Adapting Standards of Judicial Impartiality to Student Discipline in Higher Education: Pitfalls and Potential Learned from Title IX Adjudications

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INTRODUCTION

Ongoing faith in judicial decision-making is predicated on the fairness of judicial institutions. After all, "[a] fair trial in a fair tribunal is a basic requirement of due process."[1] Any legal system that respects the rule of law must ensure impartiality in the adjudication of disputes—not just in the courts, but in all forms of adjudication.[2] Therefore, adjudications of student discipline cases in higher education (at least at public institutions) must abide by the judicial ethic of impartiality as a matter of due process.[3] Students in similar situations must be treated equally to avoid injustice, without regard to adjudicators' biases or conflicts of interest, because school disciplinary systems will not work if they seem unjust to students.[4]

But is the impartiality required in university discipline cases equivalent to the standards of impartiality set forth for judges adjudicating in courtrooms? This Note argues that impartiality in student discipline should distinguish itself in part from judicial impartiality, keeping the broad strokes (a requirement of impartial decision-making and a mechanism to enforce it) but adapting them to the educational context. In Part I, an overview of impartiality as applied to formal judges denotes how partial judges can be removed from decision-making in cases where conflicts of interest or biases actually interfere—or appear to interfere—with judicial judgment. Part II then describes the educational environment of student discipline at institutions of higher education, including the concerns for impartiality unique to school discipline. Part III offers a deep look into Title IX hearings adjudicating and addressing student-to-student sexual misconduct. The administrative regulations around impartiality in Title IX decision-making—their vacillation between specificity and silence—provide insights into areas of improvement for impartiality in university student discipline at large. From these insights, this Note articulates several recommendations for practice in Part IV.

I. IMPARTIALITY IN JUDICIAL ETHICS

While impartiality has been a long-held principle for the legitimacy of court systems, its exact meaning and the expectations for judges maintaining it have shifted

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1. Withrow v. Larkin, 421 U.S. 35, 46 (1975) (applying the principle to administrative agencies with adjudicative functions in addition to the nation's courts).

2. Thomas W. Merrill, *Fair and Impartial Adjudication*, 26 GEO. MASON L. REV. 897 (2019).

3. *See* John G. Hill, Jr., *The Fourteenth Amendment and the Student—Academic Due Process*, 3 CONN. L. REV. 417, 418, 432 (1971).

4. *See* Brooke Grona, *School Discipline: What Process Is Due? What Process Is Deserved?*, 27 AM. J. CRIM. L. 233 (2000).

over centuries.[5] Lauded English jurist Sir William Blackstone held that a judge could not be attacked for partiality, as their authority depended on the presumption of their lack of bias or favor toward parties.[6] Over time, however, greater rules regarding judicial impartiality were adopted to hold U.S. judges accountable for breaching the core ethic.[7]

Impartiality is safeguarded in the courts by the dual mechanisms of recusal and disqualification.[8] Essentially, recusal involves a judge's personal determination of some infringement on their own impartiality, prompting their voluntary removal as an adjudicator of a matter.[9] Judges have a duty to evaluate the propriety in presiding over a case, by "mak[ing] a conscientious determination whether he or she can impartially assess the issues in question."[10] Disqualification covers the same act of stepping down as an adjudicator due to compromised impartiality, but it follows a motion from one of the parties to remove the judge.[11] "Recusal" and "disqualification" are often viewed as interchangeable terms,[12] and they are predominantly used interchangeably herein.

A. Conflicts of Interest: Contra Nemo Iudex in Sua Causa

One of the bedrock principles of judicial impartiality is enshrined in the Latin phrase *nemo iudex in sua causa*: no man should be judge in his own case.[13] The fundamental application of the principle prohibits a judge from presiding over a case in which they are a named party, but the doctrine is extended to other tangential instances in which the risk of partiality is considered too great for the public to bear.[14] "[D]isqualification can be expected: where a judge 1) has personal knowledge of the case; 2) has a prior relationship linking him with some element of the case; [or] 3)

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5. *See* Zygmont A. Pines, *Mirror, Mirror, on the Wall—Biased Impartiality, Appearances, and the Need for Recusal Reform*, 125 DICK. L. REV. 69 (2020) (describing the growth of impartiality as a judicial ethic from ancient Egypt, to Roman law, Blackstone's 18th century England, and modern America).

6. 3 WILLIAM BLACKSTONE, COMMENTARIES *361.

7. *See* Charles G. Geyh, *Why Judicial Disqualification Matters. Again.*, 30 REV. LITIG. 671 (2011) (describing the development of codes for judicial disqualification over four regimes).

8. *See generally* William W. Kilgarlin & Jennifer Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986).

9. *See Definitions: What Is Judicial Disqualification? What Is Judicial Recusal?*, JUD. RECUSAL RES. CTR., http://www.judicialrecusal.com/judicial-disqualification-definition/ [https://perma.cc/GHA6-6UVZ].

10. Goodheart v. Casey, 565 A.2d 757, 764 (Pa. 1989).

11. *See* JUD. RECUSAL RES. CTR., *supra* note 9.

12. *See id.* For instance, 28 U.S.C. § 455, which uses "disqualification" as a stand-in for "recusal," requires a U.S. judge to "disqualify himself" *sua sponte* in the event that certain potentially compromising circumstances exist or when the judge's impartiality might reasonably be questioned in relation to a proceeding.

13. Adrian Vermeule, *Contra Nemo Ludex in Sua Causa: The Limits of Impartiality*, 122 YALE L.J. 384, 386 (2012).

14. *See id.* at 390–91.

has a financial interest in the outcome . . . ."[15] These variations demonstrate the array of conflicts of interest—when judges have a vested reason to decide cases outside the rule of law—that undermine judicial impartiality.

B. Bias

On the other hand, bias refers to a mental inclination, prejudice, or predilection.[16] Any such personal or extrajudicial bias, such as a preexisting adverse attitude against a particular racial or ethnic group, may warrant judicial disqualification when the bias implicates a lack of impartiality toward a party.[17] For example, judges are obligated under the U.S. Code to disqualify themselves when they have a personal bias or prejudice concerning a party.[18] The most egregious of these inclinations are explicit biases—prejudices of which a judge is conscious[19]—that a judge should know prevents their ability to impartially adjudicate a case. More insidious, though, are implicit biases, which are unconscious and outside of a judge's awareness.[20] Either form of bias jeopardizes impartiality in the courts.

Over the years, several standards for bias claims have been utilized in disqualification proceedings. At one extreme lies actual bias, which, as its name suggests, refers to a prejudice legitimately present in a judicial hearing, diminishing the legitimacy of the judiciary.[21] A showing of actual bias may require "(1) evidence, usually from the judge's own mouth, of a pervasive personal bias, or (2) a statement by the judge declaring that she will ignore the evidence to achieve a predetermined result."[22] A dominant critique of the actual bias standard is the difficulty of accumulating such explicit evidence of bias, resulting in insufficient disqualification when a risk of bias is high but the bias cannot be affirmatively demonstrated.[23]

At the opposite extreme, the standard for disqualification on the appearance of bias is an "image-enhancing bias rule" that intends to improve public confidence in judicial decision-making.[24] Under tests using appearance of bias as a standard, judges are disqualified when a reasonable person might question their impartiality.[25]

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15. Donna M. Lumia, *Judicial Disqualification in California: Legal Ways of "Benching the Bench,"* 1 J. CONTEMP. LEGAL ISSUES 171, 171 (1988).

16. *Bias*, BLACK'S LAW DICTIONARY (11th ed. 2019).

17. *See* Jerome P. Vanora, *Judicial Disqualification for Personal Bias in New York State*, 8 J. NAT'L ASS'N ADMIN. L. JUDGES 105, 106 (1988).

18. 28 U.S.C. § 455.

19. *See Two Types of Bias*, NAT'L CTR. FOR CULTURAL COMPETENCE AT GEO. UNIV., https://nccc.georgetown.edu/bias/module-3/1.php [https://perma.cc/XZP8-JVJG].

20. *See id.*

21. *See* Sarah M. R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1 (2007).

22. Raymond J. McKoski, *Giving up Appearances: Judicial Disqualification and the Apprehension of Bias*, 4 BRIT. J. AM. LEGAL STUD. 35, 50 (2015).

23. *See, e.g.*, Jeffrey W. Stempel, *In Praise of Procedurally Centered Judicial Disqualification - and a Stronger Conception of the Appearance Standard: Better Acknowledging and Adjusting to Cognitive Bias, Spoliation and Perceptual Realities*, 30 REV. LITIG. 733, 754 (2011).

24. McKoski, *supra* note 22, at 52.

25. *See* 28 U.S.C. § 455 ("Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be

However, the broader appearance of bias test for disqualifications has not brought predictability or uniformity to situations when judges must determine whether to recuse themselves from a matter.[26] An appearance-based approach to disqualification arguably results in too many unnecessary recusals and does not adequately account for removing bias from the judiciary.[27]

Some compromise between the extremes of the actual bias and appearance of bias standards calls on disqualification for a probability of bias—meaning that a judge is disqualified when there is a discernible likelihood of bias present that may affect decision-making. The U.S. Supreme Court most recently articulated such a standard in *Caperton v. A.T. Massey Coal Co.*, noting that some proceedings give rise to circumstances where "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."[28] The test for such a probability of actual bias is objective, not subjective: whether an average judge in the challenged decision-maker's position is likely to be neutral or to harbor some unconstitutional bias.[29] A demonstration of actual bias is unnecessary under this standard, but the bar is also raised above the arguable (and ephemeral) appearance of bias to an assessment of the likelihood of bias infecting decisions.

II. STUDENT DISCIPLINE IN HIGHER EDUCATION

A. The Unique Context of Education

The National Center for Education Statistics recognized 1,625 public institutions of higher education in the 2019–2020 academic year.[30] These institutions, as extensions of the government, must uphold due process in their student discipline proceedings,[31] unlike private institutions.[32] But the context of student discipline

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questioned.").

26. McKoski, *supra* note 22, at 60.

27. *See* Cravens, *supra* note 21, at 3.

28. 556 U.S. 868, 877 (2009) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)).

29. *Id.* at 881.

30. U.S. DEP'T OF EDUC., NAT'L CTR. FOR EDUC. STAT., *Table 317.10. Degree-Granting Postsecondary Institutions, by Control and Level of Institution: Selected Years, 1949-50 Through 2019-20* (Sept. 2020), https://nces.ed.gov/programs/digest/d20/tables/dt20_317.10.asp [https://perma.cc/AKQ3-7BKW]. The proper number of institutions depends on how the branch campuses are counted in relation to flagship campuses. *Id.*; *see also* Josh Moody, *A Guide to the Changing Number of U.S. Universities*, U.S. NEWS (Apr. 27, 2021, 9:30 AM), https://www.usnews.com/education/best-colleges/articles/how-many-universities-are-in-the-us-and-why-that-number-is-changing [https://perma.cc/R6EZ-XTHG].

31. Goss v. Lopez, 419 U.S. 565, 581 (1975) (holding the Due Process Clause of the Fourteenth Amendment protects students at public institutions).

32. As private colleges and universities are not state actors, they are not required to provide due process protections under the Fourteenth Amendment. Blake Padget, *Process Has Come Due: An Argument for Creation of Due Process Rights for Private University Students*, 49 U. TOL. L. REV. 485, 486 (2018). Instead of federal due process, students' rights in student discipline at private institutions normally depend on contract law and what promises (potentially including commitments to impartial adjudication) appear in student codes or

remains unique from and parallel to the nation's court systems.[33] Universities use student discipline proceedings as a method of maintaining safe educational environments while promoting university and civic values.[34] "Perhaps it is as disciplinarian that the school most delicately balances its roles: as state, as quasi-parent, as police, and as educator."[35] As such, student discipline fills in a distinct niche in adjudication.[36] The available sanctions for conduct violations—expulsion, suspension, probation in relation to a specific institution—differ from those generally imposed by courts, helping to justify treating student discipline proceedings differently from courts.[37]

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handbooks. *Id.*

33. *See, e.g.*, *What Is the Difference Between the University Student Conduct Process and the Legal System?*, UNIV. OF ARK., DIV. OF STUDENT AFFS., https://accountability.uark.edu/information-for-advisors/legal-vs-conduct.php [https://perma.cc/4ANY-SRTW] (student conduct process sets community standards for a productive university environment); *see also* Peter F. Lake, *Student Discipline: The Case Against Legalistic Approaches*, 55 CHRON. HIGHER EDUC. A31–32 (2009) (arguing that colleges drop legalistic discipline systems that encroach on judicial hearings).

34. Marie T. Reilly, *Due Process in Public University Discipline Cases*, 120 PENN ST. L. REV. 1001, 1001 (2016); *see also* Ambach v. Norwick, 441 U.S. 68, 76 (1979) ("The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions . . . .").

35. Grona, *supra* note 4, at 233.

36. A hypothetical scenario can demonstrate the distinction: a student gets heavily intoxicated, gets behind the wheel of a car, and crashes into another student's car on campus. Civil courts provide for vehicular negligence and the payment for property damage. *See, e.g.*, Shelby Simon, Auto Accident Lawsuit Guide (2023), Forbes (Aug. 18, 2022, 4:12 PM), https://www.forbes.com/advisor/legal/auto-accident/auto-accident-lawsuit-guide/ [https://perma.cc/3MUK-9VE2] ("Lawsuits seeking damages for car accident-related losses are called civil suits, or civil actions. The rules of civil suits vary in each state, but the same format loosely applies."). Criminal courts cover the crime of driving under the influence, leading to criminal sanctions that could include incarceration. *See, e.g.*, *Alcohol Impaired Driving*, GOVERNORS HIGHWAY SAFETY ASSOC., https://www.ghsa.org/state-laws/issues/Alcohol%20Impaired%20Driving [https://perma.cc/4CGR-4QGX] (comparing laws addressing alcohol-impaired driving in U.S. states and territories). But the student discipline context can address the student's threat of harm to the campus community (endangering other students while driving on campus) and focus on the educational needs of the student (i.e., do they need to confront substance abuse habits before returning to campus?).

37. *See* Mara Emory Shingleton, *Dear Colleague: Due Process Is Not Under Attack at Colleges and Universities, as Shown Through a Comparative Analysis of College Disciplinary Committees and American Juries*, 27 WM. & MARY BILL RTS. J. 213, 242 (2018) ("As devastating, embarrassing, and frustrating as it may be, expulsion from a university for sexual misconduct pales in comparison to the long-term impact of being found guilty by a jury for the same conduct.").

B. Recognizing Due Process in University Student Discipline[38]

For most of U.S. history, institutions of higher education were largely shielded from judicial scrutiny by nature of acting *in loco parentis* ("in place of a parent"), acquiring rights to control and discipline students much as a legal guardian could.[39] During this "era of insularity," courts were reluctant to infringe on university discipline.[40]

College students achieved greater success in asserting their individual rights in the 1960s.[41] *Dixon v. Alabama* sounded the death knell for public universities acting *in loco parentis*.[42] Alabama State University had expelled six black students without a hearing and without specifying its reasoning—although the plaintiffs argued that the expulsion served as retaliation for the students' participation in civil rights protests.[43] On appeal, the Fifth Circuit held that students facing separation from the institution must be given (a) a notice of disciplinary action and (b) an opportunity to be heard.[44] However, the vagueness of the procedural due process requirements outlined in *Dixon* led to confusion among lower courts on how to apply constitutional protections in student discipline.[45]

For instance, in 1967's *Esteban v. Central Missouri State College*,[46] a federal district court recognized the following as required elements of supplying notice and an impartial hearing: (1) a written statement of charges presented at least ten days prior to the hearing; (2) a hearing conducted by the President of the college; (3) permission to view evidence in advance; (4) permission to have counsel at the hearing as advisors; (5) the right to present their version of events and evidence; (6) permission to hear evidence presented against them and to question witnesses; (7) a determination by the President based solely on evidence presented at the hearing, outlined in writing regarding responsibility and any sanctions; and (8) the right for either party to make a record of the hearing (at their own expense).[47] Compare these detailed requirements with those articulated in *Buttny v. Smiley*, which followed only

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38. The scope of this Note focuses primarily on student discipline proceedings for personal misconduct and student-student sexual misconduct. For a description of procedural due process for allegations of academic misconduct, see Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999).

39. Peter F. Lake, *The Rise of Duty and the Fall of in Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 4–5 (1999).

40. *Id.* at 5.

41. Shingleton, *supra* note 37, at 217.

42. 294 F.2d 150 (5th Cir. 1961); *see also* Shingleton, *supra* note 37, at 216 (describing *Dixon* as the "death of in loco parentis" and the "birth of due process" in campus disciplinary proceedings).

43. 294 F.2d at 154.

44. *Id.* at 151.

45. Elizabeth L. Grossi & Terry D. Edwards, *Student Misconduct: Historical Trends in Legislative and Judicial Decision-Making in American Universities*, 23 J. COLL. & UNIV. L. 829, 835 (1997).

46. 277 F. Supp. 649 (W.D. Mo. 1967).

47. *Id.* at 651–52.

a year later.[48] Under *Buttny*, no particular method of disciplinary procedure was required beyond (1) adequate notice of charges, (2) reasonable opportunity to prepare for and meet the charges, (3) an orderly hearing adapted to the nature of the case, and (4) a fair and impartial hearing.[49] Beyond the additional similarities, note how both courts explicitly recognized what was absent (or so basic as to be presumed) in *Dixon*—the need for student discipline adjudicators to be impartial.[50]

The Supreme Court finally upheld procedural due process in kindergarten through twelfth grade (K-12) student discipline in the landmark *Goss v. Lopez* case.[51] Nine high-school students from Ohio were given ten-day suspensions from school, without any hearings.[52] According to the Court, a student had a property interest in continued K-12 education that could not be infringed upon without minimal due process of law under the Fourteenth Amendment.[53] At minimum, students were owed notice and some kind of hearing before a suspension,[54] echoing the vague application of due process requirements expounded in *Dixon*. A student's property interest related only to public elementary and secondary education; the Court has repeatedly declined to extend the same rights to public postsecondary education.[55] Consequently, circuit courts have split on whether university students have any protected interest in higher education, which would arguably vest students with greater protection in weighty student discipline cases.[56]

C. Actual Bias v. Appearance of Bias in Student Discipline

A circuit split exists regarding whether to apply an actual bias or an appearance of bias standard in challenges to the impartiality of student discipline adjudicators.[57] According to education law and policy advocate John M. Malutinok, most courts

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48. 281 F. Supp. 280 (D. Colo. 1968).

49. *Id.* at 288.

50. *Esteban*, 277 F. Supp. at 252; *Buttny*, 281 F. Supp. at 288.

51. 419 U.S. 565 (1975).

52. *Id.* at 568.

53. *Id.* at 572–73. Part of the rationale for recognizing a property interest in K-12 education was attributed to the practice of requiring youths' attendance at school until they reached a certain age. *Id.* at 573.

54. *Id.*

55. *See* Bd. of Curators of the Univ. of Mo. v. Horowitz, 435 U.S. 78 (1978); *accord* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

56. Ty C. Medd, *Due Process Roulette: Why Public University Students Are Not Guaranteed Procedural Due Process When Facing Suspension or Dismissal*, 52 CREIGHTON L. REV. 375, 376 (2019) ("[B]oth a protected property interest in continued education and a protected liberty interest in a student's reputation should be implicated when a public university student faces dismissal or long-term suspension for academic or disciplinary reasons.").

57. *See* John M. Malutinok, *Beyond Actual Bias: A Fuller Approach to an Impartiality in School Exclusion Cases*, 38 CHILD. LEGAL RTS. J. 112 (2018) (writing on conflicts of interest and adjudicator disqualification in K-12 student discipline). Research did not reveal an instance of a court adopting the probability of actual bias standard articulated in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), but that may be due to how relatively recent *Caperton* was decided.

interpret due process requirements "thinly" for student discipline decision-makers, focusing solely on the actual bias standard in determining impartiality violations.[58] In such jurisdictions, "[s]chool disciplinary boards must of course be impartial, but they are entitled to a presumption of honesty and impartiality absent a showing of actual bias."[59] A plaintiff must generally allege sufficient facts to overcome this presumption (e.g., statements made by hearing officials or a pattern of decision-making that evidences bias).[60]

Nevertheless, a minority of courts employ a "thicker" definition of impartiality, prohibiting hearing officers from serving as decision-makers when students can show an appearance of bias.[61] Malutinok advocates for adopting this standard in student discipline cases.[62] His main concerns focus on the difficulty of demonstrating actual bias in cases where an adjudicator makes a decision in a hearing and then reviews the decision (or provides advice during deliberation) on appeal.[63] He argues that the broader standard would only minimally interfere with school functions, perhaps by outsourcing adjudication of student discipline cases to independent hearing officers.[64]

D. Concerns Over Impartiality in Higher Education Disciplinary Hearings

Some of the predominant issues brought as fodder to overcome a presumption against bias in student discipline hearings match those that are used to disqualify judges.[65] First, students complain that conflicts of interest arise when hearing officers are judging "their own causes," either by representing the school at which they were a stakeholder or by fulfilling multiple roles in the disciplinary process.[66] Second, the fear of implicit bias tainting adjudicators' impartiality is ever present.[67] The risks of compromising impartiality are exacerbated by the fact that student discipline decisions are confidential under the Family Educational Rights and Privacy Act (FERPA).[68] While court proceedings predominantly happen in the public eye,

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58. Malutinok, *supra* note 57, at 128–30.

59. Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 601 (S.D. Ohio 2016) (internal citations omitted).

60. Jared P. Cole & Christine J. Back, *Title IX & Sexual Harassment: Private Rights of Action, Administrative Enforcement, & Proposed Regulations*, CONG. RSCH. SERV. 39 (Apr. 12, 2019).

61. *See* Malutinok, *supra* note 57, at 128, 131–35.

62. *Id.* at 115.

63. *Id.* at 120–24.

64. *Id.* at 143–44.

65. *See supra* Parts I.A and I.B.

66. *See* Kern Alexander, *Administrative Prerogative: Restraints of Natural Justice on Student Discipline*, 7 J.L. & EDUC. 331, 338–42 (1978).

67. *See* Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L. J. 107 (2017).

68. *See* 34 C.F.R. § 99.3 (2020) ("*Disciplinary action or proceeding* means the investigation, adjudication, or imposition of sanctions by an educational agency or institution with respect to an infraction or violation of the internal rules of conduct applicable to students of the agency or institution.").

allowing observers to potentially root out judicial partiality, the relative secrecy of student discipline cases can obscure failures of due process.[69]

1. Adjudicating "Their Own Cause"

In the school setting, the institutional decision for adjudicators to serve multiple roles in a discipline case can implicate a conflict of interest.[70] School hearing officers may be forced or tasked to sit on tribunals at different levels, reviewing their own decisions on appeal.[71] Many institutions lack the resources and dedicated personnel to effectively separate and fulfill the various roles needed to meet all of their goals and obligations in the disciplinary setting.[72] Hiring outside, independent adjudicators would drain university resources, as those hearing officers would need to be directly compensated for their time.[73]

Additionally, the fact that adjudicators are usually stakeholders at an institution—often either staff, faculty, or students—implicates a potential conflict in the presence of incentives to adjudicate according to institutional interests. Institutional decision-makers may juggle "ancillary apprehensions, such as public perception and reputation [of the school]," when they should focus only on the merits of the case before them.[74] Here, the concern of the confidentiality of school adjudications may most distinguish itself from courts of general jurisdiction: outside stakeholders affected by judicial decisions watch for institutional conflicts of judges pressured in reviewing governmental action.[75] In student discipline cases, the accused student may be the only individual with a clear interest in assessing and disputing institutional conflicts affecting decision-makers.

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69. *See generally* Tyler Kingkade, *Why Colleges Hide Behind This One Privacy Law All the Time*, HUFFPOST (Feb. 1, 2016, 6:44 PM), https://www.huffpost.com/entry/colleges-hide-behind-ferpa_n_56a7dd34e4b0b87beec65dda [https://perma.cc/S6T3-TQEL] (criticizing schools for inappropriately invoking confidentiality laws to avoid disclosing student discipline information).

70. Malutinok raised the reality of this occurrence as a reason to adopt the broader appearance of bias standard, allowing greater challenges to conflicts in discipline decision-making to succeed. *See supra* note 57 and accompanying text.

71. *See* Alexander, *supra* note 66, at 338.

72. Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PENN ST. L. REV. 977, 996 (2016).

73. *See* Malutinok, *supra* note 57, at 129.

74. Trevor R. Byrd, *Traversing the Due Process Tightrope: How Colleges and Universities Are Struggling to Implement Equitable Sexual Assault Adjudications*, 55 WILLAMETTE L. REV. 187, 210 (2018).

75. *See generally* Safia Samee Ali, *Judging the Judges: Watchdog Groups See Spike in Interest After Rittenhouse Trial*, NBC NEWS (Dec. 18, 2021, 4:30 AM), https://www.nbcnews.com/news/us-news/judging-judges-watchdog-groups-see-spike-interest-after-rittenhouse-trial-n1285978 [https://perma.cc/UX8V-LUQY].

2. Implicit Bias

Student discipline officers, like all individuals, will form both favorable and unfavorable assessments about others based on race, ethnicity, age, appearance, and other characteristics, without consciously deciding to do so.[76] A deluge of research has noted the effects of implicit bias in K-12 student discipline.[77] Unfortunately, unlike elementary and secondary schools, institutions of higher education are not required to report demographic information of their discipline cases to the Department of Education.[78] This makes patterns of implicit bias and disproportionate impact difficult, if not impossible, to track in university student discipline.[79] Given the disproportionate number of suspensions of black students in K-12 education[80]

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76. Melissa Little, *Implicit Bias: Be an Advocate for Change*, AM. BAR. ASS'N: TYL (2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/professional-development/implicit-bias-be-an-advocate-for-change/ [https://perma.cc/3F6S-FJ6B].

77. *See, e.g.*, DANIEL J. LOSEN & JONATHAN GILLESPIE, THE CIVIL RIGHTS PROJECT, OPPORTUNITIES SUSPENDED: THE DISPARATE IMPACT OF DISCIPLINARY EXCLUSION FROM SCHOOL (2012) (noting one out of six black schoolchildren are suspended at least once, while only one out of twenty white children are ever suspended*);* Grona, *supra* note 4, at 240 (describing racial disparities in student discipline); U.S. COMM'N ON C.R., BEYOND SUSPENSIONS: EXAMINING SCHOOL DISCIPLINE POLICIES AND CONNECTIONS TO THE SCHOOL-TO-PRISON PIPELINE FOR STUDENTS OF COLOR WITH DISABILITIES 3–4 (July 2019), https://www.usccr.gov/files/pubs/2019/07-23-Beyond-Suspensions.pdf [https://perma.cc/R3GZ-QMYA] (noting the overrepresentation of students of color in discipline rates is not driven by heightened misbehavior, but by structural and systemic factors); Jason P. Nance, *Student Surveillance, Racial Inequalities, and Implicit Racial Bias*, 66 EMORY L.J. 765 (2017) (articulating the racial disparities in discipline and student safety under the movement toward strict security measures in schools); Luke M. Cornelius, *Counterpoint*, *in* SCHOOL DISCIPLINE AND SAFETY 52 (Suzanne E. Eckes & Charles Russo eds., 2012) (arguing that properly applying zero-tolerance policies can overcome adjudicator bias); Maryrose Robson, *Charters' Disregard for Disability: An Examination of Problems and Solutions Surrounding Student Discipline*, 29 B.U. PUB. INT. L.J. 353 (2020) (noting negative implicit biases against persons with intellectual disabilities); Neal A. Palmer & Emily A. Greytak, *LGBTQ Student Victimization and Its Relationship to School Discipline and Justice System Involvement*, 42 CRIM. JUST. REV. 163 (2017) ("LGBTQ youth are at higher risk of school discipline and justice system involvement, due in part to school and societal discrimination, biased school and law enforcement policies, family rejection, and housing instability.").

78. Trachtenberg, *supra* note 67, at 124.

79. *Id.* Professor Trachtenberg further notes how university professors have been instrumental in conducting research on racial bias in K-12 school discipline; he argues that they should look "even closer to home" to provide research on the issue in college-level discipline. Ben Trachtenberg, *Racial Bias in Campus Discipline: When Will Universities Look in the Mirror?*, WASH. POST (Apr. 22, 2018), https://www.washingtonpost.com/news/answer-sheet/wp/2018/04/22/racial-bias-in-campus-discipline-when-will-universities-look-in-the-mirror/ [https://perma.cc/8665-RZ69].

80. Trachtenberg*, supra* note 67, at 115–18; *see also* U.S. COMM'N ON C.R., *supra* note 77 (describing the "school-to-prison pipeline" and its impact on students of color, students with disabilities, and those at the intersection of these two identities).

and the racial bias evident in the criminal justice system,[81] "it would be a miracle if university disciplinary procedures did not produce outcomes that excessively punish black students, along with members of other disadvantaged minority groups."[82]

A pattern of implicit racial bias can be found in the University of Virginia's application of its Honor Code.[83] All Honor Code system violations entail separation from the university, constituting either a two-semester suspension for those who take responsibility upon being charged or permanent expulsion for those found responsible via a hearing.[84] A five-year study, released in 1996, showed that even though black students made up only twelve percent of the student body at the university, they accounted for thirty-five percent of investigations under the Honor Code—and twenty-three percent of students dismissed from the university for Honor Code violations.[85] In investigating this disparity, the University of Virginia found that its stakeholders were "spotlighting" students when reporting potential Honor Code violations:

> Spotlighting, some allege occurs when those who naturally stand out from those around them draw more scrutiny than their peers. Conversely, "dimming" refers to the potential for some students to avoid notice as they more readily blend in. Asian students, international students, and student-athletes in particular have seen a disproportionate number of cases reported against them at various times.[86]

However, the university claims that once a charge of an Honor Code violation has been made, statistics show that the rate at which students are found responsible is indistinguishable among sub-groups.[87] If this holds true, then the University of Virginia's issue with implicit bias likely stems from reporters of violations, and not from partial tribunals.

III. TITLE IX

Title IX of the Education Amendments of 1972 states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."[88] All educational institutions that receive federal funding must comply with Title IX's mandate, regardless of whether

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81. Trachtenberg, *supra* note 67, at 118–21.

82. *Id.* at 109.

83. *See* UNIV. OF VA. HONOR SYS., HANDBOOK FOR FACULTY MEMBERS AND TEACHING ASSISTANTS (2015). This Honor Code is a unique system of school discipline, but the issues in its application likely provide insights applicable to most other university conduct systems.

84. *Id.* at 8, 11–12.

85. Nicola White, *Lawsuit Raises Questions About Honor*, CAVALIER DAILY (Feb. 2, 2000), http://www.cavalierdaily.com/article/2000/02/lawsuit-raises-questions-about-honor [https://perma.cc/V2Q6-KSKM].

86. UNIV. OF VA. HONOR SYS., *supra* note 83, at 14.

87. *Id.*

88. 20 U.S.C. § 1681(a).

they are public or private.[89] While the prohibition of discrimination on the basis of sex demands an institution's proper response to several types of sexual harassment,[90] this Note addresses only student-to-student sexual harassment that sparks a disciplinary investigation and hearing.

The overwhelming need for institutions to address sexual misconduct[91] is clear. The rate of undergraduate females at risk for sexual assault is above twenty-six percent; the rate for transgender, genderqueer, and other gender non-conforming students is greater, surpassing twenty-nine percent.[92] It is common for those who experienced sexual misconduct to (a) fear for their safety, (b) feel helpless or hopeless, (c) feel numb or detached, (d) have nightmares or trouble sleeping, and (e) increase their alcohol or drug use, in addition to other consequences.[93] Experiencing sexual misconduct negatively impacts students' academic success, leading to decreases in their grades and likelihood of attaining their degree.[94] The dropout rate for students who experienced sexual misconduct (34.1%) was higher than the overall university dropout rates (29.8%).[95] This tandem threat to the safety of students and their academic endeavors tracks with at least one of the dominant rationales given for student discipline interventions on college campuses: maintaining safe learning environments.[96] As such, the most common sanctions used for findings of sexual

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89. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., OFF. FOR C.R. (Aug. 2021), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html [https://perma.cc/ZG99-LRA8]. The Office for Civil Rights purports that this accounts for more than 5000 postsecondary institutions. *Id.*

90. *See* Kathy Lee Collins, *Student-to-Student Sexual Harassment Under Title IX: The Legal and Practical Issues*, 46 DRAKE L. REV. 789 (1998) ("[T]here are at least five possible configurations for actionable sexual harassment: (1) employee-to-employee quid pro quo in violation of Title VII; (2) employee-to-employee hostile environment, also in violation of Title VII; (3) employee-to-student quid pro quo, in violation of Title IX; (4) employee-to-student hostile environment, in violation of Title IX; and (5) student-to-student hostile environment . . . .").

91. "Sexual misconduct" is an umbrella term used by institutions to encompass an array of banned behaviors that have a sex-based motivation or impact. The exact behaviors covered by the term may vary by institution. *See, e.g.*, *Defining Sexual Misconduct*, WILLIAMS COLL., https://titleix.williams.edu/files/2021/11/Defining-Sexual-Misconduct-November-2021.docx.pdf [https://perma.cc/ML8V-Q8SQ] ("The term 'sexual misconduct' includes sexual assault, sexual harassment, sexual exploitation, stalking, dating violence and domestic violence . . . .").

92. DAVID CANTOR ET AL., REPORT ON AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT at xiii (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [https://perma.cc/4G8X-JYQN]. Only an unknown subset of these sexual assaults is ripe for adjudication via student discipline, as the survey did not differentiate student-to-student assaults from assaults perpetrated by faculty, staff, and non-students.

93. *Id*. at A7–24.

94. Cecilia Mengo & Beverly M. Black, *Violence Victimization on a College Campus: Impact on GPA and School Dropout*, 18 J. COLL. STUDENT RETENTION: RSCH., THEORY & PRAC. 234 (2015).

95. *Id.* at 244.

96. *See supra* Part II.A.

misconduct are expulsion, suspension, probation, censure, restitution, and loss of privileges.[97] The prevalence of separation from the institution as a sanction could alone justify due process protections in sexual misconduct hearings—but the myriad requirements of Title IX demonstrate some of the pitfalls and opportunities for employing the ethic of impartiality in student discipline at large.

A. Confusing History

The roundabout application of Title IX as a student disciplinary requirement has spanned courtroom deliberations, non-binding guidance from the Department of Education, and formal governmental regulation.[98] The courts were first to apply Title IX to campus sexual misconduct,[99] absent explicit language in the original Title IX regulations stating that sexual misconduct qualified as discrimination on the basis of sex.[100]

In 1979, the Supreme Court held that Congress intended for Title IX to provide citizens with effective protection against sex discrimination.[101] Moreover, the Court implied a private right of action to enable that protection,[102] which plaintiffs could use to seek damages for Title IX violations.[103] Eventually, institutions receiving federal funds learned that they must properly rectify student-on-student sexual harassment when they receive actual notice of such an issue.[104] Otherwise, the school would be at risk for litigation and damages under students' private right of action.[105] The mechanism available for schools to address known harassment is often some form of student disciplinary process. But by 2010, many institutions of higher education still lacked clear complaint procedures to resolve students' sexual misconduct complaints.[106]

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97. Heather M. Karjane, Bonnie S. Fisher, & Francis T. Cullen, *Campus Sexual Assault: How America's Institutions of Higher Education Respond* (Oct. 2002), https://www.ojp.gov/pdffiles1/nij/grants/196676.pdf [https://perma.cc/W6AT-S3A7].

98. *See generally* Lalonnie Gray, *Title IX Compliance: Student-on-Student Sexual Violence*, 47 COLO. L. 32 (2018).

99. *Id.* at 33.

100. *See* 20 U.S.C. § 1681.

101. Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979).

102. *Id.* at 717.

103. Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60, 76 (1992).

104. *See* Davis *ex rel.* LaShonda D. v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 650 (1999); *see also* Emily Suski, *Subverting Title IX*, 105 MINN. L. REV. 2259, 2262 (2021) (noting that, after *Davis*, some courts indicated that *any* response to known violations other than *no* response was sufficient to demonstrate that an institution was not deliberately indifferent to discrimination).

105. *See, e.g.*, Nungesser v. Columbia Univ., 244 F. Supp. 3d 345 (S.D.N.Y. 2017); *see also* Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71, 71 n.4 (2017) (citing that seventy-five such cases had been filed between 2013 and 2017).

106. Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017), https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/ [https://perma.cc/FJT5-7SST].

The United States Department of Education, Office of Civil Rights (OCR) then published its 2011 Dear Colleague Letter (DCL), offering its most robust federal guidance detailing what due process procedures were expected for Title IX disciplinary cases.[107] Here, OCR said that a school's Title IX inquiry must be prompt, thorough, and impartial.[108] "[A] school's investigation and hearing processes cannot be equitable unless they are impartial. Therefore, any real or perceived conflicts of interest between the fact-finder or decision-maker and the parties should be disclosed."[109] The 2011 DCL asks for disclosure of both real and perceived conflicts of interest, potentially inviting an appearance of bias standard for disqualification in Title IX disciplinary proceedings. The Obama-era OCR followed up with Question & Answer (Q&A) guidance on Title IX and sexual violence, stating that training of Title IX adjudicators should include information on how to evaluate and weigh evidence in an impartial manner.[110]

On September 22, 2017, OCR announced that it was rescinding both the 2011 DCL and 2014 Q&A guidance, amid concerns with their due process

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107. "Dear Colleague" Letter from Russlyn Ali, Assistant Sec'y for C.R., U.S. Dep't of Educ., Off. for C.R. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/H6EL-DAY5] [hereinafter "Dear Colleague Letter"]. The 2011 DCL's roots stretch back decades across OCR Title IX investigations. *See* Shingleton, *supra* note 37, at 220. In the 2011 DCL, OCR built on basic grievance process guidance published in 1997 and 2001. Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997); U.S. DEP'T OF EDUC., OFF. FOR C.R., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [https://perma.cc/GE6L-3HDM]. Although influential in their time, a discussion of this guidance is largely redundant following later materials.

108. "Dear Colleague" Letter, *supra* note 107, at 5.

109. *Id.* at 12. But compare the generality of the impartiality guidance with that given on the promptness element:

> Grievance procedures should specify the time frame within which: (1) the school will conduct a full investigation of the complaint; (2) both parties receive a response regarding the outcome of the complaint; and (3) the parties may file an appeal, if applicable. Both parties should be given periodic status updates. Based on OCR experience, a typical investigation takes approximately 60 calendar days following receipt of the complaint. Whether OCR considers complaint resolutions to be timely, however, will vary depending on the complexity of the investigation and the severity and extent of the harassment.

Id. While the promptness guidance is admittedly flexible, it provides institutions with more detailed information on what OCR would use in assessing the propriety of a prompt response to a violation (e.g., proposing procedures on specified time frames, providing a typical investigation window).

110. U.S. DEP'T OF EDUC., OFF. FOR C.R., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 40 (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [https://perma.cc/34F2-5V42].

recommendations and with the lack of public comment in their implementation.[111] The rescindment letter argued that, thanks to OCR's amalgamation of disparate administrations' Title IX guidance, "schools face a confusing and counterproductive set of regulatory mandates, and the objective of regulatory compliance has displaced Title IX's goal of educational equity."[112] That same day, OCR published a new Q&A guidance to indicate how the new administration envisioned campus Title IX adjudications.[113] According to the 2017 Q&A, decision-makers must avoid conflicts of interest and bias in Title IX adjudications, and they must ensure that institutional interests would not interfere with the impartiality of the investigation.[114] A renewed focus on training materials recommended avoiding materials or techniques that apply sex stereotypes or generalizations, as they could affect the objectivity and impartiality of the Title IX adjudicators.[115]

All of this legal guidance is—at least in a theoretical sense—nonbinding, without the force of law.[116] In practice, OCR exerted a significant amount of pressure to enforce compliance with the guidance, varying based on the executive administration.[117] The agency published a "shame list" of schools under investigation for noncompliance with Title IX.[118] Panicking, universities reacted with overcompliance with the allegedly nonbinding guidance.[119] The truly enforceable change came when the U.S. Secretary of Education of the Trump Administration, Betsy DeVos, initiated the process for updating the Title IX regulations.[120] Many practitioners and advocates awaited the new regulations with trepidation, worried over mandatory compliance with regulations that could weaken incentives to report sexual misconduct or cause the adjudication to be more traumatic for various parties involved.[121]

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111. *See* Shingleton, *supra* note 37, at 225.

112. Letter from Candice Jackson, Acting Assistant Sec'y of C.R., U.S. Dep't of Educ., Off. for C.R. 2 (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/8QK4-L9EV].

113. U.S. DEP'T OF EDUC., OFF. FOR C.R., Q&A ON CAMPUS SEXUAL MISCONDUCT (Sept. 2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/PB9X-KU4E].

114. *Id.* at 5. An earlier part of the guidance indicated that Title IX investigators must remain free of actual or reasonably perceived conflicts of interest and biases. *Id.* at 4. It remains unclear how broadly this guidance defined prohibited conflicts of interest for adjudicators.

115. *Id.*

116. *See* U.S. DEP'T OF EDUC., OFF. FOR C.R., U.S. DEPARTMENT OF EDUCATION TITLE IX FINAL RULE OVERVIEW 1, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-overview.pdf [https://perma.cc/CUJ8-S5N5].

117. Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault [https://perma.cc/RY4B-B5CL].

118. *Id.*

119. *Id.*

120. *Id.*

121. *See id.*; *see also* Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L.

B. 2020 Revised Regulations

When the DeVos-led Department of Education proposed its new Title IX regulations for public comment, the flood of responses generated more than 124,000 comments for the agency to consider.[122] The publication of the Final Rule promulgated by the Department covered a massive 554 pages of the Federal Register.[123] OCR mandated that the revised regulations, published on May 19, 2020, would be enforced on August 14 of that year[124]—a turnaround of less than three months for institutions to align their Title IX grievance policies with the new rules.[125] Response to the revised regulations was mixed, with some proponents proclaiming that the rules restored protections for all students involved in Title IX hearings (both survivors of sexual misconduct and those accused of the misconduct) while opponents worrying that the rules would silence and re-traumatize victims.[126]

Among other changes, the revised regulations finally codified explicit requirements relating to impartial tribunals in Title IX disciplinary procedures.[127] All Title IX decision-makers must not "have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent."[128] OCR encourages institutions to adopt an objective, common-sense approach to evaluating bias, such as whether a reasonable person would believe bias exists.[129] Importantly, the agency refused to state whether the conflict of interest or bias must be "actual" or "perceived," further declining an appearance of bias standard for disqualification in Title IX grievance hearings.[130]

REV. 303 (2019) (expressing concerns that the Trump administration's intended changes to Title IX would undermine the civil rights of discriminatory harassment victims).

122. David Russcol, *Why Are the New Title IX Regulations 2000 Pages Long?*, BOS. LAW. BLOG (June 4, 2020), https://www.bostonlawyerblog.com/why-are-the-new-title-ix-regulations-2000-pages-long/ [https://perma.cc/NM6U-TC7B].

123. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026 (May 19, 2020) [hereinafter 2020 Fed. Reg.]. The vast majority of the publication (some 547 pages) covers the nonbinding Preamble that discusses the commentary and rationales given for the new regulations. *See id.* at 30026–572. The new regulations themselves only account for roughly seven pages. *See id.* at 30572–79.

124. *See id.* at 30026.

125. Additionally, some critics lamented how OCR's implementation timeline forced overhauls of complex Title IX systems at a time when schools were adapting to the first months of the Coronavirus Pandemic. *See* Greta Anderson, *U.S. Publishes New Regulations on Campus Sexual Assault*, INSIDE HIGHER ED (May 7, 2020), https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations [https://perma.cc/5VYT-567U].

126. *See id.*

127. *See* 34 C.F.R. § 106.45 (2020).

128. 34 C.F.R. § 106.45(b)(1)(iii). Further, the Preamble to the revised regulations included eight pages of discussion dedicated to the topic, "Section 106.45(b)(1)(iii) Impartiality and Mandatory Training of Title IX Personnel; Directed Question 4 (Training)." *See* 2020 Fed. Reg., *supra* note 123, at 30249–57.

129. 2020 Fed. Reg., *supra* note 123, at 30252.

130. *See id.*

Institutions must now offer training on "how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."[131] Any such training materials must not rely on sex stereotypes and must promote impartial investigations.[132] However,

> the Department does not wish to be more prescriptive than necessary to achieve the purposes of these final regulations, and respects the discretion of recipients to choose how best to serve the needs of each recipient's community with respect to the content of training provided to Title IX personnel so long as the training meets the requirements in these final regulations.[133]

While this refusal to proscribe greater details of Title IX training on impartiality is meant to provide flexibility for institutions, it leaves open the opportunity for inconsistency between institutions and a continued lack of clarity on what constitutes impartiality in the school discipline context.

In terms of the structure of Title IX discipline hearings, no Title IX Coordinator nor any investigator may serve as a decision-maker.[134] Upon conclusion of their deliberations, decision-makers must issue written determinations regarding responsibility, including findings of fact, rationales for determinations of allegations, and the procedures and permissible bases for appeals.[135] Finally, institutions must offer both complainants and respondents the opportunity to appeal a finding of responsibility (or the institution's dismissal of a formal complaint) based on a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent involved in the hearing—but such a conflict of interest or bias must have affected the outcome of the matter.[136]

C. New Biden-Era Regulations Imminent

On July 12, 2022, the Biden administration proposed a new set of Title IX regulations, fifty years after the original bill's passage.[137] The public comment period for the proposed rules closed on September 12, 2022, during which OCR received 240,199 comments.[138] Until OCR adequately sorts through those comments, edits or adapts its proposed rules accordingly, and ultimately promulgates new rules with the

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131. § 106.45(b)(1)(iii).
132. *Id.*
133. 2020 Fed. Reg., *supra* note 123, at 30254.
134. § 106.45(b)(7)(i).
135. § 106.45(b)(7)(ii)(A)–(F).
136. § 106.45(b)(8)(i)(C).
137. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) [hereinafter 2022 Fed. Reg.].
138. *See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, REGULATIONS.GOV, https://www.regulations.gov/document/ED-2021-OCR-0166-0001 [https://perma.cc/X695-WHD5] (posting public comments for review).

force of law, all previous regulations (including the 2020 regulations) remain in effect.[139]

Upon reviewing the proposed rules, it does not seem that the new administration is adopting an approach to impartiality in Title IX proceedings that is noticeably divergent from the 2020 regulations. For example, § 106.8(d)(2)(iii) in the proposed rules requires schools to train decision-makers on "[h]ow to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias"[140]—using language identical to § 106.45(b)(1)(iii) of the 2020 regulations.[141] While it is possible that the eventual final rules in this iteration of Title IX revisions may take a wholly unanticipated swing on the topics of impartiality and bias, the prospect appears unlikely. Nevertheless, with the knowledge that institutions will need to revise and update their Title IX procedures in the near future, proactively planning to include stronger efforts to promote impartiality and due process during the inevitable transition would be prudent.

D. Financial Incentives for Compliant Title IX Adjudications

Beyond the desire to offer students fundamental fairness in disciplinary proceedings, institutions have several incentives to handle Title IX grievances with due care. As previously mentioned, the Supreme Court has implied a private right of action for students to sue institutions for deliberate indifference to sexual misconduct claims.[142] But Title IX employs a dual enforcement scheme: students can sue in civil court, or they can file a complaint with OCR.[143] Upon investigating a complaint and finding a Title IX violation, OCR must seek an institution's voluntary compliance with the agency's regulations.[144] If an institution fails to voluntarily comply, OCR may initiate administrative proceedings to terminate an institution's federal financial assistance or refer the case to the Department of Justice (DOJ) for litigation.[145] To date, OCR has never terminated federal funding to enforce Title IX, as "[e]xercising this 'nuclear option' is simply too administratively cumbersome and politically perilous."[146]

Furthermore, officials at public institutions that receive federal funds are at risk for Section 1983 claims that students may litigate for mishandling Title IX

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139. *See, e.g.*, *Learn About the Regulatory Process*, REGULATIONS.GOV, https://www.regulations.gov/learn [https://perma.cc/A7ZY-E25B] (describing the rule-making process, from the pre-rule stage to the proposed rule stage to the final rule stage).

140. 2022 Fed. Reg., *supra* note 137, at 41570.

141. *See supra* note 131 and accompanying text.

142. *See supra* Section III.A.

143. Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 52 (2013).

144. ENFORCING TITLE IX: A REPORT OF THE UNITED STATES COMMISSION ON CIVIL RIGHTS 26 (1980).

145. *Id.* at 26–27.

146. R. Shep Melnick, *The Strange Evolution of Title IX*, NAT'L AFFS. 19, 21 (Summer 2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix [https://perma.cc/VJU2-8Q4N].

proceedings.[147] Section 1983 provides that any state actor who deprives an individual of their rights, privileges, or immunities will be held liable to the injured party.[148] Taken together, the combined threats of a private right of action, Section 1983 claims, funding termination, and DOJ lawsuits undergird Title IX compliance. A failure to impartially adjudicate a Title IX hearing could open the doors for any of these unwanted repercussions.

E. Potential for Conflicts of Interest and Bias in Title IX Proceedings

Title IX hearings, by their very nature, evoke incendiary reactions and perpetuate trauma. This frenetic environment and the way institutions set up Title IX proceedings contribute to the potential of a situation compromising an adjudicator's impartiality. Many of the procedural impartiality concerns are shared by both complainants and respondents alike.[149]

The revised regulations for Title IX adequately address many of the issues over conflicts of interest in sexual misconduct cases. In the past, Title IX Coordinators were not necessarily barred from making initial determinations of responsibility for misconduct (so long as they did not oversee an appeal), and Coordinators sometimes struggled to maintain impartiality by assuming multiple roles in the process.[150] Now, "[t]he person who determines responsibility may not be a school's Title IX coordinator or the investigator in the case, prohibiting schools from using the same person to fill multiple roles in a case."[151] Decision-makers in any appeal may not be the original decision-makers, investigators, or Title IX Coordinators.[152] Such changes go far in preventing position-based conflicts of interest in which an adjudicator is tasked with reviewing their own findings.[153] Investigations and decisions are passed onto fresh eyes.

As of yet, it remains impossible to fully overcome the risk of institutional factors creating a conflict of interest in Title IX adjudication. All staff members involved in

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147. *See* Michael A. Zwibelman, *Why Title IX Does Not Preclude Section 1983 Claims*, 65 U. CHI. L. REV. 1465 (1998). The Supreme Court has not yet affirmatively resolved whether legal pursuit of the implied private right of action for Title IX violations precludes a plaintiff's pursuit of a Section 1983 claim, or vice versa.

148. 42 U.S.C. § 1983.

149. *See* Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 829 (2017) ("Further, alleged victims and accused students complain of many of the same procedural pitfalls, like biased boards, insufficient transparency, untrained staff, and poor guidance.").

150. *See* Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 152, 154 (2016).

151. JARED P. COLE, CONG. RSCH. SERV., LSB10479, NEW TITLE IX SEXUAL HARASSMENT REGULATIONS OVERHAUL RESPONSIBILITIES FOR SCHOOLS 5 (2020), https://crsreports.congress.gov/product/pdf/LSB/LSB10479 [https://perma.cc/T5YB-H9SW].

152. *Id.*

153. *See* Margaret Drew, *It's Not Complicated: Containing Criminal Law's Influence on the Title IX Process*, 6 TENN. J. RACE GENDER & SOC. JUST. 191, 220–21 (2017) (raising concerns over confirmation bias when an investigator is tasked with adjudicating based on their own fact-finding).

the sexual misconduct hearings typically work for the school in some capacity.[154] Stakeholders at the institutions may "share the [school's] interest in protecting the [school's] reputation or furthering a [school's] financial interests."[155] A financial fear of lawsuits and damage payouts could influence decision-makers.[156] Given the prolific character of college sports, university administrators often face a financial incentive to take the side of male athletes in sexual misconduct cases.[157] The threats of litigation or federal funding termination may moderate some of these conflicts of interest, as may protecting students' rights to appeal in evident conflict cases. However, the only method likely to address institutional conflicts of interest may be removing Title IX decision-making from institutional control.[158]

Parallel to these concerns, bias remains a preeminent concern in Title IX adjudications.[159] Specific biases evident in court proceedings may plague Title IX hearings. "Trans women, gay men, other members of sexually diverse groups, along with native women, immigrants, differently abled and others who historically have experienced enhanced bias due to their status are treated dismissively when reporting abuse."[160] Looking to racial bias, women of color are more likely to be sexually harassed and assaulted, but they are less likely to be believed.[161] Likewise, the oft-perpetuated myth of the "Black Rapist" could prejudice decision-makers in Title IX proceedings.[162] A lack of familiarity with survivors of trauma may lead adjudicators to misinterpret observations of traumatized individuals.[163] Survivors will vary in their responses to trauma; observers unprepared for this reality may misjudge a survivor's responses if the responses do not align with personally held expectations.[164] Remorse bias, in which adjudicators subjectively read into an

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154. Byrd, *supra* note 74, at 210.

155. 2020 Fed. Reg., *supra* note 123, at 30250.

156. *See* Collins, *supra* note 90, at 828 (discussing conflicts of interest in K-12 Title IX).

157. *See* Antuan M. Johnson, *Title IX Narratives, Intersectionality, and Male-Biased Conceptions of Racism*, 9 GEO. J.L. & MOD. CRITICAL RACE PERSP. 57, 71 (2017); *see also* Gary Fineout, *FSU Official Says Football Players Get Special Treatment in Sexual Assault Cases*, ORLANDO SENTINEL (Nov. 26, 2015, 3:00 AM), https://www.orlandosentinel.com/sports/florida-state-seminoles/os-fsu-football-players-special-treatment-sexual-assault-20151126-story.html [https://perma.cc/ZA9H-TYGB] (school official claims that university gave "special treatment" to football athletes accused of sexual misconduct).

158. *See infra* Section IV.E.

159. *See* Jake New, *When Sports Boosters Judge Sexual Assault Cases*, INSIDE HIGHER ED (Aug. 18, 2016), https://www.insidehighered.com/news/2016/08/18/victims-advocates-worry-about-bias-campus-hearings [https://perma.cc/MH8Q-LT3G].

160. Drew, *supra* note 153, at 217.

161. Johnson, *supra* note 157, at 67.

162. *See id.* at 69–72.

163. *See* SUBSTANCE ABUSE MENTAL HEALTH SERVS. ADMIN., *Trauma-Informed Care in Behavioral Health Services*, *in* 57 TREATMENT IMPROVEMENT PROTOCOL SERIES ch. 3 (2014), https://www.ncbi.nlm.nih.gov/books/NBK207191/ [https://perma.cc/JT4K-E5ER] (presenting the behaviors and emotional responses that are common following trauma).

164. *See* Drew, *supra* note 153, at 212.

accused individual's expression of remorse, may play off adjudicators' implicit biases, leading to disparities in hearing outcomes.[165]

The unique context of Title IX affords its own special opportunities for adjudicator bias. Critics worry over how institutions' reliance on volunteers to staff Title IX hearing panels permits self-selection that allows individuals with preconceived notions and biases to impose their views in sexual misconduct deliberations.[166] Some commenters hoped to convince OCR to exclude from decision-making any individual who had ever advocated for victims' rights or otherwise worked in sexual violence prevention fields; others opined that such a restriction would be overbroad, as it removed individuals with experience and knowledge on sexual violence who could serve impartially.[167]

Professor Margaret Drew argues that presuming bias in people who have worked in the fields of gender violence or other feminist-based studies—that they hate men and will always support complainants—is an extension of liar mythology that treats survivors of sexual violence (namely, women) as untrustworthy sources.[168] But, as the Sixth Circuit Court of Appeals put it, "[m]erely being a feminist, being affiliated with a gender-studies program, or researching sexual assault does not support a reasonable inference than an individual is biased against men."[169] As such, OCR declined to recognize any particular professional experiences or affiliations as per se violations of Title IX's prohibitions on bias in decision-making.[170] Whether a Title IX decision-maker would hold a bias that may affect the outcome of a hearing is ultimately fact-dependent, to be determined via an objective, common sense inquiry.[171]

IV. RECOMMENDATIONS

As evidenced by the foreseeable financial threats stemming from mishandled sexual misconduct cases, "[i]t is not worth the expense, time, and energy to execute these proceedings if the process is materially unfair or biased."[172] This tenet holds true for upholding impartiality as due process in all adjudications of student discipline in higher education. But in reviewing the strides that the revised Title IX regulations have taken in upholding impartiality in the sexual misconduct sphere (and those areas where continued silence from OCR leaves Title IX impartiality open for improvement), several broadly applicable advancements for university student discipline become apparent. Three broad aspects gleaned from judicial impartiality—the requirement of impartiality, clarification on what infringes on

165. *See* M. Eve Hanan, *Remorse Bias*, 83 MO. L. REV. 301 (2018).

166. *See* 2020 Fed. Reg., *supra* note 123, at 30251.

167. *See id.*

168. *See* Drew, *supra* note 153, at 237–38.

169. Doe v. Miami Univ., 882 F.3d 579, 593 n.6 (6th Cir. 2018); *see also* Gomes v. Univ. of Me. Sys., 365 F. Supp. 2d 6, 31–32 (D. Me. 2005) (declaring that the mere fact that the hearing board chair was active in sexual assault prevention at the educational institution was not sufficient to show bias).

170. 2020 Fed. Reg., *supra* note 123, at 30252.

171. *See id.*

172. Byrd, *supra* note 74, at 190.

adjudicators' impartiality, and some mechanism to challenge claims of impartiality—should be translated to the student discipline context, but they should retain features more in line with the educational environment than with the courts.

A. Adopt a Formal Probability of Bias Standard for the Educational Context

Greater clarification—either from the Supreme Court or the Department of Education—should affirmatively adopt the probability of bias standard as the fundamental test for adjudicators, students, institutions, and courts to employ in resolving allegations of bias in student discipline. Currently, the majority of jurisdictions recognize actual bias as a valid test, but a minority of courts, using the appearance of bias, invites discord among institutional standards.[173] As Malutinok declares, "[t]he judicial disparity in what constitutes an impartial tribunal muddies the waters of a major constitutional doctrine and leads to [students] presenting arguments within that doctrine[,] . . . result[ing] in unpredictable results."[174] The revised Title IX regulations contributed to this inconsistency by refusing to explicitly state whether the standard for determining partiality was "actual" or "perceived" prejudices.[175]

However, Malutinok advocates for the incorrect resolution of that disparity in pushing for an appearance of bias standard in school discipline.[176] Many student discipline decision-makers lack formal legal education.[177] The appearance of bias approach would likely result in unnecessary recusals and appeals,[178] creating additional difficulties for institutions attempting to promptly resolve disciplinary cases. Additionally, Malutinok's primary issue with the state of due process protections in student discipline—conflicts of interest arising from adjudicators fulfilling multiple roles in student disciplinary hearings[179]—can be resolved by preventing such role conflicts, rather than adopting the troublesome appearance of bias approach in school discipline. Title IX requirements already prohibit investigators from serving as decision-makers and initial decision-makers from sitting on appeals.[180] Institutions can model other student disciplinary processes on the layout prescribed by Title IX; in doing so, a range of cases in which an appearance of bias standard may make more sense will be eliminated.

But critiques of the actual bias standard are also persuasive. Under-disqualification can pose the threat of "subjecting litigants to the loss of life, liberty

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173. Malutinok, *supra* note 57, at 128.

174. *Id.* at 134.

175. *See* 2020 Fed. Reg., *supra* note 123, at 30252.

176. *See* Malutinok, *supra* note 57, at 134.

177. Depending on the disciplinary process and institution, hearing officers can be professional staff members (including student affairs professionals), faculty from across various academic areas, and even student panelists. Some administrators and faculty will have J.D. degrees, *see* Shingleton, *supra* note 37, at 230–31, but it would be foolish to expect that the majority of campus decision-makers have a legal background.

178. *See* Cravens, *supra* note 21, at 3.

179. *See* Malutinok, *supra* note 57, at 120–24.

180. *See New Title IX Sexual Harassment Regulations Overhaul Responsibilities for Schools*, *supra* note 151, at 5.

or property in an unfair (or seemingly unfair) process."[181] The burden of producing evidence of actual bias from a decision-maker's words or actions in a student discipline hearing appears too high to properly protect students' due process rights. Asking students and decision-makers to assess bias on a probability standard—i.e., requiring the evidence to reach a *likelihood* of partiality—seems to be an effective expansion that is workable for all parties involved, even those without a legal background.

B. Enhanced Impartiality Trainings for Campus Adjudicators

Institutions should extend the impartiality trainings for decision-makers, which are now mandated under the revised Title IX regulations,[182] to all individuals serving any adjudicatory function in campus student discipline. Perhaps this means creating one impartiality training program for all forms of student discipline cases (e.g., sexual misconduct, academic misconduct, personal misconduct) that still meets the regulatory requirement, or perhaps this means specializing impartiality trainings for each different area of student discipline. It may be advisable for the government to issue impartial training materials that promote fairness and consistency across institutions.[183] Otherwise, schools will be left to determine the content of their impartiality trainings, drawing from different methodologies and legal sources.[184] While OCR does not wish to be too prescriptive in its mandates on impartiality trainings,[185] the lack of actionable requirements or guidance on impartiality trainings may create the kind of chaos previously seen in Title IX implementation across higher education. The training should clarify what relationships particular to the academic environment do or do not create conflicts of interest (e.g., previously adjudicated a misconduct case for the accused student; served as the accused

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181. Geyh, *supra* note 7, at 714.

182. 34 C.F.R. § 106.45(b)(1)(iii) (2020).

183. *See* 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, 1006–07 (2017).

184. For instance, compare some of the training topics recommended by MARTHA MATTHEWS & SHIRLEY MCCUNE, TITLE IX GRIEVANCE PROCEDURES: AN INTRODUCTORY MANUAL at F-2 (1976) ((1) maintaining an open and objective attitude; (2) avoiding taking sides or becoming emotionally involved; (3) refraining from expressing preconceived notions, ideas, judgments, or conclusions; and (4) declining to predict outcomes) and ASSOCIATION FOR STUDENT CONDUCT ADMINISTRATION, STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 28 (2014), https://www.keithedwards.com/wp-content/uploads/2015/04/ASCA-2014-Gold-Standard-Report.pdf [https://perma.cc/U856-P6JB] ((1) information on working with and interviewing persons subjected to sexual violence; (2) the importance of accountability for persons found to have committed sexual violence; (3) the effects of trauma, including neurobiological change; (4) cultural awareness training regarding how sexual violence may affect students differently, depending on their cultural backgrounds; and (5) dispelling common misperceptions about sexual assault in society (e.g., "rape myths")).

185. *See* 2020 Fed. Reg., *supra* note 123, at 30254.

student's instructor in a previous course; serving as the accused student's instructor currently), so that panelists are prepared to recuse themselves appropriately.

Whatever the case, the impartiality trainings must adequately address implicit bias. Institutions can require the use of implicit association tests (IATs).[186] Requiring student discipline decision-makers to take the IATs and reflect on their scores could bring implicit biases to the realm of consciousness.[187] However, institutions should consider how research shows that taking an IAT just one time does not provide good predictions of individual biases; a collection of tests are required before any meaningful conclusions may be drawn.[188] Accordingly, impartiality training (and IATs in particular) should be a recurring, developmental process throughout the academic year.

C. Require Written Rationales in Student Discipline Decisions

The requirement of written rationales for decisions in any student discipline case will promote impartiality among campus adjudicators and make bias more apparent for address on appeal. As one commentator put it:

> The way to get at impartial judging—i.e., to eliminate actual bias—and promote public confidence is not through the development or application of unreliable recusal and disqualification standards but through an effort to achieve greater transparency by requiring judges to provide adequate legal reasoning for their decisions in written form.[189]

However, courts have generally declined to find that due process requires written rationales in the student discipline context.[190] Some institutions (perhaps most) may give students a written decision letter of the outcome of a discipline hearing, but the ultimate decision should include the findings and reasonings used to reach the outcome. Seeing as institutions must now provide such rationales in sexual misconduct cases,[191] adopting the requirement for all other disciplinary hearings seems like a logical next step.

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186. *See* Hanan, *supra* note 165, at 352 ("Judicial training on biases in decision-making should include IAT testing to provide judges with more objective information about their biases."); *see also* Justin D. Levinson, Juajian Cai & Danielle Young, *Guilty by Implicit Racial Bias: The Guilty/Not Guilty Implicit Association Test*, 8 OHIO ST. J. CRIM. L. 187 (2010). An example of such an IAT can be found at *Project Implicit*, HARV. UNIV., https://implicit.harvard.edu/implicit/takeatest.html [https://perma.cc/UB25-SDSK].

187. *See Hanan*, *supra* note 165, at 353.

188. *See* German Lopez, *For Years, This Popular Test Measured Anyone's Racial Bias. But It Might Not Work After All.*, VOX (Mar. 7, 2017, 7:30AM), https://www.vox.com/identities/2017/3/7/14637626/implicit-association-test-racism [https://perma.cc/AM5W-YQB6].

189. Cravens, *supra* note 21, at 4.

190. HARVEY A. SILVERGLATE & JOSH GEWOLB, FIRE'S GUIDE TO DUE PROCESS AND CAMPUS JUSTICE (2014), https://www.thefire.org/research/publications/fire-guides/fires-guide-to-due-process-and-campus-justice/fires-guide-to-due-process-and-fair-procedure-on-campus-full-text/ [https://perma.cc/9U6E-E3KL].

191. 34 C.F.R. § 106.45(b)(7)(ii)(A)–(F) (2020).

Such a change would ensure that decision-makers would have to provide at least some adequate reason for their decision, based in the disciplinary charges.[192] Requiring written findings would ensure that hearing officers would not have cause to unconsciously rely on implicit biases.[193] A decision that is based in bias or a conflict of interest would not stand up to review. By providing a written rationale to students going through the process, they would be better able to mount a disciplinary appeal. An appeal that properly resolves a partiality issue at the institutional level would then preempt liability in potential litigation.[194]

D. Develop Sensible Procedures for Challenging Impartiality in the Educational Context

Courts of general jurisdiction have robust procedures for judicial disqualification.[195] But such disqualifications take place in lengthy proceedings. For instance, the average criminal felony case took 256 days to resolve, while the average criminal misdemeanor case took 193 days to resolve.[196]

But the unique educational context of student discipline justifies developing methods for addressing claims of decision-maker partiality that may differ from those used by courts. Many student discipline decisions may be resolved via singular hearings, where accused students do not learn the identities of panelists beforehand. It may not make sense for institutions to develop disqualification motions for such limited proceedings. If no upfront challenge to decision-maker impartiality is allowed, then the presence of bias or conflicts of interest should be permitted as grounds for appeal to a higher adjudicative body at the school, as recently required for Title IX proceedings.[197] So long as an effective method of challenging impartiality is communicated to students (and adjudicators), institutions should be granted deference in fitting the method to the institution's needs and existing disciplinary procedures.

E. Option: Third-Party Adjudication

All of the above recommendations still assume that internal stakeholders at an institution serve as decision-makers in collegiate student discipline. However, an alternative scheme that has gained support in recent years has proposed that universities employ external, third-party adjudicators trained in due process to decide

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192. *See* Cravens, *supra* note 21, at 4.

193. *See* Rebecca K. Lee, *Judging Judges: Empathy as the Litmus Test for Impartiality*, 82 U. CIN. L. REV. 145, 202 (2013).

194. For a summary of such threats resulting from violations of Title IX mandates, see *supra* Section III.D.

195. *See* 28 C.F.R. § 50.19 (2020) (describing motions to disqualify a judge).

196. Brian J. Ostrom, Lydia E. Hamblin, Richard Y. Schauffler & Nial Raaen, *Timely Justice in Criminal Cases: What the Data Tells Us*, NAT'L CTR. FOR STATE CTS. 6 (2020), https://www.ncsc.org/__data/assets/pdf_file/0019/53218/Timely-Justice-in-Criminal-Cases-What-the-Data-Tells-Us.pdf [https://perma.cc/8C9U-2PQY].

197. 34 C.F.R. § 106.45(b)(8)(i)(C) (2020).

student discipline cases,[198] potentially increasing the impartiality (or the public perception of impartiality) in disciplinary hearings. Even OCR permits institutions to "outsource . . . adjudication responsibilities of [institutions] to highly trained, interdisciplinary experts" in order to resolve sexual misconduct cases under Title IX.[199]

The advantages of such outsourcing include a greater likelihood of avoiding institutional conflicts of interest, the opportunity for institutions to focus on activities better suited to their educational purview, and the potential for a better allocation of resources. Third-party adjudicators would likely have fewer built-in conflicts of interest, as they would have no direct connection to the students, coaches, or administrators of the school.[200] Furthermore, adjudicating student discipline in a due process environment that is becoming increasingly legalized and litigious arguably takes university stakeholders outside of their core competencies; failures to shoulder this burden erode trust in the institution.[201] Various external adjudicators, such as law firms or retired judges, may be better suited to this tense environment. Lastly, for some institutions, hiring external hearing officers could save time and money, while providing better performance in student discipline.[202]

However, disadvantages could include adjudicators unfamiliar with the educational mission of student discipline and increased costs to institutions. Turning to external adjudicators may result in those sitting on hearing panels being too divorced from campus life or culture to understand the context of the higher education institution.[203] Hiring outside, independent hearing officers will put some drain on university resources, as those officials must be compensated for their time.[204] Given that the goal of hiring these external adjudicators is to find decision-makers well-versed in due process and impartiality, the financial costs of such independent adjudicators may be extensive. Further, outsourcing student discipline to a government office could resolve concerns of bias, but it could slow the procedures in a manner detrimental to student interests.[205]

Naturally, the choice to outsource student discipline will depend on the needs and resources of particular institutions. On the whole, this Note cautions institutions away from jumping to exercise this option. There is immense educational value in

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198. *See, e.g.*, OREN R. GRIFFIN, INVESTIGATING COLLEGE STUDENT MISCONDUCT 36 (2018) ("Institutions may decide to select an outside entity (law firms, consultants, or investigators) for numerous reasons. The college may determine that certain expertise is necessary to analyze the alleged student misconduct, the university may not have the personnel available to conduct the investigation in a timely manner, or the institution may hire an outside firm to conduct the investigation to demonstrate that the process was indeed impartial and objective.").

199. 2020 Fed. Reg., *supra* note 123, at 30063.

200. *See* Erika Weiler, *The Growing Plague: Title IX, Universities, and Sexual Assault*, 8 ARIZ. ST. U. SPORTS & ENT. L.J. 138, 158 (2019).

201. *See* Smith & Gomez, *supra* note 72, at 997.

202. Ben Trachtenberg, *Hiring and Training Competent Title IX Hearing Officers*, 86 MO. L. REV. 261, 276 (2021).

203. *See id.* at 278 ("A retired judge, while learned in the law, may not have spent much time on a university campus for more than four decades.").

204. Malutinok, *supra* note 57, at 129.

205. *See* Weiler, *supra* note 200, at 160.

institutions providing accountability measures tailored to their students. The educational context of student discipline acclimates students to the community values and expectations of a campus. This education may be lost if conduct adjudications are removed entirely from internal control.

CONCLUSION

When institutions decide to take on the burden of adjudicating student discipline cases, they must commit to doing so impartially—to both guarantee fundamental fairness to students and to protect those students' due process rights. Schools "teach as much about the letter and spirit of the law by the way they administer their disciplinary system as by what they teach in the classroom about due process."[206] Impartiality in student discipline stems from the same source as judicial impartiality, but it has grown into its own evolutionary niche. Upon reviewing the way that Title IX sexual misconduct cases are controlled to promote impartiality, it becomes evident how the unique context of education justifies a carve-out of a specialized standard of impartiality.

206. David Schimmel & Louis Fischer, *Discipline and Due Process in the Schools*, 1 UPDATE ON L. RELATED EDUC. 4, 37 (1977).