Bennett Nuss (BN): Hello and welcome to another episode of *A Hard Look*, an Administrative Law Podcast brought to you by the Administrative Law Review, Washington College of Law and American Bar Association. My name is Bennet Nuss, the senior technology editor of the Administrative Law Review, supporting me in the booth is the incomparable Anthony Aviza ALR's technology editor who makes me sound far better than I otherwise deserve. Before we being please note that the positions, views, and ideas advanced by speakers on this podcast are representative of themselves alone. Their positions cannot be fairly attributed to the administrative law review, Washington College of Law, nor any other organizations to which the speakers may be affiliated.

Additionally, this episode involves candid discussion of sexual violence on college campuses and the Title IX investigations that may or may not follow. If such a topic would be disturbing to any of our listeners, I would encourage you to click off now and we hope to see you next time. Additionally, if you have been a victim of sexual assault you can find resources to find help in the description of this podcast.

That being said, let's begin. When students decide to attend college, they do so for a myriad of reasons, these reasons can be purely academic as a necessary step for a professional career or even as a means to figure out what they want to do with their lives. Nobody attends college to be a victim of sexual violence. But it does happen, according to the Rape, Abuse, & Incest National Network, 13% of all college students experience rape or sexual assault through physical force, violence, or incapacitation. This number disproportionately slants towards women. 26.4% of women experience nonconsensual contact while in undergraduate college, men are not exempt either as 6.8% of men experience sexual violence while in undergrad as well. And men that attend college are five times more likely to be sexually assaulted than their peers that don't attend college.

Of course, these statistics only represent cases where victims or those with personal knowledge of the event report the attack. And thus, the dark figure is impossible to know with certainty. This is especially true when considering that interpersonal relationship violence can involve mental coercion to the degree that the victim may not know that they being violated. Considering these circumstances, colleges have a unique interest in providing a safe environment, especially considering that most underclassmen decide to, if they are not required to, reside of campus.

The Department of Education has also seen fit to administer some guidelines on how to adjudicate cases in which there is an instance of alleged sexual violence between students which has become a political flashpoint. The Obama, Trump, and Biden administrations have all taken different positions on how to address Title IX adjudications. And this topic is what brings our guest here today.

Mehraz Rahman is a 3L at the American University Washington College of Law. She is originally from Austin, Texas, and attended the University of Texas. While an undergraduate, Mehraz participated in sexual violence prevention advocacy on campus. In law school, she is a senior articles editor on the Administrative Law Review and is involved in the Marshall Brennan Constitutional Literacy Program project, providing legal knowledge to DC public high school students.

Her comment *Biting the Hand that Feeds: The Need for Independence and Impartiality in the Title IX Sexual Misconduct Investigation Process for Colleges and Universities* was or perhaps will be

published in the Administrative Law Review volume number 75.3 based on the timing that this podcast comes out. Thank you so much for coming on Mehraz.

Mehraz Rahman (MR): Thank you so much for the introduction, Bennett. I'm looking forward to talking about my comment and such an important legal topic here today. Before we begin, I wanted to acknowledge a few things. One, not everyone falls under the gender binary, of course. But, the reason we use the binary here is just because the limitations and the statistics that we have and the way that they're reported tends to be male, female things like that. Two, the terms gender and sex, so in reality have a difference. Here, they're used relatively interchangeably just because the language used in the law is sex instead of gender. Three, I also wanted to provide a warning that I might use the word rape and not just the more kind of socially acceptable term sexual assault because they do have a difference and I think that is important to acknowledge.

(BN): All right, and thank you so much for providing that background. So, getting straight into the material Title IX of the education amendments of 1972 state 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", sexual misconduct adjudications aren't facially implicated in this language. So, how did we get to the point where the executive branch is becoming involved in these kinds of cases?

(MR): The overall idea of the law is that Title IX prohibits all discrimination on the basis of sex in educational programs and activities that receive federal financial help. The other area that Title IX is known for and may be more known for than sexual misconduct adjudication, is gender discrimination in college sports and that includes high school as well just educational sports. Important to note sports are also not mentioned anywhere in the language of the law. So though sexual misconduct wasn't originally facially included in the Title IX language. In the nineties, the Department of Education interpreted the term discrimination particularly on the basis of sex to include, "sexual harassment or sexual violence such as rape, sexual assault, sexual battery and sexual coercion." The department's reasoning is that experiencing this type of sexual misconduct prevents a person from receiving equal educational access.

So, my understanding is that the standard established by the department in the nineties was that the school was supposed to take an action if and when it could reasonably be expected to be effective in ending the sexual misconduct and also preventing it in the future. Under the law during the Obama era, schools were supposed to take action if they know or reasonably should know about sexual harassment or violence that creates a hostile educational environment. The Supreme Court has also weighed in on the issue and held that schools may not be deliberately indifferent to known acts of sexual misconduct in a case called *Gebser v. Lago Vista*. I think over the years and over different administrations when and how exactly schools are supposed to take action has been controversial and at issue. So that's kind of a long winded answer to your question.

(BN): No worries at all. So, the case that you discussed as foundational in this area is *Franklin v. Gwinnett County Schools*. So that we have a foundation for further discussion on this point what was the holding of this case?

(MR): The issue in Franklin was actually what exact remedies are available to enforce Title IX, which is important because, you know, otherwise you won't be able to enforce it and the department doesn't really have any power. The school argued that only equitable relief was allowed under Title IX. So that means not money and kind of more if they wanted the school to stop doing something. But the student in this case argued that money damages were also allowed to enforce Title IX if a violation occurred. The court here held in favor of the student and held that Title IX allows students who experience sexual harassment in public schools to sue for monetary damages. So, as you can see, that kind of is the basis for, that can be the basis for using money as a way to enforce the Title IX law.

(BN): Right, and we've both mentioned the Department of Education at this point. Is this the main federal agency that has regulatory control and influence in this area? And if so, how does this influence play out?

(MR): Yes, definitely the Department of Education, as we've both mentioned already is the main agency that can create regulations and rules to enforce Title IX. I think the main reason is because the education amendments of 1972 under which Title IX was created, those were kind of created to apply to educational institutions that receive federal funding and that federal funding comes from the Department of Education.

(BN): How did the Department of Education and Office of Civil Rights within the Department of Education handle the question of sexual violence prevention before modern changes to the regime? Because it had been an institution for nearly 40 years before the Obama administration had kind of tampered or tinkered with the, with the standards. So, what did it look like before the "modern era?"

(MR): The Department of Education before the modern era, which would probably be around 2011 when the Obama administration's Department of Education issued guidelines to enforce Title IX for sexual misconduct. I think that title IX before then was widely thought of as a law that was just for preventing gender discrimination in college and high school sports.

It was the Supreme Court in the nineties that made it more clear that sexual violence is a form of sex discrimination that's addressed by title IX. Before 2011, starting in the late nineties under President Bill Clinton, the department also issued guidelines clarifying that "sexual harassment of students can be a form of discrimination prohibited by Title IX" and that the Office for Civil Rights has long recognized that sexual harassment of students by school employees, other students or third parties is covered by Title IX. So definitely before 2011, there's like kind of a public perception that Title IX was still mostly just about sports. But it was actually in the nineties, that kind of kick started that understanding by the Department of Education, that Title IX also applied to sexual harassment and other such discrimination.

(BN): Right, and we've both kind of shown our cards a little bit by mentioning 2011 because in 2011, the Obama administration issued the Dear Colleague letter which kind of marked the first real politicization and public recognition of campus sexual assault adjudications. So, what exactly was this letter and what did it contain?

(MR): I'm not sure if it was the first real politicization, but definitely in the public's eyes, really, really politicized the whole topic of campus sexual assault and brought Title IX to the attention of a

lot of different people. The 2011 Dear Colleague letter, as you said, I'll just call it the DCL for simplicity issued by President Obama's Department of Education contained guidance about schools responsibilities and obligations under the law to redress violations of Title IX specifically, it provided students protections against sexual misconduct. In 2011, the DCL stated that schools were obligated to take action as I mentioned before, if they knew or reasonably should have known about sexual harassment or violence that created a hostile educational environment. So kind of what happened here is a lot of people interpreted this as increasing the obligations of a school, but it was issued as guidance. So really it, I mean, I think it was and the Obama administration's Department of Education said that it was just guidance for what schools probably should have already been doing.

(BN): Right. And so, agency guidance and dear colleague letters are such a force of agency guidance. They don't carry regulatory weight like in formalized rule with through the normal note (notice) and comment rule making process. So why did this letter have such a profound impact on how campuses handled sexual assault, adjudications even though it technically wasn't binding?

(MR): You kind of got to the heart of why it's controversial in the first place with that question. So, the fact that this type of guidance doesn't carry regulatory weight like a rule that goes through the whole notice and comment process under the Administrative Procedure Act is exactly what makes it so controversial. According to the Department of Education a DCL is a type of significant guidance document issued under the Office of Management and Budgets final bulletin for agency good guidance practices. They're sort of meant to supplement existing laws and provide guidance on how to follow them but not necessarily create new laws or rules. Technically because of this, they're not legally binding, but it kind of worked anyways in this case because it basically incentivized schools not to lose federal funding by violating the guidelines.

(BN): So basically, and feel free to contest me if you think that my read of the situation is wrong, along with the dear colleague letter was an explicit or implicit threat from the Department of Education that universities and schools could lose federal grant funding unless they complied with these kind directives.

(MR): So whether a person would interpret it as a threat would probably kind of depend on where they fall on the political spectrum. Conservatives for sure would classify it as a threat. And people who are more on the liberal side who want to Title IX misconduct adjudications in colleges to take seriously the accusations brought forth by accusers and make sure that they were getting justice would definitely not classify it as a threat and would just classify it as a guideline.

So, schools which were afraid of losing federal funding adopted their policies and or practices to meet the new guidelines which were arguably more favorable to those who are accusing others of sexual misconduct. And this happened because they were afraid of losing their federal funding from the department. So some mostly conservatives criticized this, they thought it was a unilateral action by the Obama administration, basically having the effect of a rule without going through what they thought of as the necessary notice and comment processes, the letter really just intended to compile previous guidance into a document that would later clarify and guide the department's expectations for these types of adjudications. I sort of think it did that, of course, but a lot of folks don't agree.

(BN): So how specifically did universities adapt and mold their programs surrounding sexual misconduct adjudications in response to this letter?

(MR): That's a good question. It's a little difficult to track exactly how schools change their policies and programs as a result of the 2011 DCL because so much has changed since then and older policies are a little hard to track down and compare with newer policies. In the process, I sort of had to comb through press releases and news articles to cobble together what I could about schools older policies.

I think the main difference is that the DCL made it so that schools had to use a preponderance of the evidence standard to decide whether a sexual misconduct occurred and whether disciplinary action needs to be taken. To clarify this standard means it is more likely than not that sexual harassment or violence occurred. So where schools might have used a more stringent standard before kind of more akin to a criminal law investigation. Here, they were kind of encouraged to take a little bit of a lower standard so that it would mean more likely than not that a sexual harassment occurred would lead to some sort of a disciplinary action.

(BN): So, taking ourselves away from the discussion of the policy itself for a moment. Is this a somewhat troubling trend that agencies can issue these kinds of letters or guidance documents on independent institutions and wield so much power over them. For example, with this instance, many universities rely on federal grants for research and making the solvency of academic work contingent to the whims of the Department of Education, for any issue seems to be somewhat troubling for academic freedom. What do you think about that?

(MR): Definitely a very important point. And a lot of people would argue that yes, it is troubling. I probably would too. It's super political, to be quite honest, it's almost like different administrations can weaponize these types of guidelines to try and make entities relying on federal funding, do what the administrations want them to do. So, of course, when an administration institutes a policy that I like, I don't mind it as much, but when an administration issues guidelines, I think are harmful, I think it's bad like most people probably do. So at the end of the day, I mean, yeah, of course, I don't want someone to strip down the Title IX misconduct adjudications to make them unaffected at getting people who have experienced sexual violence, any type of justice.

(MR): So, I think it is pretty troubling even though the guidelines issued under the Obama administration were probably some that I agree with more or less or thought were better than what was going on before. In my opinion though, that's kind of why I'd prefer a notice and comment process for this kind of change. Obviously, these types of rules can and do change with administrations as well. However, one, there's kind of a requirement to take the public's comments into account, which is always a good thing. And two, it's a little bit harder to both put into place and undo than just a guideline.

(BN): So, the 2011 dear colleague letter was followed up by the 2014 question and answers document provided by the Office for Civil Rights or OCR. What did this document contain?

(MR): The Q and A was issued three years later and it was to provide additional specific guidance

and instructions to universities and colleges clarifying their duties under Title IX and the 2011 letter. The Q and A provided three procedural requirements, institutions bound by Title IX have to take. First, OCR required every school to disseminate a notice of non-discrimination which states that under Title IX, the institution is not allowed to discriminate on the basis of the sex in its educational programs and activities. Number two, the Q and A established and reinforced that schools have to have a Title IX coordinator and clarify what these coordinators duties would be. Lastly, the Q and A required every university to adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints.

(BN): So, did this Q and A fundamentally change how universities were handling their new Title IX programs or was it more of a clarification on the previous guidance in the dear colleague letter?

(MR): It's kind of the same thing with the DCL. It would depend who you ask. I would definitely say it was more of a clarification and intended to make things easier for colleges and universities, but of course, others might disagree.

(BN): Right. So, moving to probably the most academically controversial part of your comment, which is your classification of various Title IX programs. So, what are these different models that you've identified?

(MR): Definitely potentially controversial as I said before, it was difficult throughout this whole process to actually go through different universities, policies and isolate and categorize different title IX sexual misconduct adjudication models. It was sort of an effort going through different policies and reviewing other scholarship on the topic. In the end, I determined that there are three models. The investigative or single investigator model is the first, the disciplinary hearing model and the hybrid model.

(BN): So, the first that you mentioned, which is the investigative model, what exactly is it? And what kinds of practices would indicate that a university is using this mode of adjudication?

(MR): In the investigative model a trained investigator or investigators interview the complainant and alleged perpetrator, they then gather physical evidence, interview available witnesses and then either make a finding, present a recommendation to some sort of a board, or even work out sort of an acceptance of responsibility agreement with the offender in a little bit more detail. In this model, universities appoint an investigator investigative team to first meet with the complainant and then decide whether the complaint even merits more fact finding. The same investigative team, if it does determine that the complaint merits more fact finding and that the claim is valuable, proceeds to interview both parties separately. And then upon further fact finding in a written form of cross examination, determine whether the accused party is responsible. The investigative model combined the investigation part of the process with the adjudication kind of making the investigator the fact finder and initial decision maker. In doing this it attempted to reduce contact between the parties and the courtroom like atmosphere which could lead to conflict and re traumatization of the victim.

(BN): So, what would you identify as the potential shortcomings with the investigative model and this method of adjudicating sexual misconduct claims?

(MR): So, the main criticism of this model comes from those who probably lean a bit more conservative. And it is that the model lacks due process for those who are accused, it doesn't give them an opportunity like they would have in a criminal trial to confront or cross examine their accuser or present their own evidence to sort of poke holes in the accuser's case against them. Also, people don't like that. The investigator is both the fact finder and initial decision maker. All fair points in my opinion.

BM: The second method that you identify within your comment is the disciplinary hearing method. What is it and what kind of practices would indicate that a university is using this mode of adjudication?

(MR): In a disciplinary hearing model a panel tries and hears a student's case kind of like in a traditional courtroom setting. Here, universities employ an investigator or investigative team to conduct an initial screening to determine whether a complaint should be further adjudicated. The respondent accused party may choose to have the complaint heard in a hearing. Then the primary fact finding is done by the parties when they present their cases to a board of university officials who then make a final determination of responsibility in the case for context. This was the method preferred in the Trump administration's Department of Education and the Secretary of Education Betsy DeVos.

(BN): So, what would you identify as potential shortcomings that come along with the disciplinary hearing method?

(MR): As I just mentioned, this was the model that was preferred by the Trump administration which opted for a required live hearing where both parties must be present with cross examination, which is still currently the law. Sexual violence prevention advocates and activists, and I tend to agree say that this model can do a lot of damage and inflict re traumatization on victims and survivors of sexual violence and harassment to start it kind of makes it way less likely that a victim or survivor would come forward in the first place with the possibility of getting re-traumatized and the unlikelihood of success for their claim.

I would argue that this kind of defeats the purpose of having such processes in the first place. But that might have in some ways been the point of having a live hearing and such a high standard to beat, to have a successful claim against an accused person. Further, it can be harmful for both the accused and the accuser by involving more and more people and bureaucracy and giving more and more people information about something that can be traumatizing or embarrassing to both parties involved. It's way more likely to draw out the process, which might kind of not be desirable for any party involved.

(BN) And you've also identified a third, being a hybrid model. So, what is it? And what kind of practices would indicate that a university is using this mode of adjudication?

(MR) As the name suggests, the hybrid is the combination of the previous two models we discussed. Like the other two models, first, an investigative team is tasked with fact finding to determine whether the case should proceed on its merits. If a disciplinary hearing is then deemed

necessary, the investigator conducts further fact finding. Once both parties have had an opportunity to review the others reports, a hearing takes place where the parties can present their case to a board or a panel of university officials. The board then serves as the decision maker and figures out whether the accused party is actually responsible of what the person is accusing them of. Different universities have taken different approaches to the hybrid model, back before the Trump administration, the disciplinary model with the live hearing component was required for example, the University of Minnesota hired lawyers to act as investigators as employees of the university's title nine office which is housed within the office for Equity and Diversity.

As another example, Yale University hired outside investigators to conduct the fact finding and generate a report of both parties claims these actions basically serve to add a layer of independence to the investigation and adjudication process without forcing parties to relive the trauma and draw out the process.

(BN): And even though this is a kind of moderate or middle of the road method of adjudication, what would you identify as potential shortcomings with this method?

(MR) For such a sensitive topic with such high stakes for both parties and the school, I don't really know if there's such a thing as a perfect solution. I've seen people be hurt by the Title nine adjudication process on both sides.

And I have also seen how little the Title IX adjudication process, even before the Trump administration's rule was implemented, come out with a decision in favor of the accuser. And often it will just end up being inconclusive because there's almost never enough evidence. Some would argue that due process here is still an issue if the accused doesn't have a chance to confront the accuser in a live hearing. Some would argue that the model still provides too higher risk for re traumatization and not enough opportunities for an accuser to win.

A central part of my comment, which is another criticism of probably all of these models is that there's still not enough independence here when the people who are decision makers and investigators are employed by the school. This means that they most likely report to the university's administrators who pay their bills and it poses a major conflict of interest in my opinion.

(BN) So moving to Secretary DeVos' term as the head of the Department of Education, what did the Trump Rule require as it pertains to sexual misconduct adjudications as you've kind of intimated throughout this discussion thus far, the Trump rule constituted a considerable ground shift in this area of adjudication. And so what exactly was it intended to do?

(MR) So the Trump rule got rid of the single investigator model altogether and implemented only a disciplinary hearing model with - here's the most important part - a requirement for live hearings with both parties presenting and a cross examination function. I think it was possible for the people to appear virtually, so maybe they didn't necessarily have to be in the same room, but they still did still in a sense, have to face each other.

It also changed the preponderance of evidence standard to broadly promote a clear and convincing standard, which is a much higher standard and closer to that in a criminal court, making it in general harder for accusers to play prevail on their claims, and keep in mind that before this even it was already still hard for accusers to prevail on their claims.

(BN) So what exactly was the effect of this role in these adjudications?

(MR) I don't think the full extent has really been measured yet and it's still in place. As I said, I think the biggest and most egregious effect is that people are even less likely than before to come forward if they've been sexually harassed or experienced sexual violence before this, even with the Obama era regulations, as I've said, it was already difficult for accusers to prevail in these types of sexual misconduct cases unless a victim went through a fairly intrusive evidence collection process right after the violence occurred or happened to have a lot of evidence, which is just kind of unlikely. It's pretty hard to win.

For example, if a person didn't immediately not shower and do a rape kit, that might make it really, really hard to win one of these cases.

Even in the criminal context, the vast majority, over 60%, of rapes are not reported to police. And I can only imagine the numbers for other types of sexual violence and misconduct. I would say that the overall effect has been negative in terms of keeping college students safe from sexual violence.

Another slightly smaller thing is that the Trump rule also places restrictions on what institutions can do to regulate the equity between parties chosen and assigned advisor, some of which enable considerable inequities between parties. In practice, this type of thing can give one party an unfair advantage in a Title IX proceeding.

(BN) What kind of unfair advantages might materialize during one of these adjudications?

(MR) Specifically, while universities aren't allowed to charge a party any money for an assigned advisor and have to stop a hearing if a party doesn't have an advisor, the universities also can't place a limit on who a party selects as an advisor or set a cost ceiling for this type of advisor. So a person could hire a lawyer if they have the more financial resources and the ability to hire a skilled legal professional to represent them while others may not be able to. And another person might just get like a professor from the school assigned to them. So this would definitely skew in the advantage of the person that has more financial resources.

Practically, a lot of the times the person who usually gets professional legal representation is the accused and the accuser will get an advisor who might be anyone from a professor, the school assigned to if they can afford a lawyer.

(BN) So, moving on to the structure of these sexual assault adjudications under Title IX, are there any concerns regarding the impartiality of those that handle these adjudications considering that they're most likely university staff, and if so, how might the loyalties of a Title IX Adjudicator compromise their findings?

(MR) I certainly have concerns, and that's kind of what prompted me to write about this in the first place. While I certainly think that Title IX Adjudicators try their best to have the party's best interests at heart, I really think it's impossible to be free from all biases when the university is paying your bills. It's probably kind of cynical of me, but I feel like a person's loyalty is more likely to be with whoever is paying them. I think we'll talk about this a little later in this podcast, but it goes along with my recommendations of adding a layer of impartiality and independence that would help to solidify these adjudicators ability to be impartial.

(BN) Moving into the current administration, the current Secretary of Education <Miguel> Cardona proposed a change to the Trump Rule. So what inspired this proposed rule?

(MR) The change proposed and not yet implemented would basically take it back to the Obama era rule, which makes sense, because, you know, President Biden was President Obama's Vice President. A cynical person, like me for example, would say that it's probably just a politically favorable thing for the Biden administration to do as President Obama's Vice President. It makes sense that he would want to go back to what was in effect back then.

Also, of course, ever since the Trump administration's rule went into effect, sexual violence prevention activists have demanded such a change and probably even more than going back to just what President Obama had implemented. And Joe Biden himself also was a major proponent of other laws that prevent violence against women, such as the obviously named violence against Women Act. All in all, it was pretty on brand, I think for the Biden administration and I think it can probably go even a little further.

(BN) So getting down into the specifics of this proposed rule, what would it require of universities if it were to be passed first?

(MR) It takes back the standard from clear and convincing, which is more like an 80% ish likelihood of certainty, to a preponderance of evidence standard, which is just 51% or so…more likely than not, which is what was in place before though it still allows schools to choose the clear and convincing standard required under Trump. This is kind of just how it was before as well before the Trump rule was implemented.

Second, it throws out the live hearing, cross examination requirement. Third, it broadens the definition of sexual harassment. And lastly, it brings back an option for a school to implement an investigatory model.

(BN) So how would this rule if it's passed as is change the dynamic of on campus sexual assault adjudications?

(MR) it would certainly change the dynamic from how it is now. It would go back to how it was before giving schools the option to choose between the different models, how it would like to adjudicate sexual misconduct claims, they can choose also which standard of proof to go with: either the preponderance of the evidence or clear and convincing. But really, we know what it will be like because it'll pretty much go back to how it was under Obama.

(BN) And because, well, nothing is ever going to be perfect in this area, what are some issues regarding the effects of Cardona's proposed rules, because there have to be, just like with anything, some identifiable issues with the development?

(MR) Of course, yeah. I mean, as you said, it's really, really impossible…or hopefully someday it will be possible to have a perfect or near perfect rule that would bring justice to all sides here in this type of space. But some issues include as before.

People will kind of go back to complaining that it doesn't provide enough due process rights to the accused, which is fair. I also personally don't think that going back to how things were before really fixes all the issues that were always there when it came to sexual misconduct. Adjudications, for example, the people who are investigating them and making decisions are still

employed by the school. The school is still paying their bills. There's still not enough independence and fairness to both accusers and accused.

There's still also a conflict of interest and likelihood that the people who are paid by the school will make rulings that are favorable to the school's interest, right?

(BN) And before we get into any kind of discussion regarding your recommendations for how to potentially reform this entire system, and this is something that's been on my mind with this entire subject matter. It's that sexual misconduct to the degree to which the Title IX committee would have jurisdiction, they generally pertain to identifiable crimes or torts that could be handled in the conventional legal setting. So why should universities have these independent adjudicators rather than assigning them to a more traditional court?

(MR) This is a really good question and I think it's fair.

I personally don't really think that having a Title IX investigation necessarily prevents a person from taking their claim to court or reporting it to the police, which would result in potentially a criminal prosecution.

That's sort of part of the criticism that people have with the due process concerns actually with the criminal prosecutions, some people think that because there's a possibility for criminal prosecution, that it would almost be like a double punishment if a person was also found to be accountable in the Title IX context. I think the Title IX investigation is just meant to address the part of it that resulted in a hostile educational environment and inhibited a person in that specifically educational setting.

But you're right that a lot of it overlaps and it's definitely a fair concern. I think that overall, it would probably be a loss if we got rid of that Title IX misconduct adjudication process and just took it to traditional courts. It might do things like overwhelm traditional courts which already have a lot going on on their dockets and some people, you know, might not even want a person to be accused of a crime.

(BN) Yeah, and so, but I mean, going on and talking more about this kind of criminal aspect of these issues is that do you think that universities and the Department of Education by extension, through the promulgation of these rules may be inadvertently encouraging victims of sexual violence to not take legal action against their abuser by providing these Title IX committees almost as like a remedial area to get some concerns addressed?

(MR) I could definitely see why that might be a concern, but at the end of the day, I don't really think it does that I don't think undergoing a Title IX investigation necessarily would make someone who wants to take legal action, not take those actions. If anything, it might help the fact-finding process in those cases.

I think the real issue is that stigma around sexual assault and violence and the unlikelihood of prevailing in any type of sexual violence case, whether it's Title IX, criminal, civil, all of that kind of discourages victims and survivors from coming forward in whatever context that may be.

I'm not sure the exact statistics on whether a title nine procedure would prevent a victim or survivor initiating a civil or criminal case outside of the school that would probably be worth looking into. But I do know that victims and survivors are just generally not really likely to report.

(BN) Right, and going on to the last of these kind of extraneous questions considering that due process is such an issue within these adjudications. It's why they're a political flashpoint in the first place. Wouldn't these due process concerns be better addressed in a court controlled by constitutional and standing statutory controls rather than this new, chimerical, administrative realm?

(MR) Maybe some might think that for sure, some would definitely argue that. But the point of title nine protections is to create a safe and discrimination free environment in school.

Also from the accused perspectives, this isn't the same as facing a criminal prosecution and potentially a greater level of impediment to one's freedom like jail time. And at the end of the day, that might not even necessarily be something that a victim or survivor wants, they might not want a person to have that level of a punishment. They might just want to make sure that they have a safe environment to learn and to get the benefits of the tuition that they're paying.

(BN) Right. So, moving on to the recommendations that you provided in your comments. The first recommendation that you speak to is the implementation of something that you've deemed a “hybrid plus” model. Can you explain what this hybrid plus model might look like or entail?

(MR) Of course. And I want to stress that this is only my first recommendation because it's more practical or feasible than my second recommendation, which I'm sure we'll discuss in just a minute.

This model would basically include everything in the hybrid model just with an added layer of independence enacted through a notice and comment, rulemaking process. This model implements the necessary two part process that ensures the investigative team is not also the decision maker and allows for there to be a hearing if necessary. But such a model must also include an additional layer of separation between title nine officers from the employer university to reduce potential funding or reciprocity bias and ensure that these types of decisions being made are impartial and that people aren't just ruling a certain way because it would make the school look better.

(BN) So because you're proposing this kind of new structure that we haven't really seen implemented before, can you provide a few possibilities as to what this “hybrid plus” model might look like on a functional basis?

(MR) For sure, my recommendations include several possibilities or a combination of these in the interest of preserving university discretion and reducing financial and bureaucratic burdens that the department could experience.

Universities should employ various mechanisms to comply. For example, putting the title IX office, investigators and decision makers in an office that doesn't report directly to higher level university administrators and making sure they're charged with holding the university officials accountable for abiding by the law such as a legal office separate from the university's general counsel could help with that.

Further universities may choose to hire investigators who are externally employed entirely a university's Title IX office can also consider hiring lawyers as investigators and decision makers who are already bound by an external ethics code to make sure that their commitment to the law and mitigating biases in their determinations is strong. The imposition of an ethics code in that

same vein alone, as long as it includes a provision about being impartial in fact finding and making determinations could also help increase impartiality.

(BN) And so because you've named your new model, the hybrid plus model, it begs a contrast to the traditional hybrid model. So, what makes your hybrid a plus model, just that? A plus version of the original hybrid?

(MR) Yeah, that's a good question. I think that the hybrid model alone basically has the same disadvantages as the single investigator model or a disciplinary hearing model.

The investigative model is inadequate because though the intentional separation of the victim and perpetrator can increase comfort and fairness for a complainant, the combination of the investigative and decision-making processes can take away from a student's due process rights if they're accused or the Trump iteration, at least of the disciplinary hearing model, disadvantages include the cross examination requirement being more likely to re traumatize victims.

The lack of a cost ceiling for advisers perpetuating inequities between the amount of representation the parties can afford and the structure of title nine personnel in general still greatly lacks impartiality further.

While a hybrid model is better than either of the former models alone, it alone can't really solve that problem of impartiality. So the model suggested here with its additional layer of independence and impartiality serves to increase fairness for all parties involved.

(BN) So, your second and self admittedly more radical recommendation is for Congress to create a body under the Department of Education similar to the Department of Labor's Equal Employment Opportunity Commission or EEOC. As a quick primer, what is the EEOC and how does it function?

(MR) Radical is a funny word to use here, but you're kind of right. It would take more resources, that's for sure.

The EEOC is a statutorily created independent agency housed within the Department of Labor. It's responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee based on race, sex, nationality, age, et cetera. Accordingly, it has the authority to investigate such charges of discrimination against employers and then make a finding. This process can include lots of things from settlements to hearings or even the EEOC filing a lawsuit against employers who have violated the law that the EEOC is charged with enforcing.

(BN) So what would your proposed EEOC-like organization do in order to better control these programs, considering that they're so decentralized currently that imposing this new kind of organization would be kind of a radical change. So how would they do something like that first?

(MR) First, and most importantly, the investigators and decision makers would be employed and trained by the Department of Education, not the university to ensure impartiality and having a decision maker that's substantially separated from the institution that's involved in the title nine proceeding.

As investigators are in the EEOC, the investigators in this model would be charged with efficiently, fairly and accurately assessing the allegations in the complaint, sexual misconduct

claim. The investigators would be charged with interviewing the relevant entities, gathering evidence and potentially making a determination of guilt. And really at the end of the day, the main thing here in this part is that they would not be paid by the university. While investigators may make findings of whether title nine has been violated and sexual misconduct has occurred after the conclusion of the investigation, a complainant will have the opportunity to request a hearing with an administrative judge and that can really help to better control these programs and make sure that it's fair for everyone involved, including the person who ends up being…who ends up losing in the case.

The decision of the agency would be binding and an adverse ruling for a party could include consequences like expulsion, a financial sanction to a university that's deemed to have not abided by Title IX requirements or a lawsuit filed by the Department of Education. However, there would be an opportunity to appeal to an administrative judge of the department's Office of Hearings and Appeals which provides quote, “an independent forum for the fair, impartial equitable and timely resolution of certain disputes involving the Department”. End quote.

(BN) Right. And so you've also noted that your proposed organization would have to be substantially different than the preexisting EEOC. So why would that difference need to exist, and what differences would there be?

(MR) Yes, definitely, there should definitely be some differences because Title IX proceedings are steeped in legal jargon and the stakes for the outcome are so high for both the complainant and the accused. Though it may end up proving kind of costly, both parties should be required to be represented by an attorney. The EEOC doesn't require this in its adjudications and parties can be pro se or represent themselves.

The Title IX agency that I'm suggesting impartial tribunal and administrative judges as courts do for indigent defendants in criminal proceedings would appoint a legally trained individual to be a party's advisor so that if they can't afford one, in order to be fair, the process should be free from inequities and injustices. So hopefully this requirement would help get us closer.

(BN) So on a practical level, your proposed organization is potentially identifying criminal action on the part of a defendant in these instances, is there a potential issue with double jeopardy in these cases where a government trial of a case finds a defendant guilty which can then be applied to criminal proceedings by a different distinct government entity? Be it a trial court or some other administrative court?

(MR) I don't think this would have any more issue with double jeopardy than a regular Title IX investigation at a college or university. It's definitely a fair question, but a finding of guilt here would have the same result as a finding of guilt at a university which would just be disciplinary action from the school.

However, what would be improved would be that it would provide a method for a fair process for everyone involved so that the final result reached is more likely to be accurate.

(BN) So in creating this government entity within the Department of Education, we're essentially trying to create a neutral arbiter to try these proceedings, which is something that you've identified as insufficient at the university level. However, as we noted with the 2011 Dear Colleague Letter, administrative bodies can be easily directed one way or the other to prefer parties at the whims of an administration, even without the passage of a final rule. In your mind.

Is there a way to prevent this kind of pressure from an administration from compromising your new organization?

That's a really good question because that definitely does happen. I think just having this type of a tribunal would help to guard against that type of preference. I suppose like other independent agencies that have this problem, this the creation of this body could come with a stipulation that it has to have a certain number of lawyers or adjudicators that tend to side certain ways or belong to certain political parties. And there are already independent agencies that do this kind of thing.

It can be like some of those agencies that require the same number for each side or have one person in the middle or have one person that the, if there's an odd number, have one person that the administration can choose to go one way or the other. That way, even if a certain administration is charged with populating the decision makers in this agency, it would be relatively even one way or another.

In my opinion though, it would be more important to have people who are experiencing this type of adjudication and sensitive to the needs and outcomes for both the accused and the accuser.

(BN) And so in the vein of the previous question, executive branch entanglement in how colleges handle their sexual misconduct adjudications is arguably how this topic became so hotly contested in the first place. Is a potential solution the executive simply having standards regarding balance and then not becoming involved, save for an express violation of these looser standards from institutions?

Some might say this, this would probably be the less controversial and less resource intensive approach, for sure. I think it's basically what I suggested with my first recommendation where the notice and comment procedure is used by the Department of Education to place more stringent impartiality requirements on schools.

(BN) All right. Well, thank you so much for coming on and talking with us, Mehraz. If people want to find you, where can they?

(MH) It was my pleasure. Thank you for having me, Bennett. Please feel free to shoot me a message at my personal email, Mehraz.rahman@gmail.com, or feel free to find me on LinkedIn or other social media.

(BN) All right, and if you want further reading on this subject, you can find Mora's comment linked in this episode's description as well as some recommended reading. Thank you for listening. If you enjoyed the podcast, be sure to refer it to a friend and follow us on the platform of your choice. Until next time, my name is Bennett Nuss, and this has been A Hard Look brought to you by the Administrative Law Review, Washington College of Law and the American Bar Association. We'll see you next time.