LIBERTY UNIVERSITY

Liberty University Law Review

Volume 14
Issue 2 *Spring 2020*

Article 3

January 2020

Mutual Is Not Always Equitable: The Misuse of Mutual No Contact Orders in Title IX Proceedings Addressing Sexual Misconduct

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ARTICLE

MUTUAL IS NOT ALWAYS EQUITABLE: THE MISUSE OF MUTUAL NO CONTACT ORDERS IN TITLE IX PROCEEDINGS ADDRESSING SEXUAL MISCONDUCT

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I. INTRODUCTION

On January 22, 2014, President Barack Obama established the White House Task Force to Protect Students from Sexual Assault, which was led by the Office of Vice President Joe Biden and the White House Council on Women and Girls.[1] The White House Task Force brought together various federal officials and agencies for listening sessions with campus safety experts to coordinate and improve federal enforcement around the issue of campus sexual misconduct.[2,3] As part of this effort, the White House Task Force developed sample policy language[4] to assist educational institutions in complying with applicable federal laws.[5] Within the various sample policies,

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1. Memorandum Establishing White House Task Force to Protect Students from Sexual Assault, 2014 DAILY COMP. PRES. DOC. 43 (Jan. 22, 2014).

2. *Id.; see also* Press Release, Office of the Vice President, FACTSHEET: Resource Guide and Recent Efforts to Combat Sexual Violence on College and University Campuses (Sept. 17, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/17/fact-sheet-resource-guide-and-recent-efforts-combat-sexual-violence.

3. The term "sexual misconduct" is used throughout this article to reference unwanted sexual contact and activity reported to educational institutions in violation of their Title IX policies prohibiting sex discrimination instead of using the criminal term "sexual assault," as not all forms of prohibited sexual misconduct may qualify as criminal.

4. Press Release, Office of the Vice President, *supra* note 2.

5. Primarily Title IX of the Higher Education Amendments of 1972 ("Title IX"), which is a federal civil right prohibiting sex discrimination in education, 20 U.S.C. §§ 1681–1688 (2020), as well as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery Act"), which is a federal statute addressing campus safety, crime

there is a recommendation that has been expanded upon by various educational institutions and the Trump administration to impede survivors seeking equal access to educational opportunities and benefits on campus after reporting peer-perpetrated sexual misconduct in order to access the Title IX grievance process.[6] It is a recommendation that educational institutions impose mutual "no contact" orders against the parties involved in a sexual misconduct complaint as a default interim measure pursuant to Title IX.[7] While seemingly innocuous on its face, and often unchallenged by complainants (who routinely desire no further contact with the accused perpetrator), such default orders raise several concerns. For one, these orders may become a mechanism for an accused individual or educational institution to retaliate against a complainant.[8] Additionally, these orders may functionally deny a complainant equal access to education whenever the accused is present on campus.[9] As discussed *infra*, such outcomes are counter to the very purpose of Title IX.[10]

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reporting, and campus disciplinary proceedings addressing gender violence, 20 U.S.C. § 1092(f) (2020).

6. Pursuant to Title IX implementing regulation 34 C.F.R. § 106.8(b), an educational institution in receipt of federal funding must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging" prohibited sex discrimination. 34 C.F.R. § 106.8(b) (2020). Educational institutions often use their honor code and student disciplinary procedures to implement the Title IX grievance process. *See generally* HANNAH R. LEISMAN, SURVJUSTICE, INC., WHY CAMPUSES HANDLE SEXUAL ASSAULT CLAIMS (Laura L. Dunn, ed., 2017), https://www.stetson.edu/law/academics/highered/home/media/Why%20Campuses%20Handle%20Sexual%20Assault%20Claims.pdf.

7. *See* TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, WHITE HOUSE, SAMPLE LANGUAGE FOR INTERIM AND SUPPORTIVE MEASURES TO PROTECT STUDENTS FOLLOWING AN ALLEGATION OF SEXUAL MISCONDUCT 5 (2014), https://www.justice.gov/archives/ovw/page/file/910296/download. Please note that the original White House Task Force website (www.notalone.gov) no longer exists and the information contained on that website has been transferred over to the U.S. Department of Justice's website. *Protecting Students from Sexual Assault*, U.S. DEP'T JUST. (Nov. 5, 2018), https://www.justice.gov/archives/ovw/protecting-students-sexual-assault.

8. *See infra* Section II; *see also* Tyler Kingkade, *When Colleges Threaten to Punish Students Who Report Sexual Violence*, HUFFPOST (Sept. 9, 2015) https://www.huffpost.com/entry/sexual-assault-victims-punishment_n_55ada33de4b 0caf721b3b61c.

9. *See infra* Section II.

10. 20 U.S.C. § 1681(a) (2020) ("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 . . . ."); Jackson

Given the risks associated with default mutual no contact orders, this law article argues that such orders are not equitable interim measures, and that educational institutions should not issue any mutual no contact orders as a default in sexual misconduct cases. Instead, institutions should only issue such mutual orders upon a lawful, good faith factual basis to justify such a limitation on a complainant's educational access in accord with due process at public institutions or relevant procedural protections at private institutions. Furthermore, this article argues that any no contact orders issued by an institution must also comply with the applicable provisions of Title IX and the Clery Act governing instances of campus sexual misconduct, which explicitly prohibit retaliation against complainants.[11] In support of these arguments, this article starts with a scenario showing how default mutual no contact orders risk harm to the educational access and legal rights of complainants,[12] then reviews the evolution of mutual no contact orders,[13] discusses the applicable laws governing an educational institution's issuance of such orders,[14] and ends with sample policy language that ensures educational institutions only impose mutual no contact orders against parties to a sexual misconduct complaint upon a lawful, good faith, factual basis.[15]

II. MUTUAL NO CONTACT ORDER SCENARIO[16]

University College is an institution of higher education founded in the Jesuit tradition. Its mission is to "educate young men and women who go on to serve Christ through their chosen professions." Through its acceptance of federal funding, University College is subject to the requirements of Title IX

v. Birmingham Bd. of Educ., 544 U.S. 167, 173–74 (2005) ("Retaliation against a person because that person has complained of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action."); Cannon v. Univ. of Chi., 441 U.S. 677, 690–93 (1979) (finding a private cause of action implied under Title IX while noting that its statutory language has an "unmistakable focus on the benefited class," which are those discriminated against on the basis of their sex when seeking access to educational opportunities and benefits).

11. *See infra* Section IV.

12. *See infra* Section II.

13. *See infra* Section III.

14. *See infra* Section IV.

15. *See infra* Section V.

16. This case study is a work of fiction. Names, characters, places, and incidents are either products of the author's imagination or used fictitiously. Any resemblance to actual events or locales or persons, living or dead, is entirely coincidental.

and the Clery Act; thus, it has adopted and published Title IX grievance procedures to address complaints of gender violence, including peer-perpetrated sexual misconduct.

During the 2018–2019 school year, Janet Doe was an enrolled sophomore student and volleyball player at University College. During the first week of September 2018, Janet Doe met Johnny Rae, a football player and junior student at University College. Johnny and Janet quickly started dating after they bonded over losing their fathers. Johnny had lost his father at a young age, but Janet had just lost her father to cancer that previous summer. Johnny started spending all his time with Janet and often slept over in her dorm room. Most nights, Johnny would hold Janet as she fell asleep crying about the loss of her father. Around early October 2018, Johnny started coming over later and later at night to her dorm room and he was often intoxicated. Johnny would apologize for drinking too much and blame his football teammates for being bad influences on him, but it kept happening week after week. Janet became upset that Johnny kept drinking, so the two started fighting. The fights would often wake up Janet's roommate, who started pressuring Janet to stop letting Johnny come over.

On October 26, 2018, Johnny showed up uninvited and drunk to Janet's dorm room late at night after celebrating a football team victory. Janet was upset and did not want to let him in, but Johnny claimed he just wanted to hold her. To avoid upsetting her roommate, Janet agreed to let Johnny into the dorm room on the condition that he be quiet. Johnny agreed. While lying in bed together, Johnny started saying he wanted to marry Janet given the deep connection that they had formed over the last two months. He then stated he wanted to have sex with Janet, which deeply upset her. Johnny knew that Janet was a devoted Catholic waiting to have sex until marriage and thus she was not on birth control. Johnny had previously claimed he would respect her wishes to wait until marriage. When Janet declined to have sex that night, Johnny started getting upset and loud, so she decided to appease him by offering to make out while secretly hoping he would just fall asleep. After starting to kiss him, Johnny got physically aggressive and forced himself on top of Janet. He then digitally penetrated Janet's vagina with his fingers saying she would "like it" despite her protests. Janet then yelled "stop" and started crying. Johnny rolled over and passed out.

That night, Janet reported what happened to her roommate, who then woke up Johnny and asked him to leave while stating he was never allowed back in the dorm room. The next morning, Johnny repeatedly called Janet

and sent over 80 text messages apologizing and begging for Janet not to break up with him. Johnny tried many tactics to get Janet to respond: stating he would get religious counseling, stating he wanted to marry her, apologizing for pressuring her to have sex, claiming he would kill himself if she left him, promising to stop drinking, etc. Janet had left her cell phone in the dorm room when she drove home for the day to talk to her mother about what happened. Janet's mother had liked Johnny, so she counseled Janet to confront him about what happened and forgive him if he agreed to stop drinking. When Janet came back to campus, she was alarmed by all the messages Johnny left so she called him. Johnny cried on the phone and begged forgiveness, and when Janet said he had to get help for his drinking in order to stay together, he agreed.

For the next few weeks, Johnny brought over gifts and food for Janet whenever her roommate was gone. Despite his pledges to reform, on November 18, 2018, Johnny came over drunk again. Janet refused to answer the door, so Johnny came and banged on her dorm room window. Johnny started calling and messaging Janet repeatedly saying that he was sorry for drinking, but it was the anniversary of his father's death, so she of all people should understand. When Johnny came to the door again, Janet's roommate tried to confront him, but he pushed passed her into Janet's room and closed the door. A big argument ensued in Janet's room while the roommate ran to get the resident assistant. When the roommate and resident assistant returned, they found Janet disheveled and sobbing on the floor. The resident assistant called University College's Police Department and an officer came to take Janet's statement. Janet reported the previous sexual and dating violence but declined a rape kit and stated that she needed time to decide whether to press charges.

On November 20, 2018, Janet's mother called University College's Dean of Students to report what happened, and the Dean offered to impose a no contact order against Johnny but noted one would be imposed against Janet as well per institutional policy. Janet did not want any contact with Johnny, so University College issued the default mutual no contact orders. The next day, Janet met with the Dean to open a Title IX complaint against Johnny, which University College explained would be a confidential process. Upon receiving a copy of the mutual no contact order, Janet learned that she was prohibited from communicating with Johnny, going into areas of campus where he was likely to be present, and talking about the Title IX process with

other students. This order further required Janet to leave anywhere on campus where Johnny was present first.

When Janet returned to campus for exams, she first went to the chapel in order to receive spiritual guidance as she was emotionally struggling. In the chapel lobby, she ran into Johnny, who was waiting to meet with the chaplain. Janet immediately left in accord with the no contact order and arranged by email to meet with the chaplain the next day. When she met with the chaplain, he stated that Johnny was remorseful and had confessed his sins to receive absolution. The chaplain also conveyed that he would be working with Johnny, who had pledged to stop drinking and quit the football team to avoid negative influences on him. The chaplain and Janet then discussed forgiveness as a way to encourage Johnny to stay on the "straight and narrow" and stop drinking. After a week of praying and talking with her mother, who agreed forgiveness was the "Christian thing to do," Janet reached out by text message to forgive Johnny. Johnny responded by Snapchat[17] asking if she would drop the criminal charges and Title IX complaint. Janet replied that she had emailed the police to confirm that she was not pursuing criminal charges, but she explained that she would keep the Title IX complaint to ensure Johnny had some accountability.

The next day, Janet received an email from the Title IX Coordinator stating that Johnny had submitted a copy of her text message, which was a violation of the mutual no contact order. Janet confirmed that she had sent the message, so University College issued a written reprimand that suspended her from all extracurriculars, including volleyball, for the rest of the semester as a sanction while maintaining the no contact order against both parties. When Janet reported Johnny's Snapchat message, he denied it and she was unable to provide proof of the communication. In response, University College issued only an informal verbal warning for Johnny to avoid any communication per the order. About a week later, Janet's volleyball teammates encouraged her to go out for some fun by attending the last home football game on campus. Believing that Johnny had quit the team, Janet attended. During the game, she saw him on the sidelines, and he made eye contact with her. Although this upset Janet, she decided to stay with her teammates to avoid making a big deal of the situation. The next day, Johnny reported Janet as violating the mutual no contact order, which prohibited her from going anywhere he would likely be on campus. Janet admitted to going

17. Snapchat is a social media application that deletes exchanged messages.

to the football game with her teammates but reported to the Title IX Coordinator that she had thought Johnny had quit the team. In response, the Title IX Coordinator issued a verbal warning against Janet stating that she would be suspended the next time for any violation of the mutual no contact order.

The next semester, in early February 2019, Janet attended the birthday party of a friend who was on the cross-country team. Several student-athletes attended the party. Early in the night, Janet noticed several football players in attendance, including Johnny. Johnny made eye contact with Janet but did not leave as required by the order. At one-point, Johnny even walked up and spoke to a volleyball teammate standing immediately next to Janet about an assignment in a shared class. Janet left the party and reported this encounter to the Title IX Coordinator by email. After an investigation, University College found insufficient evidence of a no contact order violation as several witnesses disagreed about who had been present at the party first. The week after, Johnny kept appearing near Janet's classes despite her previously not seeing him in that area of campus earlier in the semester. She also started seeing him more and more in the athletic facilities during her workouts with the volleyball team. When she reported this to University College, the Dean and Title IX Coordinator replied there was nothing that could be done given that both students had a right to use the athletic facilities and be in those class areas on campus.

Around mid-March 2019, while Janet was walking to class, Johnny came up behind her with a group of football players stating loudly that he was so happy to have broken up with a "crazy bitch" who told "lies" about him. Janet reported this to the Title IX Coordinator who interviewed Johnny and the football players. Johnny and the players claimed not to have known that Janet was present, and that Johnny had been talking about someone else regardless, so University College concluded that there was insufficient evidence of a no contact order violation. After this, members of the football team would glare at Janet while in the athletic facilities and one even knocked into her on the way to a class. Janet decided not to report these incidents to University College given her belief that there was not enough proof to support her claims.

Fearful of ongoing retaliation and intimidation on campus, Janet chose to move home while the Title IX complaint remained under investigation. Janet's grades steadily declined, and she continued to be late for classes whenever she ran into Johnny or other football players on campus due to her

hiding in the bathroom to avoid contact. Janet eventually stopped her extracurriculars, including volleyball, to limit her time on campus and thus the likelihood she would run into Johnny or the football team. Janet also stopped socializing with other student-athletes due to rumors circulating that she had lied about the rape because nothing had happened to Johnny. Janet could not refute these rumors because the no contact order prohibited her from speaking about the matter and she feared being suspended for violating the order.

As seen in this scenario, University College had no factual basis to justify the imposition of a no contact order against Janet in the first place, but it did have a sufficient factual basis to impose one against Johnny. Instead of the Dean providing Janet information about her options to obtain various protective measures, such as a one-way restraining order through the civil courts, the Dean presented Janet with one option if she wanted protection from Johnny while on campus. The default mutual no contact orders imposed by University College were not equitable interim measures because they did not ensure Janet's equal access to educational opportunities and benefits on campus free from a hostile environment following her good faith report of Johnny's dating and sexual violence. Instead, the orders provided Johnny a tool to penalize Janet for maintaining her Title IX complaint against him. It also curtailed Janet's educational access by negatively impacting her participation in the women's volleyball team. Given University College's enforcement of the order against Janet, she withdrew more and more from campus and even stopped reporting intimidation and retaliation to campus officials. This scenario shows how default mutual no contact orders are often inequitable interim measures and may become part of retaliation or a hostile educational environment on campus.

III. THE EVOLUTION OF MUTUAL NO CONTACT ORDERS

The original policy language from the White House Task Force on default mutual no contact orders limited these institutional directives to prohibitions regarding communications between the parties of a sexual misconduct complaint.[18] While this limited scope does not create an inherent risk of

18. *See* TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, WHITE HOUSE, *supra* note 7 (listing the interim measure option of a "'No contact' directive pending the outcome of an investigation" and noting "[s]uch a directive serves as notice to *both parties* that they must not have verbal, electronic, written, or third party communication with one another . . . ." (emphasis added)).

denied educational access for complainants, several educational institutions have expanded upon mutual no contact orders to additionally prohibit the proximity of the parties to one another while on campus (or even off campus).[19] Such mutual no contact orders, as shown in the scenario above, may require a party to physically leave or avoid certain areas on campus whenever the other party is present. [20] This often limits the other party's access to educational opportunities and benefits on campus. By mutually prohibiting the parties from coming into proximity to one another, educational institutions may be providing accused individuals with a tool for retaliation,[21] as well as an ineffective interim measure that fails to ensure equal educational access for complainants pending the outcome of the Title IX process.

Upon receiving a report of sexual misconduct, an educational institution has a good faith basis to issue a one-way no contact order that limits the proximity of an accused perpetrator to a complaining victim for a variety of reasons. First, the institution has a legal obligation to correct any hostile educational environment created on campus by the alleged sexual misconduct by ensuring a complaining victim's ongoing access to education

19. *See, e.g.*, *No Contact Orders*, BATES C., https://www.bates.edu/student-affairs/student-conduct/code-of-student-conduct/no-contact-orders/ (last visited Jan. 25, 2020).

20. *See, e.g.*, Letter from Loyola Univ., to Complainant, Official Directive (Nov. 1, 2017) (requiring Complainant to "limit the potential for contact you may have with [Respondent]" by "mak[ing] every effort to remove yourself from situations where you may interact both on and off campus" and prohibiting her from discussing the matter "with anyone other than your family, advisor or a University official," noting that a "fail[ure] to meet any of these expectations, additional measures, including disciplinary action, may be put into place that may affect your student status.") (on file with the author, cited with consent of the Complainant, and redacted to maintain the privacy of the parties).

21. *See, e.g.*, Letter from Texas A&M Univ., to Complainant, No Contact Order (Sept. 9, 2019) (mandating "a concerted effort to avoid any close proximity" with the other party and specifying: "In areas where neither of you [are] required to be present, if one of you arrives first, the other must leave. In areas where you are both required to be present, you must each avoid sitting near the other. In areas where [the other party's] presence is required and yours is not, you may not be present. In areas where your presence is required and [the other party's] is not, they may not be present," noting "it is very important that you understand and abide by the above-stated conditions, since an infringement of this order may result in disciplinary consequences. This may include revising the order such that the responsibility to avoid the other party falls exclusively on the party found responsible for violating the order.") (on file with the author, cited with consent of the Complainant, and redacted to maintain the privacy of the parties).

is free from sexual hostility.[22] Second, Title IX liability attaches whenever an educational institution has actual notice of peer-perpetrated sexual misconduct but fails to prevent ongoing harassment through its deliberate indifference in response to that notice.[23] Finally, an educational institution has a duty to prevent the possibility of intimidation or retaliation by the accused or others against a complainant.[24] Such harassment and intimidation is not always verbalized, such as when an accused perpetrator comes close to stare menacingly at a complaining victim or intentionally comes into immediate proximity to otherwise intimidate a complainant.[25] Several educational institutions have addressed such non-verbalized behaviors through expansive no contact order language, such as Brown University, which issued the following amended no contact order language after receiving reports that the accused student had continued to come near the complainant in an effort to intimidate and harass her:

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22. *See* OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE 12 (2001) [hereinafter 2001 REVISED SEXUAL HARASSMENT GUIDANCE], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf ("If a student sexually harasses another student and the harassing conduct is sufficiently serious to deny or limit the student's ability to participate in or benefit from the program, and if the school knows or reasonably should know about the harassment, the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence. As long as the school, upon notice of the harassment, responds by taking prompt and effective action to end the harassment and prevent its recurrence, the school has carried out its responsibility under the Title IX regulations." (footnote omitted) (citing 34 C.F.R. § 106.31(b))).

23. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999) (establishing Title IX liability for educational institutions that have actual notice of peer-perpetrated sexual harassment and violence and respond with deliberate indifference to leave a hostile educational environment unremedied and thus denying equal access to education to victimized students).

24. *See* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 17; OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER 16 (2011) [hereinafter 2011 TITLE IX GUIDANCE], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf ("Schools should be aware that complaints of sexual harassment or violence may be followed by retaliation by the alleged perpetrator or his or her associates."); Doe v. Forest Hills Sch. Dist., No. 1:13-cv-428, 2015 WL 9906260, at *18 (W.D. Mich. Mar. 31, 2015) (finding that "[t]raining concerning Title IX's prohibition on retaliation against complainants may also have mitigated Plaintiff's emotional distress and social ostracization" to sustain a failure to train claim brought under 42 U.S.C. § 1983).

25. *See supra* Section II; *see also, e.g.*, OCR No. 02-14-2438 (alleging that the accused student had approached the complaining student and her guest in Hamilton College's dining hall to first harass the complainant and then deter the guest from spending time with the complainant by disparaging her to the guest).

> The No Contact Order requires that he refrain from contact, direct or indirect, with you. This means that [Respondent] should not attempt to approach, visit, call, or send messages to you. It also means that he should not try to speak with you through mutual acquaintances or other third parties. You should contact the Department of Public Safety and the Office of Student Life if he attempts to contact you.
>
> The following list, which was provided to [Respondent], includes some of the behaviors which may constitute a violation of the No Contact Order. Please note that this is not an exhaustive list but will assist you in understanding the parameters of the order.
>
> [Respondent] should not approach you. If he sees you, he should cross the street or turn around and walk in the opposite direction.
>
> He should not speak to you, even from a distance.
>
> He should not approach or speak to anyone who is standing with or near you.
>
> If you are in the same class or participating in the same meetings as [Respondent], he should arrive early and sit in the front left of the classroom, or in a location as discussed with a dean in advance.
>
> He should not speak loudly around you in an attempt to have you hear his comments.
>
> If you are in the same space, he should not stare at you or look in your direction repeatedly or continuously.
>
> I want to reiterate that this is not an exhaustive list but can be used as a guide for managing a variety of situations that may arise.[26]

Such expansive prohibitions ensure that no contact orders can effectively deter non-verbalized harassment, intimidation and retaliation, and thus

26. Letter from Brown Univ., to Complainant, No Contact Order (Nov. 5, 2015) (on file with the author, cited with consent of the Complainant, and redacted to maintain the privacy of the parties).

ensure a complaining victim's equal access to education free from a hostile educational environment, which is the purpose of an equitable interim measure under Title IX.[27]

While the legal basis for the White House Task Force's recommendation that educational institutions equally impose mutual no contact orders to prohibit communication between the parties to a sexual misconduct complaint is unclear, it made this recommendation within a broader policy affirming Title IX's requirement that educational institutions provide equitable interim measures to ensure complainants have equal educational access pending the Title IX grievance process.[28] Despite this guarantee of equal access as the core tenet of Title IX,[29] the U.S. Department of Education ("ED") under the Trump administration effectively abandoned the requirements of equitable interim measures through the rescission of previously issued Title IX guidance,[30] as well as the issuance of new interim guidance.[31, 32] Specifically, ED's Office for Civil Rights ("OCR") issued a 2017 interim Title IX guidance that answered "Question 3: What are interim measures and is a school required to provide such measures?" by responding:

> Interim measures are *individualized services* offered as appropriate to *either or both the reporting and responding parties* involved in an alleged incident of sexual misconduct,

27. *See supra* text accompanying note 22.

28. *See* TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, WHITE HOUSE, *supra* note 7 ("Interim measures are those services, accommodations, or other assistance that the College *puts in place for victims* after receiving notice of alleged sexual misconduct but before any final outcomes—investigatory, disciplinary, or remedial—have been determined. We want students to be safe, to receive appropriate medical attention, and to get the help they need to heal and to *continue to access their educational opportunities*." (emphasis added)).

29. *See, e.g.*, 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 16.

30. On December 21, 2018, the Trump administration rescinded the 2011 Title IX Guidance as well as OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter 2014 Q&A GUIDANCE], both issued by the Office of Civil Rights during the Obama administration. *See* 2011 TITLE IX GUIDANCE, *supra* note 24, at 1.

31. *See generally* OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT (2017) [hereinafter INTERIM 2017 TITLE IX GUIDANCE], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

32. *See also* SurvJustice Inc. v. DeVos, No. 18-cv-00535-JSC, 2018 U.S. Dist. LEXIS 169485, at *2–3 (N.D. Cal. Oct. 1, 2018) (dismissing challenge brought by victim rights organizations against the Education Department and its officials for the rescission of previous guidance and issuance of new guidance under Title IX because it was not considered a final agency action).

> prior to an investigation or while an investigation is pending.[33]

Despite citing Section VII(A) of the 2001 Revised Sexual Harassment Guidance for this provision of the interim guidance, OCR provided a novel interpretation of this section because the previous guidance provides only one example of an interim measure where an educational institution separated both students from shared classes or housing.[34] This example hardly justifies the Trump administration's decision to move away from interim measures as institutional actions taken to ensure a complainant-victim's equal access to education free from a sexual hostile education during the pending Title IX grievance process.[35] The interim guidance continues on to explicitly prohibit educational institutions from "mak[ing] such [interim] measures available only to one party" and prohibits institutions from "rely[ing] on fixed rules or operating assumptions that favor one party over another" when issuing interim measures.[36] This goes far beyond an interpretation of Section VII(A) of the 2001 Revised Sexual Harassment Guidance.[37]

There is an "operating assumption" behind the federal civil right known as Title IX, which is that sex discrimination, such as peer-perpetrated sexual misconduct, may impede equal access to educational opportunities and benefits for *victimized* students.[38] Based on this operating assumption, educational institutions receiving federal funding must respond upon actual notice of sexual misconduct in a manner that is not deliberately indifferent.[39]

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33. INTERIM 2017 TITLE IX GUIDANCE, *supra* note 31, at 2 (emphasis added).

34. *See* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 16 ("For instance, if a student alleges that he or she has been sexually assaulted by another student, the school may decide to place the students immediately in separate classes or in different housing arrangements on campus, pending the results of the school's investigation.").

35. *See supra* text accompanying note 22. While OCR rescinded the 2011 Title IX Guidance and 2014 Q&A Guidance during the Trump administration, *see supra* text accompanying note 31, it did not rescind the 2001 Revised Sexual Harassment Guidance that had previously gone through notice and comment prior to its issuance by OCR. *See* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at i–ii.

36. INTERIM 2017 TITLE IX GUIDANCE, *supra* note 31, at 2–3.

37. While Question 3 of the Interim 2017 Title IX Guidance generally cites this section as an authority, it is specifically referencing page 16 of the 2001 Revised Sexual Harassment Guidance. *See supra* text accompanying note 34.

38. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

39. *Id.*

From this understanding, "rules" have logically followed from ED that require educational institutions to take equitable interim measures that ensure equal educational access for complainants (i.e., an education free from a sexually hostile educational environment) to avoid claims of deliberate indifference.[40] Instead of aligning with the equity requirements of Title IX, OCR's 2017 interim Title IX guidance conflates the concept of *equity* with *equality*.[41] This conflation within the interim guidance not only promotes the practice of default mutual no contact orders, it effectively authorizes educational institutions to issue such orders under Title IX despite viable arguments that such a practice is unlawful as a default practice, as discussed *infra*.[42]

To understand why default mutual no contact orders are not equitable, it is essential to understand the difference between equity and equality. While mutual treatment is essentially equal treatment, equal treatment is not necessarily equitable treatment. The Merriam-Webster Dictionary defines "equal" as "the same measure, quantity, amount, or number as another" to make something "like in quality, nature, or status" to "affect[] . . . in the same way" without "variation in appearance, structure, or proportion."[43] Equality, therefore, bears a direct relationship to the concept of mutuality, which ensures equal treatment "directed by each

40. *See Davis*, 526 U.S. at 648 (holding that "school administrations will continue to enjoy flexibility" in determining how to respond to peer-perpetrated sexual misconduct as long as the response is not "clearly unreasonable in light of the known circumstances" to constitute "deliberate indifferen[ce]"); *supra* text accompanying note 22.

41. Inexplicably, OCR's mandate of equal treatment for the parties to a sexual misconduct complaint lasts even *after* an educational institution *has found an accused student responsible for committing the alleged sexual misconduct* to exceed and contravene Title IX. Specifically, the guidance answers "Question 9: What procedures should a school follow to impose a disciplinary sanction against a student found responsible for a sexual misconduct violation?" by limiting an educational institution's considerations to three points: (1) "deciding how best to enforce the school's code of student conduct"; (2) "considering the impact of separating a student from her or his education"; and (3) ensuring "a proportionate response to the violation." *See* INTERIM TITLE IX GUIDANCE, *supra* note 31, at 6. Notably, the interim guidance removes from these post-finding considerations the previous mandate that educational institutions must ensure a remedy for the hostile educational environment created by the sexual misconduct to restore a victim's equal educational access, which is at the very heart of Title IX. *See* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 16.

42. *See infra* Section IV.

43. *Equal*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equal (last visited Jan. 25, 2020).

toward the other" and thus is "shared in common" or "joint."[44] Title IX ensures equal access to education for all students regardless of their sex,[45] but the law does so in part through the requirement that educational institutions respond promptly and equitably to complaints of sexual misconduct.[46] In defining "equity," the Merriam-Webster Dictionary provides the explanation that it is "justice according to natural law or right" and "*specifically*: freedom from bias or favoritism" to ensure that the result is "something that is equitable."[47] For something to be "equitable" it must be the result of "dealing *fairly and* equally with all concerned."[48] Thus, while equitable treatment is meant to ensure equality, equal treatment may not always be equitable.[49]

In the context of campus sexual misconduct complaints, equity requires that educational institutions recognize the different positions of the parties during the pending Title IX grievance process. While both parties theoretically started with equal educational access, only the complaining party is alleging unequal educational access due to sexual misconduct, which has been allegedly committed by the responding party. During the resulting grievance process, respondents are entitled to procedural protections meant to prevent the erroneous deprivation of their educational access absent a lawful basis for doing so.[50] Complainants are

44. *Mutual*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/mutual (last visited Jan. 25, 2020).

45. *E.g.*, INTERIM 2017 TITLE IX GUIDANCE, *supra* note 31, at 1.

46. *See supra* text accompanying note 6.

47. *Equity*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equity (last visited Jan. 25, 2020).

48. *Equitable*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/equitable (emphasis added) (last visited Jan. 25, 2020).

49. A popular visual illustration of the difference between equality and equity shows three people of different heights trying to see over the same fence. Equality means the same size stepping stool is given to each person, despite it helping only the tallest person to see over the fence. Equity means giving different size stepping stools to each person to ensure they all can see over the fence, regardless of their height. *See Illustrating Equality VS Equity*, INTERACTION INST. FOR SOC. CHANGE (Jan. 13, 2016), http://interactioninstitute.org/illustrating-equality-vs-equity/.

50. *See infra* Section IV(C). A lawful basis would include making a factual determination that the respondent poses an ongoing threat to the campus community to justify an interim suspension. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 576 n.8 (1975); Stricklin v. Regents of Univ. of Wisc., 297 F. Supp. 416, 420 (W.D. Wisc. 1969) (delineating when and under what

entitled to equitable interim measures meant to restore their equal educational access by remedying any hostile environment created on campus by the sexual misconduct pending the grievance process.[51] Rather than imposing default mutual no contact orders against both parties, given their differing positions and related legal rights, equitable interim measures would consider their differing needs for educational access pending the Title IX grievance process. Such measures would also consider the underlying factual allegations to impose appropriate no contact orders aimed at ensuring educational access free from a hostile environment for the complainant without unlawfully impeding on the rights of the accused student. Default mutual no contact order policies, procedures, and practices, by their very nature, do not consider the differing positions of the parties nor the underlying factual allegations specific to a complaint. Thus, such default orders are not equitable interim measures and as such might not restore equal educational access for the complainant pending the grievance process to fall short of Title IX's requirements. Instead, such default orders assume that equal treatment of the parties will create an equitable result, which is not often the case.[52]

Mutual is not always equitable; therefore, educational institutions should not adopt or implement mutual no contact orders as a default response to complaints involving sexual misconduct or other gender-based violence.[53] Instead of ensuring educational equity, default mutual no contact orders tend to fall short of the equity requirements of Title IX, both in theory and in practice.[54] Such orders also fall short of the relevant victim rights provisions included in the Clery Act, which require institutions to offer protective

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conditions an educational institution may impose an interim suspension based upon "reasonable cause to believe that danger will be present if a student is permitted to remain on campus" pending a full adjudication).

51. *See infra*, Section IV(A); *see also* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 16 (obligating educational institutions to impose equitable interim measures during the grievance process and particularly after the grievance process has found the respondent responsible for sexual misconduct).

52. *See supra* Section II.

53. Pursuant to the Clery Act, institutions of higher education in receipt of federal funding must address stalking and intimate partner violence through their campus disciplinary proceedings in addition to sexual assault, which has been historically address through the mandated Title IX grievance process under 34 C.F.R. § 106.8(b). 20 U.S.C. § 1092(f)(8)(B)(i)(I)(aa) (2020).

54. *See supra* Section II, *infra* Section IV(A)(1).

measures as accommodations for complaining victims.[55] Instead, default mutual no contact orders tend to limit a complainant's access to educational opportunities and benefits—above and beyond the already unequal educational access caused by the sexually hostile environment arising from the alleged sexual misconduct—whenever an accused perpetrator is present.[56] Furthermore, these orders may constitute institutional retaliation prohibited under both Title IX and the Clery Act, or at least facilitate intimidation and retaliation by responding parties and/or their supporters.[57] Furthermore, educational institutions are failing to consider the procedural rights of complainants when imposing default mutual no contact orders against them. Specifically, the imposition of a default mutual no contact order against complainants, absent a good faith basis to justify such a limitation on their educational access, may constitute a violation of due process or other applicable procedural protections.[58]

IV. APPLICABLE LAW

As an overview, both Title IX and the Clery Act address campus sexual misconduct—the former as a federal civil rights issue and the latter as a campus crime and safety issue.[59] These federal laws apply to both private and public educational institutions receiving federal funding.[60] When public institutions respond to campus sexual misconduct complaints, the Due Process Clause of the U.S. Constitution is implicated to ensure there is no erroneous deprivation of a student's educational access absent a fair process

55. *See infra* Section IV(B)(1).

56. *See infra* Sections IV(A)(2), IV(B)(2); *supra* text accompanying notes 19–21.

57. *See supra* Section II; *supra* text accompanying note 25.

58. *See infra* Section IV(C).

59. It should be noted that while both Title IX and the Clery Act offer protections for victims of sexual assault, neither law limits its application to student-victims only. Instead, the Clery Act provides rights to "victims" without limitation, 20 U.S.C. § 1092(f)(8)(B)(iii), (f)(8)(C) (2020), and Title IX's statutory language protects any "person" seeking educational access, opportunities or benefits, 20 U.S.C. § 1681(a); Cannon v. Univ. of Chi., 441 U.S. 677, 691 (1979) (noting the "unmistakable focus on the benefitted class" per the statutory language of Title IX). Furthermore, Title IX requires educational institutions to remedy hostile educational environments for all those impacted within the campus community, not just for those directly victimized by sexual misconduct. *See* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 16–17; *see also* 2011 TITLE IX GUIDANCE, *supra* note 24, at 17.

60. *See* 20 U.S.C. §§ 1092(f)(1), 1681(a) (2020).

involving sufficient procedural protections.[61] Likewise, private institutions must comply with relevant procedural protections, whether contractually based or arising from other state law protections, to ensure there is no unlawful deprivation of a student's educational access.[62] Each applicable legal protection is discussed below with a particular focus on how it is implicated and likely violated by the institutional practice of issuing default mutual no contact orders against complainants in campus sexual misconduct cases.

A. *Title IX*

According to the U.S. Supreme Court, the statutory language of Title IX creates an "unmistakable focus on the benefited class"[63] through its framing:

> *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 . . . .[64]

As Title IX jurisprudence developed, the U.S. Supreme Court held that discrimination on the basis of sex included discrimination in the form of sexual harassment and violence.[65] In particular, peer-perpetrated sexual misconduct is a legally recognized form of prohibited sex discrimination addressed by Title IX.[66] Thus, sexually victimized students are in the

61. *See, e.g.*, Dixon v. Ala. State Bd. of Educ., 294 F.2d 150 (5th Cir. 1961).

62. *See, e.g.*, Doe v. Brandeis Coll., 177 F. Supp. 3d 561, 601 (D. Mass. 2016) (finding insufficient procedures in a campus sexual misconduct disciplinary proceeding under Massachusetts law, which recognizes the concept of "basic fairness . . . separate from and in addition to . . . contractual obligation[s] to follow the rules . . . set forth" by an educational institution regarding its disciplinary policies and procedures).

63. *Cannon*, 441 U.S. at 691.

64. 20 U.S.C. § 1681(a) (2020) (emphasis added).

65. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998) (citing Oncale v. Sundowner Offshore Sers., Inc., 523 U.S. 75, 80–81 (1998)).

66. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

benefited class protected by the statutory language of Title IX.[67] Accused students are not, absent a showing of sex discrimination.[68]

Title IX is enforceable through an implied cause of action.[69] To raise a Title IX claim within the Fourth Circuit, "a plaintiff must show that (1) she was a student at an educational institution receiving federal funds, (2) she was subjected to harassment based on her sex, (3) the harassment was sufficiently severe or pervasive to create a hostile (or abusive) environment in an educational program or activity, and (4) there is a basis for imputing liability to the institution."[70] Regarding the fourth element, Title IX liability is imputed when an educational institution has actual notice of peer-perpetrated sexual misconduct yet responds with deliberate indifference to "deprive the victim of access to the educational opportunities or benefits provided by the school."[71] An institution must have "substantial control over both the harasser and the context in which the known harassment occurs" to establish Title IX liability for peer-perpetrated sexual misconduct.[72] The Court has described deliberate indifference as administrative action or inaction that is "clearly unreasonable in light of the known circumstances."[73] Liability also attaches when an educational institution's own "deliberate indifference subject[s] its students to harassment, *i.e.*, at a minimum, causes

67. *Cannon*, 441 U.S. at 694 ("Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner is clearly a member of that class for whose special benefit the statute was enacted.").

68. *See, e.g.*, Xiaolu Peter Yu v. Vassar Coll., 97 F. Supp. 3d 448, 462 (S.D.N.Y. 2015) (rejecting a Title IX claim of erroneous outcome arising out of a campus-based Title IX grievance procedure due to the plaintiff's failure to allege gender bias or related procedural flaws to support this claim).

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

70. Doe v. Bd. of Educ., 888 F. Supp. 2d 659, 665 (D. Md. 2012) (quoting Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007).

71. *Davis*, 526 U.S. at 650.

72. *Id.* at 630 (finding such control when the "misconduct occurs during school hours and on school grounds, [as] the misconduct is taking place 'under' an 'operation' of the funding recipient").

73. *Id.* at 648; *see also* DeGroote v. Az. Bd. of Regents, No. CV-18-00310 (D. Az. Feb. 7, 2020) (granting summary judgment to Title IX plaintiff stating "it is difficult to imagine how the University could have done less" regarding its "response to known harassment" to find it "clearly unreasonable" and thus constituting deliberate indifference).

students to undergo harassment or makes them liable or vulnerable to it."[74] To avoid such liability, educational institutions often implement no contact orders to prevent or otherwise deter ongoing harassment upon actual notice of peer-perpetrated sexual misconduct.

1. Equity Requirements

Congress has given primary enforcement authority over Title IX to ED.[75] Through its issuance of implementing regulations, ED has obligated educational institutions to provide campus-level Title IX grievance processes that address student complaints of sex-based discrimination.[76] Through this grievance process, educational institutions must respond to sexual misconduct complaints in a "prompt and equitable" manner.[77] As part of this equity requirement, OCR has issued guidance that directs educational institutions to provide equitable interim measures that restore a complainant's equal access to education pending the final outcome of the Title IX grievance process.[78] Such interim measures should deter harassment, intimidation and retaliation against the complainant and otherwise remedy any hostile educational environment created by the alleged sexual misconduct.[79] As discussed *supra*, default mutual no contact orders equally imposed upon a complaining and responding party are not inherently equitable.[80] Therefore, educational institutions seeking to comply with Title IX's implementing regulations and related guidance regarding equitable interim measures should not issue such orders as a default. Instead, educational institutions should issue no contact orders that consider the differing position of the parties and the underlying factual allegations to ensure equitable measures that ensure equal educational access to any student denied such access due to a sexually hostile educational environment.

74. *Id.* at 630 (internal quotation marks omitted). *See* Kollaritsch v. Mich. State Univ. Bd. of Trs., 944 F.3d 613 (6th Cir. 2019) (Thapar, J., concurring) (noting a growing circuit split on this issue); *see also* Farmer v. Kan. State Univ., 918 F.3d 1094 (10th Cir. 2019).

75. 20 U.S.C. § 1682 (2019).

76. LEISMAN, *supra* note 6.

77. *Id.* at 2.

78. *See supra* Section III; *see also supra* text accompanying notes 22 and 28.

79. *See* 2001 REVISED SEXUAL HARASSMENT GUIDANCE, *supra* note 22, at 17.

80. *See supra* Section III.

2. Prohibition on Retaliation

Civil liability also attaches under Title IX when an educational institution intentionally discriminates against a student on the basis of sex.[81] Such intentional discrimination includes retaliation, such as when an institution takes adverse action against a complainant for his, her, or their[82] complaint of sex discrimination.[83] To raise a claim of retaliation under Title IX within the Fourth Circuit, plaintiffs must allege two elements: (1) that "they engaged in protected activity under Title IX" and (2) "as a result of their protected activity[,] they suffered an adverse action attributable to the defendant educational institution."[84] The adverse action taken must be "materially adverse," which is defined as sufficient to "dissuade[] a reasonable [person] from making or supporting a charge of discrimination."[85] Such adverse action includes those taken directly by the educational institution or indirectly, such as when the institution acts with deliberate indifference towards peer-perpetrated retaliation.[86] Thus, under the right factual

81. *See* Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 642. Intentional discrimination claims also include selective enforcement actions. *See* Doe v. Salisbury Univ., 107 F. Supp. 3d 481, 488, n.7 (D. Md. 2015) (noting the Fourth Circuit has favorably cited to Yusuf v. Vassar Coll., 35 F.3d 709, 714–16 (2d. Cir. 1994) which advanced a selective enforcement theory under Title IX). Such claims also include a recipient's own official policies and practices condoning peer-perpetrated harassment regardless of actual notice. *See* Simpson v. Univ. of Colo. Boulder, 500 F.3d 1170, 1177 (10th Cir. 2007); *see also* Doe v. Baylor Univ., 240 F. Supp. 3d 646, 653 (W.D. Tex. 2017).

82. Given the high rates of sexual misconduct committed against individuals who identify outside the gender binary, the pronoun "their" is used here in the singular to acknowledge this population through the use of a gender-neutral pronoun. BUREAU OF JUSTICE STATISTICS, CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT, APP. E-9 (2016) (finding that transgender and gender non-confirming students experienced higher rates of sexual violence (27.8 percent) compared to female students (20.4 percent) since entering college).

83. *See* Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) (holding that termination of a male coach after his complaint of unequal funding and equipment access for the female basketball team as compared to the male basketball team constituted retaliation and thus intentional discrimination on the basis of sex to violate Title IX).

84. Feminist Majority Found. v. Hurley, 911 F.3d 674, 694 (4th Cir. 2018) (citing Coleman v. Md. Ct. of App., 626 F.3d 187, 191 (4th Cir. 2010)).

85. *Id.* (quoting Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 68 (2006) (internal quotation marks omitted)) (alterations in original).

86. *Id.* at 695 (citing *Davis*, 526 U.S. at 645; *Jackson*, 544 U.S. 167).

circumstances, default mutual no contact orders may give rise to Title IX claims on grounds of retaliation and deliberate indifference.

The imposition of mutual no contact orders against complainants as a default response to their engagement in the protected activity of reporting sexual misconduct is arguably *prima facie* retaliation.[87] Whenever such an order limits a complainant's access to educational opportunities and benefits on campus, which occurs when such orders prohibit proximity to the accused or require complainants to avoid certain areas of campus where the accused may be present,[88] the imposition of the default order is arguably an adverse action.[89] As demonstrated in the scenario above, such adverse action also may qualify as "materially adverse" when a complainant is disciplined under the order or otherwise left unable to access classrooms, athletic teams or facilities, or even the campus at large, given the ripple effect of the mutual no contact order on the complainant's educational access.[90] Therefore, educational institutions should reconsider the imposition of default mutual no contact orders against complainants absent sufficient factual justification for doing so as any resulting denial of educational access is arguably retaliation prohibited under Title IX.

B. *Clery Act*

Beyond the requirements of Title IX, educational institutions are bound to abide by the requirements of the Clery Act when it comes to complaints of sexual misconduct that qualify as sexual assault.[91] In response to reports of sexual assault, the Clery Act requires educational institutions to provide

87. *See* Doe v. Salisbury Univ., 107 F. Supp. 3d 481, 489 (D. Md. 2015) (citing Coleman v. Md. Ct. of App., 626 F.3d 187, 190 (4th Cir. 2010)) (outlining prima facie retaliation as showing plaintiff (1) engaged in a protected activity; (2) an adverse action occurred; and (3) there is a causal connection between the protected activity and the adverse action).

88. *See supra* Section II & III; *see also supra* text accompanying notes 19–21.

89. *E.g.*, Complaint at 11, Jane Doe v. Oregon State Univ., No. 6:18-cv-01432 (D. Or. filed July 31, 2018).

90. *See supra* Section II.

91. 20 U.S.C. § 1092(f) (2019); *see* U.S. DEP'T OF EDUC. OFFICE OF POSTSECONDARY EDUC., HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 3–6 (2016) [hereinafter 2016 CAMPUS SAFETY HANDBOOK] (defining "sexual assault" as "[a]ny sexual act directed against another person, without consent of the victim, including instances where the victim is incapable of giving consent"). The Clery Act covers a variety of gender violence above and beyond sexual misconduct. *See* 20 U.S.C. § 1092(f) (2019).

written information to victims about their rights and options.[92] While the Clery Act does not have a private cause of action,[93] or even establish a standard of care per the limitations in its statutory provisions,[94] anyone can report a violation of the Clery Act to ED's Clery Act Compliance Division ("CACD") within the Office for Federal Student Aid.[95] After CACD opens a program review, whether upon receipt of a complaint or other notice of a potential Clery Act violation,[96] it may fine an educational institution for violations occurring within the last five years.[97] In recent years, CACD has issued significant fines for widespread institutional violations under the Clery Act regarding the mishandling of sexual assault reports in several high profile cases, such as the Jerry Sandusky child sexual abuse scandal at Pennsylvania State University, the University of Montana sexual assault scandal captured in Jon Krakauer's *Missoula*, and the sexual abuse scandal involving Dr. Larry Nassar at Michigan State University.[98]

92. *See* 20 U.S.C. § 1092(f)(8)(B)(ii)–(vii) (2019).

93. 20 U.S.C. § 1092(f)(14)(A)(i) (2020).

94. 20 U.S.C. § 1092(f)(14)(A)(ii) (2020); *see also* 20 U.S.C. § 1092(f)(14)(B) (2020) (prohibiting the admissibility of evidence of an educational institution's compliance or noncompliance "except with respect to an action to enforce this subsection").

95. *See Clery Act Reports*, FEDERAL STUDENT AID, https://studentaid.ed.gov/sa/about/data-center/school/clery-act-reports (last visited Jan. 25, 2020) (authorizing a program review upon a complaint, media coverage, an institution's own audit, or as part of the FBI's Criminal Justice Information Service (CJIS) Audit Unit.).

96. *Id.*

97. Fines are issued pursuant to 20 U.S.C. § 1094(c)(3)(B) (2019) and 28 U.S.C. § 2462 (2019). *See In re* Lincoln Univ., U.S. Dep't of Educ., No. 13-68-SF-R (September 13, 2016) (finding a five year statute of limitations applies to fines regarding violations of the Clery Act and that such violations can be renewed by a recipient's ongoing misrepresentation of older violations when occurring within the five year period).

98. *See, e.g.*, Jake New, *Historic Fine for Penn State*, INSIDE HIGHER ED (Nov. 4, 2016), https://www.insidehighered.com/news/2016/11/04/education-departments-historic-sanction-against-penn-state-clery-violations; Keila Szpaller, *University of Montana fined nearly $1 million for Clery Act violations; UM to appeal*, MISSOULIAN (Oct. 1, 2018), http://missoulian.com/news/local/university-of-montana-fined-nearly-million-for-clery-act-violations/article_219218a5-0bc5-5eea-8d55-6f5f962ddc00.html; Sophie Tatum, *Michigan State to be fined $4.5M for its handling of disgraced doctor Larry Nassar*, ABC NEWS (Sept. 5, 2019), https://abcnews.go.com/Politics/michigan-state-fined-45m-handling-disgraced-doctor-larry/story?id=65407485.

1. Relevant Victim Rights Provisions

Amongst the various victim rights provisions within the Clery Act, there is a requirement that educational institutions provide written information to complaining victims "regarding orders of protection, *no contact orders*, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court."[99] This written information must include the institution's "responsibilities" regarding the enforcement of such orders.[100] As clarified through ED's implementing regulations, this provision specifically requires that complaining victims receive comprehensive information about available protective measures through the educational institute itself.[101] ED's sub-regulatory guidance specifics that institutions must further disclose to complainants: (1) the "legal options . . . available to them and under what circumstances"; (2) "how to request information about the available [protective measure] options" and "specific contact information" for making such requests; (3) "instructions for how to file a request for each of the options" regarding protective measures; (4) "the institution's responsibilities for honoring such requests and complying with these orders"; (5) "clear information about what the victim should do to enforce an order of protection"; and (6) "information on other available [protective measure] options in your jurisdiction."[102] While this provision does not prohibit default mutual no contact orders *per se*, it does make clear that no contact orders are meant to be protective measures for victims and thus the right of complainants to seek and obtain, rather than something to be imposed against them. As exemplified above, the imposition of mutual no contact orders as a default often leaves complaining victims vulnerable to intimidation and retaliation on campus.[103] And all too often, institutions are not informing complainants about all available protective measures, such as civil restraining orders.

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99. 20 U.S.C. § 1092(f)(8)(B)(iii)(IV) (2019) (emphasis added).

100. *Id.*; 2016 CAMPUS SAFETY HANDBOOK, *supra* note 91, at 8–11 ("Your statement must also disclose the institution's responsibilities for honoring such requests and complying with these orders.").

101. Institutional Security Policies and Crime Statistics, 34 C.F.R. § 668.46(b)(11)(ii)(D) (2015) ("Where applicable, the rights of victims and the institution's responsibilities for orders of protection, 'no-contact' orders, restraining orders, or similar lawful orders issued by a criminal, civil, or tribal court or *by the institution*.") (emphasis added).

102. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 91, at 8–11.

103. *See supra* Section II.

Another relevant victim rights provision requires that educational institutions provide "options for, and available assistance in, changing academic, living, transportation, and working situations."[104] Per the Clery Act's implementing regulation, ED has interpreted this statutory provision to require that educational institutions provide complainants information about their rights and options to obtain protective measures as an accommodation.[105] To obtain accommodations under the Clery Act, a complainant victim must request them and the requested accommodation must be "reasonably available" from the institution.[106] As clarified in sub-regulatory guidance, an "institution is ***obligated*** to comply with a student's *reasonable* request for a living and/or academic situation change following an alleged sex offense."[107] Written information about how a victim can request protective measures as an accommodation must also "identify how [institutions] will determine what measures to take and who will be responsible for making that decision."[108] Sub-regulatory guidance clarifies that the factors educational institutions should consider when determining whether to provide a requested protective measure as an accommodation

> include, but are not limited to the following: the specific need expressed by the complainant; the age of the students involved; the severity or pervasiveness of the allegations; any continuing effects on the complainant; whether the complainant and alleged perpetrator share the same residence hall, dining hall, class, transportation or job location; and whether other judicial measures have been taken to protect the complainant (e.g., civil protection orders).[109]

104. 20 U.S.C. § 1092(f)(8)(B)(vii) (2019).

105. 34 C.F.R. § 668.46(b)(11)(v) (2015) (The regulations require "[a] statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations *or protective measures*. The institution must make such accommodations or *provide such protective measures* if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement." (emphasis added)).

106. 20 U.S.C. § 1092(f)(8)(B)(vii) (2019); 34 C.F.R. § 668.46(b)(11)(v) (2015).

107. 2016 CAMPUS SAFETY HANDBOOK, *supra* note 91, at 8–14 (emphasis added).

108. *Id.* at 8-14–8-15.

109. *Id.* at 8-15.

This guidance goes on to state that protective measure "should *minimize* the burden on the victim . . . . [and] not, as a matter of course, remove the victim . . . while allowing the alleged perpetrator to remain without carefully considering the facts of the case."[110] This clarifies that complaining victims have a right to seek protective orders rather than suggesting these orders should be imposed against them as a matter of course. In particular, the sub-regulatory guidance directs educational institutions not to burden victims when imposing protective measures, as is too often the case when institutions issue default mutual no contact orders to impede their educational access.[111]

2. Prohibition on Retaliation

In 2013, Congress passed the Violence Against Women Reauthorization Act ("VAWA"), which amended the Clery Act.[112] As part of these VAWA amendments, the Clery Act now includes an express statutory prohibition against retaliation, which states that "[n]o officer, employee, or agent of an institution participating in any program under this subchapter shall retaliate, intimidate, threaten, coerce, or otherwise discriminate against any individual for exercising their rights or responsibilities under any provision of this subsection."[113] This broad protection covers complaining victims who exercise their rights under the Clery Act, including the right to obtain protective measures.[114] Educational institutions should, therefore, beware of any effort to coerce a complaining victim into accepting a mutual no contact order before agreeing to issue any protective measures against the accused perpetrator—an all too common practice covered in the scenario.[115] Furthermore, educational institutions should consider whether it is in fact discriminatory to impose a default mutual no contact order against a complaining victim simply for engaging in the protected activity of reporting sexual misconduct pursuant to the Title IX and the Clery Act.[116] While CACD

110. *Id.* (emphasis added).

111. *See supra* text accompanying notes 19–21.

112. Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304, 127 Stat. 54, 89–92 (codified as amended at 20 U.S.C. § 1092(f) (2019)).

113. 20 U.S.C. § 1092(f)(17) (2019).

114. *See* 2016 CAMPUS SAFETY HANDBOOK, *supra* note 91.

115. *See supra* Section II.

116. *See supra* Section IV(A)(2).

has only recently issued a final program review enforcing this provision,[117] it is likely that future enforcement actions will continue to protect complaining victims from unjustified impositions that limit their educational access due merely to their decision to report sexual misconduct.

C. *Due Process and Other Procedural Protections*

The Due Process Clause of the U.S. Constitution applies whenever public educational institutions undertake action to deprive students of their legally protected interests in educational access.[118] Procedural due process is meant to constrain governmental actions in order to prevent the erroneous deprivation of an individual's legally protected interest.[119] To prevent such erroneous deprivations, the U.S. Supreme Court has articulated minimal procedural due process requirements of (1) notice and (2) an opportunity to be heard "at a meaningful time and in a meaningful manner."[120] Implicit within these due process protections is the requirement that the government must first make a determination justifying the deprivation.[121] This is necessary so that a responding party can receive notice and have a

117. *Final Program Review Determination*, FEDERAL STUDENT AID (Aug. 23, 2019), https://police.unc.edu/files/2019/11/U.S.-Department-of-Education-Final-Program-Review-August-2019.pdf (showing the most notable CACD enforcement effort around this provision recently occurred through the issuance of a Final Program Review determination against University of North Carolina Chapel Hill on August 23, 2019).

118. *See, e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (requiring a public secondary institution to provide minimal due process of notice and an opportunity to be heard regarding a temporary ten-day suspension of a student from school based on statutory rights). While there has been no definitive holding that students have a legally protected property interest in their educational access at institutions of higher education, this has often been presumed by courts. *See, e.g.*, Dixon v. Alabama, 294 F.2d 150, 157 (5th Cir. 1961).

119. Mathews v. Eldridge, 424 U.S. 319, 332 (1976).

120. *Id.*; *see* Goldberg v. Kelly, 397 U.S. 254, 267 (1970) (quoting Armstrong v. Manzo, 380 U.S. 545, 552 (1965)). While these due process standards are the threshold, additional protections may be warranted as appropriate to the circumstances. *See Mathews*, 424 U.S. at 335 (establishing the following factors-based test: "First, the private interest that will be affected by the official action; second, 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 finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.").

121. *C.f. Goldberg*, 397 U.S. at 267 (authorizing informal "pre-termination hearings" prior to deprivation of welfare rights and requiring such a hearing "to produce an initial determination of the validity" of the deprivation).

meaningful opportunity to be heard in order to challenge any deprivation or proposed deprivation of their educational access based upon "incorrect or misleading factual premises or on misapplication of rules or policies to the facts of particular cases."[122] Whenever default mutual no contact orders deprive or propose to deprive complainants of their equal access to educational opportunities and benefits,[123] the orders arguably deprive them of their legally protected interest under Title IX.[124] Thus, such default orders would likely violate due process protections given the lack of any initial determination based upon the underlying facts to justify such a limitation on complainants' rights to equal educational access under Title IX.[125] Educational institutions should, therefore, ensure that any imposition of no contact orders against complainants be based upon determinations that sufficient justification exists based upon the factual allegations to limit their educational access. Any such order should also provide complainants the right to be heard on the imposition of the order to ensure sufficient procedural protections are in place.

Whenever complainants report sexual misconduct to private educational institutions, they should receive basic procedural protections, whether through contract or other procedural protections offered under state law.[126] As contracts are a matter of state law, each jurisdiction varies on the level of protections offered to students based upon any particular private educational institution's disciplinary policies and procedures.[127] Some state courts have held that there are additional protections beyond contractual provisions, such as the notion of basic fairness, that are implied within any procedural framework offered by institutional policies and procedures.[128] Therefore,

122. *Id.* at 268.

123. *See supra* Section II; *see also supra* text accompanying notes 19–21.

124. *See supra* Sections III & IV(A).

125. *Id.*

126. *Accord* AM. LAW INST., PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES, DISCUSSION DRAFT, APP. § 1.2 (2018) ("The procedures used to respond to complaints of sexual assault and related misconduct should be fair and impartial in their treatment of both complainants and respondents and should respect basic tenets of due process, including notice, a meaningful opportunity to be heard, and a decisionmaker who is impartial.").

127. *E.g.*, *compare* Ctr. Coll. v. Trzop, 127 S.W.3d 562, 568 (Ky. 2004) *with* Rollins v. Cardinal Stritch Univ., 626 N.W.2d 464, 470 (Minn. Ct. App. 2001) *with* Schaer v. Brandeis Univ., 735 N.E.2d 373, 378 (Mass. 2000).

128. *See supra* text accompanying note 62.

Complainants may be able to challenge the default mutual no contact orders imposed against them when there is insufficient justification based upon the factual allegations to limit their educational access, especially if it contravenes the institution's own written policies and procedures that have adopted the requirements of Title IX and the Clery Act.[129] It is thus advised that educational institutions abandon such default practices to ensure mutual no contact orders are only imposed when justified based upon the known facts of a particular sexual misconduct complaint.

V. SAMPLE POLICY LANGUAGE

To ensure educational institutions are responding lawfully to complaints of sexual misconduct, they must implement truly equitable (rather than merely equal) interim measures. Institutions should not issue a mutual no contact order as a default and instead issue mutual orders only when there is a good faith factual basis for limiting a complainant's access to educational opportunities and benefits on campus, such as reports of mutual dating violence or abuse between the parties.[130] In such instances, both parties may

129. *See* Doe v. N. Mich. Univ., No. 2:18-CV-196 (W.D. Mich. May 28, 2019) (indirectly enforcing the Clery Act by allowing a breach of contract claim to proceed for violation of plaintiff's right to an advisor of choice under the school's policies); 20 U.S.C. § 1092(f)(8)(B)(iv)(II) (2020) (requiring educational institutions to provide the accused the right to an advisor of choice).

130. *Accord* VICTIM RIGHTS LAW CENTER, WHERE TO START: DRAFTING, IMPLEMENTING, AND ENFORCING NO CONTACT ORDERS FOR SEXUAL VIOLENCE VICTIMS ON COLLEGE CAMPUSES, 5 (2015) ("The Department of Education's April 2011 Dear Colleague Letter (DCL) states that schools should minimize the burden on the victim when taking steps to separate the students. For institutions that choose to use mutual orders, carefully consider the circumstances under which your institution will issue a mutual NCO, rather than a single party or unilateral NCO. Mutual orders restrict both parties from contacting one another. Therefore, contact by either party constitutes a violation. Consequently, the burden is on both parties to stay away from each other or make arrangements to avoid contact. A unilateral NCO restricts only one party from contacting another individual. Generally, it means that the individual who requested the order does not have the burden to leave a situation in order to avoid contact. For example, if a student who requested the NCO walks into the dining hall and sees the harasser, it is the burden of the harasser to remove him/herself from the situation. When determining which type of order to issue, it is also important to keep in mind that harassers can manipulate mutual orders to retaliate against victims, intentionally placing them in fear of receiving sanctions. Administrators should make an informed and deliberate decision about what type of NCO they will issue in which circumstances and apply it consistently, keeping in mind the DCL guidance to minimize the burden on the victim and the institution's legal obligation to take steps to prevent retaliation.").

pose a risk to one another to justify the imposition of a mutual no contact order to prevent further violence. While educational institutions have long enjoyed the authority to regulate their campuses with deference from the courts,[131] they may not do so through the imposition of unlawful orders that limit the educational access of complainants. Complainants have legally protected interests regarding educational access, such as those under Title IX and the Clery Act.[132] Instead, institutions should only issue lawful orders that seek to maintain campus safety through the prohibition of conduct that could constitute harassment, intimidation, or retaliation. Such prohibitions are justifiable as they ensure a campus is free from a sexually hostile educational environment while the Title IX grievance process is pending.[133]

It is important that educational institutions honor the protections granted by law to a complaining party, while still honoring the procedural protections offered to the responding party under due process or otherwise. Such institutional policies should first signal prohibitions against discrimination, harassment, and violence within their interim measure policies to establish both the community standards and legal authorities that serve as the basis for the institution's authority to take interim protective measures:

> To further its educational mission, University College affirms the right of every student to access educational opportunities and benefits in a safe campus environment free from crime as well as other forms of prohibited discrimination, harassment, and violence on the basis of sex, gender, sexual orientation, gender identity or expression, national origin, race, color, creed, religion, disability, age, or genetic information. As part of its commitment to ensuring a safe learning environment for all, University College will exercise its authority to keep the campus community safe and free of known or reasonably suspected threats or other risks of discrimination, harassment, and violence as authorized under state and federal law.

Thereafter, educational institutions should specify in their interim measure policies all the appropriate campus official(s) who may receive requests for

131. *See, e.g.*, Goss v. Lopez, 419 U.S. 565, 591–92 (1975); Regents of Univ. of Mich. v. Ewing, 474 U.S. 214 (1985).

132. *See supra* Section IV(A) & (B).

133. *See supra* Section III.

protective measures. This provision should include the institution's authority to take immediate action to impose protective measures pending any final disciplinary action in order to preserve the community standards and ensure campus safety:

> Every student is encouraged to promptly report any perceived misconduct and/or potential crimes to University College's Dean of Students [insert contact email, address, and phone] and Police Department [insert contact email, address, and phone]. The Dean of Students works directly with other appropriate campus officials, such as the Title IX Coordinator [insert contact email, address, and phone] and [insert other appropriate officials], to ensure all reports are handled in compliance with campus policies as well as applicable state and federal laws.
>
> Upon receiving a report of potential misconduct or a possible crime, the University College's Dean of Students and/or Police Department will inform the complainant about their rights and options to receive protective measures from University College and any other relevant institutions, including, but not limited to, no contact orders, restraining orders, and no trespass orders.

Institutions should ensure that these campus officials have appropriate training on applicable state and federal law as well as specialized training on threat assessment. This latter training will allow officials to evaluate all reported misconduct or crime and determine whether to implement interim protective measures as appropriate. Furthermore, institutions should formalize the assessment process used before imposing interim measures against those accused:

> The University College's Dean of Students and/or Police Department will issue timely warnings as appropriate based upon the known facts of the reported misconduct or crime, as well as promptly flag such reports to the Threat Assessment Team for determinations about appropriate interim protective measures pending the outcome of the campus disciplinary process, such as interim suspensions,

> no trespass orders, and any other actions appropriate under the known circumstances.
>
> The Threat Assessment Team will consist of one member of the University College's Dean of Students Office, the Police Department, Counseling Services, Title IX Office, and any other members designated by the President of University College. All Threat Assessment Team members will be annually trained in threat detection, including on the topic of gun violence, dating violence, sexual violence, stalking, and all other serious crimes and misconduct.

Standard interim protective measures should be outlined within institutional policies along with the criteria used by the Threat Assessment Team for issuing all interim measures. This works to ensure that any decisions by educational institutions to implement such measures can withstand judicial scrutiny, if any is sought:

> In accord with the notions of basic fairness implied within the explicit procedural protections offered by the University College's disciplinary policies, the Dean of Students and/or Police Department reserves the right to issue interim protective measures against any accused person pending the outcome of the campus disciplinary process. Standard interim protective measures include, but are not limited to, evicting a student from university housing; moving a student to new university housing; adjusting a student's class schedule; limiting a student's access to campus or extracurriculars; limiting routes to or from campus; issuing a no trespass order to prohibit a person or student's access to campus; suspending a student or employee; and issuing no contact orders against students as appropriate under the known facts. Such measures will be issued by the Dean of Students and/or Police Department, with oversight by the Threat Assessment Team as appropriate, who will determine appropriate interim measures based on the known facts and their expertise. Whenever the presence of an accused person is deemed to pose an ongoing threat to the campus community, or to otherwise create a hostile educational environment, University College will impose interim

> measures as appropriate to maintain the safety and wellbeing of the campus community.

Finally, an educational institution should build in an appeal process for students to challenge any issuance of an interim protective measure against them:

> Upon implementation of any interim protective measure against an accused person, that person will receive written notice of the same and have an opportunity to be promptly heard on the imposition of the measures by the Dean of Students and/or the Chief of Police who will consider the determination of the Dean of Students' Office and/or the Police Department along with any determination made by the Threat Assessment Team to assess whether the interim protective measure is appropriate under the known facts to preserve campus safety or otherwise address a hostile free educational environment pending the outcome of the campus disciplinary process.

Practice makes perfect, so at least once a year, educational institutions should run through a model scenario to use such policies. This ensures that all campus offices and officials referenced in these written policies and procedures can coordinate effectively with one another to assess and implement interim protective measures in a timely fashion.[134]

VI. CONCLUSION

By issuing default mutual no contact orders against complainants, educational institutions are implementing inequitable interim measures that tend to perpetuate rather than remedy hostile educational environments in violation of Title IX. By further limiting a complainant's access to campus whenever the accused perpetrator is present, mutual no contact orders impede a complainant's equal access to education. Instead of ensuring equal

134. Ideally educational institutions will run the scenario prior to the start of the new school year, which is often referred to as the "red zone" when freshmen and sophomore women are at particular risk of peer-perpetrated sexual assault on campus. *See, e.g.*, CHRISTOPHER P. KREBS, ET. AL, THE CAMPUS SEXUAL ASSAULT STUDY (2007); *see also* Peter Jacobs, *The 'Red Zone' is a Shockingly Dangerous Time for Female College Freshmen*, BUS. INSIDER (July 14, 2014), https://www.businessinsider.com/red-zone-shockingly-dangerous-female-college-freshmen-2014-7.

educational access through equitable interim measures, institutions are imposing default mutual no contact orders without consideration of the differing positions of the complaining and responding parties during the pending Title IX grievance process. This practice fails to consider whether the underlying factual allegations of a sexual misconduct complaint even justify the potential deprivation of a complainant's educational access. As educational institutions continue to grapple with the requirements of federal law around the contentious issue of campus sexual misconduct, they should remember that the primary purpose of Title IX is to guarantee equal educational access to the protected class of students—those discriminated against, harassed, or suffering violence on the basis of sex.[135] As argued above, mutual is not always equitable; thus, mutual no contact orders may not sufficiently protect complainants nor satisfy the requirements of applicable laws when imposed as a default without consideration of the known facts.[136] Instead of imposing default mutual no contact orders, educational institutions should adopt written policies and procedures that consider the underlying factual allegations in a sexual misconduct complaint as well as the differing positions of the parties before determining what interim protective measures to implement during the Title IX grievance procedure. Such protective measures must ensure equal educational access under Title IX by seeking to remedy or prevent a hostile educational environment. Only upon such considerations will an issued mutual no contact order be equitable, rather than merely equal.

135. *See supra* text accompanying note 27; *supra* Section IV(C).

136. *See supra* Section IV(A)(2).