consequences while unable to exercise due process rights. Recognizing unfair treatment, some respondents have legally retaliated. Respondents have been expelled and reinstated following a successful Title IX counter suit against the university (Doe v. Regents of the University of California San Diego, 2015). Though not expelled, one student accused of sexual assault filed a FERPA violation and breach of contract lawsuit for denying access to transcripts and other blocked educational opportunities (Vaughan v. Vermont Law School, 2011).

Campuses are sheltered, highly social environments, where the spread of personal information can create a hostile environment for victims as well as respondents, regardless of the factual nature of the information. Students accused of sexual assault sometimes face public ridicule. For example, students at Columbia University posted "rape-lists" and held events naming respondents and victims (Nungesser v. Columbia University, 2015). Rumors of sexual assault cause distress and foster harassment regardless of the outcome, which is detrimental to respondents’ educational experience. Some respondents have been ostracized by other students and university faculty (Vaughan v. Vermont Law School, Inc. et al., 2011). Such issues that respondents may experience are difficult to prove in court under Title IX claims, and, if successful, to legally rectify. Thus, Title IX policy aims to protect victims from retaliation and ridicule—and though these protections often fall short for victims—no policies are currently in place that aim to protect respondents. The adjudication process as it currently is fails to protect either party.

Today, more respondents are filing Title IX complaints—approximately 50 are currently in process, compared to 12 two years ago (Smith, 2015). However, this does not mitigate respondents’ uphill battle of proving a Title IX claim in order to rectify wrongdoing. Title IX’s victim-specific protections diminish due process rights for respondents. Enhanced due process rights for respondents may conflict with Title IX’s goals. Thus, there is clear and convincing evidence we have yet to achieve a balance of fairness for both parties.

The imbalance of fairness in Title IX adjudication

Preponderance of the evidence standard

The OCR maintains the preponderance of the evidence standard (preponderance standard) is consistent with the standard of proof employed in litigation for civil rights violations, and thus is appropriate for Title IX adjudication. The preponderance standard is the lowest standard of proof in the American judicial system and allows IHEs to punish respondents if the victim presents sufficient evidence to
suggest more likely than not, a sexual assault occurred. The preponderance standard generally requires 50.01% certainty of guilt to convict (Silverglate & Gewolb, 2014). Before 2011, some IHEs applied the clear and convincing standard, which is an intermediate standard generally requiring a 75% certainty of guilt to convict (McCauliff, 1982). The highest standard of proof employed in criminal trials is the beyond a reasonable doubt standard, which requires 90.3% certainty of guilt to convict (McCauliff, 1982). Contention exists as to whether the lower standard evenly situates the victim with the respondent in adjudication (Cantalupo, 2012), or increases the likelihood of false-positive outcomes that would be mitigated by higher standards of proof (Hendrix, 2013).

Proponents for the clear and convincing standard of proof within Title IX adjudication argue the preponderance standard makes guilt easier to establish—providing victims with precedence in adjudication at the detriment of the respondent (Hendrix, 2013). Conflicting evidence both supports and challenges this argument. Respondents disciplined for sexual misconduct have filed more than 110 lawsuits against IHEs alleging that due process violations and the preponderance standard detracted from their presumption of innocence (Boys and Men in Education, 2015). More than 10% of these lawsuits have been successful in staying or overturning IHE disciplinary decisions in Title IX adjudication. These lawsuits suggest that in some cases, the preponderance standard may unfairly tip the scales toward a decision favorable to the victim. Conversely, if Hendrix’s (2013) argument is correct, there should be a notable increase in findings of responsibility and expulsions after the issuance of the 2011 DCL. Pre-DCL, up to 25% of respondents found responsible were expelled (Lombardi, 2010), while post-DCL, 12% of respondents found responsible were expelled (Anderson, 2014), indicating a decrease in expulsions with the preponderance standard in place. Further, more than 100 open Title IX investigations against IHEs alleging mismanagement of sexual assault cases (New, 2015b) suggest the preponderance standard does not necessarily prejudicially benefit the victim at the expense of the respondent.

Current evidence collection procedures compound the unfair nature of Title IX adjudication. As in criminal proceedings, evidence utilized in Title IX adjudication is collected through investigations. Reardon (2005) explained that IHEs do not always utilize independent, impartial third parties to conduct investigations (although some IHEs have begun to do so). Victims and respondents are often required to act as investigators, identify potential witnesses, and collect statements and evidence to prove sexual assault did or did not occur (Reardon, 2005). These burdensome investigation requirements breed a hostile environment and diminish fairness of adjudicatory outcomes for victims. For example, victims—without the training or experience of a sexual assault nurse examiner—must conduct their own physical examinations and document bodily injuries—including bruises, scrapes, and genital trauma—exacerbating emotional harm and feelings of fear and isolation (Reardon, 2005). Evidence collected under these circumstances is likely to be compromised. Under emotional duress, evidence collected may lack weight of evidence, which refers to the believability or persuasiveness of evidence used at trial (West’s Encyclopedia of American Law, 2008). Consequently, one could argue the scales are unfairly tipped toward an outcome favorable to the respondent who likely has fewer roadblocks to collecting evidence. These circumstances are also likely to discourage victims from reporting sexual assault, which reduces Title IX’s effectiveness at eliminating sex discrimination within IHEs (see Campbell et al., 2001).

The OCR has also not provided IHEs with any guidance as to what evidence is required to establish guilt under the preponderance standard within Title IX adjudication. Without specific guidance from the OCR as to the appropriate application of the preponderance standard, IHEs potentially risk failing to hold guilty students accountable (Weizel, 2012). In criminal rape trials, the beyond a reasonable doubt standard requires stronger evidence to prove the defendant’s guilt than is required under the preponderance standard in Title IX adjudication. This stronger evidence may include corroborating eyewitness accounts, forensic evidence, timeliness of reporting, and/or evidence of physical force or the use of a weapon, which is unlikely applicable to victims on campus—especially those involving date and acquaintance rape (Weizel, 2012). The OCR’s guidance fails to articulate however that this type of evidence is not required to substantiate guilt under the
preponderance standard, suggesting IHE staff training protocols may also be deficient. Consequently, disciplinary panel members may erroneously require a higher standard of proof, regardless of the mandated lower standard (e.g., Tenerowicz, 2001).

**Right to cross-examination**

Both victims and respondents experience the consequences of various and conflicting legal requirements, which create an environment where unfair treatment is systemic and acceptable, and fairness appears dangerous and inconvenient rather than beneficial and necessary. The ability to cross-examine witnesses is essential to due process as it allows both parties to substantiate the veracity of witness’ claims and refute false testimony (Wellman, 1997). In Title IX adjudication however, the OCR has clearly articulated direct—or face-to-face—cross-examination is inappropriate, as it could traumatize the victim and create or perpetuate a hostile environment. Multiple cross-examination legal mandates within the current disjointed Title IX adjudicatory environment create overlapping and conflicting compliance requirements for IHEs. During the adjudicatory process, attorneys hired by both parties may—or may not—be allowed to directly cross-examine witnesses, depending on the circumstances of the case (Silverglate & Gewolb, 2014). One federal district court requires IHEs provide respondents the right to face their accusers (Danso v. University of Connecticut, 2007). Another decision mandates that direct cross-examination may—or may not—be necessary if witness credibility is a determinative factor of the respondent’s future at the IHE (Donahue v. Baker, 1997). An earlier decision stipulates that IHEs must consider the respondent’s cross-examination rights (Dixon v. Alabama State Board of Education, 1961), but can diminish those rights if they create an administrative and/or fiscal burden (Mathews v. Eldridge, 1976). In cases involving more serious charges, the respondent may—or may not—be entitled to the right to face their accuser (Nash v. Auburn University, 1987). However, no clarification is provided as to what constitutes more serious charges.

Indefinite OCR guidance and conflicting legal requirements equate to poorly designed and varied procedures that meet the lowest standards of fairness. As a substitute for direct cross-examination, the OCR advises IHEs to allow indirect cross-examination. Case law allows respondents to ask victims questions through the disciplinary panel (Donohue v. Baker, 1997). Disciplinary panels can also shield the victim from the view of the respondent to avoid direct confrontation (Cloud v. Trustees of Boston University, 1983). Many IHEs have failed to implement effective indirect cross-examination procedures consistently and adequately due to the legal and federal cross-examination obligations detailed above and deficient guidance from the OCR. Some suggest indirect cross-examination protects respondents’ right to confront their accuser and challenge conflicting testimony (Triplett, 2012). This process also eliminates the need for victims to endure direct confrontation with their attackers, mandated by Title IX. However, case law and the OCR fail to offer much specificity as to which procedures should be implemented to meet these requirements while ensuring the due process rights of respondents.

In a disjointed adjudicatory environment, it is likely that IHEs will sometimes give precedence to one party’s rights as they struggle to balance rights for both parties. In lawsuits against IHEs, respondents disciplined for sexual assault claim disciplinary panels did not ask all submitted questions (Smith, 2015). Restricting this right is associated with generating a hostile environment for the victim, which would trigger the OCR to consider cutting the IHE’s federal funding. Restricting cross-examination rights also creates an obvious conflict between the respondent’s 6th Amendment rights and the victim’s right to an education free from sex discrimination. Cross-examination is one of the more traumatizing aspects of the adjudication process for victims (Ehrlich, 2001), making them feel as if they have been revictimized (Gentleman, 2013). Under the dictates of Title IX, IHEs are obligated to protect victims from respondent questions that may humiliate them. However, respondents have also alleged IHEs did not allow the opportunity to
dispute testimony, provide a list of the victim’s witnesses, and/or interview potentially exonerating witnesses (Kingkade, 2015).

Denial of the right to counter testimony significantly diminishes the likelihood of fair outcomes for victims and respondents. In disciplinary hearing transcripts obtained by The New York Times, a college disciplinary panel interrupted the victim during critical lines of questioning, and changed the subject before the victim finished answering questions that would have clarified what happened during the incident in question and helped to establish the three respondents’ guilt (Bogdanich, 2014). The panel also misrepresented witness statements and asked about internal college reports and witness statements the victim had never seen. At the conclusion of the hearing, the three respondents were found not responsible. Perhaps the outcome would have been different if the victim was able to access the respondents’ testimony, evidence, and witness statements, and submit counterquestions through the disciplinary panel. Without the right to counter testimony, false testimony can become the “evidence” of guilt or innocence, and the fairness and accuracy of a disciplinary decision cannot be validated. Thus, the perceived legitimacy of the IHE adjudicatory system diminishes, and a hostile environment for victims proliferates (see Procedural and Distributive Justice section). As discussed in the following section, the opaque nature of Title IX adjudication requirements has reduced fairness of outcomes and students’ perceived legitimacy of the system, and failed to diminish the incidence of sexual assault on IHE campuses. Students are more likely to self-regulate their behavior and adhere to rules when adjudication is perceived as procedurally fair and thus legitimate (Tyler, 2006).

**Procedural and distributive justice**

The organizational justice (OJ) literature from psychology offers a promising explanation for victim and respondent dissatisfaction with the current resolution process. The OJ concept—traditionally applied in corporate settings—is applicable in any organization, which is defined as any social entity with members working toward common goals (e.g., educational goals; Kals & Gallenmüller-Roschmann, 2011). OJ attempts to explain how and why people assess the fairness of organizational decisions (Greenberg, 1987). Subsequent research has identified two sub-dimensions that influence these decisions: DJ and PJ. The greatest theoretical and empirical support comes from a combination of both dimensions (Colquitt & Greenberg, 2003). We contend that DJ and PJ are important for both victims and respondents, but for different reasons.

**Distributive justice**

The DJ dimension is concerned with outcome fairness (Adams, 1965). Independent of the process through which decisions are made, people are least satisfied with decisions yielding unfair outcomes regardless of the favorability of the outcome (Bornstein & Dietrich, 2007). DJ is concerned with assessments of absolute fairness, but rather relative fairness based on a number of factors. According to DJ, there are four factors on which the fairness of an outcome is rated. Two of these—need and efficiency—are important to victims, while the others—proportionality and equality—are important to respondents.

**Importance of DJ for victims**

Following a sexual assault, victims are inherently concerned with outcome fairness. Victims that perceive more DJ in the proceeding are more likely satisfied, which is linked with an increased willingness to participate in the adjudication process (Erez, 1999). Victims’ satisfaction with the process is not necessarily contingent upon the outcome of the legal proceedings, as it may seem logical to assume; however, the relationship is more complex. Victims are interested in a variety of outcome goals simultaneously, with instrumental goals (i.e., deterring the offender, protecting the victim, and protecting others) being the most important, and retribution being less so (Orth, 2003).
In the parlance of DJ, victims are concerned with the need and efficiency factors. Need refers to the socially constructed minimum amount of something—punishment in this case—necessary to achieve a goal, akin to making the victim whole again in civil litigation (Bornstein & Dietrich, 2007). Efficiency refers to the minimum amount of punishment necessary to satisfy the victim (Sen, 1992). Therefore, victims are most likely interested in punishments satisfying instrumental goals with little interest in retribution.

**Importance of DJ for respondents**

Understandably so, respondents are focused on the DJ factors of equality and proportionality. Equality refers to a person’s assessment of whether the outcome—punishment in this case—is commensurate with similarly situated others. Given the massive inconsistencies noted in both the process IHES handle sexual assaults and the punishments levied against offenders, it is logical that respondents have equality concerns (Creeley, 2013). Proportionality, on the other hand, refers to whether a person deserves the outcome (Miller, 1999): in our case, whether the respondent feels as though the punishment is commensurate with the violation of the student code of conduct. It is important to recognize that while it may be impossible to fully assuage the DJ concerns of respondents, research suggests employing other OJ dimensions (i.e., PJ) may help.

**Procedural justice**

In contrast to the outcome-focused concerns highlighted previously, PJ focuses on the utilization of fair procedures to make decisions (Tyler, 2006). Evidence suggests people more willingly accept and comply with decisions, even those seen as unfavorable, when the process used to make those decisions is perceived as fair (Tyler, 2007). Further, the importance of perceived fairness extends beyond those with direct contact with the decision-making process, and can extend to others in the same organization (i.e., other students on campus). This suggests using fair procedures is both specifically (i.e., to those with direct experiences) and generally (i.e., to the public at large) desirable. Procedurally fair treatment is directly related to perceptions of legitimacy, which is directly related to behavioral self-regulation and rule adherence (Tyler, 2006). In essence, people feel a sense of moral obligation to follow the rules and comply with the decisions of legitimate authorities (Tyler, 2007). Legitimacy serves to bolster informal social control, and procedurally fair treatment has direct effects on increased legitimacy (Tyler, 2006). Some scholars argue a lack of PJ may motivate criminals to engage in future criminality (Casper, 1972). Therefore, PJ is an important goal within the realm of manipulation by most decision-makers (Burke & Leben, 2007).

There are four important elements to consider when examining the procedural fairness of decision-making: (a) voice, (b) respect, (c) neutrality, and (d) trustworthiness. Voice refers to people’s desire to know that authority figures both listened and gave credence to their side of the story (Tyler, 2007). Allowing participants a voice in the decision-making process engenders feelings of process control (Tyler, 2006). Respect revolves around participants’ desires to be treated as though they are worthy of respect, and decision-makers take their concerns seriously (Tyler, 2007). This involves treating people in a courteous manner—while respecting their broadly defined rights. Neutrality focuses on the belief the decision-maker has no preconceived preference for any party in the decision-making process. In essence, letting a person know the decision was not made prior to considering their side of the story (Tyler, 2007). Trustworthiness is an assessment of the character of the decision-maker, and asking whether care and sincerity were focal concerns in the decision-making process (Tyler, 2007). Unlike in DJ, each of these elements may matter to victims and respondents, although for different reasons.

**Importance of PJ for victims**

The manner in which victims are treated during the resolution process can be just as important as the outcome of the proceedings. Some argue PJ concerns moderate the effect of DJ concerns,
whereby those victims experiencing more procedurally fair treatment want more lenient sentences of offenders (Colquitt & Greenberg, 2003). The most important PJ concern for victims is having a voice in the proceedings (Wemmers & Cyr, 2006). Having a voice in the proceedings increases a victim’s perception of control and autonomy, which are key to a timely recovery (Frazier, 2000). Furthermore, perceptions of PJ are bolstered if those involved in the resolution process clearly communicate belief in the victim’s statements (neutrality and respect; Patterson, 2011). Some Title IX mandates from the DCL may have been working to accomplish these goals (e.g., reducing the burden of proof and investigating all claims). Bolstering victims’ perceptions of PJ helps retain feelings of dignity and individuality (Elliot, Thomas, & Ogloff, 2012). This in turn is essential to assisting victims with a timely recovery, improves cooperation with the investigatory process, and strengthens the perceived legitimacy of the IHE. Elevated perceptions of legitimacy diminish traditional barriers victims face, allowing victims to feel more comfortable reporting victimization (Ullman & Filipas, 2001).

**Importance of PJ for respondents**

There is a long line of scholarship highlighting the importance of PJ for those accused of violating the law or other organizational rules, which due to space concerns is not summarized here (see generally, Tyler, 2006) Suffice it to say, respondents are likely exceptionally concerned with PJ. Concerns about voice can be satisfied by IHEs offering the respondent the opportunity to be heard during the disciplinary process, which thanks to the DCL is becoming—at least nominally—more likely. Likewise, respondents want to know the decision maker is neutral and trustworthy. Changes mandated by the DCL lead many respondents to feel as though the proceedings are a façade designed to protect the institution at the expense of the respondent’s rights (Triplett, 2012). Given the potential financial coercion of Title IX, coupled with the recent changes mandated by the DCL, these fears are understandable—although unwarranted based on the suspension and expulsion data.

**Implications for policy development and practice**

The argument presented above clearly suggests Title IX is not working to protect victims from sex discrimination or respondents’ due process rights despite moral and legal obligations. The solution to this predicament potentially lies in moving away from a pseudo-adversarial system, to one based on restorative justice (RJ). Some scholars advocate the implementation of RJ systems in Title IX processes (e.g., Koss, Wilgus, & Williamsen, 2014). We contend RJ in the Title IX adjudication process could allow for greater access to justice for both parties.

Unlike the current pseudo-adversarial process, RJ seeks acknowledgement of both the harm caused and holding the offender responsible for repairing the harm (Koss et al., 2014). Unlike mediation, RJ requires offenders take responsibility for the harm caused—ideally from the outset of the process—and work collaboratively with the victim to repair that harm (McGlynn, 2011). Critics of the application of RJ to sexual assault argue that the tenets of RJ risk revictimization and endangerment to the safety of victims (McGlynn, Westmarland, & Godden, 2012). The traditional concerns (i.e., secondary victimization) against employing RJ within sexual assault cases may be unwarranted because—with the proper protocols—the benefits (i.e., victim recovery and offender reintegration and behavioral change) far outweigh the risks (McGlynn et al., 2012). The current adjudication system is designed under the presumption that victims are highly vulnerable and in need of guarding, and in this attempt fails to respond to the actual needs of victims seeking justice and often induces greater harm (see the Adjudication Harms to Victims section) because the current system was not designed to meet victims’ needs or achieve goals other than punishment (Koss, 2014). Victims describe the need to tell the story of their experiences, obtain answers to questions, experience validation, observe offender remorse, receive support that counter-acts self-blame, and have input into the resolution of their violation (Koss, 2014). An RJ approach can meet these agentic and empowerment needs of victims, transforming a potentially revictimizing experience into one
that actually aids in recovery (Umbreit, Coates, Vos, & Brown, 2002). Victims are often left dissatisfied with traditional resolution processes, and are thus likely to perceive RJ as superior to the current model because the entire process seeks to enhance victims’ PJ and DJ concerns.

Respondents also benefit from RJ; especially if careful consideration is given to process design. An increased aura of transparency in the process and reducing the adversarial nature of the proceedings may bolster respondents’ willingness to take responsibility from the outset (Braithwaite, 2002). Given the argument that some IHE sexual assaults revolve around cases of alleged mistaken consent (Hendrix, 2013), a process clearly enumerating each party’s rights/responsibilities, and identifying the likely punishment, may assuage respondents’ unwillingness to take responsibility. The primary concern of responsible parties entering RJ is centered on the outcome (Braithwaite, 2002). Clearly articulating at the outset that the goal is not necessarily to remove the student from school may convince otherwise reticent respondents to acknowledge the harm caused and genuinely work to repair it (Zehr, 2002). While this may be perceived as letting offenders off easy, taking responsibility and participating in RJ is more difficult for the respondent than the traditional adversarial process because it requires the respondent to listen to the victim, acknowledge the harm caused, and work to repair that harm (Braithwaite, 2002).

The set-up of the RJ conference—especially if intentionally considered—could serve to ameliorate other respondent due process concerns, namely the ability to cross-examine witnesses. While most conferences focus on allowing the victim a voice (one of the primary benefits of this model), and the ability to ask questions of the respondent (McGlynn et al., 2012), the process could also allow the respondent to make statements and ask appropriate questions. Thus, allowing both parties to be heard by the other. This process would require intentional design and an adept leader capable of managing the process. Even if only a minor exchange occurred, this would represent a stark improvement over respondents’ experiences with the current adjudicatory process. This would also satisfy the desire of the respondent specifically to have the ability to cross-examine the victim—although because of the model, in a less adversarial manner. Both offenders and victims participating in RJ report higher perceptions of PJ (Braithwaite, 2002). These elevated perceptions of PJ likely stem from having an equal opportunity to be heard in a respectful manner in front of the other person. Further, moving away from the burden of proof standard necessary in an adversarial model will likely alleviate the respondents concerns of being inappropriately found responsible due to a lower burden of proof.

The current adjudicatory process likely leaves both victims and respondents dissatisfied with the outcome. While respondents held accountable for their actions may never be satisfied with the outcome of the process, it is possible to enhance perceptions of distributively just outcomes for both parties through the RJ model. Victims’ perceptions of DJ will be enhanced both by knowing what the outcome of the process is, and having a voice in crafting that outcome. Recall that victims are not necessarily interested in punitiveness, but by concerns of protecting themselves and others from subsequent victimization—addressing concerns of equality and efficiency. Respondents, hearing how their actions affected both the victim and the larger campus community, will likely have elevated perceptions of DJ—addressing concerns of equity and proportionality. Therefore, transitioning away from the pseudo-adversarial model towards a RJ model is advantageous for both victims and respondents in the Title IX adjudicatory process. Moving away from an adversarial model to one in which the process works with the respondent to repair the harm caused will likely improve victims’ ability and willingness to participate, report, and eventually recover from a sexual assault. In addition to helping those who have been victimized, the proposed move to the RJ model will serve to enhance perceptions of system legitimacy and may make IHEs safer for all students.

While transitioning to RJ would benefit both parties in these cases, it is unclear what this process would look like. The specific development of this process is beyond the scope of this article, and would require theoretical, programmatic, and empirical work by RJ scholars. However, we support the model developed by Koss and colleagues (2014) who provide a variety of outcome contingencies
based on a variety of potential outcomes (i.e., findings of responsibility vs. not responsible). It is imperative to design a system that enhances victims’ safety, recovery, and experiences with the Title IX adjudication process. Victims should not be forced to engage in a process that makes them uncomfortable. However, respondents should not receive substantively different outcomes because of the adjudicatory process.

**Conclusion**

With the widespread prevalence of campus sexual assault, there is a clear need for continued action to improve and transform the way IHEs handle sexual violence. Yet the current state of Title IX adjudication processes threatens to undermine the progress and work that has been done around campus safety. The process does harm to both victims and respondents, which results in a net loss of progress on the issue.

We have demonstrated how the legislation of, and related to, Title IX creates an unclear and confusing web of mandates IHEs struggle to interpret. We have shown how IHEs implement this legislation while struggling to balance irreconcilable concerns and legal obligations at the federal and constitutional levels, resulting in an often arbitrary and unstandardized process. With a specific focus on due process rights, we have demonstrated the limits of IHEs adequately balancing respondent and victim due process concerns. PJ and DJ are two theoretical concepts we have deployed to guide a better understanding of the impossibility of balancing due process rights and victim concerns within the current Title IX adjudication system.

It is possible to understand the mechanisms contributing to the failure of Title IX adjudication once we account for respondent and victim perceptions of PJ and DJ. PJ, which focuses on using fair procedures, and DJ, which is concerned with fair outcomes, are impossible to achieve for either party under the current system. Future remedies must attend to this central limitation. RJ can serve as an emergent promising practice in Title IX adjudication due to its emphasis on fair processes, equal participation, and fair outcomes. RJ has long been utilized for other offenses with success. Centering PJ and DJ within Title IX adjudication will ensure students perceive the system control mechanisms as legitimate, thus contributing to a reduction in sexual assault at IHEs.

**References**


Cloud v. Trustees of Boston University, 720 F.2d 721 (1st Cir. 1983).


Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961).


Nash v. Auburn University, 812 F.2d 655 (11th Cir. 1987).


