ELIMINATING A HOSTILE ENVIRONMENT TOWARDS COLLEGES AND UNIVERSITIES: AN EXAMINATION OF THE OFFICE FOR CIVIL RIGHTS' UNCONSTITUTIONAL PROCESS AND PRACTICES

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INTRODUCTION

One hundred and forty sexual assault investigations at 124 colleges and universities.[1] The numbers are startling, but the handling of these investigations by the United States Department of Education's Office for Civil Rights ("OCR"), many of which began more than one year ago,[2] is also troubling. In 2014, the average OCR investigation of a sexual assault at a college or university lasted 1,469 days, or approximately four years.[3] Five prominent Democratic United States Senators expressed concern over the backlog of OCR investigations and wrote to the United States Secretary of Education: "[I]t is alarming that many institutions have had investigations open more than three years."[4]

Many of these lengthy investigations will eventually conclude with a Hobson's choice for the college or university that is a recipient of federal financial assistance. To resolve alleged violations of Title IX identified during the investigation, the recipient must either (1) enter into a resolution agreement designed to address any alleged violations *prior* to receiving actual notice of them or (2) refuse to voluntarily enter

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1 Tyler Kingkade, *124 Colleges, 40 School Districts Under Investigation for Handling of Sexual Assault*, HUFFINGTON POST (July 24, 2015, 2:06 PM), http://www.huffingtonpost.com/entry/schools-investigation-sexual-assault_55b19b43e4b0074ba5a40b77. The United States Department of Education's Office for Civil Rights ("OCR") has the authority to investigate post-secondary institutions (colleges and universities) that are recipients of federal financial assistance under Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex. 20 U.S.C. §§ 1681(a), 1682 (2012); 34 C.F.R. §§ 106.1, 106.2(a), 106.2(i) (2015).

2 Kingkade, *supra* note 1.

3 *Id.*

4 Letter from Dianne Feinstein, Al Franken, Tim Kaine, Amy Klobuchar & Mark R. Warner, U.S. Senators, to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. 1–2 (Dec. 12, 2014), http://www.virginia.edu/sacs/2014/references/REF6.pdf. OCR had ninety Title IX sexual violence investigations open when the senators sent this letter. *Id.*

into such a resolution agreement.[5] The latter results in OCR declaring an impasse in negotiations[6] and publicly issuing a letter of findings without a resolution agreement.[7] A recipient that refuses to endorse a resolution agreement also risks losing all or part of its federal financial assistance[8] and being misperceived as callous and unconcerned about sexual violence.

OCR's current procedures and practices in investigating colleges and universities ("recipients") are unnecessarily adversarial and punitive when both OCR and the recipient share the same goal of creating a safe learning environment for students.[9] The students at a college or university under investigation will benefit from OCR identifying issues early in its investigation and allowing a recipient to quickly remedy alleged issues before OCR concludes its investigation, particularly when investigations may last four or more years.[10] The real victims of a lengthy investigation followed by an adversarial process are the students, and they deserve a better process. This Article analyzes the constitutional infirmities in OCR's current procedures and practices and offers two viable solutions. Part I describes OCR's current procedures for its investigations. Part II discusses how these procedures deprive a

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[5] *See infra* Parts I.A–B.

[6] *See infra* note 43 and accompanying text.

[7] *See infra* note 45 and accompanying text.

[8] OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., CASE PROCESSING MANUAL art. VI, § 601 (2015) [hereinafter CPM] (explaining the process OCR follows for initiating an administrative action); 34 C.F.R. §§ 100.8, 100.13(f), 106.71 (2015) (granting the authority to effect compliance by suspending, terminating, or refusing to grant federal financial assistance). Federal financial assistance encompasses:

> (1) grants and loans of Federal funds, (2) the grant or donation of Federal property and interests in property, (3) the detail of Federal personnel, (4) the sale and lease of, and the permission to use (on other than a casual or transient basis), Federal property or any interest in such property without consideration or at a nominal consideration, or at a consideration which is reduced for the purpose of assisting the recipient, or in recognition of the public interest to be served by such sale or lease to the recipient, and (5) any Federal agreement, arrangement, or other contract which has as one of its purposes the provision of assistance.

Id. § 100.13(f).

[9] *See* Letter from Terence R. McAuliffe, Governor, Commonwealth of Va., to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. 1–3 (Aug. 14, 2015), http://apps.washingtonpost.com/g/documents/local/letters-about-the-sexual-violence-investigation-at-u-va/1784/ (noting the unduly adversarial and punitive nature of OCR's current procedures).

[10] *See* Dara Penn, Comment, *Finding the Standard of Liability Under Title IX for Student-Against-Student Sexual Harassment: Confrontation, Confusion, and Still No Conclusion*, 70 TEMP. L. REV. 783, 791–92 (1997) (explaining that because of the long administrative delays, student-victims "are unable to benefit from eventual institutional Title IX compliance because they graduate, relocate, or transfer to other schools by the time any institutional changes are effectuated").

recipient of procedural due process or actual notice of the alleged violations and a meaningful opportunity to be heard. Part III analyzes how OCR's current process violates the Spending Clause with respect to public colleges and universities. This Part also reveals that OCR is finding recipients in violation of its guidance documents and not necessarily in violation of Title IX or its implementing regulations. Part IV offers two solutions to a college or university currently under investigation.

I. OCR'S CURRENT CASE PROCESSING MANUAL AND PRACTICES

The OCR Case Processing Manual ("CPM") provides the procedures to investigate and rectify complaints, compliance reviews, and directed investigations.[11] OCR may initiate an investigation under Title IX after a proper complaint is filed.[12] OCR may also initiate an investigation under Title IX after OCR decides to initiate either a compliance review or a directed investigation.[13] OCR may initiate a compliance review when, during the process of investigating a complaint, "OCR identifies new compliance concerns involving unrelated issues that were not raised in the complaint or issues under investigation."[14] OCR may also periodically initiate a compliance review without any complaint being filed against a recipient[15] or may fold the investigation of a particular

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[11] CPM, *supra* note 8, at 2.

[12] 20 U.S.C. § 1682 (2012); 34 C.F.R. §§ 100.7(a)–(c), 106.71 (2015); *see generally* CPM, *supra* note 8, §§ 101–10, 301 (prescribing the procedure for evaluating complaints and for initiating an investigation following receipt of a valid complaint). A recipient first receives notice that a complaint was filed against it when OCR decides to open a case for investigation. *Id.* § 109. The notification letter to the recipient does not include the identity of the complainant unless OCR determines that disclosure of the complainant's identity is necessary to resolve the complaint and the complainant endorses a consent form to disclose his or her identity. *Id.* § 103. The letters of notification to the complainant and the recipient contain a statement of "OCR's jurisdiction with applicable regulatory citations," the allegations that OCR is investigating, and "[i]nformation about OCR's Early Complaint Resolution [("ECR")] process." *Id.* § 109. OCR offers ECR to the parties only if OCR determines that ECR is appropriate and both parties are willing to proceed with this resolution option. *Id.* § 201. OCR may also offer to resolve a complaint through the Rapid Resolution Process ("RRP") for "substantive areas determined by OCR to be appropriate for such resolution." *Id.* § 207. A complainant, however, must sign a consent form to disclose his or her identity before OCR proceeds with RRP. *Id*. Only a complaint, and not a compliance review or directed investigation, may be resolved through ECR and RRP. *Id.* §§ 201, 207.

[13] CPM, *supra* note 8, §§ 301(b), 402.

[14] *Id.* § 301(b).

[15] *Id.* § 401; *see also* 34 C.F.R. § 100.7(a) (stating that periodic compliance reviews may be conducted to determine whether recipients are in compliance with the regulations of Title VI of the Civil Rights Act of 1964); *id.* § 106.71 (incorporating by reference the procedural provisions of Title VI of the Civil Rights Act of 1964 into Title IX of the Education Amendments of 1972).

complaint into a compliance review.[16] Lastly, OCR may conduct a directed investigation when a report or other information, such as a news article, indicates possible noncompliance with Title IX, and "the compliance concern is not otherwise being addressed through OCR's complaint, compliance review or technical assistance activities."[17]

This Article focuses on the process to resolve complaints, compliance reviews, and directed investigations under CPM Section 302, which results in a resolution agreement without a letter of findings,[18] and CPM Section 303, which results in a resolution agreement accompanied by a letter of findings.[19] Under CPM Sections 302 and 303, OCR will issue a resolution letter, but under CPM Section 302, the resolution letter will not contain any findings of noncompliance.[20] For purposes of this Article, "resolution letter" refers to a resolution under CPM Section 302, and "letter of findings" refers to a resolution under CPM Section 303.

A. CPM Section 302 Resolution Agreement Reached During an Investigation

Prior to the conclusion of OCR's investigation, a recipient may request to resolve any allegations or issues in a complaint, compliance review, or directed investigation by voluntarily entering into a resolution agreement.[21] OCR may, in its discretion, resolve any allegations or issues during the course of an investigation unless OCR has obtained sufficient evidence to support a finding of noncompliance about a particular allegation or issue by a preponderance of the evidence.[22] Once OCR has obtained sufficient evidence to support a finding of noncompliance, the current CPM requires OCR to issue a letter of findings for each particular allegation or issue.[23]

OCR may enter into a "mixed resolution," or a resolution under CPM Sections 302 and 303 for investigations that concern multiple

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[16] CPM, *supra* note 8, § 110(k).

[17] *Id.* § 402.

[18] *Id.* § 302.

[19] *Id.* §§ 303–04.

[20] *Id.* § 301(c). *Compare id.* § 302 (stating that "[a] copy of the resolution agreement will be included with the resolution letter," but not requiring the inclusion of findings of noncompliance), *with id.* § 303 (stating that a letter of findings will be provided to the parties when OCR determines whether there is sufficient evidence to support a finding of noncompliance).

[21] *Id.* § 302.

[22] *Id.* ("Where OCR has obtained sufficient evidence to support a finding under CPM subsection 303(a) (insufficient evidence) or CPM subsection 303(b) (violation) with regard to any allegation(s), OCR will not resolve the allegation(s) pursuant to CPM Section 302, but will proceed in accordance with the appropriate provisions set forth in CPM Section 303.").

[23] *Id.* § 303(b).

allegations and issues, where the investigation "has found a violation with regard to some allegations and issues and/or insufficient evidence with regard to other allegations and issues, and/or where there are some allegations and issues that are appropriate to resolve prior to the conclusion of the[] investigation."[24] The letter accompanying a mixed resolution includes "the allegations and issues for which OCR has made a finding[]" of "either [a] violation or insufficient evidence"; this letter also includes the "issues that are being resolved prior to the conclusion of the investigation."[25]

If OCR determines a resolution agreement is appropriate prior to the conclusion of its investigation, OCR will share the proposed terms of the resolution agreement with the recipient and inform the complainant, if any, "of the recipient's interest in resolution."[26] The resolution agreement requires the recipient to take "[s]pecific acts or steps" to address OCR's compliance concerns[27] and, in a mixed resolution, to address the identified violation(s).[28] For a resolution wholly under CPM Section 302, a recipient may negotiate with OCR to reach a final resolution agreement within thirty calendar days (or less at the discretion of OCR) from the date when the recipient receives the proposed terms of the agreement.[29] OCR may choose to suspend its investigation during the negotiation period.[30] If the recipient and OCR do not reach a final agreement by the thirtieth day, then OCR will resume its investigation no later than the thirty-first day after negotiations begin.[31] This thirty-day period for negotiation cannot be reinitiated.[32] For a mixed resolution, OCR proceeds in accordance with CPM Section 303, which provides for a ninety-day negotiation period.[33]

If the recipient and OCR reach a final resolution agreement wholly under CPM Section 302, then OCR issues a resolution letter, which includes a statement of the case, but no finding of a violation.[34] After

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[24] *Id.* § 301(d).

[25] *Id.*

[26] *Id.* § 302.

[27] *Id.* § 304.

[28] *Id.* § 301.

[29] *Id.* § 302(a).

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* §§ 301–03.

[34] *Id.* § 302. The statement of the case in a resolution letter includes information such as "each allegation and issue investigated to date supported by any necessary explanation or analysis of the evidence," "[t]he outstanding areas that OCR would have to investigate in order to reach a determination regarding compliance," "[t]he date of the recipient's expression of interest in resolving the complaint," "OCR's basis for entering into the resolution agreement," and "[a]n explanation of how the terms of the agreement are

entering into a resolution agreement, the recipient undergoes a monitoring period in which OCR confirms that the recipient is fulfilling its obligations under the agreement.[35] A monitoring period typically lasts three or more years, and the most recent resolution agreements from 2014 and 2015 typically do not specify when the monitoring period ends.[36]

Although nothing in the CPM precludes OCR from sharing the resolution letter with the recipient prior to the recipient's endorsement of the final resolution agreement, OCR publicly issues the resolution letter with an accompanying press release after the recipient endorses the final resolution agreement.[37] The recipient usually receives the resolution letter a few hours before the letter is publicly issued.

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aligned with the allegations and issues investigated." *Id.*; *e.g.*, Letter from Thomas J. Hibino, Reg'l Dir., Region I, Office for Civil Rights, U.S. Dep't of Educ., to Dorothy K. Robinson, Vice President & Gen. Counsel, Yale Univ. (June 15, 2012) [hereinafter Yale Univ. Resolution Letter], https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf.

[35] CPM, *supra* note 8, art. V. OCR concludes the monitoring of a resolution agreement only after it "determines that the recipient has fulfilled the terms of the resolution agreement and is in compliance with the statute(s) and regulations(s) . . . at issue." *Id.*

[36] *Compare* Resolution Agreement, Harvard Law Sch., Complaint No. 01-11-2002, at 10 (Dec. 23, 2014), http://www2.ed.gov/documents/press-releases/harvard-law-agreement.pdf ("[T]he monitoring period of this Agreement will extend for three years, or until, if later, such time as OCR determines that [Harvard University and Harvard Law School] have fulfilled the terms of this Agreement . . . ."), *with* Resolution Agreement, Mich. State Univ., OCR Docket Nos. 15-11-2098 and 15-14-2113, at 21 (Aug. 28, 2015) [hereinafter MSU Resolution Agreement], http://www2.ed.gov/documents/press-releases/michigan-state-agreement.pdf ("OCR will not close the monitoring of this Agreement until OCR determines that the University has fulfilled the terms of this Agreement and is in compliance with the regulation implementing Title IX . . . ."), *and* Voluntary Resolution Agreement, S. Methodist Univ., OCR Case Nos. 06112126, 06132081, and 06132088, at 15 (Nov. 16, 2014), http://www2.ed.gov/documents/press-releases/southern-methodist-university-agreement.pdf (same), *and* Voluntary Resolution Agreement, Tufts Univ., Complaint No. 01-10-2089, at 16 (Apr. 17, 2014) [hereinafter Tufts Univ. Resolution Agreement], http://www2.ed.gov/documents/press-releases/tufts-university-agreement.pdf (same).

[37] For example, four days after Yale University entered into a resolution agreement, OCR issued the resolution letter with an accompanying press release. Voluntary Resolution Agreement, Yale Univ., Complaint No. 01-11-2027, at 6 (June 11, 2012) [hereinafter Yale Univ. Resolution Agreement], https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-b.pdf; Yale Univ. Resolution Letter, *supra* note 34, at 1 (issuing the resolution letter on June 15, 2012); Press Release, U.S. Dep't of Educ., U.S. Department of Education Announces Resolution of Yale University Civil Rights Investigation (June 15, 2012), http://www.ed.gov/news/press-releases/us-department-education-announces-resolution-yale-university-civil-rights-investigation.

B. CPM Section 303 Investigative Determination

If OCR concludes its investigation, then OCR must determine by a preponderance of the evidence whether there is sufficient evidence to support a conclusion of noncompliance.[38] When sufficient evidence exists to make a finding of noncompliance, OCR prepares a letter of findings and proposed resolution agreement.[39] Even though nothing in the CPM precludes OCR from sharing its letter of findings with the recipient prior to the negotiation of the resolution agreement, OCR does not share the letter of findings with the recipient until after the recipient "voluntarily" enters into a final resolution agreement.[40] OCR publicly issues the letter of findings with an accompanying press release, and the recipient typically receives the letter of findings only a few hours before the letter is publicly issued.[41]

A recipient may engage in negotiations to reach a final resolution agreement with OCR within ninety calendar days from the date when the recipient receives the proposed resolution agreement.[42] If OCR and the recipient do not reach a final agreement within ninety calendar days, OCR will issue an impasse letter on the ninety-first day, informing the recipient that "OCR will issue a letter of finding(s) in 10 calendar days if

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[38] CPM, *supra* note 8, § 303.

[39] *Id.* § 303(b). OCR's letter of findings includes a statement of the case, and this statement provides: a description of "each allegation and issue investigated and the findings of fact for each, supported by any necessary explanation or analysis of the evidence on which the findings are based"; "[c]onclusions for each allegation and issue that reference the relevant facts, the applicable regulation(s), and the appropriate legal standards"; and an "explanation of how the terms of the agreement are aligned with the allegations and issues investigated and are consistent with applicable law and regulation(s)." *Id.*; *e.g.*, Letter from Meena Morey Chandra, Dir., Region XV, Office for Civil Rights, U.S. Dep't of Educ., to Kristine Zayko, Deputy Gen. Counsel, Mich. State Univ. 25–35, 39–40 (Sept. 1, 2015) [hereinafter MSU Letter of Findings], http://www2.ed.gov/documents/press-releases/michigan-state-letter.pdf.

[40] CPM, *supra* note 8, § 303. For example, three days after Michigan State University entered into a resolution agreement, OCR issued its letter of findings. MSU Resolution Agreement, *supra* note 36, at 21 (signing the agreement on August 28, 2015); MSU Letter of Findings, *supra* note 39, at 1 (issuing the letter of findings on September 1, 2015).

[41] *See* Press Release, U.S. Dep't of Educ., Michigan State University Agrees to Change its Response to Complaints of Sexual Harassment, Sexual Violence (Sept. 1, 2015), http://www.ed.gov/news/press-releases/michigan-state-university-agrees-change-its-response-complaints-sexual-harassment-sexual-violence (announcing that the OCR resolved an investigation against Michigan State University after the university entered a resolution agreement); *supra* note 40.

[42] CPM, *supra* note 8, §§ 303(b)(1), 303(b)(2)(i) ("OCR may end the negotiations period at any time prior to the expiration of the 90-calendar day period when it is clear that agreement will not be reached . . . .").

a resolution is not reached."[43] If the recipient enters into a resolution agreement at this or at any other juncture, then the recipient will undergo monitoring until OCR confirms the recipient is fulfilling its obligations under the agreement.[44] If there is no agreement during this ten-day period, OCR publicizes a letter of findings on the eleventh day.[45] The recipient must enter into a resolution agreement within thirty calendar days of the date of the letter of findings; otherwise, OCR will issue a letter of impending enforcement action.[46]

C. OCR's Administrative Enforcement Action

"When OCR is unable to negotiate a resolution agreement," OCR may either "(1) initiate administrative proceedings to suspend, terminate, or refuse" federal financial assistance from the recipient "or (2) refer the case to [the Department of Justice] for judicial proceedings."[47] An administrative proceeding conducted by a Department of Education administrative law judge will likely provide a friendlier forum for OCR than a federal district court. Accordingly, this Article describes the administrative proceeding, which OCR has not had reason to initiate in over twenty years.[48] The administrative proceeding is lengthy, cumbersome, and involves many layers of review before the recipient receives a final agency action.

An administrative hearing through the Department of Education's Office of Hearings and Appeals is similar to, but less formal than, a hearing before a federal district court.[49] To initiate the administrative

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[43] *Id.* § 303(b)(2)(ii). The impasse letter is not publicly issued. Additionally, if the recipient does not respond to the proposed resolution agreement within thirty calendar days of receipt, then OCR may issue an impasse letter, informing the recipient that "OCR will issue a letter of finding(s) in 10 calendar days if a resolution agreement is not reached within that 10-day period." *Id.* § 303(b)(2)(i).

[44] *Id.* art. V.

[45] *Id.* § 303(b)(3).

[46] *Id.* § 303(b)(3). After the letter of impending enforcement action is issued, OCR must approve any resolution agreement that the recipient proposes. *Id.* § 305.

[47] *Id.* art. VI.

[48] Indeed, one of the last administrative hearings that directly addressed a compliance review under Title IX began on May 25, 1989, and concluded on April 30, 1992. *In re* Capistrano Unified Sch. Dist., Docket No. 89-33-CR, 1992 EOHA LEXIS 1, 1–4 (1992) (investigating Title IX in the employment context); *see also In re* Birmingham City Sch. Dist., Docket No. 86-IX-6, 1989 Ed. Civ. R. Rev. Auth. LEXIS 9, 9 (1992) (investigating Title IX in the context of athletic opportunities).

[49] *See* 34 C.F.R. §§ 100.6–0.11, 101.1–1.131, 106.71 (2015) (setting forth the procedures for an administrative hearing). The hearing will be held at the office of the Department of Education in Washington, D.C., unless the Department official concludes that it is more convenient to hold the hearing elsewhere. *Id.* § 100.9(b). The parties to the proceeding include the recipient and the Assistant Secretary for the Office for Civil Rights. *Id.* § 101.21. An amicus curiae may also participate in the hearing if it files a petition to participate and that petition is granted. *Id.* § 101.22(a). All pleadings, correspondence,

hearing, OCR sends the recipient a notice of opportunity for hearing within thirty days of the notice of the deferral action.[50] OCR uses a preponderance of the evidence standard in such administrative hearings.[51] The hearing examiner is either an administrative law judge whom the agency appoints or an administrative law judge from another agency if the agency lacks sufficient staff.[52] The designation of the hearing examiner states whether the hearing examiner makes an initial decision or "certif[ies] the entire record including his recommended findings and proposed decision to the reviewing authority," who may be the Secretary of Education or any person acting pursuant to authority delegated by the Secretary.[53]

The initial decision of a hearing examiner becomes final if no exceptions are filed within twenty days, and constitutes the "final agency action" under the Administrative Procedure Act.[54] If the hearing examiner makes a recommended decision, or if exceptions are filed to a hearing examiner's initial decision, the reviewing authority must review the decision and issue its own decision, which constitutes the "final agency action" under the Administrative Procedure Act.[55]

1. Secretary of Education's Discretionary Review

If the Secretary of Education has not personally made the final agency action, a party may request that the Secretary review the final

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exhibits, transcripts, exceptions, briefs, and other documents filed in the proceeding constitute the exclusive record for decision, commonly referred to as the "administrative record." *Id*. § 101.92. The administrative record is public. *Id.* §§ 101.2, 101.91.

[50] CPM, *supra* note 8, § 601. The recipient of federal funding must be afforded an opportunity for hearing prior to the suspension, termination, or refusal to grant federal financial assistance. 34 C.F.R. §§ 100.8(c), 106.71. The recipient may file a response within twenty days after service. *Id*. § 101.52.

[51] Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence 11 (Apr. 4, 2011) [hereinafter DCL on Sexual Violence], http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[52] 34 C.F.R. § 101.61 (citing 5 U.S.C. §§ 3105, 3344 (2012)).

[53] *Id*. § 101.62, 100.13(d). The Civil Rights Reviewing Authority ("CRRA") typically serves as the reviewing authority, but there is currently no standing CRRA body. ARTHUR L. COLEMAN & JAMIE LEWIS KEITH, A PRIMER ON OCR: THE RULES, THE REGULATIONS, AND THE STRATEGIES FOR EFFECTIVELY ADDRESSING COMPLAINTS OF DISCRIMINATION FILED WITH THE U.S. DEPARTMENT OF EDUCATION'S OFFICE FOR CIVIL RIGHTS 9 n.46 (2012), http://www-local.legal.uillinois.edu/nacua12/presentations/3A_Handout.pdf; *see also U.S. Department of Education Principal Office Functional Statements*, U.S. DEP'T EDUC., http://www2.ed.gov/about/offices/list/om/fs_po/om/oha.html (last updated Oct. 14, 2015) (explaining the nature and responsibilities of the CRRA as a "body appointed by the Secretary" to review decisions of administrative law judges).

[54] 34 C.F.R. § 101.104(a); *see also* 5 U.S.C. § 704 ("[A] final agency action for which there is no other adequate remedy in a court [is] subject to judicial review.").

[55] 34 C.F.R. § 101.104(b); *see also* 5 U.S.C. § 704 (explaining which agency actions are subject to judicial review).

decision.[56] The Secretary may accept or refuse a request, in whole or in part.[57] If a party fails to request the Secretary's review, it does not constitute a failure to exhaust administrative remedies for purposes of procuring judicial review.[58] The Secretary may also review the final decision at his discretion.[59]

2. Letter from Secretary to Legislative Committees

If the administrative proceeding results in an express finding that the recipient has failed to comply with Title IX, then the Secretary must file with the House and Senate committees "having legislative jurisdiction over the program involved, a full written report of the circumstances and the grounds" for the suspension, termination, or refusal to continue federal financial assistance.[60] Thirty days after the Secretary's report to these committees, the order suspending, terminating, or refusing to continue financial assistance becomes effective.[61]

3. Federal District Court Action under the Administrative Procedure Act

Once the final agency action is rendered, the recipient may file an action in federal district court to challenge this action.[62] The reviewing court will set aside agency actions, findings, and conclusions that are

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;

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[56] 34 C.F.R. §§ 100.10(e), 101.106.

[57] *Id.* § 101.106.

[58] *Id.*

[59] *Id.* § 100.10(e).

[60] 34 C.F.R. § 100.8(c); *see also* 42 U.S.C. § 2000d-1 (2012) (requiring a written report to be filed with the appropriate House and Senate committees for an action terminating or refusing to grant or continue federal financial assistance to any program or activity).

[61] 34 C.F.R. § 100.8(c).

[62] 42 U.S.C. § 2000d-2; *see also* 5 U.S.C. §§ 702–04 (2012) (granting the right of judicial review for "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action," and describing which agency actions will be subject to judicial review); 34 C.F.R. § 101.104 (describing what constitutes a final agency action). The reviewing court or agency may postpone the effective date of any action to suspend, terminate, or refuse to grant federal financial assistance pending conclusion of the judicial proceeding. 5 U.S.C. § 705. A lawsuit for declaratory or injunctive relief may be filed against the federal officer or officers responsible for compliance, namely the Secretary of Education and Assistant Secretary for the Office for Civil Rights in their official capacities. *Id.* § 702.

> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.[63]

This lengthy and costly administrative proceeding, which may result in another lengthy federal district court proceeding, discourages many recipients from pursuing legal action and instead forces these recipients to tolerate the constitutional infirmities in OCR's process.[64]

II. OCR'S PROCEDURES DENY A RECIPIENT PROCEDURAL DUE PROCESS

Terence McAuliffe, the Governor of the Commonwealth of Virginia, recently wrote to Secretary of Education Arne Duncan to express concern "that the process used by OCR has fundamentally shifted from being a constructive, cooperative attempt to resolve any Title IX issues into an adversarial action that has denied [a] [u]niversity . . . the very basic requirements of due process—adequate notice and an opportunity to be heard by an impartial tribunal."[65] Both of Virginia's United States Senators agreed in a separate letter to Secretary Duncan that "[t]he Governor's letter raises serious procedural questions that could affect the accuracy of [OCR's] investigation."[66] Lack of due process was the crux of the Governor's and Senators' concern, and Governor McAuliffe articulated the manner in which OCR's process currently deprives a recipient of due process when he wrote:

> OCR has not and will not give the [u]niversity . . . an ability to challenge either OCR's legal conclusions or factual findings *before* OCR publicly issues a Letter of Findings. While there is a formal process to challenge these findings, it is only after the Letter of Findings has been made public, and in which the [u]niversity . . . would be in a defensive posture. At the same time, it is my understanding that the [u]niversity . . . has been asked to, nevertheless, agree to a settlement with OCR, even though it has never been provided with written findings to support what OCR has concluded.[67]

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[63] 5 U.S.C. § 706.

[64] *See* Ellen J. Vargyas, Commentary, Franklin v. Gwinnett County Public Schools *and its Impact on Title IX Enforcement*, 19 J.C. & U.L. 373, 384 (1993) (reasoning that although universities can defend Title IX cases through litigation, defending them in courts and other forums "can result in heavy economic losses including damages in addition to the costs of litigation").

[65] Letter from Terence R. McAuliffe to Arne Duncan, *supra* note 9, at 1.

[66] Letter from Tim Kaine & Mark R. Warner, U.S. Senators, Commonwealth of Va., to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. (Aug. 25, 2015), https://assets.documentcloud.org/documents/2501863/letters-about-the-sexual-violence-investigation.pdf.

[67] Letter from Terence R. McAuliffe to Arne Duncan, *supra* note 9, at 2.

The Governor's letter addressed OCR's investigation of a particular university,[68] but OCR's process for every recipient of federal financial assistance is the same. No law, regulation, or rule precludes OCR from sharing its resolution letter or letter of findings with a recipient before the recipient enters into a resolution agreement.[69] OCR, however, provides the recipient with the resolution letter or the letter of findings only *after* the recipient "voluntarily" enters into a resolution agreement.[70]

A recipient must endorse a resolution agreement without actual notice of any alleged violations, even though the resolution agreement is supposedly tailored to remedy the alleged violations OCR identified during the course of its investigation.[71] Although OCR may orally share a summary of its findings, OCR's process places recipients in an untenable position—a recipient must either (1) endorse a resolution agreement without actual notice of the alleged violations or (2) reach impasse; wait ten days; endure the stigma of receiving the letter of findings, which is publicly issued on the eleventh day; and, upon receipt of the letter of findings, promptly enter the thirty-day period towards an enforcement action.[72]

OCR's process violates the minimal requirements of procedural due process—notice and a meaningful opportunity to be heard—under the rubric articulated by the United States Supreme Court in both *Mathews v. Eldridge*[73] and *Mullane v. Central Hanover Bank & Trust Co.*[74] The Supreme Court has long acknowledged that "a corporation is a 'person' within the meaning of the equal protection and due process of law clauses"[75] and "rejected [the] argument that 'the liberty guaranteed by the Fourteenth Amendment against deprivation without due process of law is the liberty of *natural* not of artificial persons.'"[76] "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard

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[68] *Id.* at 1.

[69] Even the CPM that OCR publishes does not forbid OCR from providing the resolution letter to a recipient prior to the recipient entering into a resolution agreement. *See supra* notes 37, 40 and accompanying text.

[70] *See supra* notes 37, 40 and accompanying text.

[71] *See supra* notes 34–40 and accompanying text.

[72] *See supra* notes 42–47 and accompanying text.

[73] 424 U.S. 319, 332–35 (1976).

[74] 339 U.S. 306, 314–15, 319 (1950).

[75] Grosjean v. Am. Press Co., 297 U.S. 233, 244 (1936) (citing Covington & Lexington Tok. Co. v. Sandford, 164 U.S. 578, 592 (1896)).

[76] Old Dominion Dairy Prods., Inc. v. Sec'y of Def., 631 F.2d 953, 962 n.19 (D.C. Cir. 1980) (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 780 n.16 (1978)).

are essential."[77] A recipient's good name, reputation, and honor are at stake throughout OCR's process, and a publicly issued, erroneous resolution letter or letter of findings may cause irreparable harm.[78]

A. Procedural Due Process under Mathews

In *Mathews*, the Supreme Court considered the following three distinct factors to adjudicate a denial of due process claim against a federal official: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."[79]

With respect to the first consideration, OCR's administrative action to suspend, terminate, or refuse to grant federal financial assistance severely affects a recipient's educational mission.[80] A recipient cannot make a well-informed decision whether to enter into a resolution agreement without actual notice of the alleged issues or violations. Additionally, publicly issuing the resolution letter or letter of findings without first giving the recipient an opportunity to review it for accuracy may harm the recipient's reputation, which is difficult to reestablish.[81]

The risk of erroneously depriving a recipient of federal financial assistance is difficult to gauge because OCR has not initiated an administrative enforcement proceeding against a recipient in recent history.[82] Such an administrative proceeding, however, is lengthy, onerous, and may involve various levels of administrative review, including a review by the Secretary of Education.[83] Accordingly, the government's cost to initiate such a proceeding and the recipient's cost to defend itself are significant.[84]

The risk of harming a recipient's reputation is great when a recipient is not provided with the resolution letter or letter of findings

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[77] Bd. of Regents v. Roth, 408 U.S. 564, 573 (1972) (quoting Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971)).

[78] *See* Anonymous, *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), https://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students (explaining that a university's efforts to comply with OCR standards might all be lost in public critique as a result of a public investigation, "or, even worse, having the 'letter of agreement' OCR makes public displayed for all to read").

[79] Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976).

[80] Penn, *supra* note 10, at 792.

[81] *See supra* note 78 and accompanying text.

[82] *See supra* note 48 and accompanying text.

[83] *See supra* notes 49–63 and accompanying text.

[84] Vargyas, *supra* note 64, at 384.

prior to entering into a resolution agreement. At the recent conclusion of a compliance review, the Assistant Secretary for the Office for Civil Rights explained that she withdrew a letter of findings "'purely for accuracy reasons.'"[85] She explained her reasoning as follows: "'The reason I withdrew it is I don't stand by it. . . . I'm a neutral arbiter. I need to go where the facts lead me.'"[86] Inaccuracies and errors may be easily avoided if OCR provides a recipient with actual notice of the alleged issues and violations in advance because both OCR and the recipient share the same interest in accuracy.[87]

Additional procedural safeguards could include sharing a draft resolution letter or draft letter of findings prior to, or contemporaneous with, sharing the proposed resolution agreement with the recipient.[88] Such a procedural safeguard would afford the recipient an opportunity to review the letter and rebut any false allegations or factual inaccuracies during the negotiation period. This procedural safeguard would also allow OCR to substantiate and reassess its findings before finalizing its letter and before initiating an administrative proceeding.[89] If the recipient identifies any errors and OCR changes its letter, the recipient should receive a copy of the revised letter. The recipient should also have the opportunity to review the final resolution letter or letter of findings before entering into a resolution agreement.

OCR would bears virtually no additional administrative burden in providing both the draft and final resolution letter or letter of findings to the recipient before the recipient entered into a resolution agreement. OCR should have prepared a draft of such a letter before sharing the

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[85] Nick Anderson, *In Secret Letter, Feds Sternly Criticized U-Va. For Handling of Sexual Violence*, WASH. POST (Mar. 5, 2016), https://www.washingtonpost.com/local/education/in-secret-letter-feds-sternly-criticized-u-va-for-handling-of-sexual-violence/2016/03/01/297e9b3a-d728-11e5-9823-02b905009f99_story.html.

[86] *Id.*

[87] A factually accurate record will only help OCR potentially prevail in such a proceeding. *See supra* notes 49–63 and accompanying text.

[88] For example, the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP") provides a federal contractor with a notice of violation letter (which is not publicly issued) and an opportunity to respond to the allegations in this letter before entering into a conciliation agreement, which is comparable to a resolution agreement. OFFICE OF FED. CONTRACT COMPLIANCE PROGRAMS, U.S. DEP'T OF LABOR, FEDERAL CONTRACT COMPLIANCE MANUAL 264–65 (2013). The federal contractor thus has the opportunity to bring any inaccuracies to OFCCP's attention before entering into a conciliation agreement or before any referral to the Solicitor of Labor for possible enforcement proceedings. *Id.* at 282–83.

[89] *See Tufts Reaffirms Commitment to Title IX Compliance*, TUFTS U. CTR. FOR AWARENESS, RES. & EDUC., http://oeo.tufts.edu/sexualmisconduct/tufts-reaffirms-commitment-to-title-ix-compliance/ (last visited Jan. 28, 2016) (expressing disappointment that OCR did not inform the university of its findings of possible violations before the university entered a voluntary resolution agreement, despite the fact that the university was cooperative in working with OCR throughout the investigation).

proposed terms of the resolution agreement because the resolution agreement is tailored to address issues or violations that OCR identified during its investigation. OCR may orally and generally share alleged issues or violations from a draft letter during negotiations concerning the resolution agreement, but oral statements do not always translate into the same written finding.[90] A recipient may better ascertain the validity and accuracy of OCR's claims through a written copy of the resolution letter or letter of findings.[91] Additionally, counsel for the recipient may better advise a client whether to endorse a resolution agreement after evaluating and assessing the alleged issues or violations in a resolution letter or letter of findings.

B. Procedural Due Process under Mullane

The Supreme Court addressed procedural due process in *Mullane*, in which it considered whether "notice [was] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[92] In considering the constitutional sufficiency of notice that a trust company provided to beneficiaries, the Supreme Court held:

> [W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.[93]

In *Mullane*, the trust company only gave the beneficiaries notice of a petition for a binding and conclusive judicial settlement by publication in a nearby newspaper.[94] The Supreme Court held that such notice was insufficient "[a]s to known present beneficiaries of known place of residence" because the trust company should have "reasonably

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[90] *See Tufts Reaffirms Commitment to Title IX Compliance, supra* note 89 (stating that OCR declared the university to be out of compliance with Title IX despite the fact that during a four-year investigation, OCR never indicated that the university's policies were out of compliance and even affirmed the university's progress and compliance).

[91] *See id.* (explaining that the university was not informed of its noncompliance until it signed a voluntary resolution agreement).

[92] Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950); *see also* Milliken v. Meyer, 311 U.S. 457, 463 (1940) (holding that notice was "reasonably calculated to give [a party] actual notice of the proceedings and an opportunity to be heard" when the party was domiciled in the state, had actual notice, and was personally served while outside the state).

[93] *Mullane*, 339 U.S. at 315 (citations omitted).

[94] *Id.* at 309.

calculated" that notice to the beneficiaries by mail to their address was circumstantially required.[95]

Similarly, OCR could easily provide actual notice of any alleged issues or violations to a recipient by sharing a copy of the resolution letter or letter of findings at the same time as the proposed resolution agreement. OCR's current process is a mere gesture because any oral generalizations or summaries of the resolution letter or letter of findings are subject to change.[96] For example, Tufts University voluntarily entered into a resolution agreement with OCR because "OCR consistently affirmed [its] progress and current compliance with the law."[97] According to Tufts:

> At no time before we signed the April 17 Voluntary Resolution Agreement did OCR indicate that it found the University's *current* policies out of compliance with Title IX. . . . It was not until April 22—after we signed the Voluntary Resolution Agreement—that OCR informed us of its serious and . . . unsubstantiated finding. Given the extensive collaborative efforts to reach that Agreement, we are disappointed by the department's course of action. Our repeated requests to speak with OCR in Washington about this new finding have been unsuccessful.[98]

OCR's investigation at Tufts began with one student's complaint filed in June 2010; OCR concluded its investigation four years later with a letter of findings, issued on April 28, 2014, which also served as a letter of impending enforcement action.[99] OCR found that Tufts' failure to respond appropriately to the student's written complaint of sexual harassment subjected her to a sexually hostile environment.[100] Upon

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[95] *Id.* at 318–19.

[96] *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/ (stating that OCR allegedly represented to the university that its current policies were compliant with Title IX, prior to issuing a letter of findings declaring the university's current policies noncompliant); *cf.* Press Release, U.S. Dep't of Educ., U.S. Department of Education Finds Tufts University in Massachusetts in Violation of Title IX for its Handling of Sexual Assault and Harassment Complaints (Apr. 28, 2014), http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix- (stating that the university's changes were important improvements, but were insufficient to comply with Title IX).

[97] *Tufts Reaffirms Commitment to Title IX Compliance, supra* note 89; *see also* Tufts Univ. Resolution Agreement, *supra* note 36, at 1–3 (stating that Tufts University voluntarily complied with OCR and had taken several steps to address OCR's concerns).

[98] *Tufts Reaffirms Commitment to Title IX Compliance, supra* note 89.

[99] Letter from Thomas J. Hibino, Reg'l Dir., Region I, Office for Civil Rights, U.S. Dep't of Educ., to Anthony P. Monaco, President, Tufts Univ. 1–2 (Apr. 28, 2014) [hereinafter Tufts Letter of Findings], http://www.ed.gov/news/press-releases/us-department-education-finds-tufts-university-massachusetts-violation-title-ix-its-handling-sexual-assault-and-harassment-complaints.

[100] *Id.* at 2.

learning of this finding, Tufts revoked its voluntary resolution agreement for approximately eleven days and later reentered the same resolution agreement.[101] Any recipient may face the same challenge that Tufts faced with OCR's current process; oral notice of any alleged issues or findings is effectively no notice.

III. OCR'S CURRENT PROCESS VIOLATES THE SPENDING CLAUSE

Although a private recipient of federal financial assistance, such as a private university, may have stronger grounds for a procedural due process argument,[102] a public recipient, such as a public university, may also argue that OCR's practices violate the Spending Clause of the United States Constitution.[103] The Supreme Court has repeatedly acknowledged that Title IX was "enacted pursuant to Congress'

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[101] *See* Letter from Tony Monaco, President, Tufts Univ., to Univ. Cmty. (May 9, 2014), http://president.tufts.edu/blog/2014/05/09/affirming-tufts'-commitment-to-sexual-misconduct-prevention/ (stating that Tufts "reaffirmed [its] commitment to the voluntary agreement" on May 8, 2014); 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 (stating that Tufts revoked its commitment to the voluntary resolution agreement on April 26, 2014); *Tufts Reaffirms Commitment to Title IX Compliance, supra* note 89 ("[O]n April 26, [2014], we regretfully revoked our signature from the Voluntary Resolution Agreement.").

[102] Although due process typically protects persons from government action, public universities and colleges should make arguments similar to those presented in this Article about fundamental fairness, which is equated with due process. *See* Panetti v. Quarterman, 551 U.S. 930, 949 (2007) (equating procedural due process with fundamental fairness); Daniels v. Williams, 474 U.S. 327, 331–32 (1986) (stating that the Due Process Clause promotes fairness by requiring the government to follow appropriate procedures).

[103] U.S. CONST. art. I, § 8, cl. 1. A private college or university may also make an argument similar to the Spending Clause argument presented in this Article, but this Article focuses on the constitutional infirmities in OCR's process and practices. A private college or university should argue that OCR cannot measure a recipient's compliance with Title IX against OCR's guidance because the recommendations in the guidance documents are not legislative rules that carry the force and effect of law. *See* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020, 1024 (D.C. Cir. 2000) ("It is well-established that an agency may not escape the notice and comment requirements by labeling a major substantive legal addition to a rule a mere interpretation." (citation omitted)); Paralyzed Veterans of Am. v. D.C. Arena L.P., 117 F.3d 579, 587–88 (D.C. Cir. 1997) (explaining the distinction between interpretive rules and substantive rules and stating that substantive rules have the "force of law"); G.G. v. Gloucester Cty. Sch. Bd., No. 4:15cv54, 2015 U.S. Dist. LEXIS 124905, at *24–25 (E.D. Va. Sept. 17, 2015) ("Allowing the Department of Education's Letter to control here would set a precedent that agencies could avoid the process of formal rulemaking by announcing regulations through simple question and answer publications. Such a precedent would be dangerous and could open the door to allow further attempts to circumvent the rule of law—further degrading our well-designed system of checks and balances.").

authority under the Spending Clause."[104] When Congress acts under the Spending Clause, it essentially "generates legislation 'much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions.'"[105] The Supreme Court has held:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, [the Supreme Court] enable[s] the States to exercise their choice knowingly, cognizant of the consequences of their participation.[106]

OCR's process and practices violate the Spending Clause because its publicly issued letters of findings reveal that OCR is finding recipients in violation of its guidance documents and not in violation of express, unambiguous conditions that Congress authorized through Title IX or its implementing regulations.[107] Although OCR acknowledges "the contractual nature of Title IX,"[108] it unlawfully imposes recommendations in its guidance documents as conditions on recipients. Examples of such unlawfully imposed conditions include, but are not limited to: (1) OCR's requirement that a recipient adopt the preponderance of the evidence standard to evaluate complaints of sexual

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[104] Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640 (1999); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 287 (1998) (stating that conditions on awards of federal funds under Title IX are attached by Congress under its spending power).

[105] *Davis*, 526 U.S. at 640 (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

[106] *Pennhurst*, 451 U.S. at 17 (citations omitted).

[107] *See* Letter from Joel J. Berner, Reg'l Dir., Region I, Office for Civil Rights, U.S. Dep't of Educ., to Martha C. Minow, Dean, Harvard Law Sch. 3 n.3 (Dec. 30, 2014) [hereinafter Harvard Letter of Findings], http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf ("The applicable legal standards described [in this letter of findings] are more fully discussed in OCR's 2011 Dear Colleague letter on Sexual Violence . . . .").

[108] Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,092–93 (Nov. 2, 2000). After the Supreme Court established the knowledge standard for hostile environment claims in *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999) and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998), OCR sought to revise its 1997 Sexual Harassment Guidance, and published a notice in the Federal Register to request comments. OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i–ii (2001), www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. OCR allowed notice and comment prior to issuing its 2001 Revised Guidance, which was promulgated as final policy guidance and not as a regulation. *Id.* at ii.

harassment and sexual violence[109] and (2) OCR's use of a different knowledge standard for hostile environment sexual harassment claims than the Supreme Court's standard in *Davis v. Monroe County Board of Education*.[110]

Neither Title IX nor the implementing regulations require a recipient to use the preponderance of the evidence standard to evaluate complaints of sexual harassment.[111] However, in its letter of findings OCR requires "the recipient [to] use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence."[112] The requirement of a preponderance of the evidence standard does not appear in Title IX or its implementing regulations and is only found in OCR's 2011 Dear Colleague Letter on Sexual Violence.[113] Nonetheless, OCR finds a recipient who fails to adopt the preponderance of the evidence standard in violation of Title IX and its implementing regulations.[114]

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[109] *See infra* notes 111–14 and accompanying text.

[110] *Compare Davis*, 526 U.S. at 650 ("[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."), *with infra* notes 115–19 and accompanying text.

[111] *See* Lavinia M. Weizel, Note, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1617, 1641–42 (explaining that federal courts have disagreed over what procedural due process and Title IX require for student disciplinary hearings); *see also* Smyth v. Lubbers, 398 F. Supp. 777, 799 (W.D. Mich. 1975) (suggesting that schools should use the higher standard of clear and convincing evidence to protect students' due process rights). *But see* DCL on Sexual Violence, *supra* note 51, 10–11 (arguing that the preponderance of the evidence standard is consistent with Title IX because the Supreme Court has applied this standard in litigation of civil rights claims).

[112] Harvard Letter of Findings, *supra* note 107, at 3–4; *see*, *e.g.*, Letter from Taylor D. August, Reg'l Dir., Region VI, Office for Civil Rights, U.S. Dep't of Educ., to R. Gerald Turner, President, S. Methodist Univ. 4 (Dec. 11, 2014) [hereinafter SMU Letter of Findings], http://www2.ed.gov/documents/press-releases/southern-methodist-university-letter.pdf (requiring the recipient's Title IX grievance procedures to include "the evidentiary standard that must be used (preponderance of the evidence) in resolving a complaint"); Letter from Timothy C.J. Blanchard, Dir., N.Y. Office, Office for Civil Rights, U.S. Dep't of Educ., to Christopher L. Eisgruber, President, Princeton Univ. 6 (Nov. 5, 2014) [hereinafter Princeton Letter of Findings], http://www2.ed.gov/documents/press-releases/princeton-letter.pdf ("[I]n order for a recipient's grievance procedures to be consistent with the Title IX evidentiary standard, the recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment, including sexual assault/violence."); MSU Letter of Findings, *supra* note 39, at 6 ("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."); Tufts Letter of Findings, *supra* note 99, at 5 ("[T]he recipient must use a preponderance of the evidence standard for investigating allegations of sexual harassment/violence.").

[113] DCL on Sexual Violence, *supra* note 51, at 10–11.

[114] *E.g.*, Harvard Letter of Findings, *supra* note 107, at 7.

Similarly, OCR acknowledges that its knowledge standard for hostile environment sexual harassment (the "constructive knowledge standard") differs from the Supreme Court's standard (the "actual knowledge standard") in the following manner:

> While the Supreme Court in *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999), requires *deliberate indifference* by the recipient to "*severe and pervasive*" harassment of which a recipient had *actual knowledge* to establish liability for damages under Title IX, shortly after those decisions were issued, OCR clarified in its 2001 Guidance that a recipient's failure to respond promptly and effectively to *severe, persistent, or pervasive harassment* of which it *knew or should have known* could violate Title IX for . . . administrative enforcement.[115]

OCR applies the constructive knowledge standard as "the standard for administrative enforcement of Title IX,"[116] even though this standard only appears in guidance documents and is not a legislative rule with the force and effect of law.[117] Ironically, OCR justifies the constructive knowledge standard as opposed to the actual knowledge standard because "[c]onsistent with the Title IX statute, [OCR] provide[s] recipients with the opportunity to take timely and effective corrective action before issuing a formal finding of violation."[118] This justification, however, fails because OCR currently does not provide a recipient with the opportunity to take timely and effective corrective action before issuing a formal finding of violation under Section 303 of the current

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[115] Letter from Anurima Bhargava, Chief, Civil Rights Div., U.S. Dep't of Justice & Gary Jackson, Reg'l Dir., Seattle Office, Office for Civil Rights, U.S. Dep't of Educ., to Royce Engstrom, President, Univ. of Mont. 5 n.8 (May 9, 2013), http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf (emphasis added).

[116] DCL on Sexual Violence, *supra* note 51, at 4 n.12; *e.g.*, Harvard Letter of Findings, *supra* note 107, at 3–4 (applying the constructive knowledge standard to determine Title IX compliance); MSU Letter of Findings, *supra* note 39, at 4–5 (same); Princeton Letter of Findings, *supra* note 112, at 2–3 (same); SMU Letter of Findings, *supra* note 112, at 2–3 (same); Tufts Letter of Findings, *supra* note 99, at 2–3 (same).

[117] *See supra* notes 103–08 and accompanying text.

[118] Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,095–96 (Nov. 2, 2000). OCR acknowledged:

> The *Gebser* Court rejected a constructive notice, or "should have known" standard, as the basis for imposing monetary damages because of its central concern that a recipient should not be exposed to large damage awards for discrimination of which it was unaware. This aspect of the *Gebser* opinion, however, is not relevant in our enforcement actions in which recipients voluntarily take corrective action as a condition of continued receipt of Federal funds. Moreover, as stated previously in the section entitled "Title IX Compliance Standard," under [OCR's] administrative enforcement, recipients are always given actual notice and an opportunity to take appropriate corrective action before facing the possible loss of Federal funds.

Id.

CPM.[119] Although OCR could arguably adopt a constructive knowledge standard for administrative enforcement of Title IX hostile environment sexual harassment claims by promulgating a regulation through notice-and-comment rulemaking, it has not done so.

Mandating compliance with recommendations in guidance documents clearly violates the Spending Clause.[120] In *Pennhurst State School & Hospital v. Halderman*, the Supreme Court held that Congress acting pursuant to its spending power did not condition a grant of federal funds on a state's agreement to assume the cost of "providing 'appropriate treatment' in the 'least restrictive environment' to their mentally retarded citizens," even though Congress expressly included the provision of such treatment in the Developmentally Disabled Assistance and Bill of Rights Act.[121] In comparison to more specific provisions of this Act, the Supreme Court held that the express provision of such treatment was a general statement of "findings," which "represent[ed] general statements of federal policy, not newly created legal duties."[122] If Congress's express provision of particular treatment in a statute was "too thin a reed"[123] to create legal duties in *Pennhurst*, OCR's guidance documents, which are actually statements of federal policy, constitute a mere fig leaf.

Additionally, the ambiguity and uncertainty in OCR's guidance documents run counter to the principle in *Pennhurst* that Congress must speak with a clear voice and impose a condition in unambiguous terms.[124] In February 2015, the Task Force on Federal Regulation of

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[119] *See supra* notes 37–40 and accompanying text.

[120] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2606 (2012) ("As we have explained, '[t]hough Congress' power to legislate under the spending power is broad, it does not include surprising participating States with post-acceptance or "retroactive" conditions.'" (alteration in original) (quoting Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 25 (1981))); South Dakota v. Dole, 483 U.S. 203, 207 (1987) ("[I]f Congress desires to condition the States' receipt of federal funds, it 'must do so unambiguously . . . enabl[ing] the States to exercise their choice knowingly, cognizant of the consequence of their participation.'" (second and third alteration in original) (quoting *Pennhurst*, 451 U.S. at 17)); *Pennhurst,* 451 U.S. at 17 ("The legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." (citations omitted)); Va. Dep't of Educ. v. Riley, 106 F.3d 559, 561 (4th Cir. 1997) ("Language which, at best, only implicitly conditions the receipt of federal funding on the fulfillment of certain conditions is insufficient to impose on the state the condition sought.").

[121] *Pennhurst*, 451 U.S. at 18–19.

[122] *Id.* at 22–23.

[123] *Id.* at 19.

[124] *Id.* at 17 ("By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation."); *see also* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 640–41 (1999)

Higher Education, created by a bipartisan group of United States Senators, raised concerns about the lack of clear guidance contained in OCR's guidance documents.[125] The Task Force reported:

> In at least one case, a guidance document meant to clarify uncertainty only led to more confusion. A 2011 "Dear Colleague" letter on Title IX responsibilities regarding sexual harassment contained complex mandates and raised a number of questions for institutions. As a result, the Department was compelled to issue further guidance clarifying its letter. This took the form of a 53-page "Questions and Answers" document that took three years to complete. Still, that guidance has raised further questions. Complexity begets more complexity.[126]

Even the President of the University of California, who is a former Governor and Attorney General of Arizona and a former United States Secretary of Homeland Security, has publicly stated that OCR's guidance documents "left [campuses] with significant uncertainty and confusion about how to appropriately comply after they were implemented."[127] If both a bipartisan legislative task force and the President of the University of California find OCR's guidance unclear, then a state is certainly "unable to ascertain what is expected of it."[128]

States have not voluntarily and knowingly accepted the requirements in OCR's guidance documents.[129] "Though Congress' power to legislate under the spending power is broad, it does not include

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(holding that the scope of liability in private damages under Title IX is limited by the Spending Clause's requirement that Congress be unambiguous).

[125] TASK FORCE ON FED. REGULATION OF HIGHER EDUC., RECALIBRATING REGULATION OF COLLEGES AND UNIVERSITIES 1 (2015), https://www.acenet.edu/news-room/Documents/Higher-Education-Regulations-Task-Force-Report.pdf.

[126] *Id.* at 12.

[127] Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 395 (2015). For example, Janet Napolitano addresses the paradox of OCR's requirement to honor a complainant's request for confidentiality while also investigating a complaint:

> The 2011 Dear Colleague Letter and the 2014 Questions and Answers document place strong emphasis on a victim's ability to control the process by requesting confidentiality or requesting that an investigation not be pursued. Yet paradoxically, OCR also states that campuses must still investigate a complaint even when a complainant does not want an investigation, which is inconsistent with respecting the complainant's request not to pursue an investigation. Campuses must notify victims of their various reporting options, but they cannot require a victim to report the crime to law enforcement and cannot reasonably delay an investigation to accommodate a law enforcement investigation.

Id. at 399 (footnotes omitted).

[128] *Pennhurst,* 451 U.S. at 17; s*ee supra* notes 126–27 and accompanying text.

[129] Since OCR's 2001 guidance, OCR has not requested comment on its sexual harassment and sexual violence guidance documents. Napolitano, *supra* note 127, at 394–95 n.26.

surprising participating States with postacceptance or 'retroactive' conditions."[130] Any recommendation in OCR's guidance documents that exceeds Title IX and its implementing regulations and that OCR enforces as a requirement constitutes such a retroactive condition. A recipient's compliance should be evaluated through the express and unambiguous conditions in Title IX, the implementing regulations, and relevant case law instead of evolving guidance documents. Otherwise, OCR succeeds in imposing retroactive conditions without Congress's authorization.

IV. TWO SOLUTIONS

Unless OCR changes its current process and practices, recipients who do not want to enter a resolution agreement before receiving a letter of findings have two primary options: (1) request a resolution under CPM Section 302 ("Section 302 resolution"), which precludes a letter of findings, or (2) if OCR proceeds under CPM Section 303, file a lawsuit for declaratory and injunctive relief against the Secretary of Education and Assistant Secretary for the Office for Civil Rights in their official capacities.

A. Section 302 Resolution

Recipients may wish to request a Section 302 resolution early on during OCR's investigation because the CPM does not permit OCR to resolve any allegations or issues where OCR has obtained sufficient evidence to support a finding of violation.[131] Although OCR will not issue a letter of findings for a Section 302 resolution, OCR will issue a resolution letter, which describes "each allegation and issue investigated to date supported by any necessary explanation or analysis of the evidence."[132] The recipient should request a copy of the resolution letter before entering the resolution agreement, even if OCR is likely to deny such a request. A Section 302 resolution should not be perceived as an admission of noncompliance because all recipients currently enter into a resolution agreement to resolve investigations.[133] Nonetheless, the resolution agreement should expressly state that the recipient does not admit a violation of Title IX or its implementing regulations.[134]

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[130] *Pennhurst,* 451 U.S. at 25.

[131] CPM, *supra* note 8, § 302.

[132] *Id.*

[133] *Id.* §§ 302, 304.

[134] *E.g.*, Yale Univ. Resolution Agreement, *supra* note 37, at 1 ("OCR has not made a finding of noncompliance and this Resolution Agreement has been entered into voluntarily by the University and does not constitute an admission that the University is not in compliance with Title IX and/or its implementing regulation.").

B. Declaratory and Injunctive Relief

Where a resolution under CPM Section 302 is not available, a recipient may request a mixed resolution under CPM Sections 302 and 303.[135] A mixed resolution and a resolution wholly under Section 303 of the CPM will result in a publicly issued letter of findings.[136] When OCR sends a recipient the resolution agreement, a recipient has ninety days to negotiate the terms of the resolution agreement.[137] During these ninety days, or preferably during the ten-day period after impasse,[138] a recipient may pursue a legal challenge against OCR.

A recipient may file an action under 28 U.S.C. § 1331 for the violation of rights, privileges, and immunities under the Due Process Clause[139] and, if the recipient is a public recipient, the Spending Clause,[140] to receive injunctive and declaratory relief under the Declaratory Judgments Act.[141] A federal district court may enjoin OCR from publicly issuing the letter of findings and require OCR to give the recipient actual notice of the alleged violations before voluntarily entering a resolution agreement.[142] For a public recipient, a federal district court may enjoin OCR from evaluating the recipient's compliance based on requirements found only in guidance documents that exceed Title IX, the implementing regulations, and case law.[143] A recipient should request a declaratory judgment on the same grounds.[144]

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[135] *See supra* notes 22–24 and accompanying text.

[136] *See supra* Parts I.A–B.

[137] CPM, *supra* note 8, § 303(b)(1).

[138] *Id.* §§ 303(b)(2)–(b)(3).

[139] U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."); *id.* amend. XIV ("No state shall . . . abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ."); *see* 28 U.S.C. § 1331 (2012) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."); Mathews v. Eldridge, 424 U.S. 319, 332–33 (1976) (explaining that the interest of an individual to continue to receive statutory benefits is a property interest subject to the due process protections of the Fifth and Fourteenth Amendments).

[140] *See supra* Part III.

[141] 28 U.S.C. §§ 2201–2202 (2012).

[142] *See infra* Part IV.B.2.

[143] *See infra* Part IV.B.2.

[144] A recipient should seek a declaratory judgment: (1) requiring a recipient to enter into a resolution agreement prior to giving the recipient actual notice of the alleged violations violates the Due Process Clause; and (2) with respect to a public recipient, mandating a recipient to adhere to requirements found only in OCR's guidance documents that exceed Title IX or its implementing regulations violates the Spending Clause.

1. Standing

To establish standing to sue prior to an administrative proceeding,[145] a recipient should submit a written request to OCR for the letter of findings when the recipient receives the resolution agreement.[146] OCR will decline sharing the letter of findings at this juncture and may give an oral preview of its findings.[147] Although the CPM describes when a recipient will receive a letter of findings,[148] a recipient should confirm in writing that OCR will not provide the recipient with the letter of findings until after the recipient enters into a resolution agreement. A recipient should also confirm in writing the basis for any oral findings.[149] A recipient should take particular note of any finding that is based solely on a guidance document and not on Title IX, its implementing regulations, or case law. For example, such a letter should confirm whether OCR will make a finding of a hostile environment based on the constructive or actual knowledge standard.

These confirmatory letters help establish: (1) an actual injury, (2) "a causal connection between the injury and the conduct" underlying the plaintiff's claim, and (3) a likelihood that the injury will be "redressed by a favorable decision" of the court.[150] A recipient should incorporate its confirmatory letters by reference into the complaint to establish OCR's refusal to provide the recipient with the letter of findings and OCR's intention to find the recipient in violation of requirements found only in guidance documents that exceed Title IX, its implementing regulations,

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[145] A party is typically required to exhaust its administrative remedies prior to invoking the power of a court for judicial review. Sims v. Apfel, 530 U.S. 103, 107 (2000). But "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough." Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 201 (1983) (quoting Reg'l Rail Reorganization Act Cases, 419 U.S. 102, 143 (1974)). Additionally, where the issue presented is a purely legal issue that does not require factual development, the matter is ripe for judicial review. Abbott Labs. v. Gardner, 387 U.S. 136, 149 (1967). The constitutional infirmities in OCR's process and practices present such legal issues.

[146] The ninety-day negotiation period begins on the date when the recipient receives the proposed resolution agreement from OCR. CPM, *supra* note 8, § 303(b)(1).

[147] *See id* § 303(b)(2) (providing that OCR's letter of findings will be issued on the eleventh day if an agreement is not reached in the ten-day impasse period).

[148] *Id.*

[149] In drafting these confirmatory letters, a recipient should be mindful of the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2012), as well as any applicable state FOIA.

[150] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 38 (1976). Pursuant to Article III, Section 2 of the United States Constitution, federal courts only have jurisdiction over actual cases and controversies, and a case of actual controversy is a prerequisite to a declaratory judgment. U.S. CONST. art. III, § 2; *see* 28 U.S.C. § 2201 (2012) ("In a case of actual controversy within its jurisdiction, . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration . . . .").

or case law. The complaint should also incorporate by reference other relevant publicly issued letters of findings to demonstrate that OCR imposed the same or similar recommendations found only in guidance documents as mandatory conditions on other recipients.[151] The recipient's confirmatory letters, in addition to OCR's other letters of findings, will establish the causal connection between the constitutional injury and OCR's actions.

A recipient's injury-in-fact is the denial of due process caused by a lack of actual notice of alleged violations and the unlawful imposition of conditions that Congress has not authorized. With respect to an injunction, this injury is most imminent during the ten-day period after the letter of impasse is issued. During the ninety-day period after the resolution agreement is issued, a recipient's failure to enter into the agreement results in the issuance of a letter of impasse.[152] Ten days after the letter of impasse is issued, however, OCR will publicly issue the letter of findings, commencing the thirty-day period before OCR begins to initiate an enforcement action against the recipient.[153]

Without a favorable decision by the court, the recipient will not receive actual notice of alleged violations or issues before entering into a resolution agreement, and its compliance will be measured against the requirements in guidance documents and not against congressionally authorized conditions in Title IX and its implementing regulations. Additionally, the recipient will be forced to endure a lengthy, onerous administrative proceeding, which itself constitutes an injury-in-fact.

2. Preliminary Injunction

To receive a preliminary injunction, a recipient must allege facts in the complaint, not just cursory statements or legal conclusions, to establish that the recipient "is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[154]

A recipient has a clear and convincing probability of success on the merits of its Due Process and Spending Clause claims for the reasons described in Sections II and III of this Article. With respect to a

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[151] Even though OCR may argue that a recipient was on notice through publicly issued letters of findings to other recipients, those recipients' decision not to challenge the constitutional infirmities in OCR's process and practices does not waive the recipient's right to bring such a constitutional challenge.

[152] CPM, *supra* note 8, § 303(b)(2)(i).

[153] *Id.* § 303(b)(3).

[154] Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); *see also* Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346–47 (4th Cir. 2009) (reaffirming the standard set by *Winter*).

recipient's due process argument, OCR will likely argue that a recipient may elect to reach impasse; receive the letter of findings, which is publicly issued at this juncture; and enter into a resolution agreement during the thirty-day period prior to the enforcement action against the recipient. This argument contravenes OCR's implementing regulations, which require OCR "to the fullest extent practicable [to] seek the cooperation of recipients in obtaining compliance . . . [and to] provide assistance and guidance to recipients to help them comply voluntarily."[155] Such an argument also offends fundamental fairness, which is equated with due process.[156] The purpose of Title IX is to prevent sex discrimination—not to subject recipients to public ridicule, scorn, and blame. Recipients are partners in this mission, where the safety of the students is the first priority. A recipient should request that OCR file a copy of the letter of findings under seal because the letter likely contains personally identifiable information of students or factual details about a particular case sufficient to identify a particular student in violation of federal privacy laws.[157]

In opposition to a public recipient's claim under the Spending Clause, OCR is likely to argue that a court must defer to an agency's permissible interpretation of a statute,[158] but this argument fails for two reasons. First, a court accords such deference only when ambiguity exists in a statute or regulation,[159] but the recipient's argument would not be based on any such ambiguity in Title IX or its implementing regulations. For example, the argument that OCR cannot use a knowledge standard for hostile environment sexual harassment that deviates from the Supreme Court's standard does not concern any ambiguity in Title IX. Indeed, the term "hostile environment sexual harassment" only appears in Supreme Court case law interpreting Title IX, and not in Title IX or its implementing regulations.[160] Thus, OCR's constructive knowledge standard for hostile environment sexual harassment claims is not an interpretation of Title IX or any other statute, but a reinterpretation of Supreme Court precedent. Similarly, no ambiguity exists in Title IX or its implementing regulations about the

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155 34 C.F.R. § 100.6(a) (2015).

156 *See supra* note 102 and accompanying text.

157 *See generally* Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2012); 34 C.F.R. pt. 99.

158 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–44 (1984) (stating that when congressional intent "is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute").

159 Christensen v. Harris Cty., 529 U.S. 576, 588 (2000) ("[D]eference is warranted only when the language of the regulation is ambiguous.").

160 *See supra* Part III.

standard that a recipient must use to evaluate a complaint of sexual harassment or sexual violence because Title IX and its implementing regulations do not require any particular standard.[161] Second, "[i]t is axiomatic that statutory ambiguity defeats altogether a claim by the Federal Government that Congress has unambiguously conditioned the States' receipt of federal monies in the manner asserted."[162] Any alleged ambiguity might help establish that Congress did *not* speak unambiguously or with a clear voice and further support a claim under the Spending Clause.

In the absence of preliminary relief, a recipient will be deprived of due process and subjected to unconstitutionally imposed conditions. Additionally, a complainant may be eagerly awaiting the resolution of a lengthy investigation, which may be prolonged by a lengthy administrative proceeding. In these circumstances, the "balance of equities tips in [the recipient's] favor,"[163] especially if the recipient expresses voluntary willingness to comply with Title IX and its implementing regulations. Inasmuch as Title IX concerns safety, a prompt and equitable resolution between OCR and a recipient benefits the public.[164]

CONCLUSION

OCR's current procedures and practices deprive a recipient of procedural due process and, for a public recipient, violate the Spending Clause. Until OCR changes its current procedures, a Section 302 resolution benefits both OCR and the recipient and, more importantly, a recipient's students. A Section 302 resolution allows OCR to more promptly conclude its investigation, decreasing the backlog of investigations. Such a resolution also allows a recipient to quickly address any issues in its compliance with Title IX. Most importantly, a Section 302 resolution will expediently resolve any issues that may affect other students in the future.[165]

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[161] The Code of Federal Regulations only requires a recipient to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part." 34 C.F.R. § 106.8(b).

[162] Va. Dep't of Educ. v. Riley, 106 F.3d 559, 567 (4th Cir. 1997).

[163] Real Truth About Obama, Inc. v. Fed. Election Comm'n, 575 F.3d 342, 346–47 (4th Cir. 2009) (stating the four-prong test for obtaining a preliminary injunction).

[164] If the recipient is a public recipient, then taxpayers' money will be used to defend the public recipient in any protracted administrative proceeding.

[165] A Section 302 resolution, however, does not resolve the Spending Clause claim. Ultimately, a legislative solution to the Spending Clause claim is best.