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Less Safe in the Ivory Tower: Campus Sexual Assault Policy in the Trump Administration

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ABSTRACT

Since the late 20th century, the federal government has regulated colleges' and universities' handling of campus sexual and gender-based violence (CSGBV). Although the arc of history has bent toward establishing greater protections for victims of such violence, new proposed regulation by the U.S. Department of Education under the Trump administration focuses more heavily on ensuring due process rights for students accused of CSGBV. Most recently, in November 2018, U.S. Secretary of Education, Betsy DeVos submitted a proposed rule change to the regulation of *Title IX of the Education Amendments of 1972*. This article provides the historical context for this most recent proposed federal regulation of CSGBV and discusses the criticism of this proposal that, if it is implemented, students would become less safe in the ivory tower.

KEYWORDS

Campus sexual assault; gender-based violence; Title IX

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Under President Barack Obama's administration, the federal government cast light on the dark side of the ivory tower – the prevalence of campus sexual and gender-based violence (CSGBV¹) – with an unprecedented degree of attention (Butler, Kulig, Fisher, & Wilcox, 2019). During the course of the Obama era, the federal government provided new policy directives and legislation on how colleges and universities address, investigate, and adjudicate disclosures and complaints in CSGBV cases, especially under Title IX of the Education Amendments of 1972 (herein, Title IX). Their activities include the publication of the 2011 Dear Colleague Letter (U.S. Department of Education, Office for Civil Rights [OCR], 2011), the passage of the 2013 Campus Sexual Violence Elimination Act (SaVE Act), and, in 2014, the establishment of the White House Task Force to Protect Students from Sexual Assault and launch of the “It’s on Us” social media campaign (Butler et al., 2019; It’s on Us, n.d.). Collectively, these initiatives aimed to raise awareness of CSGBV, to implement evidence-informed preventative measures, and to expand services and protections for CSGBV victims (Butler et al., 2019; Kaukinen, Miller, & Powers, 2017).

Federal legislation, regulation, and guidance on CSGBV not only shapes how colleges and universities that receive federal funding respond to this problem, but also is itself a response to the claims of key stakeholders, including grassroots student-focused activists (e.g., Clery Center, End Rape on Campus, Take Back the Night), and of violence scholars and their four decades of research (e.g., Banyard, Plante, & Moynihan, 2005; Fisher, Cullen, & Turner, 2000; Koss & Oros, 1982; Krebs et al., 2011). Thus, governance, activism, and research contribute to the social construction of the problem of CSGBV and the resulting responses to the problem. The seeds of the efforts of government officials, activists, and researchers emerged in the 1970s and continue strong today.

Under President Donald Trump's administration, the attention on CSGBV remains, but the goals of the federal response have diverged from the victim-centered goals of the Obama administration. Specifically, Trump's Secretary of Education, Betsy DeVos, has rescinded the 2011 Dear Colleague Letter on Sexual Violence (herein, 2011 Letter; OCR, 2011), issued new federal guidance on

CSGBV, and proposed a rule change to the application of Title IX to CSGBV. Each of DeVos's actions shifts the attention on CSGBV to focus less heavily on prevention efforts and protections for these victims and more on requirements for the protection of due process rights for students who are accused of committing an act of sexual misconduct² (OCR, 2017b; Saul & Goldstein, 2017).

The first of these actions, rescinding the 2011 Letter, effectively eliminated the Obama- era guidance that defined the acts that are considered sexual assault, and “supplement[ed] the [2001 Revised Sexual Harassment Guidance] by providing additional guidance and practical examples” regarding how campuses are required to handle sexual assault under Title IX (OCR, 2011, p. 2). In the 2017 Dear Colleague Letter (herein, 2017 Letter) announcing that the 2011 Letter had been rescinded, the OCR argued that the 2011 Letter guidance required standards that were more stringent than those many schools already had in place, “led to the deprivation of rights for many students,” and “imposed regulatory burdens without affording notice and the opportunity for public comment” (OCR, 2017a, p. 2). In the same 2017 Letter, the OCR announced the publication of *Q&A on Campus Sexual Misconduct* (herein, 2017 Q&A; OCR, 2017b). The 2017 Q&A provided new interim guidance that was later integrated into a proposed change to the regulation of Title IX that DeVos submitted to the Federal Register in November 2018 (Nondiscrimination on the Basis of Sex, 2018). This regulatory change would alter how schools that receive federal funding are required to respond to CSGBV cases, with several aspects of this change intended to expand protections to the due process rights of students accused of CSGBV (Nondiscrimination on the Basis of Sex, 2018).

In this article, we describe the changes and proposed changes that DeVos has made to federal CSGBV policy and guidance. We begin with an overview of how federal legislation, regulation, and guidance has shaped the collegiate response to CSGBV since the passage of Title IX in 1972 through the end of Obama's presidency in 2017. We also describe the social context in which such governance during this period unfolded. We then describe the efforts under the Trump administration to rollback this prior legislation and administrative guidance, in

particular those issued during the Obama era. Finally, we discuss some of the responses from key stakeholders who claim college students will be less safe in the ivory tower should DeVos's proposed regulatory changes be implemented.

Historical developments in federal regulation of the collegiate response to CSGBV

Although the prevalence of CSGBV has been documented since the late 1950s (Kirkpatrick & Kanin, 1957; Koss, Gidycz, & Wisniewski, 1987; Koss & Oros, 1982), the federal government has not always been involved in shaping how campus administrators respond to this violence (Sloan & Fisher, 2011). In the 1960s and 1970s as part of the broader feminist movement, women founded grassroots organizations, such as Take Back the Night ("the first worldwide effort to combat sexual violence and violence against women," which began in the 1970s in the United States; Take Back the Night Foundation, n.d., para. 1), and the National Women's Law Center (founded 1972; National Women's Law Center, n.d.).

Shortly following the emergence of these grassroots advocacy organizations, legislation was passed in the late 20th century that provided the groundwork upon which federal policy on CSGBV is built today. This next section traces the history of federal regulation of the collegiate response to sexual assault, beginning with the passage of Title IX of the Education Amendments of 1972 and Title II of the Student Right-to-Know and Campus Security Act of 1990, then moves to a discussion of federal responses under the Bush and Obama administrations in the early 2000s, and finally describes the most recent actions and proposed actions by the Trump administration. Figure 1 presents key events along this timeline. We argue that the Trump administration's response to CSGBV is rooted in the federal government's decades-long struggle to address the issues concerning the reporting of and response to sexual and gender-based violence against college students.

Federal regulation of the collegiate response to CSGBV in the 20th century

Prior to the start of the Obama presidency in January 2009, the major pieces of federal legislation that governed colleges' and universities' responses to CSGBV were Title IX and Title II of the Student Right-to-Know and Campus Security Act

(1990) – renamed the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act in 1998 (herein, Clery Act; Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1998; McCallion, 2014). Although the DeVos administration has not yet proposed to Congress changes to the regulation of latter, the Clery Act is an important avenue through which federal policy on campus sexual assault may be affected.

<p>1972: <i>Title IX of the Education Amendments of 1972</i> signed into law by President Richard Nixon</p>	<p>2009: Barack Obama is sworn in as 44th president of the United States</p>	<p>2013: <i>The Campus SaVE Act</i> is passed as part of the VAWA amendments to the Clery Act</p>	<p>January 2017: Donald J. Trump is sworn in as the 45th president of the United States</p>	<p>November 2018: DeVos proposes to amend regulations to the implementation of Title IX</p>	
<p>1998: <i>Gebser v Lago Vista Independent School District</i> U.S. Supreme Court decision</p>	<p>1999: <i>Davis v Monroe County Board of Education</i> U.S. Supreme Court decision</p>	<p>2011: Dear Colleague Letter on Sexual Violence is published by the OCR</p>	<p>July 2017: DeVos hosts "listening sessions" with survivors of CSGBV, students wrongfully accused of CSGBV, and campus representatives and CSGBV experts</p>	<p>January 2019: Public comments on DeVos's proposed rule amendment to Title IX close</p>	
<p>1990: Title II of the <i>Student Right-to-Know and Campus Security Act</i> (renamed <i>Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act</i> in 1998) is signed into law by President George H. W. Bush</p>	<p>2001: <i>Revised Sexual Harassment Guidance</i> is published in the Federal Register</p>	<p>2006: Dear Colleague Letter on Sexual Harassment is published by the OCR</p>	<p>2014: <i>Questions and Answers on Title IX and Sexual Violence</i> is published by the OCR</p> <p>The White House Task Force to Protect Students from Sexual Assault is established and publishes its first report</p>	<p>January 2017: The Task Force publishes its second report</p> <p>February 2017: Betsy DeVos is sworn in as U.S. Secretary of Education</p>	<p>September 2017: The OCR rescinds the 2011 <i>Dear Colleague Letter</i> and the 2014 <i>Questions and Answers on Title IX and Sexual Violence</i></p> <p>The OCR publishes <i>Questions and Answers on Campus Sexual Misconduct</i></p>

Figure 1. Milestones in federal policy on campus sexual assault and harassment.

Jeanne Clery was raped and murdered in her dorm room on the Lehigh University campus in April 1986 (Sloan & Fisher, 2011). After her death, Jeanne's parents, Connie and Howard Clery founded the Clery Center (formerly Security on Campus, Inc.), a grassroots organization that advocated for improving student safety and awareness of crime on college campuses (Sloan & Fisher, 2011). The Clerys and the Clery Center lobbied in Congress and were successful in 1990 when George H. W. Bush signed the bill into law. The Clery Act requires all institutions of higher education that participate in Higher Education Act Title IV financial assistance programs to annually report campus crime statistics and

campus security policies (Clery Center, 2019; McCallion, 2014). These annual reports not only contribute to public awareness of campus crime and security issues but can also serve as the fact basis for federal guidance and regulation (see e.g., Nondiscrimination on the Basis of Sex, 2018; OCR, 2011). Additionally, the Clery Act definition of sexual assault, “an offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program,” is used in the other federal guidance, regulation, and policy discussed in this article. Thus, any changes to the Clery Act itself or to its regulation could impact the collection of crime data that serves as the fact basis for other legislation, regulation, and guidance on campus sexual assault. It is unknown whether DeVos will propose changes to the Clery Act before the 2020 election, but any such changes to the law itself (as opposed to changes to the administrative regulation of the law) would require Congressional approval (USAGov, 2019).

More central to our review of federal guidance, regulation, and policy on campus sexual assault is Title IX. Title IX states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance” (Education Amendments of 1972, p. 995). Congress’s motivation for the passage of Title IX in 1972 was to address broad sex discrimination by educational institutions, including women’s “limited access to educational programs” and exclusion “from ‘male’ programs, such as medicine” (U.S. Department of Justice, 2012, p. 2). However, in the late 1990s, two Supreme Court decisions drew attention to the application of Title IX to sexual harassment.

First, in *Gebser v. Lago Vista Independent School District* (herein, *Gebser*; 1998) the Supreme Court ruled that “a school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment” (Revised Sexual Harassment Guidance, 2000, p. 66092). Then, in *Davis v. Monroe County Board of Education* (herein, *Davis*; 1999), the Court held that schools could be held liable for monetary damages in cases of student-on-student sexual harassment that meet the *Gebser*

criteria (Revised Sexual Harassment Guidance, 2000). These Supreme Court decisions are referenced throughout the major federal guidance and regulations issued throughout the 2000s (see e.g., Nondiscrimination on the Basis of Sex, 2018; OCR, 2001, 2011, 2017b). It is to the federal regulatory activity during the first decade of the new millennium that we now turn.

Federal regulation of the collegiate response to CSGBV: 2000-2010

Early federal guidance and landmark research

A key piece of guidance from the federal government was issued by the OCR during George W. Bush's presidency in response to the *Gebser* and *Davis* decisions. In 2001, the OCR issued the *Revised Sexual Harassment Guidance* (herein, 2001 Revised Guidance). The 2001 Revised Guidance largely reaffirmed principles of the 1997 *Sexual Harassment Guidance* (herein, 1997 Guidance) but also issued new clarification of the 1997 Guidance in light of the *Gebser* and *Davis* decisions. The 2001 Revised Guidance also defined sexual harassment as “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature” and clarified that “sexual harassment of a student can deny or limit, on the basis of sex, the student’s ability to participate in or receive benefits, services, or opportunities in the school’s program” (OCR, 2001, p. 2). Another key clarification was that “if the alleged harassment is sufficiently serious to create a hostile environment and it is the school’s failure to comply with the procedural requirements of the Title IX regulations that hampers early notification and intervention and permits sexual harassment,” the school would be responsible to “take corrective action, including stopping the harassment, preventing its recurrence, and remedying the effects of the harassment on the victim” (OCR, 2001, p. 14).

In addition to the 2001 Revised Guidance, the first few years of the new millennium were also marked by the publication of landmark research findings from studies funded by the National Institute of Justice (NIJ) and Bureau of Justice Statistics (BJS) in the U.S. Department of Justice (for an extensive review, see Butler et al., 2019; Kaukinen et al., 2017). Building from Koss’s seminal work during the 1980s (Koss et al., 1987;

Koss & Oros, 1982), Fisher et al. (2000) published *The Sexual Victimization of College Women*, which reported their findings from a “telephone survey of a randomly selected, national sample of 4,446 women who were attending a 2- or 4-year college or university during fall 1996” (p. 3). The study showed that 2.8% of female college students “had experienced either a completed ... or attempted rape incident” which translates to “27.7 rapes per 1,000 female students” (Fisher et al., 2000, p. 10). Though these were not the first national-level estimates of the sexual victimization of college women, these estimates of the victimization rates of college women provided further empirical evidence to support the claims of activists that campus sexual assault was indeed a widespread social problem (Sloan & Fisher, 2011). Then, in 2000, Karjane, Fisher, and Cullen were funded by the NIJ to execute a nationwide study to examine, among other issues, Title IV’s school’s compliance with the Clery Act. Published in 2002, their results revealed nationwide inconsistencies in the reporting of campus crime statistics, the existence of campus sexual assault policies, the training of school officials and students on responding to sexual assault, and the implementation of sexual assault awareness education by colleges and universities (Karjane, Fisher, & Cullen, 2002). These findings showed that although campus sexual assault had been recognized as a social problem, the campuses’ efforts to address the problem were lacking, at best, and absent, at worst.

In the years following the publication of these landmark studies, the federal government reaffirmed its concern about campus sexual assault when Congress funded three additional large-scale studies of campus sexual assault: (1) the Campus Sexual Assault study (Krebs, Lindquist, Warner, Fisher, & Martin, 2007); (2) Drug-Facilitated, Incapacitated, and Forcible Rape: A National Study (Kilpatrick, Resnick, Ruggiero, Conoscenti, & McCauley, 2007); and (3) the Historically Black Colleges and Universities Campus Sexual Assault Study (Krebs et al., 2011). The federal government also reaffirmed its interest in campus sexual assault when the OCR issued a Dear Colleague Letter in January 2006, which reiterated the 2001 Revised Guidance and announced that the OCR planned to “conduct compliance reviews related to sexual harassment in schools” (OCR, 2006, para. 6).

The 2011 Dear Colleague Letter

The government's response to CSGBV reached unprecedented heights when the Obama- era OCR amended the 2001 Revised Guidance (OCR, 2001) with the issuance of the 2011 Letter (OCR, 2011). The 2011 Letter stated that Title IX prohibition of sexual harassment also prohibits a broader range of acts which constitute sexual violence, defined as "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol ... [or] due to the victim's intellectual or other disability" (OCR, 2011, p. 1). This definition expanded the purview of Title IX beyond cases that meet the aforementioned definition of sexual harassment provided by the 2001 Revised Guidance by including cases in which the victim was incapable of giving consent. The OCR argued that these changes to federal guidance were made in the interest of victims of all forms of sexual violence, to ensure "that all students feel safe in their school, so that they have the opportunity to benefit fully from the school's programs and activities" (OCR, 2011, p. 2). However, critics of the 2011 Letter have expressed that there are a range of issues with the 2011 Letter's guidance.

First, the 2011 Letter explains that schools are required to publish nondiscrimination policies and recommends that these policies specifically state that sexual harassment and sexual violence are prohibited. The OCR also explains that schools must have grievance procedures in place by which students can report sexual harassment or sexual violence, that these procedures must be published publicly, and that Title IX coordinators and school law enforcement officers must be trained to understand these procedures. Although these points largely reaffirm the 2001 Revised Guidance, perhaps the most controversial new provision of the 2011 Letter is its statement that "in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)" (OCR, 2011, p. 11). Whereas prior to the 2011 Letter the OCR had no set requirement for the standard of evidence in grievance procedures, the 2011 requirement meant that schools using the clear and convincing standard of

evidence (“i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred”) or higher standards would be required to use the lower standard (OCR, 2011, p. 11).

The OCR (2011) justified this change by explaining that the Supreme Court “has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act” and that the OCR itself uses this evidence standard “when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX” (pp. 10–11). On one hand, proponents of the change argued that the preponderance of the evidence standard is “the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness” (Loschiavo & Waller, 2017). On the other hand, critics argued that the change was inappropriate because “Congress had already rejected legislation that lowered the standard” (i.e., an early version of the Campus SaVE Act) and because it can have “negative effects, such as the stripping away of the accused student’s presumption of innocence” (Rice, 2018, pp. 774, 776). These arguments will be echoed in our discussion of the DeVos administration’s criticism of the 2011 Letter.

Second, the 2011 Letter describes “steps to prevent sexual harassment and sexual violence and correct its discriminatory effects on the complainant and others” that it recommends schools to implement (OCR, 2011, p. 14). These include education and prevention programs such as “orientation programs for new students, faculty, staff, and employees” as well as additional training for other students, including residence assistants and athletes (p. 14). The Letter goes on to describe “remedies for the complainant” when they become aware of an incident of sexual harassment or violence, such as counseling and medical services, tutoring, or arranging to limit contact between the complainant and the alleged perpetrator (p. 16). Critics argue that the 2011 Letter’s guidance that schools ensure their remedies “minimize the burden on the complainant” can place a burden on the alleged perpetrator (Rice, 2018, p. 775).

Third, critics argue that guidance from the 2011 Letter infringes upon the due process rights of students accused of sexual harassment or sexual violence (Rice,

2018). The 2001 Revised Guidance included a section that described the due process rights of those accused of sexual harassment and the 2011 Letter reiterates this section, stating that “public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant” (OCR, 2011, p. 12). Although this statement is repeated almost verbatim from the 2001 Revised Guidance, Rice (2018) criticizes the 2011 Letter because it does not include a specific section on due process rights of the accused, because only two sentences in the 2011 Letter discuss due process.

However, this criticism should be considered in light of the facts that a Dear Colleague Letter is a distinct document from a final rule submitted to the Federal Register (as is the 2001 Revised Guidance), that the 2011 Letter includes a footnote directing readers to the explanation of due process in the 2001 Revised Guidance, and that the section devoted to due process in the 2001 Revised Guidance is only six sentences longer than the two- sentence explanation included by the 2011 Letter. Perhaps the strongest counterpoint to this criticism is that the 2011 Letter did not *add* to or *change* any guidance on due process rights of the accused provided in the 2001 Revised Guidance. Despite these criticisms, the Obama administration and activists continued to work toward greater protections for victims of CSGBV throughout the remainder of Obama’s tenure as President, and social scientists continued to probe the question of how to best prevent CSGBV by conducting empirical research.

Federal regulation of the collegiate response to CSGBV: 2012-2017

The 2013 Campus SaVE Act was part of the 2013 Violence Against Women Reauthorization Act (VAWA, 2013) amendments (Sec. 304 of S. 47) to the Clery Act. One notable characteristic of the SaVE Act is that, in light of research that showed bystander intervention training programs had promising effects on increasing students’ use of intervention strategies and decreasing students’ support for rape myths (e.g., Banyard et al., 2005; Coker et al., 2011), it requires schools to

provide “primary prevention and awareness programs for all incoming students and new employees” and “safe and positive options for bystander intervention” (Campus Sexual Violence Elimination Act, 2013, p. 90). Thus, the Campus SaVE Act represents a data-driven approach by the federal government to prevent CSGBV.

In the same year, college students founded the activist organizations Know Your IX and End Rape on Campus (End Rape on Campus, n.d.; Know Your IX, n.d.-b). Know Your IX “is a survivor- and youth-led project ... that aims to empower students to end sexual and dating violence in their schools” (Know Your IX, n.d.-a, para. 1). One of their activities is to educate students about “their legal rights to safe educations free from gender-based harms” afforded to them under Title IX (Know Your IX, n.d.-a, para. 3). End Rape on Campus “works to end campus sexual violence through direct support for survivors and their communities; prevention through education; and policy reform at the campus, local, state, and federal level” (End Rape on Campus, n.d., para. 1). These dedicated activist efforts, among others, have been instrumental in amplifying the voices of survivors of CSGBV and in advocating for “federal accountability for Title IX ... and Clery Act enforcement” (End Rape on Campus, n.d., para. 5).

Also influential have been the contributions of researchers from a range of disciplines who research the measurement, predictors, consequences, and prevention of CSGBV. Over this time period, researchers developed and administered campus climate surveys that would update and improve upon the validity of the prevalence and incidence estimates of CSGBV. Their efforts include the Administrator Researcher Campus Climate Collaborative (ARC3), the Campus Climate Survey Validation Study (CCSVS; Krebs, Lindquist, Berzofsky, Shook-Sa, & Peterson, 2016), and the Association of American Universities Climate Survey on Sexual Assault and Sexual Misconduct (Cantor et al., 2017). The results of these surveys have shown that a substantial number of college students experience CSGBV during their college tenure, with many being recurring victims (Kaasa, Fisher, Cantor, & Townsend, 2016) and have extended prior knowledge by showing that non-cisgender students are at a higher risk for sexual assault, stalking, and intimate partner violence than are

cisgender students (Cantor et al., 2017).

To further clarify the guidance provided by the 2011 Letter, the OCR (2014) published *Questions and Answers on Title IX and Sexual Violence* (herein, 2014 Q&A). The 2014 Q&A also suggested “proactive efforts schools can take to prevent sexual violence” (p. ii) and responded to some of the contentious issues related to sexual violence complaints, such as the potential for retaliation against complainants. The 2014 Q&A also clarifies that “Title IX protects all students at recipient institutions from sex discrimination, including sexual violence” including “elementary to professional school students; male and female students; straight, gay, lesbian, and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins” (OCR, 2014, p. 5).

On January 22, 2014, the Obama administration established the White House Task Force to Protect Students from Sexual Assault (herein, Task Force). In response to research that showed as many as one-in-five of the college women surveyed “reported experiencing attempted or completed sexual assault since entering college” (Krebs et al., 2007, p. 53), the Task Force was established “with a mandate to strengthen federal enforcement efforts and provide schools with additional tools to combat sexual assault on their campuses” (White House Task Force to Protect Students from Sexual Assault, 2014, p. 6). In April 2014, the Task Force published *Not Alone: The First Report from the White House Task Force to Protect Students from Sexual Assault*. This report recommended the expansion of campus climate surveys to collect information on the prevalence and incidence of CSGBV, further implementation of sustained prevention programs such as bystander intervention training, and the establishment of campus sexual misconduct policies that protect survivors’ confidentiality when reporting victimization (White House Task Force to Protect Students from Sexual Assault, 2014).

In *The Second Report of the White House Task Force to Protect Students from Sexual Assault*, published in January 2017, the Task Force identified “six primary elements that should be considered when a school is developing their comprehensive plan to address sexual assault” including “1. Coordinated campus and community response; 2. Prevention and education; 3. Policy development and

implementation; 4. Reporting options, advocacy, and support services; 5. Climate surveys, performance measurement, and evaluation; and 6. Transparency” (White Task Force to Protect Students from Sexual Assault, 2017, p. 7). This Task Force report describes at length how schools can implement each of these elements.

As of the writing of this article, there is no information on the White House website about the Task Force (aside from the archived 2014 and 2017 reports), thus the Task Force may have been disbanded when Obama left office. However, as alluded to throughout our discussion, the Trump administration has not abandoned interest in CSGBV. The next section details the changes and proposed changes to federal guidance, regulation, and legislation on campus sexual assault over the course of the Trump presidency thus far.

Federal CSGBV policy under the Trump administration

On February 7, 2017 – hours after Vice President Mike Pence cast the tie-breaking vote in the U.S. Senate to confirm Betsy DeVos’s appointment to the position – she was sworn in as U.S. Secretary of Education (Boyer, 2017). The current administration’s stated goals for the Department of Education (DOEd) focus primarily on making changes to federal policy on educational choice at the K-12 level and on reducing the “federal footprint in education” (DeVos, 2018, para. 3; see also, DeVos, 2017). However, DeVos’s actions beginning in July 2017 suggest that the Trump administration views CSGBV as a problem from which the federal government cannot simply step away. The current section describes the actions DeVos has taken in her two-and-a-half-year tenure as Secretary of Education that are related to the issue of CSGBV (i.e., the listening sessions on the impact of Title IX sexual assault guidance, 2017 Dear Colleague Letter, and the 2018 proposed amendment to the regulation of the implementation of Title IX) and the OCR’s stated reasoning and goals underlying these actions.

Listening sessions on the Department of Education’s Title IX sexual assault guidance

In July 2017, DeVos’s first move related to CSGBV as Secretary of Education was to hold three “listening sessions” to “discuss the impact of the Department’s Title

IX sexual assault guidance on students, families and institutions” (U.S. Department of Education, 2017, para. 1). The first session included nine students who were sexual assault survivors, represented by eight different organizations (U.S. Department of Education, 2017).³ The second session focused on “students who have been falsely accused and disciplined under Title IX” and included seven student and two parent participants represented by three different organizations (U.S. Department of Education, 2017, para. 6).⁴ The third session included 19 “representatives of educational institutions and subject matter experts” (U.S. Department of Education, 2017, para. 8).

As with the response to previous efforts by the federal government to address CSGBV, the reactions to DeVos’s listening sessions were bifurcated. On one hand, proponents of the listening sessions expressed satisfaction that DeVos listened to students who had been wrongfully accused of committing CSGBV (Young, 2017). For example, one student who participated in the listening sessions and said he was falsely accused of sexual assault referred to the listening session as “uplifting” and stated that “it was a moment where you felt like you were finally being seen” (Reilly, 2017, para. 4). On the other hand, critics bemoaned that DeVos did not give equal attention to victims of CSGBV as she did to wrongfully accused students, who were represented by men’s rights groups that have been marked as misogynistic and even hostile (Reilly, 2017).

After these listening sessions, DeVos referred to the day as “emotionally draining,” (Guild, 2017, para. 4) and stated to reporters, “There are some things that are working. There are many things that are not working well ... We need to get this right” (Kreighbaum, 2017, para. 3). She also said that there are “substantive legal questions [regarding Title IX] to be addressed, including the evidentiary standard, due process, and lack of public input” (Guild, 2017, para. 8). These three points would become the focus of the 2017 Dear Colleague Letter that marked DeVos’s first change to federal guidance on CSGBV.

The 2017 Dear Colleague Letter

Following these listening sessions, on September 22, 2017, the OCR announced

in a new Dear Colleague Letter (herein, 2017 Letter; OCR, 2017a) that it had rescinded the 2011 Letter and the 2014 Q&A. At the same time, the OCR announced the publication of *Q&A on Campus Sexual Misconduct* (herein, 2017 Q&A; OCR, 2017b). This document described schools' legal obligations to respond to sexual misconduct, and provided guidelines for the adjudication, decision-making, and appeals of sexual misconduct cases (OCR, 2017b).

The 2017 Q&A largely reverted guidance back to the 2001 Revised Guidance. However, the Q&A also provided specific guidance on the three problems DeVos claimed the 2011 Letter created. First, with regard to the evidentiary standard, the 2017 Q&A states that schools should use “either a preponderance of the evidence standard or a clear and convincing evidence standard” (OCR, 2017b, p. 5) but, in a footnote, goes on to explain that schools should use the same standard of evidence in sexual misconduct cases that they use in all other misconduct cases. The OCR (2017b) argues that “when a school applies special procedures in sexual misconduct cases,” such as using a lower standard of evidence, “it suggests a discriminatory purpose and should be avoided” (p. 5). The 2017 Q&A also notes that schools are required to disclose the standard of evidence used in sexual misconduct cases in their annual Clery Act security reports.

The 2017 Q&A only discusses due process in a footnote, but notably, mentions that the “OCR has previously informed schools that it is permissible to allow an appeal only for the responding [(i.e., accused)] party” (OCR, 2017b, p. 7). This is a departure from the 2014 Q&A guidance, which stated that “if the school provides for an appeal, it must do so equally for both parties” (OCR, 2014, p. 26).

Finally, demonstrating its contrasting approach to the Obama administration's issuance of guidance outside of the rulemaking and public comment process, the 2017 Q&A states that “the Department intends to engage in rulemaking on the topic” at hand and “will solicit input from stakeholders and the public during that rulemaking process” (OCR, 2017b, p. 1). The OCR followed through on this promise with their proposal to amend the regulation of Title IX.

The 2018 proposed amendment to regulation of the implementation of Title IX

On November 29, 2018, DeVos submitted to the Federal Register a proposal to amend the regulations on the implementation of Title IX (herein referred to as the proposed rule; Nondiscrimination on the Basis of Sex, 2018). In the summary of the proposed rule, the OCR states that modifications and clarifications are made “pertaining to the availability of remedies for violations, the effect of Constitutional protections, the designation of a coordinator to address sex discrimination issues, the dissemination of a nondiscrimination policy, the adoption of grievance procedures, and the processes to claim a religious exemption” (Nondiscrimination on the Basis of Sex, 2018, p. 61462). Ultimately, the OCR claims that these amendments are “intended to promote the purpose of Title IX by requiring recipients to address sexual harassment, assisting and protecting victims of sexual harassment and *ensuring that due process protections are in place for individuals accused of sexual harassment*” (Nondiscrimination on the Basis of Sex, 2018, p. 61462, emphasis added).

This third stated goal is distinct from prior Title IX guidance and regulation not in that due process protections have been ignored previously (they have been included in prior OCR guidance), but in that due process rights of the accused have not been at the forefront of prior guidance and regulation. Thus, a major highlight of the proposed rule is its heightened attention to the due process rights of accused students. Confirming due process rights of the accused as a key goal of the proposed rule, DeVos stated that “every survivor of sexual violence must be taken seriously; and every student accused of sexual misconduct must know that guilt is not predetermined” (U.S. Department of Education, 2018, para. 2).

In a press release on the day the rule was proposed, the DOEd highlighted key provisions of the proposed rule and announced the 60-day period during which the proposal would be open for public comments to be submitted to the Federal Register (U.S. Department of Education, 2018). The public comment period closed on January 28, 2019, with many comments that infer from published research that the proposed Title IX rule change would negatively impact the safety of students on college and university campuses (Kreighbaum, 2019). The following section identifies the main rule changes to Title IX regulation that the DeVos administration

has proposed and discusses concerns with these changes that have been voiced by two organizations made up of key stakeholders in the issue of CSGBV.

Less safe in the ivory tower: key stakeholders' responses to the proposed rule changes under the Trump administration

As of July 14, 2019, a total of 124,152 comments on DeVos's proposed rule were submitted to the Federal Register over the course of the 60-day comment period. To date, no comprehensive summary of all of the comments has been published. Although we are unable to provide a comprehensive discussion of the public comments, we have identified two extensive response letters that were submitted to the Federal Register by the Division of Women and Crime (DWC) of the American Criminological Society and by the Campus Advocacy & Prevention Professionals Association (CAPPA). The concerns of these letters are largely overlapping and can be summarized by three main points: (1) Title IX regulation under the proposed amendment would be a significant departure from prior regulation of Title IX and from data-driven policies and practices regarding CSGBV; (2) The proposed amendment would limit the scope of a school's responsibility to respond to sexual harassment; and (3) The changes would create harms to victims of sexual harassment. These concerns are discussed in the following sections.

Departure from prior guidance, regulation, and research

The CAPPA (2019) and the DWC (2019) argue that the proposed rule is a significant departure from prior guidance and regulation of Title IX, including the 1997 Guidance, the 2001 Revised Guidance, the 2011 Letter, and the 2014 Q&A. These departures include the proposed rule that would limit schools' responsibility to respond to sexual harassment that "occurs outside of a recipient's program or activity" (CAPPA, 2019, p. 15), the allowance for schools to implement "unregulated 'mediation' processes in lieu of investigations" (DWC, 2019, p. 6), and the allowance for "schools to delay investigations of sexual harassment" while "concurrent law enforcement investigation is ongoing" (DWC, 2019, p. 14). Further, the DWC claims that these major shifts in regulation would harm complainants. In

addition to moving away from prior regulation, the DWC and CAPPAs argue that the proposed rule ignores or even directly contradicts the practices that are supported by empirical research for investigating and adjudicating CSGBV cases. This first issue, the proposed rule's departure from prior guidance and research, is an overarching concern that applies to the additional issues that the DWC and CAPPAs identified.

Limiting the scope of schools' responsibility to respond to CSGBV

Several of the proposed rule changes would limit the scope of schools' responsibility to respond to reports of CSGBV. First, the proposed rule changes the definition of sexual harassment. Under the 2011 Letter's guidance, schools are responsible to address an act of "harassing conduct ... [that] is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program" (OCR, 2011, p. 3). Under the proposed rule, sexual harassment is defined more narrowly as "unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity" (Nondiscrimination on the Basis of Sex, 2018, p. 61466). The definition of sexual harassment is also limited in the proposed rule, as it must occur within an institution's "education program or activity" and, for this reason, schools could avoid liability for responding to "a significant amount of sexual harassment such as incidents that occur in off-campus housing, online, or among students studying abroad" (DWC, 2019, p. 11). Again, this rule change would ignore research that shows a small minority of students who are sexually assaulted are victimized while at school or on their commute to/from school (e.g., Fisher et al., 2000; Sinozich & Langton, 2014).

Second, under the proposed rule, schools would only be liable to respond to sexual harassment if a complaint is made to the school's Title IX coordinator. As CAPPAs (2019) points out, this would exempt schools from their responsibility to address sexual harassment cases that are reported to other school officials (including those who are required by the Clery Act to report the incident to the

institution) and would be impractical for large institutions in which an unreasonable number of cases would fall under the purview of a single person. Further, the proposed rule requires that, in grievance procedures, “any individual designated by a recipient as a coordinator, investigator, or decision-maker not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent” (Nondiscrimination on the Basis of Sex, 2018, p. 61497). This standard would be difficult to meet if Title IX coordinators who have a background in victim advocacy or other related fields could be considered as having a general bias (CAPP, 2019).

Third, “the proposed guidance would allow schools to adopt a ‘clear and convincing standard’ for sexual harassment complainants” rather than the preponderance of the evidence standard set by the 2011 Letter (DWC, 2019, p. 8). As the DWC (2019) explains, “Universities are not criminal courts of law. Higher levels of proof are required in criminal court because of the possible sanctions” (p. 8). The CAPP (2019) also criticizes the clear and convincing standard because schools, unlike law enforcement, do not have the investigative resources to gather evidence to meet the clear and convincing standard and because this “singles out victims of sexual harassment and abuse for uniquely less protection than victims of race- or disability-based discrimination” (p. 26).

Creating potential for harms to victims of CSGBV

The third overarching criticism of the responses from the CAPP and the DWC is that the proposed rule would create potential harms to victims of CSGBV. For example, the proposed rule would allow individual respondents (i.e., accused students) to claim that the interim supportive measures provided to the complainant cause unreasonable burden on them (CAPP, 2019). According to the DWC (2019), this would “make it impossible for complainants to request that respondents be moved out of their dorm or classes as an interim accommodation” and this measure ignores “demonstrated psychological harm of allowing respondents to remain in classes and dorms with complainants” as well as “significant physical safety risk regarding revictimization of the complainant” (p. 20).

These potential harms to victims extend to the disciplinary process. The proposed rule would “require schools to establish procedures for live cross-examination of complainants and respondents by a party’s advisor of choice” (DWC, 2019, p. 17). Both the DWC and the CAPPa note that live cross-examination, especially by individuals who are not trained in legal cross-examination, could retraumatize victims and create an unfair advantage to students who are able to secure legal counsel and that the DOE “exceeds its authority by attempting to apply principles of criminal law to both regulatory compliance and school disciplinary settings” (CAPPa, 2019, p. 19). The process of cross-examining victims can also discourage victims from reporting. The proposed rule would also allow for informal, “unregulated ‘mediation’ processes in lieu of investigations” (DWC, 2019, p. 6). The DWC and CAPPa oppose this option and suggest that informal processes based on the restorative justice model would be a better alternative.

Conclusion

Two key points must be acknowledged in considering the changes to federal guidance on and regulation of campus’s treatment of CSGBV. First, the proposed regulatory change under the Trump administration is different from the Obama-era response to campus sexual assault because it would impose *legal requirements* to how campuses respond to sexual assault, rather than guidance that cannot be legally enforced (such as that issued in the 2011 Letter). In the 2017 Letter, the Acting Assistant Secretary for OCR, Candice Jackson, criticized the 2011 Letter for failing to clarify Title IX requirements and for not undergoing the public review and comment required when a regulatory change is proposed to the Federal Register (OCR, 2017a). The 2017 Letter states that “the Department intends to implement” a policy that “responds to the concerns of stakeholders and that aligns with the purpose of Title IX to achieve fair access to educational benefits ... through a rulemaking process that responds to public comment” (OCR, 2017a, p. 2). The Department followed through on this plan when they submitted the proposed Title IX rule change to the Federal Register.

Whereas a Dear Colleague Letter can be overridden by another Dear

Colleague Letter, a final regulatory rule can only be altered by undergoing the same rulemaking procedure, which allows for review by the President and typically requires a 30 to 60-day (or longer) public comment period after a proposed rule change has been submitted to the Federal Register (Federal Register, n.d.). In order to publish a final rule, the agency must summarize the problem the rule is intended to address and the “facts and data the agency relies on,” respond to criticism of the rule made in the public comments, and “[explain] why the agency did not choose other alternatives” (Federal Register, n.d., p. 7). After the final rule is published, it may still be subject to review by Congress, the President, and the Courts. Put simply, altering regulation is a lengthier process that involves more oversight by the public and by each branch of the federal government than issuing guidance does.

Second, although we highlight some of the responses to the proposed rule change, we cannot provide a comprehensive review of the public comments. There are more than 124,000 public comments on the proposed rule change. By contrast, for the 2001 *Revised Sexual Harassment Guidance*, the “OCR received approximately 11 comments representing approximately 15 organizations and individuals” (OCR, 2001, p. iii). All of the comments to the 2018 proposed rule change are available online to the public.⁵ To our knowledge, the OCR has not yet publicly responded to the comments on the proposed rule change. The Federal Register’s (n.d.) *A Guide to the Rulemaking Process* states that “at the end of the process, the agency must base its reasoning and conclusions on the rulemaking record, consisting of the comments, scientific data, expert opinions, and facts accumulated during the pre-rule and proposed rule stages” (p. 6). Further, “to move forward with a final rule, the agency must conclude that its proposed solution will help accomplish the goals or solve the problems identified [in the public comments]” (Federal Register, n.d., p. 6). Upon reviewing these comments, the DOEd may change the rule to address the issues raised in the public comments or it may terminate the rulemaking process without issuing a final rule (Federal Register, n.d.).

Although we do not yet know what DeVos’s final rule will be (or if a final rule

will be issued), federal policymakers will likely continue to grapple with developing and implementing policies that meet the goals of preventing and reducing CSGBV, ensuring the safety and wellbeing of survivors of such violence, and protecting the due process rights of students accused of perpetrating such violence. We argue that regardless of how an administration prioritizes these three goals, continued data collection via campus climate surveys will be imperative to developing evidence-based policies that address CSGBV. Additionally, just as grassroots activist organizations that seek to promote these goals have existed since well before the start of the Trump administration, these organizations will most likely continue to advocate for policy change throughout the Trump administration and throughout those that succeed it. Without their steadfast efforts at the federal level, students could be less safe in the ivory tower – a deeply troubling outcome for the nearly 20 million college students in the United States (National Center for Education Statistics, n.d.),

Notes

1. We use the term “campus sexual and gender-based violence” (CSGBV) to generally refer to acts that are encompassed by the terms “sexual harassment,” “sexual assault,” “sexual misconduct,” “intimate partner violence,” “stalking” and the various other terms used in the sources we reference. Where appropriate, we use the term that is used in the documents we reference.
2. This is the term used for CSGBV in the 2017 Dear Colleague Letter and 2017 Q&A on Campus Sexual Misconduct. Sexual misconduct includes “dating violence, domestic violence, sexual assault, or stalking” (OCR, 2017b, p. 2).
3. The participating organizations include End Rape on Campus, National Women’s Law Center, Girls Inc., Liberty Education Forum, National Center for Transgender Equality, Rape Abuse Incest National Network, SurvJustice, and Human Rights Campaign (U.S. Department of Education, 2017).
4. National Coalition for Men Carolinas, Families Advocating for Campus Equality, and Stop Abusive and Violent Environments (U.S. Department of

Education (2017)).

5. <https://regulations.gov/docketBrowser?rpp=50&so=DESC&sb=postedDate&po=0&ct=PS&D=ED-2018-OCR-0064>.

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