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The Title IX Contract Quagmire

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COMMENT

THE TITLE IX CONTRACT QUAGMIRE

*Bryce Freeman**

Courts and scholars have long grappled with whether and to what extent educational institutions are in contract with their students. If they are, then students can sue their private universities for breaching that contract—ordinarily understood as the student handbook and other materials—when the institution levies a disciplinary action against the student. But what promises, both implicit and explicit, do private universities make to their students that courts should enforce? This question has resurfaced in the Title IX context, where courts have largely drawn clear dividing lines between the rights of public and private university students. This Comment provides a framework to understand courts' approaches to contract law and higher education as well as implications for Title IX.

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INTRODUCTION

Few legal questions are as important, sensitive, and controversial as what procedures colleges and universities should use to adjudicate complaints of campus sexual assault. Studies have found that nearly one out of four female undergraduate students experience sexual assault.[1] Most incidents go unreported.[2] The reasons for not reporting include a sense that the conduct was not serious enough to report, feelings of embarrassment, and concern that nothing will be done about the misconduct.[3] When survivors do report, Title IX interpretive guidance requires universities to investigate the complaint and respond through conducting "grievance procedures."[4] Since the Department of Education's 2011 "Dear Colleague" Letter,[5] critics have charged that the procedures at these "quasi-judicial" hearings are biased against the accused.[6] Soon after taking office, the Trump Administration rescinded the "Dear Colleague" Letter and initiated a rulemaking process[7] that has also been heavily criticized.[8] Almost ten years after the "Dear Colleague Letter,"

1. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 83 tbl.3-22 (2015), https://www.aau.edu/sites/default/files/%40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [https://perma.cc/TWR9-JS42]. Reporting rates range from 5 percent to 28 percent depending on the type of behavior. *Id.* at xxi.

2. *Id.* at iv.

3. *Id.*

4. *See infra* Section I.A.

5. Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on Sexual Violence (Apr. 4, 2011) [hereinafter Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [https://perma.cc/T8HQ-Y97K].

6. Lara Bazelon, *The Landmark Sexual Assault Case You've Probably Never Heard of*, POLITICO MAG. (Apr. 18, 2017), https://www.politico.com/magazine/story/2017/04/sexual-assault-title-ix-trump-california-san-diego-215037 [https://perma.cc/E8ST-AJT8]; *see also infra* Section I.A.

7. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (allowing an institution to use a preponderance standard only if it also uses that standard for violations of its code of conduct that carry the same potential maximum sanction); Candice Jackson, Acting Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter on Campus Sexual Misconduct (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf [https://perma.cc/8PDV-HTFW].

8. *See* Tovia Smith, *Trump Administration Gets an Earful on New Campus Sexual Assault Rules*, NPR (Jan. 30, 2019, 7:32 AM), https://www.npr.org/2019/01/30/689879689

the public continues to struggle to answer the critical question of what procedures universities are obligated to afford to survivors and those accused of sexual misconduct.

Beneath the surface of this difficult question lies another: Are private university students in contract with their universities, and if so, what are the terms of the contractual relationship? When universities discipline students accused of sexual misconduct, those students often seek judicial review.[9] All students may sue under Title IX statutory remedies, which require a finding of gender bias,[10] and public university students may sue under the Due Process Clause.[11] Private university students, though, generally cannot sue under due process and instead pursue breach of contract claims.[12] These students allege that they are in contract with their private educational institutions and then point to the terms of their student handbooks, as well as notions of "fundamental fairness," as the source of a private university's contractual obligations in Title IX investigations and hearings.[13] The question of what private universities owe their students is not new,[14] but the blend of public and private law that is private universities' contractual liability in the Title IX context is yet unexplored.

This Comment proposes a framework for understanding the contractual liability of private universities and uses the recent surge of Title IX litigation as the basis for this inquiry. Though not comprehensive, the framework is a heuristic for appreciating the range of judicial approaches. It avoids the difficult questions of what procedures and standards should be employed, leaving that problem to other commentators, practitioners, and affected students. Instead, this Comment analyzes how courts have—or have not—stretched the boundaries of contract law in a way that provides private university students with equal access to judicial review of their institution's sexual misconduct disciplinary actions. While some courts applying contract law have adhered closely to the fundamental contract law principles one might learn in a first-year contracts course,[15] others have openly departed from these principles to facilitate equitable opportunity for judicial review between public and private university students.[16] Still others land somewhere in the middle, using contract law to create a door to judicial review for students, but leaving the key with the institution itself.[17]

/education-department-gathers-feedback-on-new-campus-sexual-assault-rules [https://perma.cc/6QKV-YUCT].

9. *See infra* Section I.B.
10. *See infra* Section I.B.2.
11. *See infra* Section I.B.1.
12. *See infra* Section I.B.3.
13. *See infra* Section I.B.3.
14. *See infra* Section I.B.3.
15. *See infra* Section II.B.2 (analyzing the Virginia Model).
16. *See infra* Section II.B.1 (analyzing the Massachusetts Model).
17. *See infra* Sections II.B.3–4 (analyzing the New York and Pennsylvania Models).

Part I explores the legal landscape governing Title IX grievance procedures, the causes of action plaintiffs employ against their universities, and the existing literature on the contractual liability of private universities. Part II analyzes four approaches to contractual liability courts have taken in the Title IX context. The Comment concludes by highlighting the approach taken by courts applying Pennsylvania law, which strikes the best balance between providing private universities with equitable access to judicial review while still adhering to ordinary principles of contract law.

I. TITLE IX GRIEVANCE PROCEDURES AND RELATED LAWSUITS

The U.S. Department of Education's Office for Civil Rights (OCR) has worked to reduce the incidence of sexual misconduct on college campuses by encouraging institutions to respond with disciplinary action.[18] Ensuring that reported instances of misconduct are taken seriously while also providing some protections for the accused is a difficult task—one that OCR has grappled with for decades.[19] Survivors deserve a system that responds to their complaints without causing undue stress,[20] and the accused are entitled to some minimum safeguards for their constitutionally protected interests in completing their education.[21]

The debate over how to balance these interests often sounds in due process. While plaintiffs' arguments will be referred to as "due process" claims for convenience, in reality there are several causes of action available to such plaintiffs, including statutory causes of action and breach of contract. Yet these claims are not available to all plaintiffs and vary considerably in terms of what plaintiffs must plead to survive motions to dismiss. This Part first situates the recent flurry of contractual claims within the statutes, regulations, and guidance documents shaping disciplinary procedures for students. It then discusses the causes of action available to those seeking to challenge the results of these disciplinary procedures, including due process, statutory

18. *See* S. Daniel Carter, *In Defense of the Title IX Dear Colleague Letter*, HUFFPOST (Sept. 16, 2017, 10:45 PM), https://www.huffingtonpost.com/entry/in-defense-of-the-title-ix-dear-colleague-letter_us_59bddb9ae4b06b71800c3a2f [https://perma.cc/US7Q-NVD8] (arguing the Department of Education's 2011 "Dear Colleague" Letter, discussed *supra* note 5, was successful in adding protections for both survivors and the accused while also pressuring universities to take more seriously their role in combatting sexual harassment).

19. *See infra* note 27 and accompanying text.

20. Multiple survivors have publicly criticized their universities for failing to adequately respond to their complaints of campus sexual assault, often forcing survivors to either attend classes with the accused or else leave the university themselves. *See, e.g.*, Audrey Chu, *I Dropped Out of College Because I Couldn't Bear to See My Rapist on Campus*, VICE (Sept. 26, 2017, 12:51 PM), https://www.vice.com/en_us/article/qvjzpd/i-dropped-out-of-college-because-i-couldnt-bear-to-see-my-rapist-on-campus [https://perma.cc/8TGV-UFLJ].

21. *See* Doe v. Ohio State Univ., 311 F. Supp. 3d 881, 892 (S.D. Ohio 2018) (finding that the plaintiff's interest in continuing his medical education and applying to residencies was "substantial" for due process purposes and that the plaintiff's expulsion threatened those interests through forcing him to enroll in an offshore medical school and making him ineligible for federal student loans).

causes of action, and breach of contract. This discussion reveals that Department of Education efforts to combat campus sexual assault have reignited a debate within courts about whether and to what extent private universities are subject to contract claims from their students.

A. *The Statutory and Regulatory Background of Title IX Grievance Procedures*

The complex web of campus sexual assault adjudication began in 1972 with Title IX of the Education Amendments.[22] The statute provides that "[n]o 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."[23] This mandate has enormous reach, encompassing any public or private school for any age group, including institutions of higher education.[24] Under Title IX's effectuating regulations, institutions must "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" of actions in violation of Title IX.[25] When OCR finds an institution has discriminated on the basis of sex, thereby violating Title IX, the institution must take "remedial action."[26]

While OCR has published guidance on how universities should take "remedial action" regarding peer-on-peer sexual harassment since at least the mid-1990s,[27] OCR's 2011 guidance marked a crucial turning point in how grievance procedures were viewed by the public and courts. In its April 2011 "Dear Colleague" Letter (DCL), OCR discussed both preventative and remedial measures to address campus sexual misconduct that would allow universities to demonstrate compliance with Title IX.[28] Core to this effort was requiring schools to resolve complaints of sexual harassment in a "prompt and equitable" manner, which may include disciplinary action against the accused student, accommodations for the complainant, and rem-

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22. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

23. 20 U.S.C. § 1681(a) (2012).

24. *Id.* § 1681(c). Only a handful of private educational institutions refuse to accept any federal funds. *See* Ibby Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253 [https://perma.cc/N5MJ-KKYR].

25. 34 C.F.R. § 106.8(b) (2019).

26. *Id.* § 106.3(a).

27. Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034 (Mar. 13, 1997). In 2001, OCR issued revised guidance establishing that, where a school knows or should know of an incident of sexual harassment, "the school is responsible for taking immediate effective action to eliminate the hostile environment and prevent its recurrence." U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 12 (2001).

28. Dear Colleague Letter, *supra* note 5.

edies for the broader student population.[29] While the DCL permitted a wide amount of variance in the structure of grievance procedures from school to school, it noted that compliance with Title IX requires "[a]dequate, reliable, and impartial investigation of complaints, including the opportunity for both parties to present witnesses and other evidence."[30] Failure to comply with the Title IX "prompt and equitable" requirement may result in the loss of federal funds.[31]

Much of the scholarly attention given to the DCL has focused on whether the protections OCR expects universities to provide to accused students satisfy due process. Generally speaking, due process requires government actors to provide individuals notice of state actions against them and an opportunity for a fair hearing.[32] In the criminal context, the Court has held that due process requires both proof beyond a reasonable doubt[33] and the ability for defendants to cross-examine their accusers.[34] OCR made clear in the DCL, however, that it expected universities to use a preponderance standard to reach findings of "responsibility"[35] and to bar the opportunity for the accused to cross-examine complainants.[36] Because a finding of responsibility can result in disciplinary action up to expulsion and be permanently reflected on a student's transcript, OCR's expectations for grievance procedures and satisfaction of due process requirements have been subject to considerable controversy.[37]

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29. *Id.* at 9, 16–17.

30. *Id.* at 9.

31. *Id.* at 16.

32. Mathews v. Eldridge, 424 U.S. 319, 348 (1976). Important for the purposes of this Comment, Judge Friendly deemed judicial review one element of a fair hearing in his seminal article on the subject. *See* Henry J. Friendly, *"Some Kind of Hearing,"* 123 U. PA. L. REV. 1267, 1294–95 (1975).

33. *In re* Winship, 397 U.S. 358, 368 (1970). *But see* Addington v. Texas, 441 U.S. 418, 431–33 (1979) (holding a clear and convincing evidence standard is constitutionally adequate in civil commitment cases).

34. *See* Goldberg v. Kelly, 397 U.S. 254, 269–70 (1970) ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses.").

35. *See* Dear Colleague Letter, *supra* note 5, at 10. OCR uses the term "responsibility" to describe situations in which the university reaches the conclusion that a student violated the school's sexual misconduct policy. *E.g.*, OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 5 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf [https://perma.cc/S9MW-X9GC].

36. Dear Colleague Letter, *supra* note 5, at 12.

37. *Compare, e.g.*, Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J.F. 281, 291 (2016) ("Using anything more stringent than a preponderance standard would symbolize that we as a society are comfortable with giving one group of women and girls, as well as men and boys who are gender-minorities and victimized because of it, *un*equal treatment when compared to everyone else."), Sheridan Caldwell, Note, *OCR's Bind: Administrative Rulemaking and Campus Sexual Assault Protections*, 112 NW. U. L. REV. 453, 476–86 (2017) (arguing the preponderance standard serves a critical role in establishing procedural equality between the survivor and the alleged perpetra-

While scholarly attention has overwhelmingly focused on the question of grievance procedures as *fair hearings*, this Comment is primarily concerned with the effects of the DCL's *notice* provisions.[38] The DCL included recommendations to universities on how exactly to notify students of the availability and characteristics of these procedures. OCR expected that "grievance procedures be prominently posted on school Web sites; sent electronically to all members of the school community; available at various locations throughout the school or campus; and summarized in or attached to major publications issued by the school, such as handbooks, codes of conduct, and catalogs."[39] Further, the DCL specified that these materials should include "what constitutes sexual harassment or violence[,] . . . what to do if a student has been the victim of sexual harassment or violence[,] . . . [and] what the school will do to respond to allegations of sexual harassment or violence."[40] The DCL therefore operated not only to influence the processes and standards used in grievance procedures but also the way institutions inform students of their rights and responsibilities under Title IX.

In many jurisdictions, student handbooks and other materials are considered part of a legally binding contract between students and their universities.[41] Assuming for a moment that all private university student handbooks are contracts, OCR effectively required universities to modify

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tor), *and* Emma Ellman-Golan, Note, *Saving Title IX: Designing More Equitable and Efficient Investigation Procedures*, 116 MICH. L. REV. 155, 179–86 (2017) (arguing that modest reforms, including a higher evidentiary standard where the alleged conduct could also amount to a felony and the outsourcing of fact-finding to investigation centers, would effectively balance OCR's goals and rights of accused students), *with* Tamara Rice Lave, *Ready, Fire, Aim: How Universities Are Failing the Constitution in Sexual Assault Cases*, 48 ARIZ. ST. L.J. 637, 683–84, 692–96 (2016) (arguing that due process requires that accused students have the ability to cross-examine their accuser and other witnesses, but conceding that the preponderance standard is likely to satisfy due process requirements), John Villasenor, *A Probabilistic Framework for Modelling False Title IX 'Convictions' Under the Preponderance of the Evidence Standard*, 15 LAW PROBABILITY & RISK 223, 223 (2016) (demonstrating "an innocent [Title IX] defendant faces a dramatically increased risk of conviction when tried under the preponderance of the evidence standard as opposed to under the beyond a reasonable doubt standard"), *and* Letter from Ann E. Green & Cary Nelson, Am. Ass'n of Univ. Professors, to Russlynn Ali, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ. (Aug. 18, 2011), https://www.aaup.org/NR/rdonlyres/FCF5808A-999D-4A6F-BAF3-027886AF72CF/0/officeofcivilrightsletter.pdf [https://perma.cc/G7PG-XF7T] (arguing the preponderance standard will not adequately protect those accused of sexual misconduct).

38. Other recent Notes have discussed the existence of these contractual claims without thoroughly exploring the doctrine. *See, e.g.*, Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2313–14 n.212 (2016) (identifying the distinction between Massachusetts and Virginia law); Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 502–05 (2012) (simply noting that courts have been "inconsistent" in their consideration of contract claims against universities).

39. Dear Colleague Letter, *supra* note 5, at 9.

40. *Id.* at 17–18.

41. *See infra* Part II.

their contracts with up to four million students[42] when it issued the DCL. Independent of the debate over the substance of OCR's guidance, this phenomenon led to a fresh batch of cases to understand the contractual liability of private universities vis-à-vis their students.[43] But to fully understand the relevance of this contract theory, one must also understand the other most common causes of action students use against their universities: due process and Title IX statutory claims.

B. *Causes of Action Available to Challenge Grievance Procedure Outcomes*

After a university disciplines a student accused of sexual misconduct following a Title IX grievance procedure, beyond an institution's internal appeal processes, the student may turn to state or federal courts for recourse.[44] Whether a student attends a public or private institution significantly affects what causes of action are available to them.[45] Most significantly, a student at a public university may bring a claim under the Fourteenth Amendment Due Process Clause.[46] But such a claim is unavailable to students at private universities, which are outside the scope of the Due Process Clause per the state action requirement.[47] Instead, students at private universities looking to challenge a disciplinary action must bring alternative claims, including Title IX statutory claims[48] and breach of contract claims.[49] Because public and private universities face the same legal obligations under Title IX, this disparity in the availability of causes of action raises concerns over unequal access to judicial review between public and private university students.

While many courts have recognized the student–college relationship as contractual—with the terms of the contract found in the student handbook and other materials[50]—others have explicitly rejected this cause of action.[51] It is necessary, therefore, to consider the range of causes of action available to private university students and the extent of judicial review under each.

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42. *Undergraduate Enrollment*, NAT'L CTR. FOR EDUC. STAT. (updated May 2019), https://nces.ed.gov/programs/coe/indicator_cha.asp [https://perma.cc/R6MR-3H3B].

43. *See infra* Part II.

44. Triplett, *supra* note 38, at 493.

45. *See id.* at 497–505 (comparing constitutional due process claims at public universities with contractual due process claims at private universities and finding that "private-college students are less protected than their public-school peers").

46. *See infra* Section I.B.1.

47. *See infra* Section I.B.1.

48. *See infra* Section I.B.2.

49. *See infra* Section I.B.3.

50. *See infra* Section II.B.

51. *See infra* Section II.B.2.

1. Due Process

A due process cause of action alleges that the university's disciplinary procedure denied the student fair notice or opportunity to be heard in violation of the Fourteenth Amendment.[52] Such claims have the advantage of allowing for review of a wide variety of both facial and as-applied deficiencies in a given procedure under a clear legal framework. Courts hearing § 1983 due process challenges apply the *Mathews v. Eldridge* test to determine which procedures are necessary in a particular context.[53] The *Mathews* test requires courts to consider the private interest affected, the risk of erroneous deprivation of the private interest through the procedures used, the likely value of additional procedural safeguards, and the costs to the government actor in facilitating these procedures.[54] Applying these factors, courts have gone so far as to hold that the Due Process Clause requires public universities to provide the accused an opportunity for cross-examination during Title IX grievance procedures,[55] contrary to OCR's guidance set out in the DCL.[56]

Doe v. Ohio State University typifies the application of the *Mathews* factors to a school's grievance procedures.[57] There, a public university medical student accused of sexual misconduct claimed he was deprived of due process because he was not permitted to effectively cross-examine the complainant at a hearing.[58] Applying the *Mathews* test, the court reasoned that because (1) the private interest at stake (the plaintiff's continuing medical education and professional prospects) was substantial, (2) the denial of full cross-examination directly contributed to the risk of erroneous deprivation, and (3) the cost to the government was minimal, the university may have been required to provide an opportunity to cross-examine the complainant.[59] There was no need, however, to show gender bias, in contrast with Title IX statutory claims discussed next.

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52. *See, e.g.*, Doe v. Ohio State Univ., 311 F. Supp. 3d 881, 889 (S.D. Ohio 2018).

53. 424 U.S. 319 (1976); *e.g.*, *Ohio State Univ.*, 311 F. Supp. 3d at 891–92.

54. *Mathews*, 424 U.S. at 335.

55. *E.g.*, Doe v. Baum, 903 F.3d 575, 588 (6th Cir. 2018). *But see* Haidak v. Univ. Mass.-Amherst, No. 18-1248, 2019 WL 3561802, at *8–9 (1st Cir. Aug. 6, 2019) (holding that due process requires "some opportunity for real-time cross-examination, even if only through a hearing panel," but not that the accused himself have the opportunity to cross-examine the complainant (quoting Brief of Amicus Curiae Found. for Individual Rights in Educ. in Support of Plaintiff-Appellant at 21, *Haidak*, 2019 WL 3561802 (No. 18-1248))).

56. *See* Dear Colleague Letter, *supra* note 5, at 12.

57. *Ohio State Univ.*, 311 F. Supp. 3d at 891–93.

58. *Id.* at 882, 887–89.

59. *Id.* at 892. The court noted that "cross-examination is 'essential to due process' . . . in a case that turns on 'a choice between believing an accuser and an accused.' " *Id.* (quoting Doe v. Ohio State Univ., 219 F. Supp. 3d 645, 663 (S.D. Ohio 2016)). Missing from the court's analysis are the potential adverse effects of cross-examination on the complainant herself. *See* Dear Colleague Letter, *supra* note 5, at 12 ("Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a

While due process is the main avenue for public university students challenging the outcome of grievance procedures, the state action doctrine generally forecloses the same claims from private university students.[60] Indeed, the DCL itself suggests that private universities need not comply with due process requirements.[61] Thus, while public university students who litigate their disciplinary action have a clear path under due process, students at private universities likely have to depend on one of the following two causes of action.

2. Title IX Statutory Claims

For decades, lower courts have interpreted Title IX to create two distinct categories of statutory claims for complainants and respondents challenging the outcome of a university disciplinary proceeding.[62] The Second Circuit's decision in *Yusuf v. Vassar College* is credited with identifying these claims: "erroneous outcome" and "selective enforcement."[63] To plead an erroneous outcome claim, the plaintiff must both allege sufficient facts to cast doubt on the accuracy of the outcome of the proceeding and make a plausible showing

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hostile environment."). The Sixth Circuit ultimately held that due process does require the right to cross-examine the complainant in a grievance procedure "if credibility is in dispute and material to the outcome." *Baum*, 903 F.3d at 584. Unlike in *Ohio State University*, the court in *Baum* did consider the university's interest in subjecting survivors to further harm. *Id.* at 583.

60. Some private university students have sought to invoke due process protections under a Fifth Amendment theory, namely that the Department of Education had a "sufficiently close nexus" with the private university when it issued the DCL and threatened to withhold federal funds. This theory has not been effective in circumventing the state action doctrine. *See* Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *8 (W.D. Va. Aug. 5, 2015) ("Plaintiff argues that W&L's actions violated his Fifth Amendment right to due process. Had Plaintiff been enrolled at a public university, he would have been entitled to due process and the proceedings against him might have unfolded quite differently. Unfortunately for Plaintiff, W&L is a private university, and as such, is generally not subject to the constitutional protections of the Fifth Amendment.").

61. *See* Dear Colleague Letter, *supra* note 5, at 12 ("*Public and state-supported schools* must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant." (emphasis added)).

62. Yusuf v. Vassar Coll., 35 F.3d 709, 714–15 (2d Cir. 1994). The U.S. Supreme Court has also recognized a "deliberate indifference" claim under Title IX that applies where an educational institution reaches "an official decision . . . not to remedy" a violation of Title IX. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 290 (1998). A deliberate indifference claim is cognizable where the school had actual knowledge of the student-on-student sexual harassment and the harassment was so severe and pervasive that it deprived the victims of access to equal educational opportunities. Davis *ex rel.* LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 638–53 (1999). While this claim is clearly useful to survivors of sexual misconduct who argue their educational institutions failed to adequately respond to their complaints, courts have been skeptical of its use in challenging the outcomes of a disciplinary proceeding. *E.g.*, Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 825 (E.D. Pa. 2017).

63. *See* Doe v. Cummins, 662 F. App'x 437, 451 (6th Cir. 2016).

that gender bias motivated the erroneous finding.[64] Plaintiffs can demonstrate gender bias through Title IX statements indicating bias or patterns of decisionmaking that suggest the influence of gender.[65] A selective enforcement claim, in contrast, asserts that notwithstanding a student's guilt, gender was a motivating factor in deciding to initiate the proceeding or to make the penalty more severe.[66] While a plaintiff may plead both claims in the alternative, the allegations of gender bias must be more than merely conclusory to survive a motion to dismiss.[67]

Title IX statutory claims in this context are therefore largely concerned with what some might call isolated incidents of "reverse gender discrimination."[68] Courts and commentators alike have paid significant attention to the jurisdictional split over the level of specificity required for an allegation of gender bias to survive a motion to dismiss.[69] A majority of courts require some specific statistical evidence or statements by university officials to meet this burden, while a minority allow for cases to advance to discovery without such facts.[70] Either way, because not all disputes over the fairness of a grievance procedure involve gender bias, Title IX statutory causes of action are an incomplete substitute for due process claims for private university students. If Title IX claims were the only means available to seek judicial review of a private university grievance procedure determination, then a large gap in access to judicial review would exist relative to the public university context. But in many jurisdictions, the breach of contract cause of action fills this gap.

3. Breach of Contract

Students at private universities often rely on breach of contract to obtain judicial review of the outcome of a grievance procedure. These students argue that the student–university relationship is contractual and point to the student handbook and other materials as terms of the contract.[71] Recall that the DCL encouraged educational institutions to publicize grievance proce-

64. *Yusuf*, 35 F.3d at 715.

65. *Id.*

66. *Id.*

67. *Id.*

68. *E.g.*, Bethany A. Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and* Twombly/Iqbal *in Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2665, 2688 (2017) (analyzing pleading standards in "reverse Title IX claims").

69. *See, e.g.*, Doe v. Brown Univ., 166 F. Supp. 3d 177, 186–90 (D.R.I. 2016); Corbin, *supra* note 68, at 2695–2702.

70. Corbin, *supra* note 68, at 2695–2702 (comparing and contrasting the approaches courts have taken regarding Title IX "reverse gender discrimination" claims and noting the minority view may be ascendant among courts).

71. *E.g.*, Doe v. W. New Eng. Univ., 228 F. Supp. 3d 154, 169 (D. Mass. 2017). For simplicity, this Comment refers to the entire contract as the "student handbook," although it may include other materials.

dures and definitions of sexual misconduct in their student handbooks.[72] Therefore, the breach of contract theory reasons that the DCL effectively superimposed an institution's requirements under Title IX onto the contractual relationship with its students.

Students have sued their private colleges or universities under contractual theories for decades, and they have done so in both state and federal court.[73] Countless university actions, such as expulsion for academic failure[74] or suspension for disruptive conduct,[75] have sparked these lawsuits. Aggrieved plaintiffs, in turn, have sought remedies that include damages[76] and injunctions[77] against the disciplinary actions.

Commentators have long expressed both interest in and skepticism of the idea that contract law is the appropriate vehicle for enforcing procedural protections for private university students. One early note argued that private university students have a substantial interest in their status as students that creates obligations for their institutions.[78] Under this view, contract is an inadequate means to enforce these obligations.[79] Rather than inquiring into what parties owe each other as associates, the focus is on what terms are set out in the contract signed at matriculation and in the university's rules and regulations.[80] The law of private associations, then, is more appropriate and effective as it would extend the protections of common law due process to private university students.[81] A more recent note identified numerous practical limitations to contract law in this context, including that it forecloses any balancing of the university's interests and, at the same time, entrenches the university's superior bargaining position.[82] Still others support

72. *See* Dear Colleague Letter, *supra* note 5, at 16–18.

73. Though breach of contract claims are often limited to state courts, most of the cases discussed in Part II are decided in federal courts because students have federal statutory causes of action available to them under Title IX. Thus, federal courts have frequently applied state contract law in the Title IX grievance procedure context, whether because plaintiffs originally file in federal court or because defendants remove to federal court. Diversity of citizenship may provide an alternative route to subject-matter jurisdiction. *See, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 567 (D. Mass. 2016).

74. *E.g.*, Raethz v. Aurora Univ., 805 N.E.2d 696, 697 (Ill. App. Ct. 2004).

75. *E.g.*, Tedeschi v. Wagner Coll., 404 N.E.2d 1302, 1303–05 (N.Y. 1980).

76. *E.g.*, Fussell v. La. Bus. Coll. of Monroe, Inc., 519 So. 2d 384, 387–88 (La. Ct. App. 1988) (providing return of tuition and damages for delaying career as a legal secretary).

77. *E.g.*, Corso v. Creighton Univ., 731 F.2d 529, 532–33 (8th Cir. 1984) (enjoining expulsion of student for allegedly cheating on exams and requiring new hearing in accordance with terms set out in student handbook prior to expulsion).

78. Note, *Common Law Rights for Private University Students: Beyond the State Action Principle*, 84 YALE L.J. 120, 144 (1974).

79. *Id.*

80. *Id.* at 143–44.

81. *Id.* at 144.

82. Scott R. Sinson, Note, *Judicial Intervention of Private University Expulsions: Traditional Remedies and a Solution Sounding in Tort*, 46 DRAKE L. REV. 195, 208–11, 232 (1997)

contract law as the "doctrinal foundation" for review of private universities' disciplinary actions but call for courts to look beyond mere compliance with established procedures to ensure fundamentally fair procedures.[83] At least one scholar has quantitatively studied whether contract claims have in effect achieved equal access to judicial review for private university students. Professor Perry Zirkel found that contract theories protect private university students from disciplinary sanctions as effectively as due process claims at public universities.[84] But others have expressed concern, at least in the Title IX context, that private university students have more limited access to judicial review than their public university counterparts.[85]

The discussion that follows in Part II reveals two truths about contractual claims against private universities. First, courts continue to struggle with whether private universities are actually in contract with their students.[86] Courts at times explicitly raise concerns over the DCL, complicating the contract analysis.[87] Second, the scholarly divide over the effectiveness of breach of contract claims in equalizing access to judicial review is explained by the yet underexplored fact that these claims receive vastly inconsistent treatment across jurisdictions.[88]

(identifying contract as the source of a private university's duty to its students but advocating for a negligence approach).

83. Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 685–86 (2001) (arguing that a four-corners approach to student procedural protections "invites private schools to eliminate procedures to avoid violating them" and noting that counsel have advised private universities to avoid promises of highly specific procedural protections).

84. *See* Perry A. Zirkel, *Procedural and Substantive Student Challenges to Disciplinary Sanctions at Private—as Compared with Public—Institutions of Higher Education: A Glaring Gap?*, 83 MISS. L.J. 863, 893 (2014). Professor Zirkel's dataset includes ninety-five cases featuring judicial review of private college or university disciplinary proceedings, of which fifteen involved sexual harassment or assault. *Id.* at 882–83. He concludes that "partisan characterizations of sanctioned students at private [colleges or universities] being without a right of action or with only a 'dull stick' as compared with the 'sharp sword of constitutional safeguards' merit reexamination under the lenses of objective systematic analysis." *Id.* at 901 (footnotes omitted). Notably, however, his analysis is limited to ninety-five cases, fifty of which were filed in New York, Massachusetts, and Pennsylvania. Only two cases were filed in Minnesota, and one was filed in Virginia. *Id.* at 881 & n.81.

85. Triplett, *supra* note 38, at 490–91, 502–03.

86. *Compare, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 593 (D. Mass. 2016) ("It is well-established that the student-college relationship is contractual in nature."), *with* Doe v. Marymount Univ., 297 F. Supp. 3d 573, 587–88 (E.D. Va. 2018) ("Under Virginia law, a University's student conduct policies are not binding, enforceable contracts; rather, they are behavior guidelines that may be unilaterally revised by Marymount at any time.").

87. *See, e.g.*, *Brandeis Univ.*, 177 F. Supp. 3d at 572. In *Brandeis*, the court noted that while OCR's goal of reducing sexual assault is "laudable," the question "[w]hether the elimination of basic procedural protections . . . is a fair price to achieve that goal is another question altogether." *Id.* Because the contract analysis under Massachusetts law asks whether students were afforded "basic fairness," a judgment of what the DCL accomplished prior to reaching the contract analysis seems to conflate these two separate questions. *See infra* Section II.B.1.

88. *See supra* note 38.

II. THE JURISDICTIONAL SPLIT ON STUDENT HANDBOOKS AS CONTRACTS

Courts are split on whether and to what extent student handbooks are binding contracts that place private university students on effectively equal legal footing with public university students. Because the DCL urged universities to publish their grievance procedures in student handbooks, accused students have argued that these procedures are part of a contract they have with their university, deviations from which can support a claim for breach of contract. These lawsuits have led to a flurry of decisions discussing the contractual liability of private universities. A close examination of these opinions sheds new light on how courts evaluate the contractual liability of private universities. But the import of these decisions goes beyond a lawyer's interest in contract doctrine. The effect of the court split is that for students at private universities, availability of judicial review of Title IX grievance procedures depends on an accused's jurisdiction.

This Part analyzes this court split. Section II.A identifies two considerations courts use to evaluate contractual claims against private universities—courts are interested not just in adhering to ordinary principles of contract law, but also in providing equitable access to judicial review for students at private universities. Section II.B then discusses four models and considers the implications of each.

A. *Considerations for Evaluating the Contractual Liability of Private Universities*

In deciding whether plaintiffs adequately state breach of contract claims, courts have acknowledged that recognizing the student–private university relationship as contractual raises a risk of departing from "ordinary" contract doctrine.[89] The consequences of finding this relationship to be contractual affect both student and institution. In terms of harms toward the student, the chief criticism is that student handbooks, the source of the contract's terms, lack mutuality of obligation.[90] As at least one court has noted,

89. *See, e.g.*, *Brandeis Univ.*, 177 F. Supp. 3d at 612.

90. *See* Jackson v. Liberty Univ., No. 6:17-CV-00041, 2017 WL 3326972, at *5 (W.D. Va. Aug. 3, 2017) (recognizing "that Virginia law requires an absolute mutuality of engagement between the parties to a contract such that each party is bound and has the right to hold the other party to the agreement" and, as a result, dismissing a plaintiff's breach of contract claims where the alleged contract was the university's student handbook and sexual assault policies). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. f (AM. LAW INST. 1981) (asserting that the term "mutuality" lacks "definite meaning" and that a requirement that both parties be bound is "obviously erroneous as applied to an exchange of promise for performance"). There is arguably disagreement as to whether mutuality of obligation, strictly speaking, is a component of contract doctrine at all. The case of the student handbook, which a university can revise at any time, may instead be properly understood as folded into the requirement of consideration and can be characterized as an illusory promise. Illusory promises are sufficient to void a contract for lack of consideration where the promisor retains, as is arguable in this case, too much discretion over whether to carry out the promise. *Cf.* Omni Grp., Inc. v. Seattle-First Nat'l Bank, 645 P.2d 727, 729 (Wash. Ct. App. 1982) (finding the promise to complete a pur-

universities retain the freedom to modify the terms of their student handbooks at any time after students matriculate.[91] To recognize these handbooks as contracts may lead to universities making fewer or vaguer promises within their handbooks.[92] Another consequence might be a loss in private institutions' autonomy. At its core, contract law is meant to facilitate "private legislation" that binds parties who mutually assent to agreed-upon terms.[93] For a court to write terms into a private university's written grievance procedures may undermine the very heart of what it means to be in contract and subject the university to contractual liability for terms to which it did not agree.[94] Relatedly, courts hesitate to interfere with university decisions on how to allocate their own resources.[95] The reasons for narrowly construing the contractual obligations private universities owe their students are thus many and compelling.

Despite these concerns over adherence to contract doctrine, some courts have moved ahead with putting private university students on similar legal footing as public university students. In deciding whether plaintiffs adequately plead breach of contract claims, some courts have focused their analysis on notions of fairness and due process rather than the explicit terms of the contractual relationship.[96] Finding that plaintiffs can state breach of contract claims against their private universities has the effect of creating a path to judicial review where none would otherwise exist. Where one's ability to seek judicial review of the outcome of a grievance procedure depends on (1) whether one attends a private or public university and (2) if attending a private university, one's jurisdiction, there can be a yawning gap in access to judicial review despite similar allegations. This inequity occurs despite the fact

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chase of a home was not illusory where the promise was subject to buyer's satisfaction with a feasibility report). Despite the reticence of the Restatement to recognize that "mutuality of obligation" is a required characteristic of a contract, this Comment uses this term because it is the basis for Virginia's rejection of these causes of action.

91. *Marymount Univ.*, 297 F. Supp. 3d at 587–88.

92. If not binding contracts, then the terms of student handbooks may be characterized as "gratuitous promises" or simply gifts. Enforcing gratuitous promises may cause parties to make fewer such promises out of fear of contractual liability. Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1283, 1304–05 (1980).

93. *See* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 806–10 (1941).

94. This concern is perhaps overblown, as the vast majority of jurisdictions recognize that promises made within *employee* handbooks give rise to contractual liability, but private employers have largely retained the ability to terminate employees at will otherwise. *See* Brian T. Kohn, Note, *Contracts of Convenience: Preventing Employers from Unilaterally Modifying Promises Made in Employee Handbooks*, 24 CARDOZO L. REV. 799, 807–10, 810 n.66 (2003) (collecting cases).

95. *See, e.g.*, Doe v. Allee, 242 Cal. Rptr. 3d 109, 131–32 (Cal. Ct. App. 2019).

96. *See, e.g.*, Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 601, 603 (D. Mass. 2016) (noting "Brandeis's obligation to provide basic fairness in its proceedings is separate from and in addition to its contractual obligation to follow the rules it set forth in the Handbook" and explicitly invoking "basic and fundamental components of due process of law" in evaluating Brandeis's Title IX investigation into Doe).

that both private and public universities are subject to the requirements of Title IX and face an equal risk of losing federal funds for noncompliance. Courts have not gone so far as to name this gap as a reason for finding a private university liable under a contract theory, but their contortions of contract principles show an inclination to open the courthouse doors to students.

The various approaches to student handbooks and contractual liability should be evaluated in light of their adherence to ordinary principles of contract doctrine and the degree to which they further equity in access to judicial review. The next Section shows how courts have incorporated these concepts in their opinions.

B. *Four Models of Student Handbooks as Contracts*

This Comment proposes a framework for understanding the jurisdictional split on whether and to what extent breach of contract is a viable cause of action in the Title IX grievance procedure context. The split is best conceptualized as a spectrum, with the "Massachusetts Model" establishing a per se rule that student handbooks are contracts that incorporate due process jurisprudence at one end, and the "Virginia Model" at the other end, asserting that student handbooks are never contracts because they lack mutuality of obligation. In the middle are the jurisdictions that display differing degrees of adherence to contract doctrine and equitable access to judicial review between public and private university students. This Comment highlights two models, those of New York and Pennsylvania, that strike a more appropriate balance between these competing interests.

1. The Massachusetts Model

Students who challenge the results of a Title IX grievance procedure under breach of contract will find it easiest to survive a motion to dismiss in Massachusetts courts.[97] Under Massachusetts law, the relationship between a student and a university is based on a contract, the terms of which are contained in the student handbook.[98] Massachusetts has adopted a two-part inquiry for interpreting student–university contracts. First, the court asks what a student would reasonably expect upon reading the student handbook.[99]

97. Courts applying the law of other states have cited Massachusetts law approvingly without engaging in the "basic fairness" inquiry discussed *infra*. *See, e.g.*, Doe v. Rollins Coll., 352 F. Supp. 3d 1205, 1212 (M.D. Fla. 2019) (citing Doe v. Amherst Coll., 238 F. Supp. 3d 195, 215–20 (D. Mass. 2017)); Doe v. Brown Univ., 210 F. Supp. 3d 310, 331 (D.R.I. 2016) (citing Schaer v. Brandeis Univ., 735 N.E.2d 373, 381 (Mass. 2000)). Courts applying California law conduct a similar analysis. *See Allee*, 242 Cal. Rptr. 3d at 130–31 (noting that "[f]or practical purposes, common law requirements for a fair disciplinary hearing at a private university mirror the due process protections at public universities" and contrasting its approach with that of Pennsylvania).

98. Doe v. W. New Eng. Univ., 228 F. Supp. 3d 154, 169 (D. Mass. 2017).

99. *Id.* at 170.

Courts may conduct an exhaustive comparison between the procedures provided in the particular case and those promised in the handbook at the time of the proceeding.[100] Second, the court analyzes whether the student's hearing was conducted with "basic fairness."[101] At this stage, the court may refer to due process standards used in criminal cases to determine whether the private university's action met the basic fairness test, although it is "well-established" that private universities are not required to adopt such standards.[102]

Doe v. Brandeis University demonstrates the power of the Massachusetts Model in achieving equitable access to judicial review for private university students. The contract analysis is, at first, completely familiar; the court asked whether the university contravened its stated procedures as a student reasonably understood them based on the handbook's terms.[103] For instance, the plaintiff argued that Brandeis breached the terms of its handbook by failing to provide him with access to the investigator's report within forty-five days of his request.[104] Given some ambiguity in when the plaintiff requested the report, the court found it plausible that failing to provide the report could have prevented him from making an effective appeal.[105] The contract analysis continued, though, into the question whether Brandeis provided the plaintiff with "basic fairness," both procedurally and substantively.[106] The procedural analysis explicitly invoked due process requirements.[107] Requirements included the right to have notice of charges, retain counsel, confront the accuser, cross-examine witnesses, and review evidence.[108] The court

100. *Brandeis Univ.*, 177 F. Supp. 3d at 594–600 (finding that, because private universities may reserve the right to modify their handbooks, they may, for instance, apply the procedures set forth in a 2013–2014 handbook to adjudicate conduct that occurred in the 2011–2012 academic year).

101. *Id.* at 601. At other times, the District Court of Massachusetts has viewed the basic fairness doctrine as a separate cause of action, referring to the "common law duty of basic fairness." *See, e.g.*, *W. New Eng. Univ.*, 228 F. Supp. 3d at 182–83 (cleaned up).

102. *Brandeis Univ.*, 177 F. Supp. 3d at 602. In addition to breach of contract, students in Massachusetts may also allege a separate, but related, cause of action for breach of the implied covenant of good faith and fair dealing. Such a covenant "is implied in every contract" and requires parties to conform to "the overall spirit of the bargain," rather than the "letter of the contract." *Id.* at 612. In *Brandeis*, the court concluded this covenant was breached but also expressed some confusion about how this cause of action relates to the "basic fairness" prong of the breach of contract inquiry. *Id.* While this cause of action would seem to independently give courts a great deal of discretion to import due process principles into the student–private university relationship, it seems fair to ask whether this cause of action adds much beyond what "basic fairness" already provides.

103. *Id.* at 594.

104. *Id.* at 598–99.

105. *Id.* at 599.

106. *Id.* at 601.

107. *Id.* at 602.

108. *Id.* at 603–06.

also inquired into the investigator's substantive analysis.[109] The court concluded that the failure to afford these rights to the plaintiff constituted a breach of contract claim despite the complete lack of a contract analysis.[110]

The Massachusetts Model of student handbooks as contracts thus prioritizes equitable access to judicial review over adherence to ordinary contract doctrine. The readiness of courts to view handbooks as contracts that put private university students on equal footing with public university students eschews the typical analysis of whether the parties have contracted with each other.[111] Indeed, in *Brandeis*, the court noted that the student–university relationship in Massachusetts is "somewhat unique and not necessarily tied to ordinary principles of contract law."[112] As this approach effectively incorporates notions of due process into the breach of contract inquiry, it eliminates any practical distinction between the causes of action available to the accused depending on whether they attend a public or private university. Unlike Title IX claims, which require a showing of gender bias, breach of contract as Massachusetts courts see it likely allows for judicial consideration of the fairness of the policies themselves where gender bias is not at issue. The plaintiff's argument in *Ohio State University* that the lack of cross-examination violated his due process rights would be dismissed under a Title IX statutory cause of action but would likely be allowed to advance under the Massachusetts Model. Though cross-examination of complainants may be inappropriate in Title IX grievance procedures,[113] it would still be concerning for a public university student to have the opportunity to litigate this claim while a private university student with virtually identical interests would not. The Massachusetts Model avoids this inconsistency.

2. The Virginia Model

In contrast to Massachusetts courts, Virginia courts bar all causes of action related to contract law in the Title IX context.[114] Put simply, under Vir-

109. *Id.* at 608–11 (finding "possible substantive shortcomings" that plausibly alleged a violation of the contractual relationship).

110. *Id.* at 607–08.

111. Massachusetts has such well-developed case law on this front that plaintiffs appear to not plead due process claims at all, perhaps making the strength of this assertion difficult to demonstrate. *See, e.g.*, First Amended Verified Complaint & Jury Demand at 52–68, Doe v. W. New Eng. Univ., 228 F. Supp. 3d 154 (D. Mass. 2017) (No. 3:15-cv-30192) (including thirteen causes of action, none of which were a violation of due process). For an example of a case in which a due process claim was brought and dismissed and a breach of contract survived the motion to dismiss stage, see *Mancini v. Rollins Coll.*, No. 6:16-cv-2232-Orl-37KRS, 2017 WL 3088102, at *8 (M.D. Fla. July 20, 2017).

112. *Brandeis Univ.*, 177 F. Supp. 3d at 612.

113. *See supra* note 59 and accompanying text (discussing reasons why cross-examination may or may not be required in grievance procedures).

114. Courts applying Minnesota law adopt largely the same contract analysis as Virginia law, but on at least one occasion a court found the accused plaintiff adequately pleaded a negligence claim in the Title IX context. *See* Doe v. Univ. of St. Thomas, 240 F. Supp. 3d 984, 993–

ginia law, "a [u]niversity's student conduct policies are not binding, enforceable contracts; rather, they are behavior guidelines that may be unilaterally revised by [the university] at any time."[115] This distinction stems from the requirement under Virginia law of "absolute mutuality of engagement" between parties to a contract.[116]

The court's treatment of the student's claims in *Marymount University* is illustrative. There, the accused student alleged Title IX gender discrimination, breach of contract, breach of the covenant of good faith and fair dealing, breach of the law of associations, and negligence.[117] Only the Title IX claim survived Marymount's motion to dismiss.[118] In raising the breach of contract claim, the plaintiff conceded that Marymount's Student Handbook and Sexual Assault Policy were not contracts under Virginia law and instead argued there was an implied contractual relationship where the payment of tuition guaranteed he could not be expelled for an arbitrary and capricious reason.[119] The court declined to find that an implied contract existed in a context where Virginia state courts had not done so before and stated that, assuming such an implied contract did exist, its terms would be "exception-

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95 (D. Minn. 2017). Thus, while the contract analysis looks nearly identical, courts applying Minnesota law provide an additional path for judicial review of private university disciplinary actions, but one that is beyond the scope of this Comment. Courts applying Ohio law also set an extremely high bar for students pleading breach of contract against private universities and ask only if the relevant body abused its discretion. *See* Doe v. Univ. of Dayton, No. 3:17-cv-134, 2018 WL 1393894, at *6 (S.D. Ohio Mar. 20, 2018) ("In Ohio, [abuse of discretion] means without fair, solid and substantial cause and without reason given; without any reasonable cause; in an arbitrary manner, fixed or done capriciously or at pleasure; without adequate determining principle; not founded in the nature of things; nonrational; not done or acting according to reason or judgment depending on the will alone; absolutely in power; capriciously; tyrannical; despotic." (citing Gerken v. State Auto Ins. Co. of Ohio, 20 N.E.3d 1031, 1045 (Ohio Ct. App. 2014))), *aff'd*, 766 F. App'x 275 (6th Cir. 2019). Illinois law also provides for a similar result, although plaintiffs in at least three cases brought claims under promissory estoppel rather than breach of contract. *See* DiPerna v. Chi. Sch. of Prof'l Psychology, 893 F.3d 1001, 1006–07 (7th Cir. 2018) (applying arbitrary or capricious standard to breach of contract suits by students against private universities); Doe v. Columbia Coll. Chi., 299 F. Supp. 3d 939, 960–62 (N.D. Ill. 2017) (finding statements made in student handbook were not unambiguous promises sufficient to plead a promissory estoppel claim); Doe v. Univ. of Chi., No. 16 C 08298, 2017 WL 4163960, at *10–11 (N.D. Ill. Sept. 20, 2017) (same).

115. Doe v. Marymount Univ., 297 F. Supp. 3d 573, 587–88 (E.D. Va. 2018) (footnote omitted); *see also* Jackson v. Liberty Univ., No. 6:17-CV-00041, 2017 WL 3326972, at *5–7 (W.D. Va. Aug. 3, 2017); Doe v. Wash. & Lee Univ., No. 6:14-CV-00052, 2015 WL 4647996, at *11 (W.D. Va. Aug. 5, 2015).

116. *Jackson*, 2017 WL 3326972, at *5 (quoting Brown v. Rector & Visitors of Univ. of Va., No. 3:07cv00030, 2008 WL 1943956, at *5 (W.D. Va. May 2, 2008), *aff'd* 361 F. App'x 531 (4th Cir. 2010) (per curiam)). Courts have dismissed claims brought under breach of implied covenant of good faith and fair dealing for the same reason. *See id.* at *7 ("Without an underlying contract, there can be no breach of contract or covenant of good faith and fair dealing claims."); *see also Marymount Univ.*, 297 F. Supp. 3d at 589 & n.23.

117. *Marymount Univ.*, 297 F. Supp. 3d at 576.

118. *Id.* at 591.

119. *Id.* at 588.

ally narrow."[120] While the student sought to "erect a veritable procedural fortress around him" of implied contractual terms, the court considered his argument to fly in the face of "clear precedent" finding the student–private university relationship to be noncontractual.[121] The court's reasoning here is worth reproducing in full:

> [A]dopting Doe's position would prejudice Marymount because it never assented to being bound by the procedural protections identified by Doe. Nothing in the act of paying tuition implies that a student is entitled to any specific procedural protections. Instead, to the extent any contract can be implied between a student and his or her university, the student is only protected from irrational, haphazard treatment by the university. Doe may disagree with Marymount's decision and he may believe he was treated unfairly, but he cannot imply a host of contractual terms to which the parties never assented. Instead, Doe will have to rely on the statutory remedy provided by Title IX.[122]

The court also dismissed the student's negligence claim on the grounds that Virginia courts had never acknowledged that universities owed a duty to be fair in their disciplinary proceedings.[123] Thus, in Virginia, there is no cause of action equivalent to a due process claim in the private university context. The only plausible route to judicial review of a grievance procedure is a Title IX claim, which requires a showing of impermissible gender bias.[124]

The Virginia Model has both clear advantages and troubling implications for advocates of equal access to judicial review. Rejecting the breach of contract cause of action is clean as a matter of doctrine. Courts avoid the difficult task of deciding what conduct is prohibited or what procedural protections are guaranteed, leaving that task to the university itself. And courts avoid the potentially slippery slope of binding universities to contractual terms to which neither students nor the university assented in a manner ordinarily associated with contract law. Yet this model plainly fails at the task of providing equal access to judicial review of private university disciplinary actions. Given that public and private universities are subject to indistinguishable obligations under Title IX, Virginia's position shields private universities from alternate forms of liability and therefore exacerbates fairness concerns. Other approaches strike a better balance between the competing interests of doctrinal adherence and equity in access to judicial review.

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120. *Id.*

121. *Id.* at 589.

122. *Id.*

123. *Id.* at 589–90.

124. *Id.* at 585. Here, the court found plausible gender bias based on the adjudicator's demonstration of gender bias in a separate sexual assault investigation. *Id.* at 585–87.

3. The New York Model

In New York, courts have avoided both the doctrinal audacity of Massachusetts and the timidity of Virginia in finding the private institution–student relationship to be implicitly contractual but finding the terms of the relationship to be narrow.[125] New York courts acknowledge that there is an implied contractual relationship between private students and their universities, with terms of the relationship found in university publications.[126] A private university is therefore contractually bound to provide students with promised protections.[127] But unlike under Massachusetts law, "a plaintiff must identify a specific promise or obligation that was breached in order to pursue a contract claim."[128] Even if the institution explicitly promises a "fundamentally fair" proceeding in its handbook, no additional obligations are triggered.[129]

Doe v. Syracuse University shows just how narrow this path is for students to sue their private institutions in contract. The plaintiff in that case primarily argued that he did not receive adequate notice of the charges against him in spite of a handbook provision providing that "[s]tudents have the right to written notice."[130] The court, though, did not reach an analysis of whether the notice the plaintiff received was in fact adequate.[131] Instead, the court took note of the fact that the adequate-notice provision of the hand-

125. Courts applying the contract law of other states have employed similar analyses. *See, e.g.*, Z.J. v. Vanderbilt Univ., 355 F. Supp. 3d 646, 689 (M.D. Tenn. 2018) (noting similarity with New York contract law), *appeal dismissed*, No. 19-5061, 2019 WL 3202209 (6th Cir. Apr. 26, 2019); Doe v. Lenoir-Rhyne Univ., No. 5:18-CV-00032-DSC, 2018 WL 4101520, at *3–4 (W.D.N.C. Aug. 28, 2018) (noting North Carolina permits student contract claims against private universities but requiring the plaintiff "to point to a mutual agreement with sufficiently definite terms or obligations"); Pacheco v. St. Mary's Univ., No. 15-cv-1131, 2017 WL 2670758, at *26–30 (W.D. Tex. June 20, 2017) (applying similarly narrow conception of the student–university contractual relationship under Texas law), *appeal dismissed*, No. 17–50635, 2017 WL 7036540 (5th Cir. Nov. 3, 2017); I.F. v. Adm'rs of Tulane Educ. Fund, 131 So. 3d 491, 498–99 (La. Ct. App. 2013) (noting that "a private institution has almost complete autonomy in controlling its internal disciplinary procedures" and that it is "entitled to a very strong but rebuttable presumption that [the institution's] internal administrative actions are taken in absolute good faith and for the mutual best interest of the school and the student body" (emphasis omitted)). In New Jersey, the analysis is similarly limited to whether a university (in this case, public) complied with its own rules and regulations in conducting the disciplinary proceeding. *See* Doe v. Rider Univ., No. 3:16-cv-4882-BRM-DEA, 2018 WL 466225, at *13 (D.N.J. Jan. 17, 2018); *see also* Doe v. Univ. of Or., No. 6:17-cv-01103-AA, 2018 WL 1474531, at *17–18 (D. Or. Mar. 26, 2018) (same under Oregon law).

126. Papelino v. Albany Coll. of Pharmacy of Union Univ., 633 F.3d 81, 93 (2d Cir. 2011).

127. Yu v. Vassar Coll., 97 F. Supp. 3d 448, 481 (S.D.N.Y. 2015).

128. Doe v. Syracuse Univ., 341 F. Supp. 3d 125, 140 (N.D.N.Y. 2018).

129. *See id.* at 140–41.

130. Complaint at 32, *Syracuse Univ.*, 341 F. Supp. 3d 125 (N.D.N.Y. 2018) (No. 5:17-CV-0787). Specifically, the plaintiff alleged the only notice he received was that a student filed a "complaint of relationship violence" against him. *Id.*

131. *See Syracuse Univ.*, 341 F. Supp. 3d at 140–41.

book was incorporated into the "fundamental fairness" section of the handbook.[132] Because provisions that students are treated in a "fundamentally fair" manner are nonactionable policy statements under New York law, the court dismissed the breach of contract claim.[133] On other occasions, though, courts applying this more typical contract analysis have found that plaintiffs have adequately pleaded contract claims where the statements in the handbook were not perceived as mere statements of policy.[134]

Unlike Massachusetts courts, New York courts appear to end their analysis on the basis of the terms in the handbook itself; there was no inquiry into fundamental fairness in *Syracuse University*. New York courts have thus adhered to ordinary contract doctrine more closely than Massachusetts courts. This approach lets New York courts avoid expanding contractual liability while also allowing for an alternative cause of action for students at private universities. Breach of contract in New York, though, does little to equalize access to judicial review across types of educational institutions. Because the terms of the contract are construed narrowly, a private university could write its student handbook to evade the types of legal challenges that would be more successful when aimed at a public university. In contrast to New York, the final model to be discussed—the Pennsylvania Model—allows for greater access to judicial review while also providing institutions some freedom to limit their contractual liability.

4. The Pennsylvania Model

Courts applying Pennsylvania law assume that student handbooks are express contracts and seek to apply more classical contract interpretation while also providing for greater equity in access to judicial review for private university students. Under Pennsylvania law, a contract exists between a private educational institution and its students, allowing students to sue under breach of contract where the university violates its stated procedural promises.[135] Like in many other jurisdictions, the written contract includes the terms set out in the student handbook.[136] While students "being disciplined are entitled *only to those procedural safeguards which the school specifically provides*,"[137] the terms of the handbook, if it includes a promise of fundamental fairness, may lead a Pennsylvania court to draw from notions of procedural due process required in public university disciplinary proceedings.[138]

132. *Id.* at 141.

133. *Id.*

134. *See, e.g.*, Doe v. Quinnipiac Univ., No. 3:17-cv-364, 2019 WL 3003830, at *18–21 (D. Conn. July 10, 2019) (denying motion for summary judgment of breach of contract claim applying Connecticut law).

135. Doe v. Trs. of the Univ. of Pa., 270 F. Supp. 3d 799, 810 (E.D. Pa. 2017).

136. *Id.*

137. *Id.* (emphasis added) (quoting Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 579 (Pa. Super. Ct. 1990)).

138. *See id.* at 812 n.6.

Pennsylvania's treatment of these breach of contract claims may initially appear to mirror the Massachusetts Model, but upon closer analysis the terms within the student handbook play a much more significant role.[139]

Trustees of the University of Pennsylvania provides the most thorough explanation of how Pennsylvania's interpretation of student handbooks may lead to greater equivalence in how courts review the outcomes of grievance procedures at public and private universities. There, the plaintiff cited language from the student handbook "that pledge[d] (1) . . . 'a process that is fundamentally fair, and free of bias or prejudice,' (2) that the investigating officer will conduct a 'thorough and fair investigation,' and (3) that the hearing will be 'fair[] and impartial.' "[140] The court declined to view these terms "in isolation" and instead compared the guarantees set out in the handbook to the procedures essential to "fundamental fairness" as interpreted by courts applying Pennsylvania law.[141] While the right to "fundamental fairness" guaranteed to students at state universities is not ordinarily available to students at private universities, the court found that the inclusion of the term in the contract altered this assumption.[142] This analysis indicated that a fundamentally fair process entitles students to know the specific charges and grounds that would justify discipline, the names of adverse witnesses, and the facts to which each witness testifies.[143] Students were also able to assert their own defense.[144] In this case, the court found that the student did not adequately allege a breach of a contractual duty to provide a fundamentally fair process, because the procedures promised and used plainly satisfied Pennsylvania's basic requirements of "fundamental fairness," and as a result, the court did not need to resort to due process jurisprudence as a gap-filler.[145]

139. Unlike Massachusetts, Pennsylvania does not require private universities to provide students with "basic fairness" in their disciplinary proceedings. *Id.* at 811 n.4.

140. *Id.* at 811 (second alteration in original).

141. *Id.* at 812.

142. *Id.* at 812 n.6.

143. *Id.* at 812 (quoting Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 578–79 (Pa. Super. Ct. 1990)).

144. *Id.* (quoting Boehm v. Univ. of Pa. Sch. of Veterinary Med., 573 A.2d 575, 578–79 (Pa. Super. Ct. 1990)).

145. *See id.* at 813. The court was satisfied that the university's disciplinary procedures promised a charge letter, provision of a draft factual investigative report for review and comment before the final version was written, a hearing in which both complainant and respondent were permitted to testify alongside other forms of evidence, and an opportunity to appeal. *Id.* Because the court found these procedures satisfied Pennsylvania's "basic requirements of 'fundamental fairness,' " the court dismissed the breach of contract claim on this basis. *Id.* The court did find, however, that the plaintiff adequately alleged that the university breached its contractual duty to adequately investigate the complaint. *Id.* at 817–18. As discussed above, courts applying the "New York Model" have declined to conduct this analysis even when the student handbook similarly promised "fundamental fairness." *See* Doe v. Syracuse Univ., 341 F. Supp. 3d 125, 141 (N.D.N.Y. 2018); *see also supra* Section II.B.3.

Pennsylvania courts therefore closely approximate the Massachusetts Model provided that the handbook in question promises a "fundamentally fair" disciplinary proceeding.[146] In that event, there is effective equity in access to judicial review between public and private university students. If this language is absent, however, then barring any other ambiguities the private university student is protected only by the explicit promises of the student handbook, leaving the university with greater control over defining the student's rights.[147] Under this model, private actors decide when they are to be held to the same standard as public actors.

CONCLUSION

The cases described in Part II demonstrate the variance in access to breach of contract as a means for judicial review and provide the basis for a framework to understand the contractual liability of private universities. States fall on a spectrum, with the Virginia Model at one end and the Massachusetts Model at the other. The Virginia Model prioritizes adherence to ordinary principles of contract doctrine and forces students seeking relief to rely on statutory causes of action. In contrast, Massachusetts courts recognize a contractual relationship between students and their private universities that effectively incorporates notions of due process—a legal regime that largely equalizes access to judicial review between public and private university students while concededly departing from contract doctrine.[148] In between these extremes are other jurisdictions that acknowledge breach of contract as a cause of action available to disciplined students. While courts applying the New York Model begin and end their analysis with the terms in the contract, Pennsylvania courts may invoke notions of due process normally applicable only to public university students where language in the contract is sufficiently broad. Private university students in different jurisdictions either enjoy access to judicial review that is analogous to their public university counterparts or suffer much higher barriers to the courthouse.

146. *See supra* text accompanying notes 101, 107–110. For another example of a court applying Pennsylvania law finding universities contracted into providing "fundamental fairness," see *Doe v. Univ. of the Scis.*, No. 19-358, 2019 WL 632022, at *8 & n.11 (E.D. Pa. Feb. 14, 2019). Courts have not conducted this comparison between the procedures provided for in the handbook and the procedures inherent in "fundamental fairness," however, when the complaint does not allege that the university promised a fundamentally fair hearing. *See, e.g.*, Powell v. Saint Joseph's Univ., No. 17-4438, 2018 WL 994478, at *5 (E.D. Pa. Feb. 20, 2018); Complaint at 16, *Powell*, 2018 WL 994478 (No. 17-4438).

147. *See Powell*, 2018 WL 994478, at *5 (denying a private university student's claim that the university failed to hire a qualified investigator because the investigator met the explicit requirements of the handbook).

148. This is not to say that in every application a contract claim will necessarily result in the same disposition as would a due process claim. A Massachusetts- or Pennsylvania-style approach, however, provides access to judicial review in a way that does not exist under the Virginia approach.

Which approach is best? The two competing interests at play here—adherence to ordinary contract doctrine and equity in access to judicial review—present no simple answer. Yet the Pennsylvania Model offers the best balance. Under this model, courts hold institutions accountable for their promises and protect students' interest in their education while still granting institutions the freedom to adopt procedures other than those required for public institutions.

The preceding discussion reveals significant grounds for disagreement with this evaluation. Some may argue that the Pennsylvania approach goes too far in heaping procedural requirements on private universities for making mere policy statements and that to hold institutions liable based on these statements may mean they simply will not be offered as frequently.[149] But if handbooks are in fact the source of contractual terms, then unenforceable policy statements should be removed from them anyway, because they misinform students of their rights under the contract.[150] Others may argue, though, that the Pennsylvania Model doesn't go far enough. Universities can evade protecting students' interest in their education by avoiding promises of fundamental fairness and then offering few specific protections in the student handbook. This objection, which would advance the Massachusetts Model, effectively deems private universities as public actors and necessarily devolves into a debate over the merits of the state action doctrine.

Channeling Virginia courts, a final objection to the Pennsylvania Model may call into question the entire enterprise of recognizing the student–private university relationship as contractual. This objection at first blush falls somewhat flat, as courts have developed a century of caselaw around this contractual relationship, implicitly recognizing a need to protect students' interest in their education.[151] But the ongoing divergence over the extent of a private university's contractual obligations to its students does raise the question whether contract is the best doctrinal home for the protection of this interest. Perhaps the ultimate solution is to sever the fairness inquiry from the contract analysis entirely. Courts applying Massachusetts law have done this on at least one occasion, conceiving of the "basic fairness" inquiry not as a second prong of the contract analysis but as an entirely separate

149. *See supra* note 92 and accompanying text (discussing why enforcing gift promises may lead to fewer such promises).

150. A parallel problem exists, as discussed in *supra* note 94, in the employee handbook context. The Restatement of Employment Law considers policy statements in employee handbooks to be binding on the employer despite the fact that employees are unlikely to be aware of the content of these statements. RESTATEMENT OF EMP'T LAW § 2.05 (AM. LAW INST. 2015). Instead, policy statements are considered binding on employers under a theory of "administrative agency estoppel," namely that policy statements governing personnel policy decisions should be binding until revoked. *See* Stephen F. Befort, *Employee Handbooks and Policy Statements: From Gratuities to Contracts and Back Again*, 21 EMP. RTS. & EMP. POL'Y J. 307, 309 (2017).

151. *See supra* Section I.B.3.

cause of action.[152] Until more courts adopt that approach, whether in or outside the Title IX context, the question of the contractual liability of private universities will continue to confound judges, educational institutions, commentators, and students.

152. *See supra* note 101 and accompanying text.