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A Better Balance: Providing Survivors of Sexual Violence with “Effective Protection” Against Sex Discrimination Through Title IX Complaints

ABSTRACT. Although gender-based violence has long been recognized as a form of sex discrimination prohibited under Title IX, many survivors receive little to no support from their college or university after experiencing violence. In response, an increasing number have sought redress by filing complaints with the U.S. Department of Education’s Office for Civil Rights (OCR). But as this Feature demonstrates through interviews with complainants, many wait years for relief in part because OCR currently resolves discrimination faced by individuals at the end of its lengthy investigations of structural issues. We argue that this policy, which can result in complainants experiencing unmitigated discrimination for years, is contrary to a key statutory aim of Title IX: providing “effective protection” to individuals. Furthermore, we charge that OCR, as the agency responsible for enforcing Title IX, has a legal mandate to provide for this protection, and that it can strike a better balance between systemic concerns and individual interests through establishing consistent guidelines for communicating with complainants; setting a maximum threshold of two years after the case is opened for investigating and resolving complaints; creating a corps of specialized investigators to handle cases; and acting, when possible, to protect an individual’s ability to access education while investigations are ongoing.

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INTRODUCTION

Despite Title IX's prohibition against discrimination based on sex,¹ many survivors of gender-based violence receive little to no support from their college or university after experiencing violence.² In response, an increasing number of survivors are filing Title IX complaints with the U.S. Department of Education's Office for Civil Rights (OCR).³ After they file these complaints, most survivors must wait years—sometimes even until after they graduate or withdraw from the institution—to get redress.

While OCR has dramatically improved its efforts to reform structural Title IX compliance across universities,⁴ and despite OCR criticizing schools for affording insufficient protections to victims alleging violations,⁵ it has done relatively little to promote complainants' immediate access to education. In its pursuit of structural compliance, OCR requires institutions to create or improve systems, procedures, or offices involved in the handling of gender

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1. See Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)) (“No person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).
 2. See, e.g., Angie Epifano, *An Account of Sexual Assault at Amherst College*, AMHERST STUDENT (Oct. 17, 2012, 12:07 AM), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college> [http://perma.cc/B37L-8SFZ] (detailing how the author, as a student, was involuntarily hospitalized by her school and denied the opportunity to access study-abroad opportunities).
 3. See, e.g., Lindley Estes, *UMW Feminists United File Title IX Complaint Against University: Education Students Cite Threats To Rape, Murder*, FREE LANCE-STAR (May 8, 2015, 12:00 AM), http://www.fredericksburg.com/news/education/umw-feminists-united-file-title-ix-complaint-against-university/article_68f62dce-a46a-5be8-8eec-df8ecdda50b.html [http://perma.cc/A644-PDML].
 4. See Michael Stratford, *Aggressive Push on Sex Assault*, INSIDE HIGHER ED (Apr. 30, 2014), <http://www.insidehighered.com/news/2014/04/30/white-house-calls-colleges-do-more-combat-sexual-assault> [http://perma.cc/LWG3-7]69] (describing advocates praising the policy push, the “groundbreaking” and “sweeping” Title IX guidance, a “trove” of new documents released by the Obama Administration, and “unusually aggressive” enforcement actions from OCR); see also Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2101 (2016) (“Aggressive administrative enforcement of Title IX in the sexual harassment setting by the Obama Administration’s Department of Education, responding to increased activism and organizing by student survivors, has challenged sexual harassment in schools on the ground.”).
 5. See Compliance Resolution Letter from Office for Civil Rights, U.S. Dep’t of Educ., to Tufts Univ. 19 (Apr. 28, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/01102089-a.html> [http://perma.cc/3UJB-ZM6Y] (criticizing Tufts University for failing to provide the complainant with “effective interim measures during the eighteen months that followed her January 2010 report that she had been sexually assaulted”).

violence complaints.⁶ (Examples of such efforts include requiring a university to establish a task force on sexual violence or to provide additional training to its staff.)⁷ While these systemic reforms do ultimately benefit individual students,⁸ OCR’s decision to resolve both structural and more individualized issues (such as a complainant’s lack of access to accommodations, their unreimbursed educational expenses incurred due to discrimination, or retaliation they experience) within the same voluntary resolution agreements has created unnecessary tension between the need to thoroughly investigate broad-based systemic issues⁹ and an individual’s interest in seeing her¹⁰ complaint resolved in a timely manner.¹¹

We argue that OCR’s current approach of prioritizing systemic concerns over individual interests is contrary to the dual purpose of Title IX. As the Supreme Court explained in *Cannon v. University of Chicago*, Title IX (which is patterned after Title VI)¹² has two statutory aims: to “avoid the use of federal resources to support discriminatory practices” in education programs, and “to provide individual citizens effective protection against those practices.”¹³

6. See *Voluntary Resolution Agreement, No. 01-10-2089*, TUFTS UNIV. 9 (Apr. 17, 2014), <http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf> [<http://perma.cc/ZQ9P-L34T>] [hereinafter *Tufts Resolution Agreement*] (requiring Tufts to improve how it delivers accommodations and to affirm that the Title IX Coordinator is responsible for the implementation of these accommodations).
7. *Id.* at 4, 10-11.
8. See Office for Civil Rights, *Annual Report to Congress*, U.S. DEP’T EDUC. (1999), <http://www2.ed.gov/about/offices/list/ocr/AnnRpt99/edlite-how.html> [<http://perma.cc/F3AW-Y3N6>] (stating that, when OCR conducts structural actions like compliance reviews, it is “likely to benefit large numbers of students through policy or program changes that are designed to secure equal educational opportunity”).
9. Numerous scholars have discussed the role of OCR as an agency that resolves systemic abuses. See, e.g., Alison Renfrew, Comment, *The Building Blocks of Reform: Strengthening Office of Civil Rights To Achieve Title IX’s Objectives*, 117 PENN ST. L. REV. 563, 574 (2012) (discussing OCR’s role as an entity “responsible for monitoring and enforcing Title IX for thousands of educational institutions”); see also *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).
10. While we have elected to use female pronouns when discussing individual complainants, students who identify as male or gender nonconforming (including agender students) also experience gender-based violence. For a discussion of how Title IX can be used as a tool to protect students of all genders from harassment and bullying, see Adele P. Kimmel, *Title IX: An Imperfect but Vital Tool To Stop Bullying of LGBT Students*, 125 YALE L.J. 2006 (2016).
11. See Renfrew, *supra* note 9, at 576 (“OCR seeks to redress systemic problems within an educational institution, an approach that often conflicts with the interests of the complainant who seeks the resolution of his or her individualized complaint.”).
12. See Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 601-605, 78 Stat. 241, 252-53 (codified as amended at 42 U.S.C. §§ 2000d to 2000d-7 (2012)).
13. 441 U.S. at 704.

OCR's current approach focuses disproportionately on achieving the former at the expense of the latter. However, the current tension is not insurmountable: OCR can strike a better balance between systemic reform and providing "effective protection"¹⁴ to individual complainants.

We recommend that OCR take affirmative steps to reduce investigation delays by capping investigations at two years and hiring specialized gender-based violence investigators. Additionally, OCR should reform its communications with complainants by standardizing outreach and providing regular updates. Most importantly, OCR should not wait until the end of investigations to provide relief to individual complainants. To support its recommendations, this Feature contains selections from interviews with individuals who have filed Title IX complaints with a variety of OCR regional offices.¹⁵

I. WHILE OCR HAS IMPROVED ITS RESPONSES TO SYSTEMIC INEQUITIES, INDIVIDUAL COMPLAINANTS FACE DELAYS

In its pursuit of systemic reforms, OCR has struggled to prioritize the task of securing timely relief for individual complainants. OCR's commitment to conducting thorough structural investigations of a growing number of complex gender-based violence complaints, along with Title IX's statutory requirement that OCR seek voluntary compliance from schools,¹⁶ has produced long delays

14. *Id.*

15. In order to identify individuals to interview, we posted in several online survivor groups to solicit personal narratives from survivors who had filed complaints with OCR. We also relied on personal connections to reach out directly to complainants to offer the opportunity to participate. Seven survivor-complainants participated in phone interviews. The complainants are from geographically diverse regions of the country: their complaints are being addressed by OCR's regional offices in Chicago, Cleveland, New York, Philadelphia, and San Francisco. Three of the complainants filed complaints against public institutions and four filed complaints against private institutions that receive federal funds. Complainants were asked a series of standardized questions over the phone relating to why they filed, their experience with OCR, how the OCR investigation has affected their ability to access education, their perception of the potential effectiveness of immediate relief, and their ability to access accommodations and legal representation. The identities of interviewees are kept anonymous for privacy purposes. This Feature's approach, which couples a focus on survivors and their stories with an analysis of structural discrimination, demonstrates the balance between structural and individual interests that Title IX requires. Allowing survivors to control how their voices are portrayed in academic literature models the type of consistent communication and feedback that OCR should be soliciting from complainants.

16. 20 U.S.C. § 1682 (2012) ("[N]o such action [to force compliance with Title IX's requirements] shall be taken until the department or agency concerned has advised the

in investigating and resolving cases. Because OCR does not require remedial measures on behalf of complainants until systemic issues are resolved, complainants may receive relief years after they initially filed their complaints – often after they have graduated or withdrawn from school.

Although Title IX encompasses two mandates – ending “the use of federal resources to support discriminatory practices” and providing “individual citizens effective protection against those practices”¹⁷ – OCR has focused its attention on the former aim and has greatly expanded its efforts at systemic reform in recent years.¹⁸ In April 2011, OCR released its groundbreaking “Dear Colleague Letter” (DCL).¹⁹ The DCL’s guidance reaffirmed the principle that sexual violence constitutes discrimination on the basis of sex and is therefore covered under Title IX. OCR called upon schools to “take immediate action to eliminate harassment, prevent its recurrence, and address its effects.”²⁰ The DCL further contained the most thorough details to date of schools’ specific obligations to combat gender-based violence and harassment.²¹ With the issuance of this letter, OCR signaled that the government would initiate a more aggressive enforcement policy to hold schools accountable for Title IX violations.

In addition to issuing new policy guidance, the federal government has also initiated an aggressive effort to enforce Title IX’s prohibition on using federal resources to support discrimination.²² In May 2014, OCR built upon its DCL and increased transparency by releasing an unprecedented list of fifty-five

appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.”).

17. *Cannon*, 441 U.S. at 704.

18. See, e.g., Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 19, 2015), <http://prospect.org/article/sex-lies-and-justice> [<http://perma.cc/UUK4-FG4H>] (describing federal Title IX enforcement efforts prior to the Obama Administration as a “paper tiger” and citing remarks made by the President and Assistant Secretary of OCR in support of stronger enforcement).

19. Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlynn Ali*, U.S. DEP’T EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<http://perma.cc/X3CX-YKXG>] [hereinafter *DCL 2011*].

20. *Id.* at 4.

21. This guidance was in sharp contrast to the actions of the Bush Administration’s OCR, which weakened Title IX’s protections during its tenure. See, e.g., Beth Scott, *Title IX: Equity in School Athletics*, AM. ASS’N U. WOMEN 6 (Apr. 16, 2010), <http://www.aauw.org/files/2013/02/position-on-equity-in-school-athletics-111.pdf> [<http://perma.cc/2ZCK-4SY9>] (“More broadly, the issuance of the 2005 policy guidance was part of a series of attempts by the Bush administration to weaken Title IX.”).

22. See MacKinnon, *supra* note 4, at 2101-02.

institutions under federal investigation for violating Title IX.²³ In response to receiving an increased number of complaints in fiscal year (FY) 2013, FY 2014, and FY 2015, OCR opened investigations into schools at a rapid rate; as a result, the number of institutions of higher education under investigation almost tripled.²⁴

Table 1.²⁵

TOTAL NUMBER OF SEXUAL VIOLENCE COMPLAINTS RECEIVED BY OCR

	FY09	FY10	FY11	FY12	FY13	FY14	FY15	FY16*
<i>Total Number of Sexual Violence Complaints for ESE & PSE</i>	20	35	42	33	63	127	230	34
<i>Elementary & Secondary Education (ESE)</i>	11	24	23	16	31	22	65	8
<i>Postsecondary Education (PSE)</i>	9	11	19	17	32	105	164	26

* As of January 11, 2016

OCR has also pursued Title IX's mandate of ending "the use of federal resources to support discriminatory practices"²⁶ by adopting a more critical posture in its dealings with schools. Prior to the Obama Administration, OCR had been labeled as a "rubber stamp" that "simply sign[ed] off on universities'

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23. See generally U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations, U.S. DEP'T EDUC. (May 1, 2014), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations> [<http://perma.cc/3SL4-N2B2>] (releasing a list of higher education institutions currently under investigation and pledging to update the list regularly).
24. See generally Tyler Kingkade, *Federal Campus Rape Investigations Near 200, and Finally Get More Funding*, HUFFINGTON POST (Jan. 5, 2016, 9:55 PM), http://www.huffingtonpost.com/entry/federal-funding-campus-rape-investigations_568afo80e4bo14efe0db5f76 [<http://perma.cc/F3LC-PZXU>] (showing that the current number of institutions under investigation is 222, including 159 institutions of higher education).
25. E-mail from Jim Bradshaw, Dep't of Educ. Press Office, to author Alyssa Peterson (Jan. 11, 2016, 11:42 EST) (on file with author Alyssa Peterson) (providing a chart of sexual violence complaints).
26. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

decisions.”²⁷ OCR’s approach has changed drastically in recent years under Assistant Secretaries Russlynn Ali and Catherine Lhamon. For example, in response to a campaign in the summer of 2015 by the University of Virginia to weaken OCR’s finding of noncompliance, Assistant Secretary Lhamon noted that “[t]he university was enormously displeased with what our findings were and very much hoped we would change them We did not.”²⁸ Additionally, when Tufts University revoked its signature on an April 2014 agreement because it disputed OCR’s determination that the school’s policies at the time were noncompliant with Title IX, OCR held firm and refused to modify its finding.²⁹ The university later backed down and executed the agreement.³⁰ OCR’s efforts to issue new policy guidance and to investigate schools more aggressively have increased schools’ incentives to combat hostile environments.

Unfortunately, OCR’s approach to its structural mandate is in tension with the needs of individual complainants to achieve timely resolution of their claims. As OCR acknowledges, sexual violence investigations are often complex, and its systemic investigations are exhaustive and time-consuming as a result. For each investigation, OCR examines the school’s culture, reviews previous institutional responses, interviews complainants and school officials, and analyzes existing policies and procedures.³¹ In its investigation of Tufts University—which mirrors investigations at other institutions³²—OCR

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27. See Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, CTR. FOR PUB. INTEGRITY (Feb. 25, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/25/4374/lax-enforcement-title-ix-campus-sexual-assault-cases-0> [<http://perma.cc/U8T2-3Q4N>].
28. See Nick Anderson, *U-VA. Waged Intense Fight To Influence Federal Sexual Assault Investigation*, WASH. POST (Nov. 3, 2015), http://www.washingtonpost.com/local/education/u-va-waged-intense-fight-to-influence-federal-sexual-assault-investigation/2015/11/03/1fd69812-79b3-11e5-bc80-9091021aeb69_story.html [<http://perma.cc/WN3M-3XT2>].
29. See Rachel Axon, *Tufts University Disputes Feds’ Noncompliance Claim*, USA TODAY (Apr. 29, 2014, 9:34 PM), <http://www.usatoday.com/story/news/nation/2014/04/29/tufts-university-office-for-civil-rights-sexual-assault/8490931> [<http://perma.cc/Q97X-334P>].
30. See Tyler Kingkade, *Tufts University Backs Down on Standoff with Feds over Sexual Assault Policies*, HUFFINGTON POST (May 9, 2014, 5:09 PM), http://www.huffingtonpost.com/2014/05/09/tufts-sexual-assault-title-ix_n_5297535.html [<http://perma.cc/NX4U-AMVE>].
31. See Letter from Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., & James W. Runcie, Chief Operating Officer for Fed. Student Aid, U.S. Dep’t of Educ., to Barbara Boxer, U.S. Senator 2 (Apr. 28, 2015), <http://www.boxer.senate.gov/press/related/150428EducationDepartmentReponsetoLetter.pdf> [<http://perma.cc/D3AT-AGVA>].
32. See Letter from Taylor D. August, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Dr. R. Gerald Turner, President, S. Methodist Univ. (Dec. 11, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf> [<http://perma.cc/R6HN-SXL5>] (discussing OCR’s review of university policies and interviews with complainants and administrators); see also Letter from Meena Morey Chandra, Reg’l Dir., Office for Civil Rights, U.S. Dep’t of Educ., to Kristine Zayko, Deputy Gen. Counsel, Mich.

conducted interviews with the complainant, senior administrators, and members of the faculty; obtained copies of documents from the complainant and the institution itself to shed light on how the complainant's report was processed (as well as how the school handled eight previous reports of violence); and reviewed both the school's current policies on sexual misconduct and its policies in effect at the time of the alleged discrimination.³³ And to add an additional layer of complexity, if OCR identifies noncompliance, Title IX requires that OCR seek voluntary compliance from a school before it initiates other enforcement actions.³⁴

These complexities, combined with a lack of resources,³⁵ delay justice for complainants, as OCR has decided to address discrimination faced by individuals (such as a denial of interim measures)³⁶ only after conducting systemic investigations.³⁷ This means that remedies for discrimination faced by

State Univ. (Sept. 1, 2015), <http://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf> [<http://perma.cc/EHF6-3QG7>] (describing OCR's interviews with complainants and administrators).

33. See Compliance Resolution Letter from Office for Civil Rights to Tufts Univ., *supra* note 5.
34. See Education Amendments of 1972, Pub. L. No. 92-318, §§ 901-907, 86 Stat. 235, 373-75 (codified as amended at 20 U.S.C. §§ 1681-1688 (2012)); see also *supra* note 16 and accompanying text.
35. By all accounts, the agency is underresourced. OCR's budget was increased by seven million dollars at the end of 2015. See Kingkade, *supra* note 24. However, this increase fell well short of the agency's budget request. See Office for Civil Rights, *Fiscal Year 2016 Budget Request*, U.S. DEP'T EDUC. AA-7 (2015), <http://www2.ed.gov/about/overview/budget/budget16/justifications/aa-ocr.pdf> [<http://perma.cc/U8CS-G54E>] [hereinafter FY 2016 Budget Request]. If the agency's budget were to increase to over one hundred thirty million dollars, OCR estimates that the average time to close an investigation would be reduced by thirty-three days for sexual violence cases and by twenty-two days for harassment and discipline cases, which would be "a significant impact." *Id.* at AA-11, AA-15. The President's FY 2017 budget also proposed a further increase in appropriations from current levels of one hundred seven million dollars to one hundred thirty-eight million dollars. See Tyler Kingkade, *Obama Administration Plan Would Cut Backlog of Campus Rape Investigations*, HUFFINGTON POST (Feb. 9, 2016, 4:30 PM), http://www.huffingtonpost.com/entry/obama-office-for-civil-rights-budget_us_56ba34d5e4b08ffac122d747 [<http://perma.cc/99K2-B9ME>].
36. See DCL 2011, *supra* note 19, at 15.
37. See OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL 21 (2015), <http://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf> [<http://perma.cc/N5ET-GP58>] (stating that, when OCR issues a determination of noncompliance at the end of an investigation, the proposed resolution agreement must include "action steps that, when implemented, will remedy both the individual discrimination at issue as well as any systemic discrimination"); see also *Voluntary Resolution Agreement*, No. 03-12-2062, KY. WESLEYAN C. (Aug. 13, 2013), <http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03122062-b.pdf> [<http://perma.cc/7VFJ-YFKC>]; *Voluntary Resolution Agreement*, No. 02-11-2025, PRINCETON UNIV. (Oct. 12, 2014), <http://www2.ed.gov/documents/press-releases/princeton-agreement.pdf> [<http://perma.cc/T2EP-RBU4>]; *Voluntary Resolution Agreement*,

individuals do not come until after OCR has reached a resolution agreement with the institution, making the availability of individual relief dependent on how quickly the investigation of institution-wide systemic discrimination is resolved (and often on how cooperative the individual’s school is). As a result, it may be the case that survivors at the most recalcitrant schools are perversely left without redress for the longest periods. For example, while OCR found that Tufts had “allowed for a continuation of a hostile environment that limited and denied [the complainant] access to the educational opportunities”³⁸ and required the school to reimburse her for “educational and other reasonable expenses,”³⁹ this reimbursement was additionally delayed when Tufts temporarily revoked its support for the voluntary resolution agreement.⁴⁰

In particular, this policy of requiring schools to compensate survivors in voluntary resolution agreements can be insufficient, as these agreements could be issued after a student is no longer on campus. In these cases, some students will have already been forced off campus or their academic performance will have declined due to institutional and peer violence by the time an agreement is issued.⁴¹

Arguably as a result of the decision to resolve discrimination faced by individuals only at the end of the overarching investigation and the complex nature of these cases, complainants have been forced to wait for relief for periods far beyond OCR’s stated goal of 180 days (see *infra* Table 2);⁴² this is the case even when OCR’s caseload of sexual violence complaints has

Nos. 06112126, 06132081, 06132088, SMU (Nov. 16, 2014), <http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf> [<http://perma.cc/26AJ-QJ2K>]; *Tufts Resolution Agreement*, *supra* note 6, at 13.

38. See Compliance Resolution Letter from Office for Civil Rights to Tufts Univ., *supra* note 5.

39. See *Tufts Resolution Agreement*, *supra* note 6, at 13.

40. See Axon, *supra* note 29.

41. See Dana Bolger, *Gender Violence Costs: Schools’ Financial Obligations Under Title IX*, 125 YALE L.J. 2106 (2016). One complainant filed a complaint against Northeastern University in May 2014, alleging that the school had “grossly mishandled” her case. However, the student transferred to Rollins College, stating that she “no longer felt safe at Northeastern,” and started school there in January 2015. The costs of transferring amounted to twenty thousand dollars. The complainant’s case is still pending; if she is provided reimbursement, it will occur long after she left the school. OCR initiated an investigation into her complaint in October 2014. See Tyler Kingkade, *A Number of Colleges Are Under Scrutiny for Sexual Harassment, but You Wouldn’t Know It*, HUFFINGTON POST (May 19, 2015, 5:10 PM), http://www.huffingtonpost.com/2015/05/19/colleges-sexual-harassment_n_7309444.html [<http://perma.cc/S9WV-PLCT>].

42. E-mail from Jim Bradshaw, Dep’t of Educ. Press Office, to author Alyssa Peterson (Jan. 4, 2016, 3:36 PM) (on file with author Alyssa Peterson) (providing a chart of the average duration of sexual violence complaints at the postsecondary level and noting that substantive closures included findings of insufficient evidence, early complaint resolutions, change without agreement, and change with agreement).

been relatively low. For example, while OCR received only thirty-five sexual violence complaints in FY 2010,⁴³ including the Tufts complaint, the complainant at Tufts had to wait over 1,300 days⁴⁴ for OCR to investigate, issue a finding of noncompliance, and negotiate an agreement with Tufts, before the student could receive reimbursement of expenses incurred due to the school's noncompliance.⁴⁵ These delays are not unique—in one case, an investigation lasted over 2,100 days.⁴⁶ At the postsecondary level, at least three investigations (University of Massachusetts–Amherst, Wittenberg University, and Arizona State University) have stretched on for longer than three years.⁴⁷

43. E-mail from Jim Bradshaw to author Alyssa Peterson, *supra* note 25.

44. See Matt Rocheleau, *Most Federal Sexual Cases Against Colleges Dropped*, BOS. GLOBE (Apr. 8, 2015), <http://www.bostonglobe.com/metro/2015/04/08/most-federal-sexual-violence-complaints-against-colleges-dismissed-without-penalties-reform/tl31LxcXORr2Ri auxh8iTO/story.html> [<http://perma.cc/8L65-XD3P>] (stating that OCR opened its investigation into the Tufts complaint on September 22, 2010 and deemed it resolved on April 28, 2014).

45. See Compliance Resolution Letter from Office for Civil Rights to Tufts Univ., *supra* note 5 (“OCR initiated this investigation under Title IX of the Education Amendments of 1972 and its implementing regulation at 34 C.F.R. Part 106 (Title IX). OCR examined whether the University responded promptly and equitably to complaints, reports and other incidents of sexual violence and sexual harassment (hereafter referred to as sexual violence/harassment) of which it knew or reasonably should have known, including the Student’s sexual assault report and complaint and her sexual harassment complaint, and whether any failure to respond appropriately allowed for the creation and continuation of a sexually hostile environment. OCR determined that the University has failed to provide a prompt and equitable response to complaints of sexual harassment/violence as required by Title IX, including the Student’s complaints of sexual harassment/violence.”); Office for Civil Rights, *U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for Its Handling of Sexual Assault and Harassment Complaints*, U.S. DEP’T EDUC. (Apr. 28, 2014), <http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints> [<http://perma.cc/5KMV-DCWK>] (stating that Tufts entered into an agreement to remedy its violations on April 17, 2014); see also *Tufts Resolution Agreement*, *supra* note 6, at 13 (“The University agrees to reimburse the Student Complainant for educational and other reasonable expenses as incurred from January 2010 through June 2011 related to this matter and as identified by the Complainant prior to the execution of this Agreement.”).

46. See Rocheleau, *supra* note 44 (stating that OCR’s investigation of a complaint at the Virginia Military Institute lasted 2,146 days).

47. See *id.* At present, it is unclear (due to a lack of transparency surrounding OCR’s activities) why these particular cases are taking years to resolve, although OCR has indicated that case complexity can be a factor. See Letter from Catherine E. Lhamon & James W. Runcie to Barbara Boxer, *supra* note 31, at 2; see also Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 238-43 (2011) (noting OCR’s violations of the Freedom of Information Act and the lack of transparency in its handling of cases).

Table 2.⁴⁸

AVERAGE DURATION (IN DAYS) OF SEXUAL VIOLENCE INVESTIGATIONS THAT RESULT IN SUBSTANTIVE CLOSURE

<i>Year Closed</i>	<i>FY09</i>	<i>FY10</i>	<i>FY11</i>	<i>FY12</i>	<i>FY13</i>	<i>FY14</i>	<i>FY15</i>
<i>PSE</i>	379	368	291	308	438	927	1,032

Furthermore, OCR’s current enforcement strategy has the effect of penalizing survivors of gender-based violence, as they experience longer delays than victims of other forms of discrimination. As reported by OCR, its gender-based violence investigations take fifty percent longer (325 days) on average than investigations into harassment (216 days) and Title VI school discipline cases (217 days).⁴⁹ While these delays may be due to the complexity of gender-based violence cases,⁵⁰ the end result is that survivors are denied access to timely relief in a way that other victims of discrimination are not. This result cannot be explained solely by differences in complexity, since OCR has also labeled other types of complaints, such as school discipline cases, as “complex and . . . high profile.”⁵¹ The answer to this issue is not for OCR to privilege some classes of victims over others; rather, OCR should take affirmative steps to reduce delays in processing gender-based violence cases to bring the outcomes of these cases up to the baseline for other discrimination claims.

II. STRIKING A BETTER BALANCE BETWEEN COMBATING STRUCTURAL DISCRIMINATION AND ENSURING EDUCATIONAL ACCESS FOR COMPLAINANTS

OCR’s decision to resolve violations of its guidance that affect individual complainants only at the end of long-running systemic investigations is unbalanced. This decision also demonstrates insufficient attention to one of Title IX’s statutory purposes: providing individuals with “effective protection.”⁵² This Part will first establish that OCR has a legal mandate to provide for effective protection for individuals (despite the availability of private enforcement). It then will argue that OCR must take affirmative steps

48. E-mail from Jim Bradshaw to author Alyssa Peterson, *supra* note 42.
 49. Office for Civil Rights, *supra* note 35, at AA-14.
 50. See Letter from Catherine E. Lhamon & James W. Runcie to Barbara Boxer, *supra* note 31, at 2.
 51. Office for Civil Rights, *supra* note 35, at AA-13.
 52. See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

to decrease the length of investigations and meet this legal mandate through establishing consistent guidelines for communicating with complainants; setting a maximum threshold of two years after the case is opened for investigating and resolving complaints; creating a corps of specialized investigators to handle cases; and acting, when possible, to protect an individual's ability to access education while investigations are ongoing.

A. OCR's Duty To Provide "Effective Protection"

Although some scholars view the private right of action as an important, albeit flawed, tool to enforce an individual's Title IX rights,⁵³ OCR also has an obligation, as the administrative entity responsible for enforcing Title IX,⁵⁴ to provide "effective protection."⁵⁵ This duty arises from the legislative history of Title VI; in *Cannon*, the Supreme Court explained that "the drafters of Title IX explicitly assumed that it would be interpreted and enforced in the same manner as Title VI," and the Court referenced comments from a member of Congress who asserted that Title VI addresses individual rights:

This bill [Title VI] is designed for the protection of individuals. When an individual is wronged he can invoke the protection to himself, but if he is unable to do so because of economic distress or because of fear then the Federal Government is authorized to invoke that individual protection for that individual⁵⁶

Furthermore, when the Court reasoned in *Cannon* that Title IX provided for a private right of action, it did so, in part, because the existence of a private remedy would "assist in achieving the statutory purpose of providing individual citizens effective protection against discriminatory practices."⁵⁷ Therefore, while the private remedy is an important tool to provide relief to individuals, providing "effective protection" must be a goal that cuts across both public and private mechanisms of Title IX enforcement.

53. See, e.g., Renfrew, *supra* note 9, at 570 ("As a result of the *Cannon* and *Franklin* decisions, private litigation has flourished and has become an important Title IX enforcement tool." (footnotes omitted)); see also Grayson Sang Walker, *The Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95, 102 (2010) ("In theory, OCR review and Title IX suits should be complementary modes of enforcement, but lackluster administrative enforcement has often forced private litigants to seek vindication of their civil rights within a daunting doctrinal framework.").

54. See *About OCR*, U.S. DEP'T EDUC. (Oct. 15, 2015), <http://www2.ed.gov/about/offices/list/ocr/aboutocr.html> [<http://perma.cc/6L58-KSCT>].

55. *Cannon*, 441 U.S. at 704.

56. *Id.* at 704 n.36 (citation omitted).

57. *Id.* at 678.

In addition, as subsequent Supreme Court rulings have diminished the ability of individuals to employ the private right of action, it is even more important that OCR act to protect survivors’ rights. In *Gebser v. Lago Vista Independent School District* and *Davis v. Monroe County Board of Education*, the Court ruled that schools were not liable for damages in sexual harassment cases unless they displayed “deliberate indifference.”⁵⁸ As Catharine MacKinnon argues in the pages of this Issue, these decisions have undermined efforts to hold schools accountable through the private right of action because schools can do very little and still satisfy the standard.⁵⁹ As such, it is possible that this state of affairs further encourages individuals to seek relief from OCR, elevating the need for OCR to provide “effective protection” and decrease the time it takes to investigate claims.

B. Increasing Compliance Through Intermediate Fining Authority

In order to achieve “effective protection” and to increase compliance with its voluntary resolution agreements generally, OCR requires a more nimble enforcement tool than the current mechanism provided for under Title IX, which only empowers OCR to initiate proceedings to remove federal funds from a school if it cannot secure voluntary compliance.⁶⁰ At present, this all-or-nothing defunding mechanism has never been used.⁶¹ Moreover, if

58. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 633 (1999); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292-93 (1998).

59. In order to address these barriers, MacKinnon draws upon international human-rights law and argues for a “due diligence” standard that would raise the bar of what would constitute an appropriate response to violence. See MacKinnon, *supra* note 4. She also calls for Congress to affirm the availability of monetary damages for survivors of sexual harassment in educational contexts. *Id.* However, if Congress were to take these actions, some complainants would still be unable to access justice through the courts and would find it easier to file with OCR (for economic reasons or otherwise). As such, MacKinnon’s proposal must be in addition to, as opposed to a replacement for, a robust administrative commitment to protecting individuals. Moreover, when considering potential barriers to complainants, it is also important to note that the court in *Gebser* limited its holding regarding the “deliberate indifference” standard to individuals seeking damages, rather than injunctive relief. See *Gebser*, 524 U.S. at 290. But students who have graduated will likely lack standing to pursue such relief. See Fatima Goss Graves, *Restoring Effective Protections for Students Against Sexual Harassment in Schools: Moving Beyond the Gebser and Davis Standards*, AM. CONST. SOC’Y 6 n.42 (2008), <http://www.acslaw.org/files/Goss%20Graves%20-%20%20Moving%20Beyond%20Gebser%20and%20Davis%20Final.pdf> [<http://perma.cc/74R6-YYZY>].

60. See 20 U.S.C. § 1682 (2012).

61. See Kristen Galles, *Title IX and the Importance of a Reinvented OCR*, 37 HUM. RTS. 18, 21 (2010), http://www.americanbar.org/publications/human_rights_magazine_home/human_rights_vol37_2010/summer2010/title_ix_and_the_importance_of_a_reinvented

implemented, it would be harmful to students who are not complicit in the school's failures to conform to Title IX and who benefit from federal funding.⁶² Finally, as other scholars have observed, the likelihood that OCR would subject a school to the ultimate penalty (particularly on behalf of one individual) is low, thereby weakening the credibility of enforcement efforts.⁶³

Consequently, Congress should provide OCR with the authority to fine schools up to one percent of the school's yearly operating budget.⁶⁴ A sliding scale with a maximum of one percent (predicated upon OCR pursuing a voluntary resolution agreement with the school, per Title IX's requirements)⁶⁵ constitutes a substantial penalty but also acknowledges that resources vary among institutions. These fines would also assist OCR in providing for effective protection, as this authority could be applied more defensibly to cases of individualized discrimination (as opposed to the more extreme penalty of withdrawing all federal funds).⁶⁶ OCR could use fines to pursue and enforce individualized voluntary resolution agreements while the overarching

_ocr.html [http://perma.cc/XM97-NLDY] ("However, OCR has never withheld federal funding for a Title IX violation and has referred only one case for litigation—nearly thirty years ago."); see also MacKinnon, *supra* note 4, at 2100 (discussing how OCR has developed its own "standards for compliance review . . . [that] are far more stringent than those applied by courts," although it has never removed all federal funds). MacKinnon also supports Congress providing OCR with gradual enforcement tools, such as fines. See *id.* at 2103.

62. The federal government mostly provides financial assistance to individual students and funds specific research projects. See Urahn et al., *Federal and State Funding of Higher Education*, PEW CHARITABLE TR. 3 (Jun. 2015), http://www.pewtrusts.org/~media/assets/2015/06/federal_state_funding_higher_education_final.pdf [http://perma.cc/Z5M4-NU7Z]. Federal funds often make up a large percentage of a school's operating budget. For example, at the University of Maryland, College Park, federal grants and contracts amounted to \$321,135,466 in FY 2014, which comprised 17.7 percent of the school's revenue. See *University of Maryland, College Park FY 2014 Total Operating Budget: Revenue*, UNIV. MD. C. PARK, <http://otcads.umd.edu/bfa/FY14%20Working%20Budget/Web/FY14%20REVENUE%20TOTAL%20OP%20BUDGET.pdf> [http://perma.cc/SU28-VLP8].
63. See Renfrew, *supra* note 9, at 579-80 ("[M]any view the threat of terminating federal funding as illusory; it is merely an empty threat from OCR.").
64. Cf. *id.* at 584-86 (arguing for OCR's usage of sliding, intermediate fines in lieu of removing all federal funds). This authority could be realized through amending the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 668 (1979); see also *Reauthorizing the Higher Education Act: Combating Campus Sexual Assault: Hearing Before the S. Comm. on Health, Educ., Labor & Pensions*, 114th Cong. 4 (2015) (statement of Dana Bolger, Co-Founder, Know Your IX) (arguing that fining authority should encompass all civil-rights laws that OCR enforces).
65. Education Amendments of 1972, Pub. L. No. 92-318, § 902, 86 Stat. 235, 374 (codified as amended at 20 U.S.C. § 1682).
66. In *Cannon*, the Supreme Court stated that the most severe enforcement mechanism— withdrawing federal funds from a school—may not be an appropriate response to discrimination experienced by individuals. 441 U.S. 677, 704-05 (1979).

structural investigation is ongoing (see Section II.E for a more in-depth discussion of this point).

C. Implementing Affirmative Steps To Decrease the Length of Investigations

Ultimately, to achieve “effective protection” for survivors⁶⁷ – a core aim of Title IX’s antidiscrimination mandate – OCR must also reduce investigative delays.⁶⁸ Although OCR aims to resolve investigations within 180 days,⁶⁹ it has failed to meet this goal in a number of cases that it has resolved at the postsecondary level since FY 2009.⁷⁰ Indeed, many of the cases that OCR has finished were resolved not through a thorough investigation, but rather because OCR decided that the complaint had been resolved through a compliance review that it had already conducted.⁷¹

Complainants have indicated that the delays associated with filing a complaint have made it difficult for them to focus on their education. For example, one complainant who graduated before an investigation had concluded said, “It has drawn on for a long time, and it has consumed my identity and become what I’m known for. I don’t know what’s going on or if it’s been resolved.”⁷² Another complainant stated, “I wish I could’ve been able to be traditionally invested in my education and that I didn’t have to think about rape all the time.”⁷³

67. *Id.* at 704.

68. Cf. Julie A. Davies & Lisa M. Bohon, *Re-Imagining Public Enforcement of Title IX*, 2007 BYU EDUC. & L.J. 25, 52 (detailing AAUW criticism of OCR for taking too long to resolve complaints as students experiencing sex discrimination require speedier resolution). Despite the demonstrated struggles of schools and the wide regional variation in political support for aggressive enforcement of civil-rights laws, Davies and Bohon argue for increased usage of school and state resolution methods in response to OCR delays, which differ from the federally minded recommendations within this Feature. *Id.* at 67-69.

69. Letter from Catherine E. Lhamon & James W. Runcie to Barbara Boxer, *supra* note 31, at 2.

70. Rocheleau, *supra* note 44. Since FY 2009, OCR has taken more than 180 days to resolve its investigations in cases such as Rider University (three hundred days), Tufts University Case #1 (1,328 days), Tufts University Case #2 (1,314 days), University of Mississippi (654 days), Princeton University (1,456 days), Southern Methodist University Case #1 (1,288 days), Southern Methodist University Case #2 (643 days), Southern Methodist University Case #3 (631 days), St. Mary’s College of Maryland (405 days), Michigan State University Case #1 (1,504 days), Michigan State University Case #2 (561 days), and Harvard Law School (1,548 days). *Id.*

71. *Id.* OCR resolved complaints at Vanderbilt University, Colorado State University, University of Colorado at Denver, Indiana University-Bloomington, and SUNY Binghamton through a compliance review process. *Id.*

72. Telephone Interview with Complainant A (May 31, 2015).

73. Telephone Interview with Complainant B (June 8, 2015).

Delays also have the effect of denying “effective protection”⁷⁴ by allowing the institution to continue its discriminatory practices while OCR investigates, which can mean that more students experience harms that may not be accounted for in the final voluntary resolution agreement if they have not joined the complaint.⁷⁵ In light of this phenomenon, one complainant commented that “the longer OCR delays action, the more the community will be traumatized. We worked so hard to file this and there are still people who are going through the same shit.”⁷⁶

OCR has taken positive steps on this front, but more reforms are needed to revise its procedures to reduce the ability of schools to delay relief to complainants. In 2014, OCR took a promising step when it instituted a ninety-day time limit for the negotiation of voluntary resolution agreements where it found that a school had violated Title IX.⁷⁷ In another positive development, OCR modified its Case Processing Manual to indicate that, once it provides the proposed terms of a resolution agreement and suspends an investigation during negotiations, the suspension can only last up to thirty days and cannot be reset.⁷⁸

To increase its ability to provide more timely relief to complainants, OCR should build on the reforms it has already undertaken and set a maximum threshold of two years after the case is opened for investigating and resolving complaints. This standard is feasible—from FY 2009 to FY 2013, the average resolution time for complaints that resulted in substantive closure at the postsecondary level was 357 days⁷⁹—and it would also be a marked improvement. A two-year cap acknowledges OCR’s growing caseload, its limited resources,⁸⁰ and the continued need for thorough systemic investigations. However, this cap would eliminate the extreme delays in educational access faced by some complainants. In allocating resources, OCR

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

75. See Bolger, *supra* note 41, at 2122 (“In the[] publicly available agreements, OCR d[id] not secure financial reimbursement for noncomplainants, except when attorneys, parents, or other students h[ad] named them specifically in the complaint.”).

76. Telephone Interview with Complainant B, *supra* note 73.

77. See Task Force To Protect Students from Sexual Assault, *Not Alone: The First Report of the White House Task Force To Protect Students from Sexual Assault*, WHITE HOUSE 19 (Apr. 2014), <http://www.notalone.gov/assets/report.pdf> [<http://perma.cc/LXH2-6BZZ>].

78. See OFFICE FOR CIVIL RIGHTS, *supra* note 37, at 20 (“Where a final agreement is not reached by the 30th day, the investigation will resume no later than on the 31st day after negotiations were initiated.”).

79. See E-mail from Jim Bradshaw to author Alyssa Peterson, *supra* note 42. The authors’ calculations show that the average of PSE processing times, from FY 2009 to FY 2013, is 356.8 days.

80. See Office for Civil Rights, *supra* note 35, at AA-7.

should prioritize longstanding cases and should shift staffing to cases approaching the two-year mark.

To achieve this two-year cap, OCR should also establish a corps of investigators who specialize in investigating gender-based violence.⁸¹ At present, OCR’s regional offices share the same organizational structure, which includes designating its investigators at its regional offices as generalists who handle cases across the various civil-rights statutes that OCR enforces.⁸² However, OCR has noted that sexual violence investigations “tend to be complex and may involve systemic, campus- and institution-wide issues, in addition to issues pertaining to specific students” and that it “comprehensively examines the campus culture with respect to sexual violence.”⁸³ Specialization and the familiarity that would arise from such specialization would likely increase investigators’ speed in handling these complexities, particularly as OCR’s sexual violence investigations take fifty percent longer on average than investigations into harassment and Title VI school-discipline cases.⁸⁴

D. Increasing Effective Communication with Complainants

To strike a better balance between individual and structural concerns, OCR should also increase its communications with complainants while investigations are ongoing. When asked, complainants generally noted that, while investigators had been generally sensitive and respectful of their concerns, contact with the agency had dwindled as the investigations progressed.⁸⁵ After initial contact, one complainant described, “OCR

81. See Gillibrand, McCaskill Lead Bipartisan Letter for New Resources To Fight Sexual Assaults on College Campuses, OFF. SENATOR KIRSTEN GILLIBRAND (Apr. 4, 2014), <http://www.gillibrand.senate.gov/newsroom/press/release/gillibrand-mccaskill-lead-bipartisan-letter-for-new-resources-to-fight-sexual-assaults-on-college-campuses> [<http://perma.cc/6NF6-TH3A>] (calling for additional funding for OCR to hire gender-based violence investigators); cf. Sudha Setty, *Leveling the Playing Field: Reforming the Office for Civil Rights To Achieve Better Title IX Enforcement*, 32 COLUM. J.L. & SOC. PROBS. 331, 346-47 (1999) (recommending that OCR assign more data gatherers and analysts to complex Title IX athletics cases).
82. E-mail from Jim Bradshaw, Dep’t of Educ. Press Office, to author Alyssa Peterson (Nov. 17, 2015, 11:16 EST) (on file with author Alyssa Peterson) (describing how “OCR staff work on cases across all of the civil rights laws [OCR] enforce[s]”).
83. Letter from Catherine E. Lhamon & James W. Runcie to Barbara Boxer, *supra* note 31, at 2.
84. See Office for Civil Rights, *supra* note 35, at AA-14.
85. Telephone Interview with Complainant A, *supra* note 72; Telephone Interview with Complainant C (June 5, 2015); Telephone Interview with Complainant D (May 28, 2015); Telephone Interviews with Complainant E (Interview 1: June 1, 2015; Interview 2: June 7, 2015); Telephone Interview with Complainant F (June 15, 2015); see Renfrew, *supra* note 9, at 575-76 (discussing the limited involvement of the complainant beyond the filing of the

investigators proceeded with radio silence. Now I feel as if they just collect documents for the school. I spoke with an admin who said that the OCR just exchanges documents between them and the school.”⁸⁶ Another complainant stated, “I’ve had minimal interaction [with OCR], but it was much more consistent at first. I’ve gotten maybe one phone call over the last year and a half.”⁸⁷ As a result of this silence, almost all of the complainants we interviewed do not know when, or even if, they will get relief.⁸⁸ Moreover, because of its lack of contact with them, OCR may fail to obtain the information it needs to ensure that complainants can access interim accommodations or to resolve other forms of discrimination that affect complainants’ ability to access education.

To remedy this information gap, OCR should first designate clear timelines and procedures for communicating regularly with complainants in its Case Processing Manual. This reform will allow OCR to maintain its ability to learn about problems that occur during the investigation and to keep complainants apprised of the resolution of their cases.⁸⁹ Such measures are not unprecedented in the area of civil-rights enforcement: notably, the Office for Civil Rights within the Department of Health and Human Services (HHS) instituted requirements that its staff “should keep the parties informed of the progress in evaluating and investigating a case and communicate with the parties regularly regarding the status of the case.”⁹⁰ To achieve this goal, the HHS Office for Civil Rights instituted concrete timelines within its Case

complaint despite the potential impact of the resolution on the complainant, and theorizing that this state of affairs arises from OCR’s systemic mission); *see also* Galles, *supra* note 61 (“Thus, in practice, the [OCR] process ends up being a negotiation between OCR and the school over the enforcement of the complainant’s civil rights—often without the participation, input, or approval of the injured party.”); *cf.* Erin E. Buzuvis & Kristine E. Newhall, *Equality Beyond the Three-Part Test: Exploring and Explaining the Invisibility of Title IX’s Equal Treatment Requirement*, 22 MARQ. SPORTS L. REV. 427, 439 (2012) (discussing how OCR provides complainants in Title IX athletics cases with little to no opportunity for further input after filing a complaint).

86. Telephone Interview with Complainant C, *supra* note 85.

87. Telephone Interview with Complainant A, *supra* note 72.

88. Telephone Interview with Complainant A, *supra* note 72; Telephone Interview with Complainant B, *supra* note 73; Telephone Interview with Complainant D, *supra* note 85; Telephone Interviews with Complainant E, *supra* note 85; Telephone Interview with Complainant F, *supra* note 85; Telephone Interview with Complainant G (June 1, 2015); *see* Renfrew, *supra* note 9, at 580–82 (discussing how OCR’s limited communications with complainants hinders the process of obtaining relief).

89. *See* Renfrew, *supra* note 9, at 580–81 (calling for more regular updates for complainants as well as for complainants to be able to comment on a proposed resolution agreement).

90. *See* Office for Civil Rights, *Case Resolution Manual*, U.S. DEP’T HEALTH & HUM. SERVICES 37 (June 16, 2009), <http://www.hhs.gov/ocr/civilrights/complaints/crm2009.pdf> [<http://perma.cc/3UYA-78H6>].

Resolution Manual where investigators “should strive to return the parties’ telephone calls promptly, generally by the end of the following business day” and “should acknowledge receipt of the parties’ substantive letters and e-mails within five business days and, where a response is needed, provide a response to those letters and emails in a timely manner, generally within ten business days.”⁹¹ The Department of Education should follow HHS’s lead and implement concrete procedures when communicating with complainants, such as including a status update about their case’s progress, soliciting feedback from complainants to evaluate whether interim relief measures OCR has secured are adequate, and collecting information about any retaliation and abuses complainants are experiencing from the school.

E. Acting Proactively To Protect Complainants’ Access to Education

Despite OCR’s instituting clear requirements in 2014 that recipients of federal funds should provide interim measures pending the outcome of an investigation,⁹² our interviews with complainants underscore the fact that some are unable to fully access their education while investigations are ongoing. Persistent barriers to education underscore the need for OCR to intervene while cases are ongoing in order to vindicate the “effective protection”⁹³ mandate of Title IX.

One form of discrimination that can occur during an investigation is retaliation for participating in a civil-rights complaint,⁹⁴ particularly as some complainants “go public” and reveal their identities to the media (and to their school as a result) in order to shame the institution into complying with its obligations.⁹⁵ One complainant who revealed her identity to her school

91. *Id.*

92. See Task Force To Protect Students from Sexual Assault, *supra* note 77, at 5.

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

94. See Office for Civil Rights, *Dear Colleague Letter from Acting Assistant Secretary for Civil Rights Seth M. Galanter*, U.S. DEP’T EDUC. (Apr. 24, 2013), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.pdf> [<http://perma.cc/X54Z-9B3Y>] (“[R]etaliation is a violation of federal law. . . . The ability of individuals to oppose discriminatory practices, and to participate in OCR investigations and other proceedings, is critical to ensuring equal educational opportunity in accordance with Federal civil rights laws.”).

95. See, e.g., Richard Pérez-Peña & Kate Taylor, *Fight Against Sexual Assaults Holds Colleges to Account*, N.Y. TIMES (May 3, 2014), <http://www.nytimes.com/2014/05/04/us/fight-against-sex-crimes-holds-colleges-to-account.html> [<http://perma.cc/H4GU-WNPK>] (“Stories like this are playing out at colleges across the country, as more victims go public, more of them file formal federal complaints, a new network of activists makes shrewd use of the law and the media, and the Obama administration steps up pressure on colleges.”); see also Tyler Bishop, *Title IX Trouble: Vanderbilt One of Many Schools Facing Complaints*, VAND. HUSTLER (Nov. 20, 2013, 12:07 AM), http://www.vanderbilthustler.com/news/article_1927e68e-51aa

through a media outlet indicated that “[g]oing so public really fostered hate and a hostile environment, and prompted retaliation from my school, which OCR has been unable to prevent. [. . .] I feel isolated and resentful.”⁹⁶ In this complainant’s case, OCR did not intervene in a timely fashion to protect her, although they were on campus investigating at the time.⁹⁷ This experience is not unique: another complainant who “went public” highlighted how fear of retaliation kept her from accessing her education. She stated that, in order to “transfer, almost all schools require a letter from the Dean of the previous school that was attended (basically asking for negative review). I can’t access education because I used Title IX.”⁹⁸ This testimony from complainants suggests that mistreatment from schools while OCR is investigating results in a denial of “effective protection”⁹⁹ from discriminatory practices.

Tufts University also provides an instructive case study in the continued discrimination complainants face while investigations are ongoing. When OCR opened its investigation into Tufts University on September 22, 2010, the complainant was enrolled at the institution and was denied access to effective interim measures in violation of Title IX’s requirements.¹⁰⁰ The Tufts resolution letter, which details the facts of the case, noted that, before the 2010 Fall term had started, Tufts refused to remove the accused student from a seminar in which he and the complainant were enrolled.¹⁰¹ Consequently, the complainant missed every seminar class until she graduated in Spring 2011; she even finished school early to avoid encountering the accused student and reported to OCR that she lost fieldwork opportunities and incurred debt as a result.¹⁰² The letter also stated that the administration allowed an accused

-11e3-ac6f-001a4bcf6878.html [http://perma.cc/J5LF-KCUB] (demonstrating an instance where a complainant, Sarah O’Brien, alerted the media soon after filing a complaint).

96. Telephone Interview with Complainant B, *supra* note 73.

97. *Id.*

98. Telephone Interview with Complainant D, *supra* note 85.

99. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

100. *See* Compliance Resolution Letter from Office for Civil Rights to Tufts Univ., *supra* note 5 (“The interim measures provided by the University deprived the Student of an equal opportunity to participate with other students in the Program by first alternating her attendance at the weekly seminars with the Accused and then making arrangements in the Fall 2010 under which she did not participate at all in the seminars. . . . The University’s failure to provide effective interim protective measures for the Student and, instead, placing the burden of interim measures largely on the Student was contrary to the requirements of Title IX to provide effective interim measures that minimize the burden on complainants of sexual harassment/violence.”).

101. *Id.*

102. *Id.* (“She reported to OCR that she accelerated her academic schedule and took summer coursework to graduate—and therefore exit the University—one full year early, but she asserted that she lost summer fieldwork opportunities and incurred debt in order to do

student to include details of the complainant’s sexual history during its adjudication process,¹⁰³ although this practice was expressly prohibited by the university’s own procedures.¹⁰⁴

These two examples, where the complainant was denied equal access to her program and where the accused student was able to circumvent the university’s established grievance procedures, underscore the need for OCR to adopt clear rules around consistent communication with complainants. Notably, these instances of discrimination occurred while OCR was investigating Tufts.¹⁰⁵ However, OCR’s compliance resolution letter does not indicate that it took any steps to mitigate these harms while they were occurring; rather, the letter indicates that OCR required Tufts to provide reimbursement for the complainant at the end of the investigation.¹⁰⁶ The letter also fails to state whether OCR became aware that the complainant was experiencing discrimination during its investigation.¹⁰⁷ In either scenario, having clear rules around consistent communication with complainants in its Case Processing Manual could have brought this discrimination to OCR’s attention in a more timely fashion, or increased the possibility that individuals could hold OCR accountable if it knew of discrimination but refused to act.

To ensure “effective protection” for individuals,¹⁰⁸ OCR should address discrimination that could cause harm to complainants (such as a denial of interim relief, as in the Tufts case, or retaliation) separately from the broader hostile environment if resolving the issues jointly will delay relief for the complainant. For example, if OCR determines that a complainant is being forced to attend a course with the accused student (as in the Tufts case), it could immediately negotiate a voluntary resolution agreement to resolve this

so.”); *see also* Bolger, *supra* note 41 (discussing the fact that economic harms to survivors are commonplace).

103. Compliance Resolution Letter from Office for Civil Rights to Tufts Univ., *supra* note 5 (“OCR noted that, in implementing the complaint resolution procedures with respect to the Student and Accused, the University allowed the Accused to depart from the sexual harassment grievance procedures in effect at that time, by . . . allowing him to include details of the Student’s sexual history.”).

104. *Id.*

105. OCR noted that the complainant was denied access to her program during the Fall 2010 term and that the accused student was allowed to file the addendum that departed from the University’s procedures in the summer of 2011. OCR initiated its investigation in September 2010 and concluded it in April 2014. *Id.*

106. *See Tufts Resolution Agreement, supra* note 6, at 13 (“The University agrees to reimburse the Student Complainant for educational and other reasonable expenses as incurred from January 2010 through June 2011 related to this matter and as identified by the Complainant prior to the execution of this Agreement.”).

107. *See* Compliance Resolution Letter from Office for Civil Rights to Tufts Univ., *supra* note 5.

108. *See Cannon v. Univ. of Chi.*, 441 U.S. 677, 704 (1979).

issue. Later, after OCR has determined whether or not a hostile environment is present, it could negotiate a broader voluntary resolution agreement to make sure the school institutes policies that explicitly minimize the burden on the complainants when providing for interim relief.¹⁰⁹ If a school fails to comply, OCR should initiate enforcement action against the school. This proposed shift in procedures strikes a balance between complainants' need to access timely relief and the need for thorough investigations of complex structural issues.

Complainant interviews support this conclusion. One complainant commented, "[The process] is a deterrent because people don't want to have the next years of their lives punctuated with this experience. People [who face] immediate threat[s] are at a huge disadvantage."¹¹⁰ And another stated, "We want immediate relief on an individual and campus wide level rather than soft sanctions ten years later."¹¹¹

To be sure, it is important to consider the implications of asking OCR to act earlier in the agency's role as a "neutral fact-finder . . . [that] does not act as an advocate for either party during the process."¹¹² Under the modified enforcement regime that this Feature proposes, OCR would continue to serve as an objective arbiter between the two parties. Currently, if OCR wishes to make a noncompliance determination, it prepares a letter of finding and a proposed resolution agreement; it must include information such as a statement of OCR's legal authority, any relevant legal standards, and the facts of the case.¹¹³ If OCR pursues voluntary resolution agreements to resolve instances of individual discrimination, these agreements would remain subject to the same standards, and would thus not compromise OCR's objectivity.

CONCLUSION

The status quo calls upon survivors to sacrifice themselves while OCR seeks meaningful systemic changes. Individuals who have already been victimized by perpetrators, and given little to no support by their schools, are called upon to file with OCR; to go public to the media, at great personal risk, when filing with OCR is insufficient; and to wait for the larger structural investigation to conclude before they may obtain relief for themselves. This

109. See *DCL 2011*, *supra* note 19, at 16-19 (separately enumerating "remedies for the complainant" and "[r]emedies for the broader student population").

110. Telephone Interview with Complainant B, *supra* note 73.

111. Telephone Interview with Complainant C, *supra* note 85.

112. Office for Civil Rights, *Questions and Answers on OCR's Complaint Process*, U.S. DEP'T EDUC. (Nov. 16, 2011), <http://www2.ed.gov/about/offices/list/ocr/qa-complaints.html> [<http://perma.cc/E2QZ-XH5R>].

113. See OFFICE FOR CIVIL RIGHTS, *supra* note 37, at 19.

system is not only unfair but also runs contrary to Title IX’s purpose of providing individuals with “effective protection.” OCR must adopt a more balanced approach to achieve this purpose and thus ensure that every student can access an education free from discrimination.